



# UNDervalUED:

AN ASSESSMENT OF ACCESS TO  
AND QUALITY OF JUVENILE DEFENSE  
COUNSEL IN NEW HAMPSHIRE





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A report of the National Juvenile Defender Center

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# EXECUTIVE SUMMARY

More than 50 years ago, the United States Supreme Court affirmed children’s constitutional right to due process protections in delinquency court, including the assistance of counsel. In its decision in *In re Gault*, the Court found that children need “the guiding hand of counsel at every step in the proceedings against [them]”<sup>1</sup> and outlined the vital role of counsel for children: “to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether [the child] has a defense and to prepare and submit it.”<sup>2</sup>

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But, to this day, although every state has some basic structure to provide attorneys for children, few fully satisfy *Gault*’s mandate of access to counsel for young people.<sup>3</sup>

Public defense delivery systems must recognize that the representation of children is different than that for adults and must support counsel who are trained to understand and incorporate adolescent development and the other unique aspects of defending youth. These are not merely aspirational goals. Public defense systems must implement policies and structures to ensure the due process protections mandated by *Gault* can be realized by every young person in every corner of the state.

This assessment of access to counsel and quality of representation for New Hampshire’s youth is part of a nationwide effort to systematically review and provide information about the provision of defense counsel in delinquency proceedings. The purpose of a state assessment is to provide policymakers, legislators, defense leadership, and other stakeholders with a

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1 *In re Gault*, 387 U.S. 1 (1967).

2 *Id.* at 36.

3 NAT’L JUVENILE DEFENDER CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES’ FAILURE TO PROTECT CHILDREN’S RIGHT TO COUNSEL 4 (2017) [hereinafter ACCESS DENIED], [https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final\\_single-4.pdf](https://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf).



thorough understanding of children's access to counsel in the state, to identify structural and systemic barriers that impede effective representation of children, to analyze how fee and cost structures inhibit young people's access to justice, to highlight best practices where found, and to make recommendations that will serve as a guide for improving juvenile defender services for children in the state.

### Some of the key findings of the assessment include:

- New Hampshire's appointment system does not provide counsel to youth early enough in the process; as a result, youth may appear at their initial court hearing without counsel and enter pleas without ever consulting with an attorney.
- New Hampshire has greatly reduced the number of youth held in detention pre-trial, but defender advocacy at detention hearings, particularly concerning probable cause, is lacking.
- The New Hampshire public defense system devalues delinquency cases, treats juvenile court as a training ground for defenders, and does not support defenders specializing in juvenile defense practice, preventing defenders from providing youth with the representation they need and the Constitution demands.
- The innumerable fines, fees, and costs levied on young people and families by the juvenile court system interfere with youth's right to counsel and access to diversion, shift the state's responsibility to provide counsel and services to families of least means, and burden youth and families with insurmountable debt that follows them long after the young person's involvement in the juvenile legal system has ended.

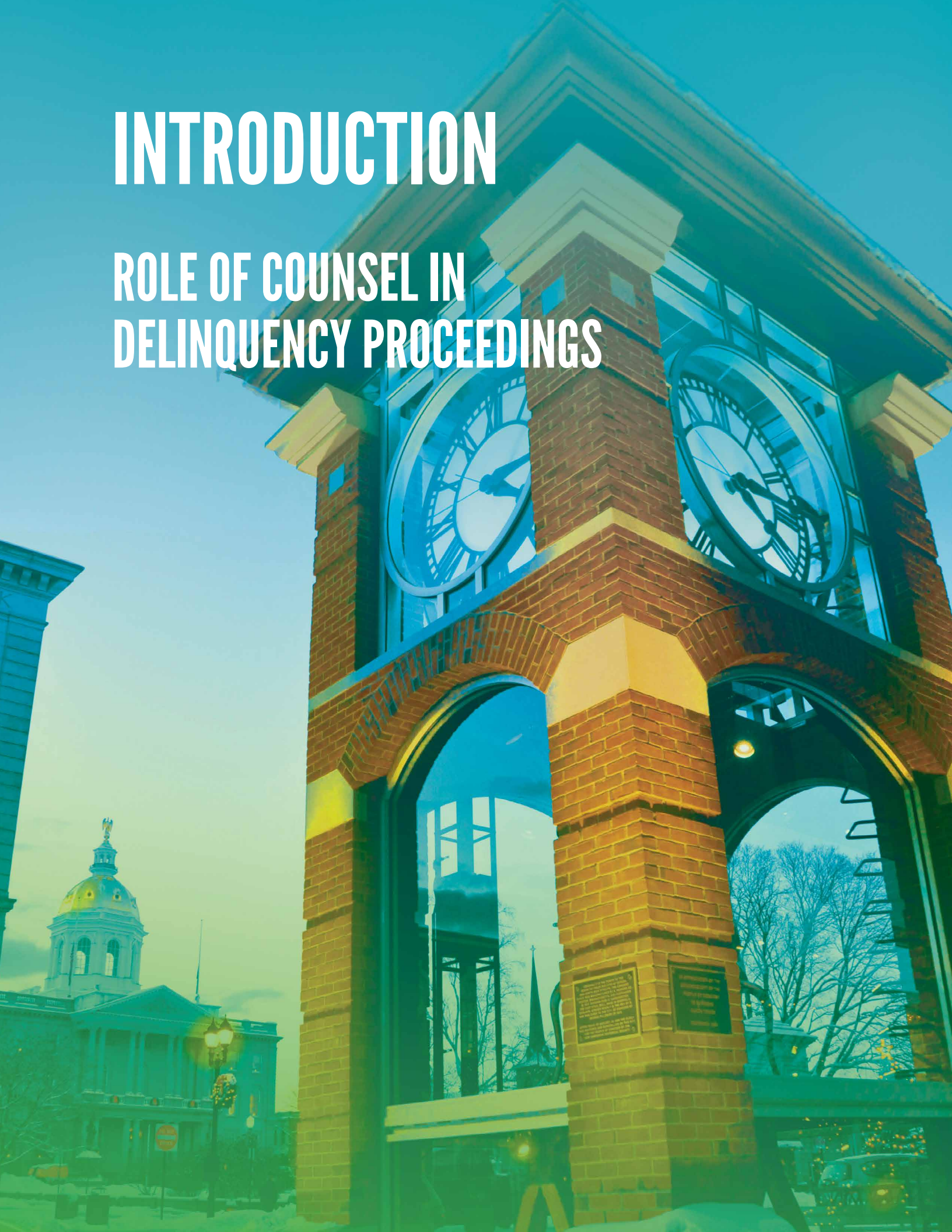
### Among other recommendations, this report encourages New Hampshire to:

- Implement a strong, well-resourced, specialized system of juvenile defense.
- Establish and support juvenile defense leadership and require specialization in juvenile defense.
- Establish state standards for juvenile defense attorney qualifications and performance.
- Automatically appoint counsel for all youth prior to their first court appearance and ensure youth are represented throughout their involvement in the juvenile legal system.
- Eliminate fines, fees, and costs associated with juvenile court involvement, particularly costs associated with youth accessing their constitutional right to counsel.

New Hampshire has both a constitutional obligation to provide every youth with a qualified defense attorney who has the resources needed to properly defend their client and a moral imperative to ensure its young people are afforded every opportunity for success. The state must meet its obligation to provide all youth access to well-trained, effective lawyers in delinquency proceedings and ensure better outcomes for its young people, their families and communities, and the entire State of New Hampshire.

# INTRODUCTION

## ROLE OF COUNSEL IN DELINQUENCY PROCEEDINGS



## ***“[C]hildren, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only.”***

**— United States Department of Justice<sup>4</sup>**

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Although the right to counsel for youth in delinquency proceedings was affirmed by the United States Supreme Court’s decision in *In re Gault* more than 50 years ago,<sup>5</sup> in many jurisdictions around the country, youth either continue to go unrepresented or, as is too often the case, receive an attorney lacking the skills, resources, or supports needed to capably represent the child.

Any actual or constructive denial of representation for youth significantly inhibits their access to due process. The right to effective assistance of counsel throughout the entirety of a youth’s system involvement is critical.<sup>6</sup> It is the juvenile defender who must insist upon fairness of the proceedings, ensure the child’s voice is heard at every stage of the process, and safeguard the due process and equal protection rights of the child.<sup>7</sup>

The juvenile defender is the only stakeholder who is ethically and constitutionally mandated to zealously advocate for the protection of the youth’s rights in a manner that is consistent with the youth’s expressed interests.<sup>8</sup> This role is distinct from other juvenile court stakeholders such as the judge, probation officer, guardian *ad litem*, or prosecutor, who consider the perceived “best interests” of the child.<sup>9</sup> Although other stakeholders may be well-intentioned, as the Supreme Court stated in reinforcing the right to counsel for youth, “[w]e made clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts.”<sup>10</sup> If the child’s attorney does not abide by the obligation to provide “expressed interest” advocacy, the youth is deprived of their fundamental right to counsel.<sup>11</sup>

Effective juvenile defense not only requires specialized practice, wherein the attorney must meet all the obligations due to an adult client, but also necessitates expertise in juvenile-specific law and policy, the science of adolescent development and how it impacts the charges against a

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4 Statement of Interest of the United States, N.P. et al. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. 2015) [hereinafter Dep’t of Justice Statement of Interest in N.P.] at 7.

5 *In re Gault*, 387 U.S. at 36.

6 *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970) (stating that “the right to counsel is the right to the effective assistance of counsel” (emphasis added)).

7 The juvenile defense attorney has a duty to advocate for a client’s expressed interests, regardless of whether the expressed interests coincide with what the lawyer personally believes to be in the best interests of the client. See *In re Gault*, 387 U.S. at 37. See generally MODEL RULES OF PROF’L CONDUCT r. 1.2, 1.3, 1.4, 1.8, 1.14 (AM. BAR ASS’N 1983). “Expressed-interest” (also called stated-interest) representation requires that counsel assert the client’s voice in juvenile proceedings.

8 See N.H. R. PROF. CONDUCT 1.2 (a) (2020); NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012) [hereinafter NATIONAL JUVENILE DEFENSE STANDARDS] at Standards 1.1, 1.2, <https://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards2013.pdf>; see also *In re Gault*, 387 U.S. at 1.

9 “Best interest” representation allows advocates to advocate for their belief in what is best for the child.

10 *In re Winship*, 397 U.S. 358, 365-66 (1970).

11 See Dep’t of Justice Statement of Interest in N.P., *supra* note 4, at 2 n.1.





young person, skills and techniques for effectively communicating with youth, the consequences of legal system involvement that are specific to juvenile court, and the ability to navigate numerous other systems impacting the trajectory of the case, such as families, schools, and adolescent mental health.<sup>12</sup>

Children “cannot be viewed simply as miniature adults” and should not be treated as such.<sup>13</sup> Rather, “[a] child’s age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception.”<sup>14</sup> Youth have different cognitive, emotional, and behavioral capacities than adults, and defenders must engage thoughtfully when communicating with youth and in crafting legal arguments with respect to a youth’s reduced culpability and increased likelihood of desistance.<sup>15</sup> The juvenile defender must apply this expertise in representing youth at all stages of the court system, including pretrial detention hearings, advisory hearings, suppression and other motions hearings, the adjudicatory phase of a trial, disposition hearings, transfer hearings, competence proceedings, and all points of post-disposition while a youth remains under the jurisdiction of the juvenile court.

Juvenile defenders must ensure a client-centered model of advocacy, empower and advise their young clients, and better equip young people to understand and make informed decisions about their case, including whether to accept a plea offer or go to trial, to testify or remain silent, to accept or advocate against a disposition proffered by the state, and to accept or offer alternatives to juvenile court dispositions and programs.<sup>16</sup>

Juvenile defense delivery systems must provide all juvenile defenders, public defenders, and contract lawyers with the necessary compensation, training, support, and oversight to ensure attorneys invest the time needed to build rapport with clients, obtain discovery and conduct investigation, engage in motions practice and appropriately prepare for hearings, monitor the post-disposition needs of clients within the court’s jurisdiction, and consult with the client to ensure expressed-interest representation at all stages of court involvement.<sup>17</sup>

Today, more than 50 years after *Gault*, it is critical that the due process protections guaranteed to youth, including the vital role of qualified defense counsel, are fully realized in juvenile courts around the country.

12 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 1.3.

13 J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

14 *Id.* at 272 (citations and internal quotation marks omitted).

15 NAT’L JUVENILE DEFENDER CTR. & NAT’L LEGAL AID & DEFENDER ASS’N, TEN CORE PRINCIPLES FOR PROVIDING QUALITY DELINQUENCY REPRESENTATION THROUGH PUBLIC DEFENSE DELIVERY SYSTEMS (2d ed. 2008) [hereinafter TEN CORE PRINCIPLES], <http://njdc.info/wp-content/uploads/2013/11/10-Core-Principles.pdf>.

16 NAT’L JUVENILE DEFENDER CTR., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT 9 (2009) [hereinafter ROLE OF JUVENILE DEFENSE COUNSEL], <https://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf>; *See also* TEN CORE PRINCIPLES, *supra* note 15.

17 Dep’t of Justice Statement of Interest in N.P., *supra* note 4, at 14.

## NJDC'S ASSESSMENTS

The National Juvenile Defender Center's (NJDC) state assessments are designed to provide policymakers and leaders with comprehensive qualitative data regarding a state's juvenile defense systems, structures, laws, policies, and practices to advance and inform decisions about how to improve juvenile defense and ensure that children's constitutional right to counsel is upheld.

By conducting statewide assessments of juvenile defense delivery systems, NJDC examines how and when youth access counsel, the quality of representation they receive, and the systemic impediments that prevent youth from receiving high-quality representation. The assessments provide policymakers and leaders with accurate baseline information and data regarding the structure, funding, and oversight of juvenile defense to highlight and promote systemic improvements in delivering defense services. Effective juvenile defense representation is essential to the fair administration of justice and can significantly impact life outcomes for youth facing the juvenile legal system.

NJDC has conducted statewide assessments of juvenile defense systems in 27 states over the last two decades.<sup>18</sup> The assessments not only gather information and data about the structure and funding of defense systems, but also examine whether youth receive counsel at all critical stages, the timing of appointments, waiver of counsel, resource allocation, supervision and training, and access to investigators, experts, social workers, and support staff. The assessment reports note promising practices within a state and offer recommendations for improvements.

Many states have used assessment report recommendations to make important changes to policies and practices to strengthen juvenile defense and ensure fair and equitable treatment for youth. Recommendations have been embraced by legislators, courts, defenders, bar associations, law schools, and others to advance legislative and other policy reforms, increase funding, enhance training, and shore up the defense of young people in juvenile courts.

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18 *State Assessments*, NAT'L JUVENILE DEFENDER CTR., <https://njdc.info/our-work/juvenile-indigent-defense-assessments/> (last visited Apr. 10, 2020).



## METHODOLOGY

NJDC began its assessment process in New Hampshire in early 2019 with the support of Administrative Judge David King, who issued a letter to local courts asking for their participation and cooperation in conducting the assessment. NJDC staff coordinated a series of meetings with multiple stakeholders from private and public entities to gather information and initial insights into New Hampshire's juvenile defense delivery system. Simultaneously, NJDC and our partners began a thorough examination of the juvenile code, caselaw, and statutes related to juvenile defense, as well as a review of existing reports and analyses of the systems of defense and juvenile courts in New Hampshire. After evaluating a wide range of factors, NJDC identified seven counties for site visits considered to be representative of the heterogeneity found in counties across the state along such criteria as population size, geographic location, presence or absence of a detention facility, ethnic/racial diversity, urban/suburban/rural setting, type of juvenile defense delivery system, and the number of delinquency petitions filed annually.

Site visits to these seven counties were conducted by 12 members of an assessment team that included NJDC staff and consultants, current and former public defenders, and academics. Each assessment team member had several years of experience and, in many cases, were considered national experts in the field of juvenile defense. The assessment team was trained on assessment protocols and participated in briefings regarding their respective counties, as well as research, reports, and background information about New Hampshire's juvenile court and defense systems.

Each site visit was conducted by two assessment team members, who spent three to five days in the seven selected jurisdictions, where they conducted interviews, court observations, and tours of courthouses, juvenile detention centers, commitment facilities, and residential placement facilities. Using interview questionnaires developed by NJDC and specifically adapted for use in New Hampshire, the assessment team interviewed

defense lawyers, prosecutors, judges, court clerks, probation officers, and detention and residential facility staff and administrators. NJDC also conducted interviews of state-level agency leaders and staff, including those involved in the collection and reimbursement of fees, fines, and other costs, as well as state juvenile justice advocates. Interviews included questions about the role and performance of defense counsel, access to counsel at all critical stages, and systemic strengths and impediments to effective representation. Jurisdictions are not specifically identified in the report to maintain the confidentiality promised to interview participants and maintain focus on statewide issues and not individual county circumstances.

Jointly, the assessment team completed 78 confidential interviews and observed 41 court proceedings across the seven counties. They also collected data and forms regarding appointment of counsel and waiver of counsel, administrative policies, and other relevant information regarding the imposition, collection, and enforcement proceedings of fees, fines, and other costs in juvenile court. Completed questionnaires, court and facility observation forms, and other documentation were submitted to NJDC for incorporation into this assessment report. The interview questionnaires and court and facility observation forms were coded and analyzed using NVivo software for qualitative data analysis, to identify trends and outlying practices and policies.

This report, including its recommendations, is the result of a year-long assessment of New Hampshire's system of providing counsel to youth in delinquency proceedings. It assesses New Hampshire's juvenile defense system in the context of what is constitutionally required and uses national standards, research, and best practices to exemplify what juvenile defense systems should minimally provide. The report provides a roadmap for reforms that can be used to strengthen the integrity of the juvenile legal system by ensuring adequate due process and equal protection of the



law through well-trained, effective defense lawyers for all youth, regardless of geography.

New Hampshire has already proven its commitment to improving its juvenile court system and its system of indigent defense. The state has improved its laws regarding when children must be represented by or have the opportunity to consult with attorneys, has all but eliminated the practice of shackling in juvenile court, and has reduced

the use of secure confinement significantly. New Hampshire can take the next step in ensuring justice for children by carefully considering the findings, recommendations, and discussion of best practices that follow.



## NEW HAMPSHIRE'S DEFENSE SYSTEM

Before examining the findings of this assessment as they relate to juvenile defense, it is helpful to understand the structure of New Hampshire's indigent defense system. The New Hampshire Judicial Council (Judicial Council)—a 24-member board, housed in the executive branch and charged with providing information and assistance to the New Hampshire courts—administers the indigent defense delivery system and ensures its quality and cost effectiveness. Under New Hampshire law, the state's "public defender program shall be under the general supervision of the judicial council for such matters pertaining to, but not limited to, allocation of cases between the public defender program and assigned counsel, performance, professional competence, and fiscal and budgetary matters."<sup>19</sup>

The Judicial Council issues a Request for Proposals and enters into a two-year contract with an entity to provide statewide public defender services. "Since 1972, the judicial council has contracted the provision of all criminal right to council services to an independent, non-profit organization called the New Hampshire Public Defender (NHPD)."<sup>20</sup> NHPD is a nonprofit corporation that provides representation in approximately 85 percent of the state's indigent defense cases. Historically, NHPD has been funded exclusively by a state appropriation. The state relieves counties of all funding and administration responsibilities, centralizing them at the state level through the NHPD. Oversight is vested in the Judicial Council, and funding is centralized in the state's indigent defense fund, which provides state money for all right-to-counsel criminal services and for civil matters that carry a state right to counsel. New Hampshire law also allows the Judicial Council to

contract for an alternate public defender program where the public defender office is unable to provide representation because of conflict of interest or otherwise.<sup>21</sup>

NHPD was founded by New Hampshire Legal Assistance in 1972 for the purpose of providing defense services for people accused of a crime who cannot afford an attorney, and it has been a standalone institution since 1985.<sup>22</sup> The program began with a single office in Concord, but has since expanded to include an administrative office in Concord and satellite offices in every county.<sup>23</sup> In 1981, NHPD expanded its practice to include appellate advocacy with the establishment of the Appellate Defender Program,<sup>24</sup> which also provides representation to youth appealing their delinquency cases.<sup>25</sup> Today, NHPD is an independent nonprofit corporation.<sup>26</sup>

NHPD's Executive Director acts as the State Public Defender. NHPD reports to an independent nine-member Board of Directors and the Judicial Council.<sup>27</sup> NHPD has the independent authority to provide primary services as it deems fit and the authority to subcontract with private counsel if necessary. The Judicial Council contracts with approved private attorneys to provide representation in conflict cases where ethical rules forbid NHPD representation. The Judicial Council has oversight of these conflict attorneys to ensure quality representation.<sup>28</sup> As part of its contract with the Judicial Council, NHPD operates the Conflict Case Administrator Office, which is walled off from NHPD staff and makes appointments pursuant to Judicial Council contracts and approved private attorney panels.

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19 N.H. REV. STAT. ANN. § 604-B:5 (2020).

20 DAVID CARROLL, RIGHT TO COUNSEL SERVICES IN THE 50 STATES: AN INDIGENT DEFENSE REFERENCE GUIDE FOR POLICYMAKERS 118 (2017), <https://www.in.gov/publicdefender/files/Right%20to%20Counsel%20Services%20in%20the%2050%20States.pdf>.

21 N.H. REV. STAT. ANN. § 604-B:8 (2020).

22 *About Us*, N.H. PUB. DEF. SYS., <https://www.nhpd.org/about-us/> (last visited Apr. 10, 2020).

23 *Id.*

24 *Id.*

25 N.H. REV. STAT. ANN. § 604-B:2 (2020).

26 *About Us*, N.H. PUB. DEF. SYS., <https://www.nhpd.org/about-us/> (last visited May 8, 2020).

27 *Id.*

28 *Id.*



Public defenders represent youth in the vast majority of juvenile cases. According to the Judicial Council, contract attorneys represent youth in approximately seven percent of juvenile cases per year, and appointed counsel represent youth in approximately one percent of cases per year.

The NHPD provides counsel to youth deemed indigent in delinquency proceedings, including appeals, as required by New Hampshire's Constitution and the United States Constitution.<sup>29</sup> A youth is considered indigent if the youth satisfies

the court, "after appropriate inquiry, that the minor is financially unable to independently obtain counsel."<sup>30</sup> All delinquency cases first go to the public defender, who screens them for conflicts. If conflicts arise, cases go to attorneys who contract with the Judicial Council to take the conflict cases from the public defender. These conflict cases are handled primarily by attorneys with a flat-fee contract and rarely by a small group of attorneys that take cases at an hourly rate when neither NHPD nor the attorneys with a regular contract can take the case.<sup>31</sup>

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29 N.H. REV. STAT. ANN. § 604-B:2 (2020).

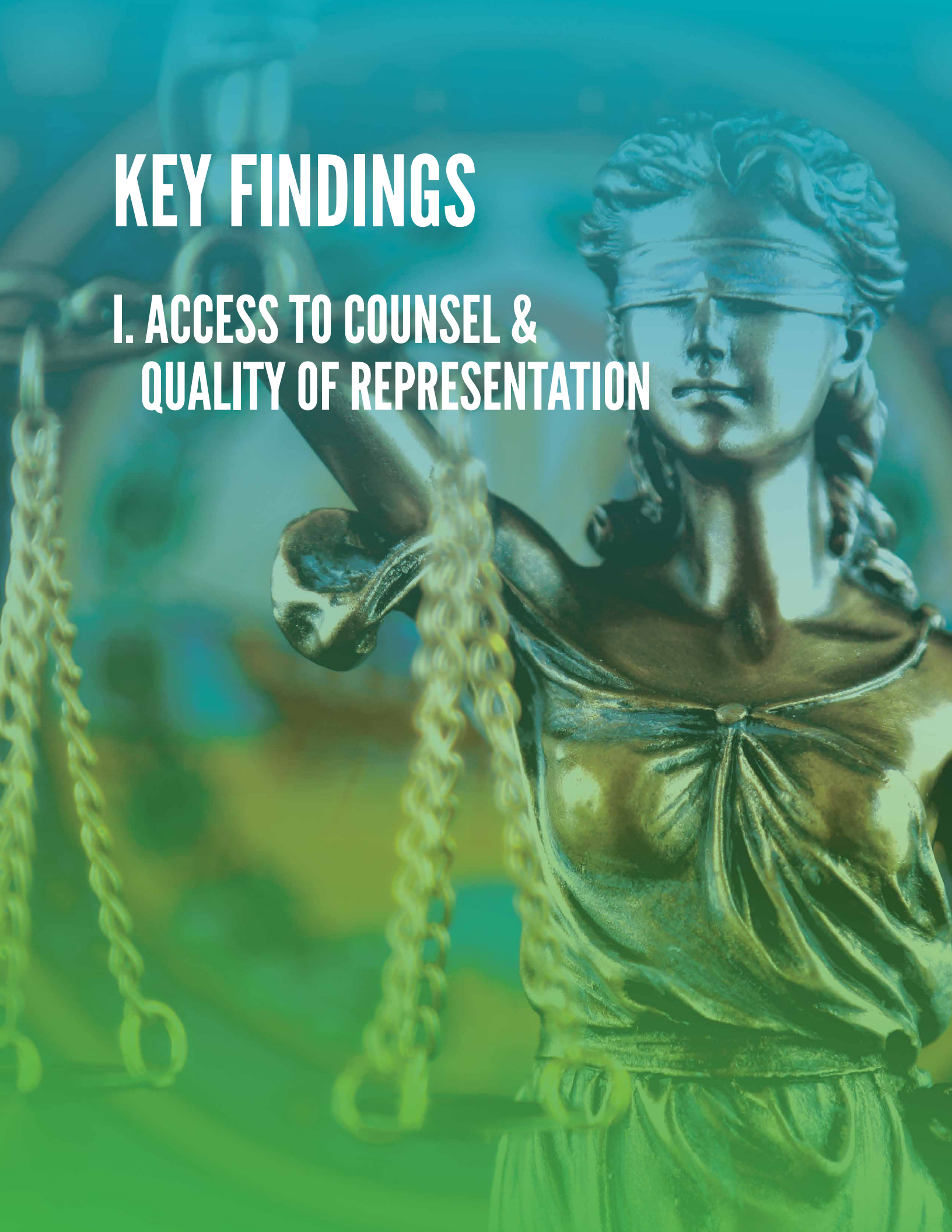
30 N.H. REV. STAT. ANN. § 169-B:12 (2020).

31 *New Hampshire*, SIXTH AMENDMENT CTR., <https://sixthamendment.org/know-your-state/new-hampshire/> (last visited Apr. 10, 2020).



# KEY FINDINGS

## I. ACCESS TO COUNSEL & QUALITY OF REPRESENTATION





**As the United States Supreme Court affirmed in *In re Gault*, children charged with delinquency have a fundamental constitutional right to notice of charges against them, the right to confront and cross-examine witnesses against them, the right against self-incrimination, and the right to counsel.<sup>32</sup>**

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Following this affirmation of the right to counsel for youth in juvenile court, the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) published Juvenile Justice Standards, recognizing “The participation of counsel on behalf of all parties subject to juvenile and family court proceedings is essential to the administration of justice and to the fair and accurate resolution of issues at all stages of those proceedings.”<sup>33</sup>

Counsel for children in the delinquency system must be recognized as an essential component of a fair and effective developmentally appropriate juvenile justice system.<sup>34</sup> “The essence of access to justice for children is access to counsel.”<sup>35</sup> It is defense counsel who must insist upon the fairness of the proceedings ensure the child’s voice is heard throughout every stage of the process, and safeguard the due process and equal protection rights of the child.<sup>36</sup> Defense counsel is the only stakeholder in the proceeding who is mandated to advocate for the protection of the youth’s rights in a manner consistent with the youth’s express wishes.<sup>37</sup>

***“The essence of access to justice for children is access to counsel.”***

National best practices call for juvenile courts to ensure and safeguard the right to counsel for youth. The National Council of Juvenile and Family Court Judges (NCJFCJ), in honor of the 50th anniversary of the *Gault* decision, issued guidance on key elements ensuring meaningful access to counsel, including automatic appointment of counsel prior to first appearance.<sup>38</sup> Beyond being a foundational matter of justice, having counsel appointed increases a young person’s perception of fairness and strengthens the legitimacy of the court.<sup>39</sup> When youth believe they are being treated fairly by the system, the chances for recidivism are reduced.<sup>40</sup>

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32 *In re Gault*, 387 U.S. 1, 10 (1967).

33 INST. OF JUDICIAL ADMIN. & AM. BAR ASS’N, STANDARDS ON JUVENILE JUSTICE, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES, STANDARD 1.1 (1979).

34 *Id.* at Standard 2.1.

35 NAT’L JUVENILE DEFENDER CTR., TALKING POINTS: DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES 1 (2016), <https://njdc.info/wp-content/uploads/2016/11/Talking-Points-NJDC-Blueprint.pdf>.

36 See generally N.H. R. PROF. CONDUCT; MODEL RULES OF PROF’L CONDUCT r. 1.2, 1.3, 1.4, 1.8, 1.14 (AM. BAR ASS’N 1983).

37 See NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 1.1, 1.2; See also *In re Gault*, 387 U.S. at 1.

38 NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES ET AL., HONORING GAULT: ENSURING ACCESS TO COUNSEL IN DELINQUENCY PROCEEDINGS (2016) [hereinafter HONORING GAULT], <https://www.ncjfcj.org/wp-content/uploads/2016/08/Access-to-Counsel-Policy-Card-Final-8.18.16.pdf>.

39 *Id.*

40 HONORING GAULT, *supra* note 38, at 1.

## A. Timing of Appointment of Counsel

NCJFCJ advocates that early appointment of counsel should be encouraged:

Juvenile justice courts that do not create systems that enable counsel to be obtained in advance of the initial hearing, and as a consequence, allow counsel to be absent or unprepared at the first hearing, make it difficult for time-specific hearings to be set and adhered to, cause additional unnecessary hearings to be set which wastes juvenile justice court resources, and delays timely justice. Such systems end up with unnecessary continuances, jeopardize family resources due to extensive waiting times (like missing work and school, transportation and parking costs), and are disrespectful to its citizens.<sup>41</sup>

The time at which counsel is appointed can greatly affect a youth's exercise of rights, the attorney-client relationship, and ultimately the attorney's efficacy. Therefore, the appointment of counsel at the very beginning of a case is critical to successful representation of a child's interests.<sup>42</sup> To appropriately protect the rights of a child and ensure that counsel has time to properly prepare for a hearing, counsel should be appointed sufficiently in advance of the first hearing

(whether or not the client is detained) to enable a meaningful opportunity to inform the client of what to expect in the proceedings, discuss options with the client, and gather information that may help in the hearing.<sup>43</sup>

This time is particularly critical for youth clients, who may be more likely to waive their rights or make statements against their own interests, including false confessions, in the hopes of resolving their case quickly.<sup>44</sup> Research on adolescent development has found that youth tend to have a preference for immediate reward (e.g. a final resolution of their case) without regard to long-term consequences and has highlighted adolescents' particular vulnerability to coercion.<sup>45</sup>

In New Hampshire, the court is to appoint counsel to youth who are unable to afford a lawyer either upon the issuance of a detention order or at the time of the arraignment, whichever comes first.<sup>46</sup> The law requires that the youth "satisfies the court, after appropriate inquiry, that the minor is financially unable to independently obtain counsel."<sup>47</sup>

The eligibility criteria for publicly funded counsel is onerous to meet. For example, a person is ineligible for publicly funded defense services based on their

41 NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, ENHANCED JUVENILE JUSTICE GUIDELINES, CH. III, 17 (2018) [hereinafter NCJFCJ JUVENILE JUSTICE GUIDELINES], [https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ\\_Enhanced\\_Juvenile\\_Justice\\_Guidelines\\_Final.pdf](https://www.ncjfcj.org/wp-content/uploads/2019/01/NCJFCJ_Enhanced_Juvenile_Justice_Guidelines_Final.pdf).

42 *In re Gault*, 387 U.S. at 36.

43 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 1.4 cmt. (citing INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 33, at Standard 4.1); *see generally* INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 33.

44 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.1 cmt.

45 Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009); Kaitlyn McLachlan et al., *Examining the Role of Interrogative Suggestibility in Miranda Rights Comprehension in Adolescents*, 35 LAW & HUM. BEHAV. 165 (2011); Allison Redlich & Gail Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 LAW & HUM. BEHAV. 141 (2003); Krishna Singh & Gisli Gudjonsson, *Interrogative Suggestibility Among Adolescent Boys and its Relationship with Intelligence, Memory, and Cognitive Set*, 15 J. ADOLESCENCE 155 (1992); *see also* Ellen Marrus, *Can I Talk Now?: Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515, 525 n.104 (2006) (review of case law of children's court confessions leads author to conclude that *Miranda* does not adequately protect juveniles from self-incrimination); *Gallegos v. Colorado*, 370 U.S. 49, 53 (1962) ("That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens... No lawyer stood guard...to see to it that [the police] stopped short of the point where he became the victim of coercion."); *see also* NAT'L JUVENILE DEFENDER CTR., SPECIAL CAUTION REQUIRED: THE REALITIES OF YOUTH INTERROGATION (2019), [https://njdc.info/wp-content/uploads/JDA/Special-Caution-Required-OnePager\\_FINAL\\_Web-2.pdf](https://njdc.info/wp-content/uploads/JDA/Special-Caution-Required-OnePager_FINAL_Web-2.pdf); NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.6.

46 N.H. REV. STAT. ANN. § 169-B:12 (2020).

47 *Id.*

perceived ability to borrow funds.<sup>48</sup> If a youth's family has real estate property that is worth more than \$10,000, they shall be deemed eligible to borrow funds.<sup>49</sup> If they have other funds available in excess of \$2,000, the child is ineligible for state-funded defense, unless a judge orders otherwise.<sup>50</sup>

During court observations, while youth who were detained had a lawyer appointed prior to a detention hearing, non-detained youth sometimes appeared at the initial arraignment hearing without having spoken to a lawyer, requiring that the court set a new hearing date to allow the child to take advantage of the right to counsel. As stakeholders explained to assessment teams, if a child asserted their wish to be represented by counsel at the arraignment hearing, that appointment was most often in the form of a piece of paper appointing counsel in name, but not in fact allowing for defense representation to occur at that hearing. Many of these youth, who had not yet met an attorney, were placed on conditional release by the court and required to comply with conditions that restricted their liberty, all without a lawyer representing their legal interests. And, while youth in New Hampshire cannot be detained at arraignment without counsel,<sup>51</sup> the law does not prevent a judge from ordering a child to be placed in a non-secure, out-of-home placement without counsel present at arraignment.

Inconsistency in the timing of attorneys' first meetings with clients and the inadequacy of time for those meetings emerged as a theme from stakeholder interviews. While defense attorneys were appointed prior to arraignment in a few jurisdictions, in many others, youth were arraigned without counsel. In those jurisdictions, defenders interviewed explained that a notice of eligibility and appointment form would usually be sent to the local public defender office after an arraignment had occurred, and the managing attorney in the office would then assign the case. During some court observations, however,

assessment team members saw attorneys present for arraignment who had been notified of upcoming arraignment hearings when the petitions were initially filed, resulting in both appointment on paper and physical presence at arraignment in those instances.

Despite these limited instances of attorney presence at arraignment, a prominent theme that emerged throughout interviews and court observations was that children, particularly those charged with misdemeanors, commonly came to court for arraignment without counsel. In these cases, stakeholders reported and court observers witnessed that children frequently waived the right to counsel and pled true at arraignment. In many of those instances, a child pled true<sup>52</sup> without consulting an attorney, and the court frequently imposed conditions that included probation without the child having any legal assistance. Several defense attorneys reported that, because they were not at arraignment, they were unaware of the rates of waiver of counsel (though some later became aware if a child was appointed counsel for a violation of probation).

### *Children, particularly those charged with misdemeanors, commonly came to court for arraignment without counsel.*

Our findings revealed that most attorneys in New Hampshire were not meeting with their clients nearly early enough. It is worth noting, as NCFJCJ points out, that these barriers to meeting with an attorney earlier in the case rarely exist for families who can independently afford to retain private counsel.<sup>53</sup>

While stakeholders within the system understand the court process, youth who go unrepresented

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48 N.H. CODE ADMIN. R. ANN. 1004.01 (a) (2020).

49 N.H. CODE ADMIN. R. ANN. 1004.01 (b) (2020).

50 N.H. CODE ADMIN. R. ANN. 1004.01 (c) (2020).

51 N.H. REV. STAT. ANN. § 169-B:14 (2020).

52 In New Hampshire's juvenile courts, youth plead "true" to an allegation, rather than guilty.

53 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41, at Ch. III, p. 25.

at any hearing, particularly their first hearing, may often be left confused by the process.<sup>54</sup> As one assessment team member stated after observing court and conducting interviews:

This system of appointment has many dire ramifications for the quality of representation down the road, but the most immediate consequence is that [too many] youth are unrepresented at their very first court hearing. Placing oneself into the shoes of a youth facing delinquency charges, it is difficult to imagine a more disempowering experience than having to face unknown proceedings without an advocate by one's side to offer advice and counseling about their decisions, explain what is happening, and fight for the youth's stated interests. The fact that arraignments are quick and routine to everyone else in the room likely makes the experience more disempowering to the youth, rather than less so.

***Arraignments are quick and routine to everyone else in the room, likely making the experience more disempowering to the youth.***

Delays in appointment of counsel also impinge on the amount of time attorneys have to meet with their clients. When attorneys are not appointed in time to meet with their clients prior to arraignment, stakeholders reported that the attorneys typically

did not meet their client until the adjudicatory hearing, which is generally held 30 days after arraignment.<sup>55</sup> Even if counsel happened to be at arraignment, stakeholders reported that they usually only had a few minutes prior to the arraignment hearing to meet with their clients, due at least in part to defense attorneys' mixed caseloads—covering both delinquency and adult criminal cases across multiple courtrooms and courthouses.

One defense attorney noted due process concerns that arose when the court held arraignment hearings without an attorney and imposed conditions of release: "Kids sign up for things they don't know [they're] signing up for, they are going home but have ten things to do. Our role is to take a minute, take a step back, make sure [they] understand. No matter how nice the judge is, I can't imagine at 16 I would have asked questions if I didn't understand."

Notably, stakeholders across the delinquency system in New Hampshire reported seeing no reason that defense attorneys should not be present at all arraignments in juvenile court. A probation officer felt "juvenile-specific lawyers should be appointed for every kid before arraignment."

Children in New Hampshire require increased access to justice, earlier in the proceedings, in order to protect their constitutional right to counsel. At a minimum, attorneys must be appointed prior to—rather than at the time of—arraignment, ideally as soon as the petition is filed. New Hampshire must create a process to allow for earlier, more frequent, and more significant client contact.

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54 See, e.g., Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980); Barry Feld, *Real Interrogation: What Actually Happens When Cops Question Kids*, 47 LAW & SOC'Y REV. 1 (2013); Jodi L. Viljoen & Ronald Roesch, *Competence to Waive Interrogation Rights and Adjudicative Competence in Adolescent Defendants: Cognitive Development, Attorney Contact, and Psychological Symptoms*, 29 LAW & HUM. BEHAV. 723 (2005); NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.1 cmt.

55 N.H. REV. STAT. ANN. § 169-B:14(II) (2020).

## B. Waiver of Counsel

As the National Juvenile Defense Standards explain:

The problem with juvenile waiver of counsel is clear: children require the advice and assistance of counsel to make decisions with lifelong consequences in the highly charged venue of a juvenile court proceeding. As a result of immaturity, anxiety, and overt pressure from judges, parents, or prosecutors, unrepresented children feel pressure to resolve their cases quickly and may precipitously enter admissions without obtaining advice from counsel about possible defenses or mitigation. In order to ensure the client's due process rights are protected, the client must have meaningful consultation with counsel prior to waiving the right to counsel. Counsel should support or spearhead efforts to provide safeguards against waiver of counsel and insist upon the early appointment of counsel.<sup>56</sup>

Acknowledging a national problem of waiver of counsel in juvenile courts, NCJFCJ has called on judges to safeguard against waiver of counsel:

It is vitally important that youth are represented by counsel, and it is the responsibility of juvenile court judges and judicial officers to ensure that their inquiries are as fulsome as possible. At the very least, youth should be afforded a meaningful opportunity to consult with counsel prior to any consideration of waiving that right. Juveniles who are not represented by counsel are not likely to effectively exercise their other due process rights.<sup>57</sup>

Waiver of counsel should never occur in delinquency proceedings unless the youth has first consulted with a qualified juvenile defense lawyer about the right to counsel and the role of a defense attorney.<sup>58</sup>

New Hampshire law presumes the appointment of counsel at the time of arraignment, unless there is a valid waiver.<sup>59</sup> Waiver of counsel is not permitted in several types of felony cases or if the prosecution seeks certification to adult court.<sup>60</sup> If the court has information indicating a youth has “an intellectual, cognitive, emotional, learning, or sensory disability,”<sup>61</sup> the youth is required to consult with counsel. In all other cases—e.g. a misdemeanor charge in which a disability is not at issue—the court has the authority to accept a waiver of counsel only if the child is “represented” by a “non-hostile” parent or guardian; both the youth and parent, guardian, or custodian agree to waive counsel; the court determines the waiver is made competently, voluntarily, and with full understanding of the consequences; the petition does not violate any laws of the Revised Statutes Annotated of the State of New Hampshire; and the prosecutor has informed the court that it does not intend to seek adult prosecution of the youth.<sup>62</sup>

New Hampshire's legislature has put numerous safeguards in place to prohibit waiver of counsel and to limit when waiver is allowable by law. It is unlawful for any prosecutor, law enforcement officer, probation or parole officer, juvenile parole board member, or other state or municipal employee to advise or provide information that encourages a youth or a youth's parent or guardian to waive the youth's right to counsel.<sup>63</sup> The law requires the court to advise youth and families that they may ask for a lawyer—free of charge and without any repayment obligations—for the purpose of deciding whether

56 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 10.4 cmt.

57 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41, at Ch. III, p. 25.

58 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 10.4 cmt.; NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41; Dep't of Justice Statement of Interest in N.P., *supra* note 4.

59 N.H. REV. STAT. ANN. § 169-B:12(I) (2020).

60 N.H. REV. STAT. ANN. § 169-B:12(II) (2020).

61 N.H. REV. STAT. ANN. § 169-B:12(I) (2020).

62 N.H. REV. STAT. ANN. § 169-B:12(II) (2020).

63 N.H. REV. STAT. ANN. § 169-B:12(V) (2020).



waiver of counsel is a good choice.<sup>64</sup> However, despite this required advisement, the court still has discretion whether to actually appoint defense counsel for that consultation.<sup>65</sup>

When asked how often young people waived counsel, most stakeholders reported that it rarely happened, with many pointing to the law prohibiting the waiver of counsel for felony charges or when a disability is raised. There was a vastly different reality, however, in the assessment teams' findings regarding waiver of counsel in misdemeanor cases. Assessment team members had serious concerns about a seemingly high rate of waiver of counsel and concerns as to whether those waivers met the statutory threshold for validity. Where waiver occurred, court observations and interviews suggested that consultation with an attorney prior to waiver did not appear to be occurring with any regularity anywhere in the state.

Moreover, the information youth and family had prior to entering court was sometimes solely supplied by probation or the prosecution. One assessment team member observed a series of informal "pre-arraignment" meetings conducted by the prosecutor and probation officer. These meetings took place before the arraignment hearing, without a defense attorney or judge present. The assessment team member reported that the children lined up outside the prosecutor's office, and the prosecutor and probation officer met with each youth (with their parent and in some cases an interpreter), reviewing the charges against them. If the child or the parent reported that the child had an Individualized Education Program (IEP) or if the case was a felony, the prosecutor or probation officer told the child they had to plead not true to the charges and go in front of the judge to be appointed a lawyer, and that they would have to come back at a later date with the lawyer.

In misdemeanor cases, however, if the child did not have an IEP, the prosecutor and probation officer reviewed the charges, told the child they could plead not true and have an attorney appointed

or could plead true *and go home that day* with whatever conditions the judge imposed. While they would explain the conditions were up to the judge to decide, they would also tell the child what they would recommend to the judge. The assessment team member reported that at no point during these meetings was the role of a defense attorney ever explained, nor was the child's right to counsel fully explained in youth-appropriate language. There was also no explanation that if the youth had a defense attorney, that attorney could make different recommendations to the judge.

Interviews with stakeholders in other counties revealed variations of this practice around the state. These observations conflict with the prohibitions against the prosecution or probation providing "information to a juvenile or the parent or guardian of a juvenile under circumstances which a reasonable person would know would encourage a waiver of the right to counsel."<sup>66</sup> And, as noted above, while children cannot be detained without counsel present, children can be placed outside their home after having waived their right to counsel and pleading true.

While New Hampshire stakeholders were unable—either at the county or state level—to provide any data regarding waiver of counsel rates for youth, assessment team members observed 41 court hearings around the state. Nearly a quarter of these hearings proceeded without a defense attorney representing the child. All but one of the hearings that proceeded without counsel were arraignments. It is important to reiterate that arraignments, even in misdemeanor cases, are often the first time restrictions on a child's liberty are considered, even if no defense attorney is present.

***Nearly a quarter of these hearings proceeded without a defense attorney representing the child.***

64 N.H. REV. STAT. ANN. § 169-B:12(II-b) (2020) (stating the court "*shall advise* the minor and the parent, guardian, or custodian that they may request such appointment and that the appointment of counsel for such purpose will not be subject to a repayment requirement") (emphasis added).

65 *Id.* (stating the court "*may appoint* counsel for an indigent minor for the purpose of consultation about the decision to request or waive counsel") (emphasis added).

66 N.H. REV. STAT. ANN. § 169-B:12(V) (2020).

When asked what motivated waiver of counsel, stakeholders thought youth were likely influenced to waive counsel by the costs of counsel, parental pressure, and a desire to not have to return to court.

Many stakeholders proposed that the most likely reason for waiver of counsel at arraignment was the \$300 fee for assistance of counsel in a juvenile case.<sup>67</sup> As one defense attorney put it, “parents want kids to take responsibility, get it over with, and not have to pay the fee. Also, they don’t want to have to come back. They want to get it over with.” A defense attorney in another jurisdiction said, “Parents may pressure them to save money.” A probation officer in a third jurisdiction reported observing a parent encouraging a child to waive counsel for financial reasons.

While the statute prohibits courts from seeking reimbursement for counsel appointed to help youth and families decide whether to waive their right to counsel, if the child exercises their constitutional right to court-appointed counsel, the statute allows for the services of defense counsel to be charged to the child or the family.<sup>68</sup> When children and families believe they can resolve a case quickly at no cost, they may be more likely to waive their rights without a full understanding of the consequences.<sup>69</sup> And court observations and interviews suggested that such consultation with counsel prior to most waivers did not appear to be occurring anywhere in the state.

In addition to the fees associated with counsel, stakeholders suggested that waiver of counsel is likely the result of a desire to end the case quickly. One judge posited that it is “frankly driven by not wanting to come back to court, wanting to resolve the case.” A probation officer in that same jurisdiction stated, “Kids are almost never against getting a lawyer; it’s pressure from the parents due to payment or wanting to be done with the case today. I always see them in the hallway and

the parent is saying we are going forward without a lawyer. Sometimes parents kick them under the table and tell the child to say yes to the judge’s colloquy questions.” Defense attorneys in other jurisdictions noted, “Parents do not want to come back to court—they want to get it done—and they feel like they are getting a good deal from the [probation officer],” and that the biggest factor was that parents pushed their children to take responsibility for the offenses and encouraged the children to waive counsel.

*“Kids are almost never against getting a lawyer; it’s pressure from the parents due to payment or wanting to be done with the case.”*

Whether the parent has a conflict of interest (and therefore can be truly seen as “non-hostile” under the statutory considerations for accepting a waiver) or whether the parent believes they are doing the right thing, youth and families are often ill-equipped to protect a child’s legal interests. Whether the child is charged with a felony or misdemeanor is irrelevant, as the lasting harms of juvenile court involvement attach when a child agrees to plead and accept a host of conditions from the court without ever accessing a defense attorney.

Waiver of counsel in delinquency cases places youth in an untenable position of facing the power of the state and the authority of the court without an advocate who can guide the young person and protect their rights. New Hampshire should require that all children, regardless of charge, consult with an attorney prior to waiving their right to counsel at any stage of the proceedings.

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67 N.H. REV. STAT. ANN. § 604-A:9 (1)(A) (2020).

68 N.H. REV. STAT. ANN. § 169-B:12 (II)(b) (2020).

69 NAT’L JUVENILE DEFENDER CTR., FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 33 (2006), <http://njdc.info/wp-content/uploads/2013/11/Florida-Assessment1.pdf>; NAT’L JUVENILE DEFENDER CTR. ET AL., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO i (2003), <http://njdc.info/wp-content/uploads/2013/11/Final-Ohio-Assessment-Report.pdf>; NAT’L JUVENILE DEFENDER CTR. ET AL., WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS 28 (2003), <http://njdc.info/wp-content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf>.

## C. Client Contact & Communication

Attorneys have a range of ethical obligations related to meeting with their clients and maintaining the attorney-client relationship.<sup>70</sup> Counsel “must meet the client as soon as practicable following counsel’s appointment.”<sup>71</sup> Juvenile defense attorneys must explain their role to youth clients in a way that is clear and developmentally appropriate based on the youth’s age, experience, maturity, and understanding.<sup>72</sup> Describing the role of counsel includes, but is not limited to, explanations of expressed-interest advocacy, attorney-client privilege, confidentiality, and allocation of decisions between the attorney and the client.<sup>73</sup> “Regular communication is essential to the attorney-client relationship. Not only do youth need to understand the nature of their case and the processes of the juvenile justice system, but they must also be in a position to ask questions of counsel and direct their representation.”<sup>74</sup>

After those early meetings with a client and throughout the scope of a case, it is critical that defense attorneys communicate on a regular basis with their youth clients, both those in custody and those in the community.<sup>75</sup> Communication is key to ensuring youth understand what is happening in their case<sup>76</sup> and attorneys secure the necessary information to provide effective representation at various proceedings, to include in motions, and to preserve the record.<sup>77</sup>

Assessment teams found a strength of practice in how defense attorneys explained their role to clients when they met. In interviews, assessment team members learned that defense attorneys generally had a good understanding of their role as expressed-interest attorneys, of adolescent development, and of how to effectively communicate their role to young people.

*Defense attorneys generally had a good understanding of their role as expressed-interest attorneys, of adolescent development, and of how to effectively communicate their role to young people.*

One defense attorney described explaining their role to their youth clients: “I am their lawyer, not their parents’ lawyer. I meet with [the youth] alone first, talk about the court process, a basic understanding of what they are looking at, go over discovery and their background, and the things they are most worried about. I explain what the adjudication and plea would look like, that it is their decision and I am here to help but ultimately do what they want, and explain the possible consequences and what they look like.”

Another defense attorney shared, “I spend time with clients and parents talking about the court process and their goals. I meet alone with my client to talk about charges and assess whether there is a need for competency evaluation.” These comments were representative of the responses most New Hampshire juvenile defense attorneys provided and demonstrated a clear understanding of the need to let young clients understand how defenders are different from other people in the system and strong attorney-client interaction across the state in this regard.

70 N.H. R. PROF. CONDUCT 1.2 (2020); N.H. R. PROF. CONDUCT 1.4 (2020).

71 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 2.1(a)

72 *Id.* at Standard 2.2 cmt.

73 *Id.* at Standards 2.2, 2.3.

74 *Id.* at Standard 2.4 cmt.; N.H. R. PROF. CONDUCT 1.4 (2020); MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt (AM. BAR ASS’N 1983); MODEL RULES OF PROF’L CONDUCT r. 1.14(a) (AM. BAR ASS’N 1983) (attorneys must maintain a “normal client-lawyer relationship” with their juvenile clients).

75 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 2.4.

76 See MODEL RULES OF PROF’L CONDUCT r. 1.4 cmt (AM. BAR ASS’N 1983); MODEL RULES OF PROF’L CONDUCT r. 1.14(a) (AM. BAR ASS’N 1983) (attorneys must maintain a “normal client-lawyer relationship” with their juvenile clients); NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 2.4 cmt.; TEN CORE PRINCIPLES, *supra* note 15. See also, ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 16.

77 See NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 2.4.

Though defenders seemed to do a generally good job explaining their role to clients, there appeared to be significant limitations in regularly communicating with clients throughout the case. Across jurisdictions, attorneys indicated that they try to engage in regular communication, but due to a number of structural barriers the reality of such communication seemed to be infrequent at best. This appeared to be the case for both young people in facilities and those in the community.

In New Hampshire, there is one facility where children who are detained pre-adjudication are held.<sup>78</sup> As the numbers of youth who are detained have declined, particularly in recent years, many of the defenders interviewed for this report had not had any, or had very few clients held in detention. Those who had represented detained clients reported that the primary method of communicating with young people in detention was by telephone. Most of these attorneys reported that the process for calling the facility was fairly seamless and that they could usually get through without a problem. One defender specifically noted that clients always told them they were alone in the private interview room and that there were no time limits on attorney phone calls. Though most attorneys reported no problems with phone communication, a couple defenders noted issues where their clients had to call them back, or where the facility staff told the defenders that they were not on an approved list for phone calls. However, another attorney noted that the issue of an approved lists was something of the past that had since been resolved to ensure that attorneys were able to speak with clients.

A few defenders mentioned that they had in-person visits with their clients in detention. All the defenders who mentioned visiting their detained clients regularly practiced in two jurisdictions in close proximity to the detention facility. Even among the small number of attorneys who noted visiting clients in detention, more than half mentioned that they sometimes had to call their clients because they did not have time to visit. Defenders cited the short timelines in juvenile court and high caseloads that required appearing

regularly in adult criminal court as reasons for being unable to communicate with youth clients in detention.

The vast majority of juvenile defenders' clients were in the community, and attorneys reported a wide variety of when, where, and how frequently they communicated with these clients throughout a case. About half of the defense attorneys interviewed reported meeting their clients for the first time at court immediately preceding hearings, while the other half reported meeting with their clients one day to two weeks in advance of hearings, regardless of type of hearing. How far in advance of a hearing an attorney reported meeting with a client appeared to be based on the individual attorney, not on the county or court in which they practiced. However, in one county, every attorney interviewed noted not being able to meet their clients until court. As one defense attorney stated, "There are definitely some circumstances I meet the client at the adjudication and then do a continuance. The continuance averages two weeks if I'm lucky."

**About half of the defense attorneys interviewed reported meeting their clients for the first time at court immediately preceding hearings.**

In critique of defenders who met their clients for the first time at court, one judge said, "The day you meet them in the courthouse lobby isn't the way to go." Another judge reported hearing complaints from youth who had not met their attorney prior to the proceeding. "That is a problem, not meeting in advance. The attorneys don't know the facts of the case, they're not flushing them out, not investigating except the most serious cases. The lawyers say, 'I tried to call.' There may be some truth to that, but I believe kids, and the lawyers are not always prepared, don't know facts walking in meeting people and that's a problem." The judge expressed concern that

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78 Sununu Youth Services Center, N.H. DEP'T OF HEALTH AND HUMAN SERVS., <https://www.dhhs.nh.gov/djjs/institutional/index.htm> (last visited Apr. 10, 2020).





attorneys seemed to prioritize representing adult clients over youth clients. When matters were set in multiple courts, the judge felt juvenile courts were shortchanged, with attorneys showing up late or not at all or having another attorney stand in. The judge reported that other judges shared this opinion and wished some public defenders would be assigned only a juvenile caseload.

Some attorneys reported communicating with clients regularly by telephone, some reported meeting them in person outside of court, either in the attorney office or at a public place, and some reported only being able to communicate with clients through their parents. Others reported only communicating with clients through meetings at the courthouse. One attorney reported communicating with clients via email or other technology such as FaceTime. Attorneys posited a number of reasons for not meeting with clients regularly: clients not returning calls, parents not wanting children to speak with or have an attorney, poverty making it less likely the client had minutes on their cell phone or had a phone at all, lack of transportation, non-responsive parents, parents not having time, clients and families not trusting “the system,” and parents getting too involved and taking over the case. Other attorneys noted the distance between courthouses and the defender offices in their jurisdiction made it difficult to meet in advance.

Multiple assessment team members reported observing court hearings at which a young person was represented at an adjudication hearing or trial by an attorney who was standing in on the case because the youth’s attorney had conflicting court schedules. The substitute attorney rarely had a relationship or rapport with the youth client and may not have been aware of all the facts of the case.

One young person interviewed by the assessment team reported having three court hearings: at the first hearing they did not have an attorney, and at the second and third hearings, they had two different attorneys. The young person explained they were unsure who their lawyer was, they did not know why their previous attorney was not there, and they had met this attorney only ten minutes before court. The young person reported never speaking to a lawyer on the phone or in person before the adjudicatory hearing. As one assessment team member opined, “What better way to signal to a child that they don’t matter than to abandon them to someone else? The system sometimes feels set up to demonstrate to young people that they just aren’t worthy of the time investment.”

*“The system sometimes feels set up to demonstrate to young people that they just aren’t worthy of the time investment.”*

The assessment team found that many young people do not receive the early and ongoing client counseling and communication envisioned by national best practices or New Hampshire ethical standards. New Hampshire defense attorneys need more opportunity to communicate with clients regularly. New Hampshire must remove the structural barriers—such as high caseloads that commonly prioritize adult court cases over youth representation—that make providing effective and zealous representation to youth clients difficult.



## D. Probable Cause & Detention Hearings

The United States Supreme Court has made clear that prior to detaining someone, the state must show there is probable cause that an offense was committed and that it was committed by the person charged.<sup>79</sup> National standards affirm that juvenile defenders must assert their client's constitutional rights regarding probable cause, protect those rights by challenging a state's claim of probable cause, and require those allegations to be supported with evidence.<sup>80</sup>

Although pretrial procedure varies among states, the Court held that the Fourth Amendment requires a judge to make a probable cause determination “promptly” after arrest.<sup>81</sup> The Court later clarified the meaning of “prompt” by establishing a 48-hour rule for probable cause determinations.<sup>82</sup> In *County of Riverside v. McLaughlin*, the Court held that the county's policy of holding probable cause hearings within two days after arrest was unconstitutional under the Fourth Amendment because the county excluded weekends and holidays when computing the time.<sup>83</sup> Because holidays and weekends were excluded, “an individual arrested without a warrant late in the week [would] in some cases be held for as long as five days before receiving a probable cause determination.”<sup>84</sup> Importantly, the Court did not exclude juvenile proceedings from its holding.<sup>85</sup> At a minimum, juvenile defense attorneys must

insist the court make a finding of probable cause prior to ordering the pretrial detention of any youth. While probable cause is a prerequisite to detention, a finding of probable cause does not automatically require detention. Juvenile defense attorneys must, as long as it is in line with their client's expressed interests, advocate for their client's immediate release from detention.<sup>86</sup> A growing body of research about the risks of placing children in detention<sup>87</sup> has found “increased victimization, recidivism, school drop-out, and long-term physical and mental health issues.”<sup>88</sup> It is critical that juvenile defense attorneys know and use information about detention posing risks of harm to youth in their arguments for release.<sup>89</sup> Risks of detention and a child's due process rights prior to any deprivation of liberty demand that defense attorneys challenge any instances where detention is sought for their youth clients.

In New Hampshire, children have an explicit right to counsel if they face the possibility of detention.<sup>90</sup> A detention hearing must occur within 24 hours of the child being taken into custody by police, excluding weekends and holidays.<sup>91</sup> New Hampshire law reiterates the constitutional obligation that the prosecution must not only demonstrate the need for secure detention, but

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79 Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

80 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.7.

81 Pugh, 420 U.S. at 125.

82 Riverside v. McLaughlin, 500 U.S. 44, 58 (1991).

83 *Id.* at 58-59. *But see*, Schall v. Martin, 467 U.S. 253 (1984) (finding that a slightly longer delay may be acceptable for youth, if other adequate procedural safeguards are in place).

84 Riverside, 500 U.S. at 47.

85 *Id.* at 58 (reasoning, “Everyone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail.”).

86 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.8.

87 *Id.* at Standard 3.8 cmt.; Karen M. Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403 (2004); Carly B. Dierkhising et al., *Trauma Histories Among Justice Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY (2013); Michael P. Krezmien et al., *Detained and Committed Youth: Examining Differences in Achievement, Mental Health Needs, and Special Education Status*, 31 EDUC. & TREATMENT CHILD. 445 (2008); Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES GEN. PSYCHIATRY 1133 (2002).

88 NAT'L JUVENILE DEFENDER CTR., A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL (2019) [hereinafter A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL], [https://njdc.info/wp-content/uploads/2019/NJDC\\_Right\\_to\\_Liberty.pdf](https://njdc.info/wp-content/uploads/2019/NJDC_Right_to_Liberty.pdf).

89 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 3.8 cmt.; A RIGHT TO LIBERTY: REFORMING JUVENILE MONEY BAIL, *supra* note 88.

90 *In re Gault*, 387 U.S. 1 (1967); N.H. REV. STAT. ANN. § 169-B:12 (IV) (2020).

91 N.H. REV. STAT. ANN. § 169-B:12(IV)(b) (2020).

also establish probable cause that the youth committed the alleged act(s).<sup>92</sup> Moreover, before a court may detain a young person, it must find the prosecutor has shown, by clear and convincing evidence, that secure detention is necessary to ensure the presence of the youth at a subsequent hearing, to provide care and supervision for a youth who is in danger of self-harm without proper supervision, or to protect the personal safety or property of others from the probability of serious harm by the child.<sup>93</sup> No child may be detained pre-adjudication if they would not be subject to secure commitment if adjudicated on the charges against them.<sup>94</sup>

With these strict statutory limits on the use of detention, stakeholders reported that detention is now rare for youth in New Hampshire. Some advocates suggested that the infrequent use of detention may soon lead to the closure of New Hampshire's sole detention facility. Given the infrequency of detaining young people in New Hampshire, most juvenile defense attorneys reported few instances of advocating for youth clients at a pre-trial detention hearing.

When detention hearings did occur, the prerequisite finding of probable cause was reportedly rarely challenged, which raised concerns with assessment team members. Of the few stakeholders that discussed defenders challenging probable cause, half worked in a single jurisdiction. Some judges noted that when probable cause was litigated, the defense attorneys had just met the client at the hearing and could not be effective because they did not know the facts and had not investigated the charges, done necessary interviews, or read available documents. These judges explicitly recognized that the current appointment system had led to ineffective advocacy at detention hearings, yet neither the judiciary nor the legislature had addressed the problem.

Defense attorneys seemed to have a mixed understanding of the process for challenging probable cause in New Hampshire. Some defenders reported that if the court sought to detain a child, the judge had to make a finding of probable cause on the record, after hearing some offer of proof or live testimony from a police officer. However, other attorneys reported that there was no mechanism for challenging probable cause or “no real process” to do so. It was unclear whether defense attorneys’ differing understanding of their ability to challenge probable cause was because so many have not had the opportunity to advocate for a client at a detention hearing or because the process used in different jurisdictions was inconsistent. As one defense attorney noted, “though it is clear in the law that probable cause must be established, no procedure for establishing probable cause in juvenile court is explicit in the juvenile statute. I think this is because probable cause should be the same as in adult court, with a witness.”

While the lack of challenging probable cause (or in some instances, even an awareness of the possibility of doing so) was concerning, the fact that attorneys reportedly were always present for detention hearings and nearly always advocated for their clients’ release is a strength in defense attorney practice in New Hampshire.

New Hampshire should be commended for its relatively low use of detention, but juvenile defense attorneys must consistently challenge probable cause and advocate for the release of their clients whenever detention is sought and clients desire release. Additional training on strategies for challenging probable cause should be provided for defense attorneys.

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92 Gerstein v. Pugh, 420 U.S. 103, 125 (1975); N.H. REV. STAT. ANN. § 169-B:14 (l)(e)(1) (2020).

93 N.H. REV. STAT. ANN. § 169-B:14 (l)(e)(2) (2020).

94 N.H. REV. STAT. ANN. § 169-B:14 (l)(e)(3) (2020).

## E. Case Preparation

Zealous advocacy on behalf of youth clients requires defense attorneys to properly prepare for a case through obtaining discovery, conducting investigation, filing motions, and utilizing experts when relevant.<sup>95</sup> Securing discovery is a critical part of an attorney's duty to investigate the facts of their client's case.<sup>96</sup> Appropriate investigation can support the client's decisions throughout the case, including whether to take a plea or go to trial.<sup>97</sup> Filing motions is a crucial part of any zealous advocacy, and experts may be necessary in a juvenile case to refute charges or provide mitigating information.<sup>98</sup>

### 1. Discovery

Discovery is the evidence and information the state is legally required to turn over to the defense in preparation for trial. It is essential for providing the defense with the full measure of the prosecution's case to aid in the decisions the young client must make about how to proceed. Discovery in juvenile court in New Hampshire is governed by Juvenile Court Rule 3.3, which requires the prosecutor to turn over a wide array of evidence and information within seven days of arraignment of a youth.<sup>99</sup> Whenever a defense attorney believes that their youth client's right to discovery, as outlined in the rules, is being obstructed, they have an obligation to secure discovery through motions to compel or litigation, unless there is a strategic reason not to and the client gives informed consent.<sup>100</sup> The discovery rules also require the youth client to provide the prosecutor with a list of witnesses, including experts and reports, they anticipate introducing at the adjudicatory hearing, within 14 days of arraignment.<sup>101</sup>

The discovery process in New Hampshire appears to be straightforward. Seventy-five percent of defense attorneys interviewed reported that they had no issues with obtaining timely and complete discovery. One attorney said that discovery is "provided up front" and they had never had to ask for anything other than what the prosecutors provided. Another said, "we request it and we get it." Others reported that the prosecutor emails discovery materials.

There were, however, a few defense attorneys who reported occasionally facing obstacles related to the short timelines in juvenile court, including sometimes not receiving discovery within the required seven days and sometimes not having enough time to review it. A few attorneys also noted that individual police prosecutors or departments could sometimes make accessing discovery difficult. For example, one attorney reported difficulty obtaining discoverable video footage because it was transmitted through a different channel than the rest of discovery. Another attorney noted that occasionally something was missing or late. In these instances, attorneys reported that they ultimately were able to obtain the required discovery without significant delays.

While it is positive that attorneys seem able to easily obtain necessary discovery in a timely fashion, it is worth noting that, given the high estimates of cases that plead at arraignment, some attorneys may not have reviewed discovery materials in many of their cases. Obtaining information necessary to assess the strength and evidence of a case, and defenders' responsibilities to review and consider all available defenses based on it, are crucial to effective juvenile defense practice.

95 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 4.5, 4.7; INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 33, at Standard 3.1; ME. COMM'N ON INDIGENT LEGAL SERVS., STANDARDS OF PRACTICE FOR ATTORNEYS WHO REPRESENT JUVENILES IN JUVENILE COURT PROCEEDINGS (2012), <https://njdc.info/wp-content/uploads/2016/01/Maine-Commission-on-Ind-Defense-Standards-for-Juvenile.pdf>; N.H. R. PROF. CONDUCT 1.1-1.4 (2020).

96 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 4.5 cmt..

97 *Id.* at Standard 4.7 cmt..

98 *Id.* at Standards 4.7, 4.8.

99 N.H. FAM. DIV. R. 3.3 (2020).

100 INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 33, at Standard 7.3(a); NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 4.6 cmt., 4.7 cmt.; ME. COMM'N ON INDIGENT LEGAL SERVS., *supra* note 95.

101 N.H. FAM. DIV. R. 3.3 (B) (2020).

## 2. Investigation

While the rules of discovery govern what the state must disclose to the defense, there is much more to understanding the full picture of a case beyond what the police or prosecution may be required to provide. Defense attorneys have an independent obligation to conduct their own investigations into every case.<sup>102</sup> “Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused’s admissions or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.”<sup>103</sup>

Early and thorough investigation is necessary to carefully test the charges brought against the child and to provide sound advice.<sup>104</sup> At least one state supreme court has found that failure to conduct investigation in a delinquency case can constitute ineffective assistance of counsel, even when the case is headed to a plea, rather than a trial.<sup>105</sup>

Assessment team members discovered that, in the seven counties visited for this report, each of the public defender offices had investigators available to their attorneys handling delinquency cases. In contrast, only a few contract attorneys reported having access to an investigator. Regardless of the availability of investigators, however, the assessment team learned that investigators were significantly under-utilized for delinquency cases, even by public defenders.

Nearly half of defense attorneys interviewed reported rarely using an investigator for delinquency cases. These attorneys were spread across offices over the entire state. One public defender estimated that investigation was requested in five to ten percent of juvenile cases in their office. When asked about obstacles to

using investigators, a defense attorney posited that, “sometimes there is an attitude about giving an investigator to juvenile cases because they are not deemed as important. But when push comes to shove, we get them. I wonder if that makes younger attorneys not ask as often as they should.” One contract attorney noted asking a paralegal to investigate juvenile cases, specifically through social media to find witnesses. The rare cases in which defense attorneys reported requesting investigators were those subject to certification to adult court and sex offenses.

Investigation is a critical piece of preparing for a juvenile case and being able to effectively fight charges against youth clients. Public defenders must begin to utilize investigators in delinquency cases, the state must provide access to investigators to contract attorneys, and investigators themselves should be encouraged to work on juvenile cases. The state and the public defense system should dispel any misperceptions that juvenile cases are simple matters that do not necessitate proper investigation.

*The state and the public defense system should dispel any misperceptions that juvenile cases are simple matters that do not necessitate proper investigation.*

## 3. Motions

A crucial part of case preparation is filing appropriate motions. This can include a wide range of motions, such as challenges to pretrial detention or conditions of pretrial release, challenges to the sufficiency of the petition, discovery motions,

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102 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 4.1-4.4.

103 ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standards 4-4.1 (American Bar Association, 3d ed.1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE].

104 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 4.1 cmt. (citing, ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 103, at Standards 4-4.1); ROLE OF JUVENILE DEFENSE COUNSEL, *supra* note 16, at 14-15.

105 State v. A.N.J., 225 P.3d 956 (Wash. 2010).



motions to suppress evidence, competency challenges, and innumerable others.<sup>106</sup> In short, motions are integral to zealous advocacy and protecting a client's rights.

Interviews with defense attorneys, judges, and prosecutors revealed significant limitations in juvenile defense practices statewide with respect to filing motions. Stakeholders reported motions were seldom filed in juvenile cases, but most defense attorneys reported no obstacles to doing so, other than short timelines in juvenile court and prosecutors "not being happy about it."

The infrequent pre-trial motions that were filed appeared to be limited in breadth. The most frequently cited motions were related to youth competency to proceed, but judges, defense attorneys, and prosecutors also reported some motions to dismiss, motions to assert Fifth Amendment rights, motions to suppress statements or evidence from a search, and motions challenging certification to adult court.

When asked about the strengths and limitations of motions practice, one judge stated, "They don't file many motions because they rarely go to trial. It drives me crazy. I come from a litigation background and am amazed sometimes that some of these cases get resolved."

***"They don't file many motions  
because they rarely go to trial.  
It drives me crazy."***

A robust motions practice is a key indicator of an effective juvenile defense practice and ensures that due process is afforded to all youth facing delinquency allegations. Defenders in New Hampshire have an obligation to advance their youth clients' rights and defenses through an active motions practice, as appropriate, in every case.

## 4. Experts

Zealous and effective juvenile defense advocacy requires that attorneys consider, and where appropriate seek out, experts and other professionals necessary for trial preparation, evaluation of clients, and testing of physical evidence.<sup>107</sup> Defending young people requires insight into a host of specialized areas of expertise, such as the science of child and adolescent development, special education, language and contextual comprehension, adolescent mental health and emotional status, and youth-related competency, to name just a few. Experts can assist in motions practice, in litigating facts or issues at trial, and at disposition with mitigation or to help with developing targeted and appropriate disposition plans.

Stakeholders recalled the use of defense experts in competency hearings, cases involving alleged sex offenses, or cases where young people were facing certification to adult court. However, the assessment teams found the use of experts was extremely rare overall in juvenile cases.

While some defense attorneys reported no obstacles to the use of experts and that the court would allocate funds to hire experts, others reported financial obstacles and concerns that using court-funded experts might preemptively reveal defense strategy. While concerns about revealing defense strategy are legitimate, defenders in other jurisdictions suggested that they get around this by filing such motions *ex parte*, which is common practice nationwide at both the state and federal levels.

One defense attorney said, "The court pays the cost of hiring the expert and, since this is done by motion, there is the problem of disclosing your defense. There often isn't the money needed to adequately pay experts. The limit is \$2,000 for a psycho-sexual eval, and there isn't anyone good available to do them" at that price. Despite this statement, no laws or rules were found that place caps on funds for experts. However, another stakeholder noted that while the state does not impose caps, individual judges and jurisdictions vary in whether they institute their own.

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<sup>106</sup> NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 4.7 (citing Standard 4.8 cmt.).

<sup>107</sup> *Id.*

Another defense attorney explained, “sometimes the court doesn’t want to give us what we are asking for. Sometimes [our requests for experts] are denied and you have to give more information about why you want that particular expert for that particular amount of money. The client ultimately gets charged for it—subject to an ability to pay hearing. We have to advise our clients that they will have to pay for the expert. That can be a barrier.”

***“We have to advise our clients that they will have to pay for the expert. That can be a barrier.”***

A couple defense attorneys noted specific difficulties with hiring experts for detained clients. One said the detention facility “wants to tell everyone who our experts are, so it’s difficult to maintain the *ex parte* nature of experts. The facility tells [probation officers] who is coming in. Or the facility makes it difficult [for the expert] to get in.” Another defense attorney noted a case where they hired an expert to evaluate a detained youth client who was facing certification to adult court. The facility would not allow the expert in because they were not on an approved visitor list, and the defense attorney did not want to provide that information to the facility. Although this issue was eventually resolved in a court hearing, obstacles to expert access such as this serve to discourage the use of experts and potentially deny youth their Fifth Amendment right to present a defense.

Systemically, juvenile defense attorneys in New Hampshire need better access to experts in order to educate themselves, the court, and other stakeholders about issues unique to their clients and young people in general. Defenders should file *ex parte* motions for court funding to assist with the defense whenever appropriate, and courts should be sensitive to the need for experts and confidentiality, particularly where youth are concerned.

## 5. Case Preparation Generally

“The [child] needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. ‘The child requires the guiding hand of counsel at every step in the proceedings against him.’”<sup>108</sup> Without engaging in thorough case preparation that includes adequate discovery, rigorous use of investigators, pre-trial motion practice, and experts when relevant, juvenile defense attorneys cannot effectively be that guiding hand of counsel that is so critical to a young person.

NCJFCJ supports effective juvenile defense practice and makes clear that juvenile defenders must promptly and routinely investigate, request discovery, meet with clients, file motions, challenge detention, challenge probable cause, and strenuously advocate for the client’s expressed interests.<sup>109</sup> Anything less amounts to a denial of the right to counsel mandated by *Gault*.<sup>110</sup>

While there is a general perception among New Hampshire stakeholders that juvenile defense attorneys are well prepared for their cases, assessment interviews and observations suggested that there were limitations to this preparation. When judges, probation officers, and prosecutors were asked specifically about how well they thought defense attorneys prepared their clients for court, they reported variations in the strengths and limitations of practice.

Strengths that were reported included the perception that defense attorneys were “dedicated, prepared for their legal arguments, and respectful of clients,” and that they understood their role as expressed-interest attorneys. One prosecutor said, “The quality of advocacy in New Hampshire on the part of the defense bar is really high. We have really good defense.”

108 *In re Gault*, 387 U.S. 1, 9 (1967) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

109 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41; NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 3.6-3.8.

110 See *In re Gault*, 387 U.S. at 36.

However, in addition to these strengths, stakeholders—including defense attorneys themselves—also identified areas of concern with respect to case preparation, such as the failure of some defense attorneys to prepare youth for hearings, limited contact with clients, an absence of attorneys at arraignment, a lack of experienced attorneys in juvenile court, high caseloads on multiple competing court calendars, and a lack of specialization in juvenile defense. One probation officer noted a specific issue with attorneys not being prepared and not having met with their clients for misdemeanor cases.

An assessment team member aptly summarized the issues with juvenile defense case preparation in New Hampshire:

Even under the best-case scenario, the current system does not allow attorneys to meet the most basic duties of competent representation, much less the national practice standards for juvenile defenders. Under no circumstances is a single, 35-minute meeting a couple of weeks before trial enough time to conduct an adequate factual investigation, learn about the client's home life, educational situation, and other personal information that could be relevant to adjudication or disposition, explain the juvenile court process adequately, ensure the client understands important concepts such as confidentiality and privilege, go over the terms of any proposed or likely deals, counsel the client on what they should do to positively affect the outcome of their case, solicit and incorporate client input into case strategy and motions practice, etc. These are discussions that should be taking place as early in the life of a case as possible, and they should continue over multiple meetings as the nature of adolescent development makes building the trust required for effective client counseling of youth a long-term process.

Earlier and more frequent contact between defense attorneys and their youth clients is essential to effective juvenile defense and can serve to empower youth, build effective working

relationships with families, and raise the level of legal practice throughout the case.

### *Earlier and more frequent contact between defense attorneys and their youth clients is essential to effective juvenile defense*

Though stakeholders reported that defense attorneys were generally prepared for their cases, findings regarding the lack of use of investigators, motions, and experts indicate otherwise. Although most judges and prosecutors consistently noted that defense attorneys were hard workers and dedicated attorneys when asked about the strengths of their case preparation, the fact that these indicators of case preparation were reportedly rarely used suggests juvenile defense practice that is much less than what true zealous juvenile defense advocacy requires. Prosecutors and judges did report that defense attorneys did not have enough time to meet with their clients, that they have too many cases overall, and that they were assigned to too many juvenile cases on the same day, all of which had an impact on their ability to be prepared.

New Hampshire should provide juvenile defense attorneys with adequate support, sufficient time, and additional training to ensure effective delinquency case preparation. Training should be focused on youth-specific pleadings and arguments to encourage more robust pre-trial motions practice. Investigators should also be allowed to specialize in juvenile defense, or at least encouraged to assist more in juvenile cases. Creating a fund for experts, so their fees do not have to be repaid by clients and families, could also serve to improve practice and access to justice for young people. While a majority of stakeholders did not report any significant obstacles to case preparation in New Hampshire, our findings indicated that the necessary tools for robust case preparation were not being utilized sufficiently. New Hampshire must provide additional time and support and limit the financial barriers to engaging in such advocacy for youth clients.

## F. Pleas, Adjudication, & Trials

The decision whether to plead or proceed to trial rests solely with the youth.<sup>111</sup> However, defense attorneys have an ethical obligation to advise young clients and give them enough information to make an informed decision.<sup>112</sup> This advice, however, should be informed by an understanding of the youth's goals and objectives, not what the defense attorney perceives is best for the child.<sup>113</sup> To provide appropriate guidance, defense counsel must work with their clients to understand the young person's goals and expectations.<sup>114</sup>

Advising young clients on the merits of going to trial versus accepting a plea offer is one of the most challenging aspects of juvenile defense practice. In keeping with expressed-interest representation, defense attorneys must counsel clients with an objective assessment of the case without exercising undue influence on the client's decision.<sup>115</sup> Prior to engaging in plea discussions, attorneys must convey any offers made by the prosecution, just as in an adult case.<sup>116</sup> This is especially important because pleas are an all-too-common occurrence, especially in juvenile court.

### 1. Pleading True

Defense counsel must ensure that youth clients understand the rights they are giving up when entering into an agreement to plead true to the charges and the potential consequences of such a plea.<sup>117</sup> Under New Hampshire law, "No plea shall be taken until the youth has the opportunity to consult with counsel or until a waiver is filed."<sup>118</sup> While New Hampshire law allows a child to consult with counsel prior to pleading true at arraignment and waiving counsel, it is not required.<sup>119</sup>

High rates of pleas in juvenile court are common across the country.<sup>120</sup> While sufficient data on the rates of cases resolved by youth pleading true to their charges was unavailable in New Hampshire, stakeholders reported a perception that the vast majority of juvenile cases were resolved in this manner. All defense attorneys interviewed stated that most or some children in New Hampshire resolved their cases through pleading true to some offense. All judges and prosecutors interviewed believed that children plead true at a higher rate than adults, saying that youth always or often pled true. This difference in perception between defense attorneys and other stakeholders is likely due to the reported instances of children pleading at arraignment, during which the judges and prosecutors are present, but defense attorneys are often absent.

Where defense attorneys were present for a plea, no prosecutor interviewed felt that defense attorneys were strongly pushing pleas on young people. One prosecutor did state that, "since most cases result in a plea, my guess is that defenders may encourage their clients to take a deal." But other prosecutors noted, "I would stake a paycheck on the fact that they would never [tell a youth they need to take a plea]" and "I think defense attorneys make appropriate judgments on the facts of the case. I've never seen a lawyer make a kid plea."

**Assessment team members  
observed children pleading with  
no attorney present.**

These statements about the care with which defense attorneys approach pleas contrast strikingly with pleas taken at arraignment hearings, where assessment team members observed children

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111 N.H. R. PROF. CONDUCT 1.2 (2020).

112 N.H. R. PROF. CONDUCT 1.4 (2020); N.H. R. PROF. CONDUCT 2.1 (2020).

113 See N.H. R. PROF. CONDUCT 1.2 (2020); see also N.H. R. PROF. CONDUCT 1.7 (prohibiting lawyers from pursuing their own interests against a client's).

114 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 1.2, 4.9.

115 See NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 4.9.

116 See *id.*

117 *Id.* at Standard 4.10.

118 N.H. REV. STAT. ANN. §169-B:13 (I)(a) (2020).

119 N.H. REV. STAT. ANN. § 169-B:12 II-B (2020).

120 Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 LAW & HUM. BEHAV. 611 (2016).



pleading with no attorney present. These arraignment pleas appeared to be assembly-line justice, with probation officers and prosecutors providing incomplete information and judges providing cursory reviews of the waiver-of-counsel form and making quick decisions on release conditions imposed.

## 2. Trials

If a child does not plead true at arraignment, the adjudicatory hearing must be held within 30 days of arraignment for youth who are released, and 21 days for youth who are detained.<sup>121</sup>

If a client chooses to proceed to trial, the attorney must engage in the full range of trial practice, including filing appropriate motions,<sup>122</sup> preparing witness testimony,<sup>123</sup> making appropriate motions and objections during the course of the trial,<sup>124</sup> cross-examining government witnesses, and presenting defense witnesses and other evidence necessary for an adequate defense.<sup>125</sup> Defense counsel should not fall victim to the informality of trials in juvenile court and should present opening and closing arguments.<sup>126</sup>

Stakeholders reported that trials in juvenile court were extremely rare. Given the concerns discussed earlier regarding a lack of investigation and motions practice, and other systemic barriers that suggested it was difficult for juvenile defenders to be adequately prepared for their cases, assessment team members questioned whether the rarity of trials was connected to those barriers.

However, of those occasions in which cases went to trial, judges and prosecutors reported strong trial advocacy skills among defense attorneys. For example, when asked about defenders' trial advocacy, nearly all judges and prosecutors reported that juvenile defense attorneys always understood the law and always or often argued juvenile-specific law in the courtroom. One prosecutor specifically noted the strength of

defense attorneys' advocacy in defending against the evidence for every element of the alleged offense. Prosecutors also noted defense attorneys' strong grasp of available service providers for youth and understanding and use of adolescent brain development in their advocacy.

One judge did note that some defense attorneys could use improvement on understanding the rules of evidence and cross-examination skills. Another judge opined that public defenders were generally better at arguing juvenile law than contract attorneys, particularly regarding developmental arguments about the immaturity of adolescents. However, other stakeholders did not report a difference in advocacy between contract attorneys and public defenders.

Although defense attorneys are perceived as strong advocates in the courtroom when cases go to trial, stakeholders should take a critical look at the rates of children pleading, particularly at arraignment. Additionally, much more thorough case preparation is required to effectively prepare youth for plea proceedings that result in their adjudication even if the case does not go to trial. The legislature and/or the court should require that all children consult with an attorney prior to entering any plea agreement. Specialization of juvenile defense would allow attorneys to hone these skills and increase the level of practice.

*Although defense attorneys are perceived as strong advocates in the courtroom when cases go to trial, stakeholders should take a critical look at the rates of children pleading, particularly at arraignment.*

121 N.H. REV. STAT. ANN. § 169-B:14 (II) (2020).

122 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 4.7.

123 *Id.* at Standards 4.7, 5.2.

124 *Id.* at Standards 4.7, 5.3, 5.6, 5.8.

125 *Id.* at Standards 4.7, 5.5, 5.6, 5.8, 5.9.

126 *Id.* at Standards 4.7, 5.4, 5.10.

## G. Disposition

Unlike adult defense, where the goal of sentencing advocacy is often to mitigate punishment, juvenile defenders must engage in disposition advocacy that focuses the court on the least restrictive means of addressing the underlying issues that brought the young person before the court, while also promoting the young person's goals for the future.<sup>127</sup> It is a more complex approach to sentencing advocacy that requires staying abreast of both client interests and community-based opportunities for youth engagement.

Counsel must work to understand the unique nature of the client's interests and strengths, including educational and mental health status and family dynamics, and be able to identify appropriate community-based interventions the client agrees with and the court may accept.<sup>128</sup> Such disposition advocacy is particularly critical because research has found that youth who were ordered to participate in services that did not match their actual needs were 18 times more likely to recidivate than youth who participated in services targeted to match their individualized needs.<sup>129</sup>

In courts that assess fees for placement, supervision, and other services, counsel should be familiar with these financial requirements and advocate against the burden of assessing such expenses against the youth and family.<sup>130</sup> Counsel should have ready access to information about service costs; New Hampshire law requires that probation provide the court with the estimated costs of recommended placements, programs, and services, because the cost of any services ordered will be assessed to the youth and family for payment.

***The cost of any services ordered will be assessed to the youth and family for payment.***

If the court adjudicates a youth delinquent, it can consider the full range of options and may order the least restrictive of the available measures.<sup>131</sup> These options include: returning the child to a parent or guardian; fining the child up to \$250; requiring restitution; ordering physical or mental health treatment of the child or family; placing the child on conditional release for no more than five years; releasing the child to the supervision of a friend or relative or to home detention not to exceed six months; releasing the child to the custody of DHHS for placement in a foster home, group home, crisis home, or shelter care facility; ordering up to 50 hours of community service; committing the child to the custody of DHHS for the remainder of their minority; ordering the child to register as a sexual offender or offender against children until the age of 18; and referring the child and family to behavioral health services.<sup>132</sup>

According to stakeholders, the most common disposition is probation or conditional release. This was cited as the disposition in most cases, regardless of whether an attorney was present, and whether it occurred at arraignment or later in the process. In 2018, there were 844 delinquent findings; 79.5 percent (671 cases) resulted in an order for probation.<sup>133</sup>

Stakeholders reported a perception of strong juvenile defense disposition advocacy across New Hampshire. Assessment team members were unable to collect court observation data to support those perceptions, because court observations included only one disposition hearing. Stakeholders reported that separate disposition hearings often did not occur, as an agreed-upon disposition was frequently included in a plea agreement either at arraignment or at an adjudication hearing. When separate disposition hearings did occur, they were set for 30 days after adjudication. In these instances, probation submitted a pre-disposition investigation report, which the attorneys used when negotiating disposition.

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<sup>127</sup> *Id.* at Standards 6.1, 6.2.

<sup>128</sup> *Id.* at Standard 6.2.

<sup>129</sup> Tracey A. Vieira et al., *Matching Court-Ordered Services with Treatment Needs: Predicting Treatment Success With Young Offenders*, 36 CRIM. JUST. BEHAV. 385, 394 (2009).

<sup>130</sup> NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 6.2 cmt..

<sup>131</sup> N.H. REV. STAT. ANN. § 169-B:19 (2020).

<sup>132</sup> *Id.* at (l)(a)-(l).

<sup>133</sup> Email from the Office of the Child Advocate to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (Mar. 20, 2020) (on file with author).

During interviews, all types of stakeholders consistently reported that defense attorneys frequently challenged the probation officer's recommended disposition. One defense attorney stated, "I have been trying to encourage everyone who does juvenile defense to challenge the idea that probation is a given. I've been fighting probation in general. The idea that every kid should be on probation is wrong, and our statute has several other available options, but there is a presumption that kids should be on probation. Also, once they are on probation I'm challenging how long and any extensions."

***"The idea that every kid should be on probation is wrong."***

Another defense attorney reported, "Usually we're arguing about whether and how much conditional release is ordered. They don't see the harm. They see it as a supervision regime, not connecting a child to services." Another attorney provided an example where a disposition hearing was held 30 days following adjudication and the pre-disposition investigation report recommended six months of counseling and conditional release. In that instance, the attorney, working with the client to identify their expressed interests and needs, was able to advocate for three months of conditional release and a requirement that the youth receive a C average at school during that time. The court agreed to the disposition proposed by the defense. Stakeholders attributed a recent increase in such advocacy to a juvenile-specific training public defenders had received.

Individualized disposition advocacy is essential to protecting a child's rights and empowering youth to participate in their own defense. Defense attorneys should continue to engage in creative disposition advocacy, working in partnership with their clients to find alternative disposition options that are tailored to the individual client's strengths and needs. But for attorneys who are not sufficiently versed in juvenile disposition options or alternatives in the community, this can be challenging without additional juvenile-specific training and support for juvenile defense specialization.

## H. Post-Disposition

Given that one of the greatest distinctions between juvenile court and adult criminal court is the focus on rehabilitation and setting young people up for future success, the period following a disposition order is critical. Yet, in many places across the country, post-disposition is often the point in a case when a young person has the least access to an attorney.<sup>134</sup> Unfortunately, New Hampshire echoes this national failure.

Involvement in the delinquency system can create a multitude of barriers to a young person's future opportunities for employment, housing, and education. Juvenile defense attorneys can play a significant role in helping eliminate such barriers through strong post-disposition advocacy. Whether the child is placed outside the home or released to the community with conditions, they remain under the jurisdiction of the court. Given that racial disparities persist throughout different points in the system,<sup>135</sup> including in numbers of youth adjudicated delinquent and dispositions imposed, such advocacy is also critical to reducing the racial and ethnic disparities following disposition.

Comprehensive post-disposition advocacy by juvenile defense attorneys encompasses a wide range of in- and out-of-court advocacy. This includes, but is not limited to, advocacy regarding appeals; probation/parole review or revocation hearings; motions to terminate probation early or modify conditions of probation; challenging fees and fines stemming from court involvement; litigating conditions of confinement, such as solitary confinement, physical or sexual abuse, and administrative grievances; advocacy at institutional disciplinary hearings; access to family while in confinement; ensuring that probation and parole officers are providing opportunities that promote youth success; access to educational, medical, or psychological services while in confinement or on probation; limiting access to and distribution of juvenile records by moving to seal, expunge, or purge the records; deregistration from offender registries; and

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<sup>134</sup> ACCESS DENIED, *supra* note 3.

<sup>135</sup> See *Unbalanced Youth Justice*, W. HAYWOOD BURNS INST., <https://data.burnsinstitute.org/> (last visited Apr. 13, 2020).



eliminating legal and other barriers to community reentry plans.<sup>136</sup>

Because New Hampshire juvenile courts are supposed to be, at least in part, predicated on rehabilitation and helping youth successfully return to their communities,<sup>137</sup> defense attorneys can play an important role in eliminating obstacles to success in the post-disposition phase of a case. National standards recognize that attorneys must maintain contact with their clients following disposition.<sup>138</sup> “In order for counsel to be effective at this stage of the juvenile justice court process, counsel must not only rely on the information provided by the probation officer, but should also independently speak with the youth,

the youth’s parent or legal custodian, and the service provider.”<sup>139</sup>

In contrast to the best practices of continued representation for youth, under New Hampshire law, representation for youth in delinquency proceedings automatically ends 30 days after disposition, unless a post-dispositional motion is filed within that timeframe.<sup>140</sup> Additionally, of the many aspects of critical post-dispositional advocacy, New Hampshire law only lists an explicit right to counsel for one proceeding: parole revocation hearings.<sup>141</sup> New Hampshire also requires regular review hearings for youth in out-of-home placements after certain time limits,<sup>142</sup> but no explicit right to counsel is provided for such hearings.<sup>143</sup>

136 ACCESS DENIED, *supra* note 3, at 32 (citing NAT’L JUVENILE DEFENDER CTR., DEFEND CHILDREN: A BLUEPRINT FOR EFFECTIVE JUVENILE DEFENDER SERVICES (2016) [hereinafter DEFEND CHILDREN], <https://njdc.info/wp-content/uploads/2016/11/Defend-Children-A-Blueprint-for-Effective-Juvenile-Defender-Services.pdf>; see *In re* N.H.M., 224 A.3d 581, 587 (D.C. 2020) (“The scope of court-appointed, paid representation extends to ‘every stage of the proceedings from [the qualifying] person’s initial appearance before the court through appeals, including ancillary matters appropriate to the proceedings.’ D.C. Code § 11-2603 (emphasis added)”)).

137 N.H. REV. STAT. ANN. § 169-B:1 (2020).

138 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 7.1.

139 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41, at Ch. IX, p. 6.

140 N.H. FAM. DIV. R. 3.11 (2020).

141 N.H. REV. STAT. ANN. § 170-H:10-a(l) (2020).

142 N.H. REV. STAT. ANN. § 169-B:31-a (2020).

143 It is worth noting that in February, 2020, the Court of Appeals for the District of Columbia held that youth are entitled to court-appointed post-dispositional assistance of counsel, even in administrative hearings before the commitment authority, saying “our law assigns the courts broader jurisdiction over children than adults, so too does it afford children a broader right to paid representation.” *In re* N.H.M., 224 A.3d 581, 590 (D.C. 2020).



Some attorneys admitted to having no further contact with clients after a disposition hearing. If a child faces revocation of probation or parole, most defense attorneys reported being re-appointed to represent youth in those cases. However, some contract attorneys noted that these cases go to the public defender rather than to them, resulting in a lack of continuity in the attorney-client relationship and gaps in information that could be used to defend the child. Attorneys who did have contact with clients after disposition acknowledged that it was usually limited to review or violations of conditional release hearings.

While some attorneys may request that a judge schedule a review hearing during disposition and thus typically be re-appointed for the review and stay on the case, many are not engaging in this advocacy. And, while it is a strength of the public defender system that some attorneys are making an attempt through such an informal work-around to stay on a child's case, without the time to conduct the regular client communication necessary to engage in more comprehensive post-disposition representation, young people cannot receive the full benefits of such representation.

One notable exception to the lack of post-disposition advocacy is in a new post-disposition project instituted in the summer of 2019 for youth who were committed to the Sununu Youth Services Center. A single public defender was reportedly assigned to provide representation at parole hearings and treatment team meetings for all youth at the secure commitment facility. However, as one defense attorney stated, "The problem with this is there is a disconnect and there is no continuity of representation. It is great that we are doing it as a system now, but there should be continuity of representation. Having one person to do it is not the best fix. It is better than it was, but not ideal. It isn't valuing the juvenile lawyers or the work." This process also does not provide post-disposition advocacy for the vast majority of youth who are on probation and navigating legal obstacles that result from juvenile court involvement like reentering school, accessing services, gaining employment, or finding housing.

## *"It isn't valuing the juvenile lawyers or the work."*

The lack of connection to clients post-disposition impacted defense advocacy, with stakeholders reporting mixed opinions of defender advocacy at probation or parole revocation hearings. One probation officer reported that most attorneys are not as prepared for parole or probation violation hearings as for "normal" court. Other stakeholders believed defenders are being "stretched too thin," resulting in less client contact and thorough advocacy at this stage of a case. However, one judge believed that defenders take an active role in post-disposition advocacy.

Stakeholders reported the lack of post-disposition advocacy in New Hampshire as having a dire impact on young people's education. As one attorney noted:

Many children in the juvenile legal system face a multitude of educational barriers, even before they enter the system. There seems to be an expectation by the juvenile court that placing children on probation will somehow erase the school problems, even though the court doesn't have jurisdiction to order school-based services. A complicating factor is that once probation is involved with a student, many schools become even less willing to provide services and are more likely to take the stance that a child is disqualified from special education. This is especially the case for high-needs students where there is broad reluctance to serve youth in the public-school environment.

One attorney also shared that for young people not facing residential placement, schools frequently pushed youth who were on probation away from school:

Even when there are clear educational difficulties, I find that schools frequently refuse to even evaluate children. Or if they do an evaluation, they will limit it to a behavioral assessment. That will identify the behaviors present, but not the underlying reasons for the behaviors. They'll then use

the assessment to say the child is choosing to be bad and therefore ineligible for services. Then when the child continues to act out, the school is quick to report the child's infractions to the probation officer and encourage a court-based residential placement.

One attorney reported that residential facilities simply removed services not offered by the facility from a child's IEP. Without an advocate to assist young people with post-disposition education advocacy, there are few avenues that lead to educational success. As one stakeholder said, "defense attorneys in New Hampshire simply aren't well enough versed on what schools are required to do during the court process and to hold the schools accountable."

Among many stakeholders, there also seemed to be a lack of knowledge about what comprehensive post-disposition advocacy should include. Most stakeholders only recognized representation at probation and parole violation hearings, and sometimes review hearings, as part of this advocacy. A handful of stakeholders mentioned things like attending treatment team meetings or participating in educational advocacy, but these statements were rare. One defense attorney did report regularly filing *habeas* petitions related to parole revocation hearings.

Stakeholders did not mention advocating against sex offender registration or assisting youth with clearing of juvenile records. It is possible these issues did not arise because the law in New Hampshire limits juvenile sex offender registration<sup>144</sup> and, according to a court administrator, it is the policy of the New Hampshire courts that delinquency records be

destroyed five years after a young person turns 18.<sup>145</sup> However, no written policy included this information, and our assessment teams were unable to verify whether courts around the state were following these protocols.

Post-disposition advocacy is lacking across New Hampshire. As a first step, juvenile defense attorneys should be afforded to youth throughout the entirety of their involvement with the legal system. Given that post-disposition is often the longest period of a child's involvement in the court system and the repercussions a child can face while under state or court supervision, it is critical that New Hampshire establish a system for post-disposition client contact and advocacy. Defense attorneys who are given support to specialize in juvenile defense should be expected to dedicate some of their time and resources to comprehensive post-disposition representation. New Hampshire law should not limit the ability of juvenile defense attorneys to represent their clients post-disposition and should require continued representation by the original attorney until a child is no longer under jurisdiction or supervision of the state or the court, in all types of proceedings. Effective post-disposition advocacy for youth would strengthen due process protections, increase youth success, and advance public safety.

***It is critical that New Hampshire establish a system for post-disposition client contact and advocacy.***

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144 N.H. REV. STAT. ANN. § 169-B:4 (V) (2020); N.H. REV. STAT. ANN. § 651-B:6 (IV) (2020).

145 Email from court clerk to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (Mar. 12, 2020) (on file with author) (stating that the only information to be retained in an electronic record is 1) verification of the parties' names; 2) current addresses of the parties; 3) disposition date; 4) disposition type; and 5) significant events, i.e. waivers).

## I. Appeals

Juvenile defense attorneys have an obligation to assist youth who wish to appeal.<sup>146</sup> Trial counsel must advise the client of the right to appeal a final order and the potential outcomes of doing so, and must take appropriate steps to preserve the right to appeal.<sup>147</sup> Advising clients about the right to appeal should happen in the early stages of a case and continue throughout the course of representation.<sup>148</sup> For a child who wishes to appeal, juvenile defenders must file appropriate notices of appeal and either themselves represent the client or arrange for other representation.<sup>149</sup>

In New Hampshire, a youth may take an appeal to the Supreme Court within 30 days of a final disposition order, but this will not suspend the order or decision of the court unless specifically ordered by the court.<sup>150</sup> The New Hampshire Public Defender has an appellate office that handles all appeals, including juvenile appeals. The cost to have a defense attorney for an appeal is \$2,000, and the New Hampshire Office of Cost Containment bills families to recover that cost.<sup>151</sup> This fee for appellate representation raises serious questions about the equity of access to justice for youth and families when there is such a significant price tag on appealing an order of the court.

Appeals provide an essential mechanism to review the work of trial courts, further develop and interpret the law, and correct errors. Yet, very few cases get appealed from juvenile courts in New Hampshire. According to stakeholders, there have been six juvenile defense appeals in the past five years, compared with approximately 100 adult defense appeals. Only a few stakeholders reported ever having filed or been aware of a juvenile appeal in their entire careers.

***The cost to have a defense attorney for an appeal is \$2,000, and the New Hampshire Office of Cost Containment bills families to recover that cost.***

The low rates of appeals in juvenile cases may be related both to the cost and to the extremely low rate of trials. If New Hampshire increases attorney specialization in juvenile defense and creates more opportunities for earlier client contact and increased case preparation, attorneys will be better equipped to create a record for appeal and ultimately file appeals when appropriate. However, without removing the costly filing fee, youth and families will continue to be left out of the appellate process. Stakeholders should not be lulled into complacency by believing a lack of juvenile appeals means the law is being upheld appropriately in juvenile courts. Until juvenile appeals become more accessible and regular, there is no check on lower courts to ensure that juvenile proceedings are actually operating as required to uphold due process and ensure justice and equity for all New Hampshire youth.

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146 Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 682-83 (2012).

147 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 7.2.

148 *Id.* at Standard 7.3.

149 INST. OF JUDICIAL ADMIN. & AM. BAR ASS'N, *supra* note 33, at Standard 10.3.

150 N.H. REV. STAT. ANN. § 169-B:29 (2020).

151 N.H. SUP. CT. R. 47 (2)(e) (2020).

# KEY FINDINGS

## II. SYSTEMIC BARRIERS TO JUSTICE





## A. Juvenile Defense System Barriers to Justice & Fairness for Youth

Juvenile defense representation requires knowledge of a unique area of law, specialized expertise, and commitment to specifically addressing and protecting youth rights and due process protections, as articulated in *Gault*.<sup>152</sup>

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A robust system of juvenile defense services to protect the rights of youth demands leadership and commitment to juvenile defense specialization, training, standards, and personnel resources. An effective juvenile defense system also calls for supervision, monitoring of workloads and caseloads, independence from the judiciary, funding, and ancillary resources. Young people in New Hampshire do not receive the benefit of juvenile practice built on these foundational elements.<sup>153</sup>

### 1. Devaluation of Juvenile Defense Practice

Specialized practice in juvenile defense is crucial to ensuring children receive zealous representation in the delinquency system.<sup>154</sup> As stated throughout this report, representing youth requires specific knowledge not only of the criminal legal system but also of how to communicate with youth, an understanding of adolescent development, specific rules pertaining to juvenile court, and other systems impacting youth, such as educational, mental and behavioral health, and child welfare systems. Given the complexities and specialized nature of juvenile defense that go well beyond general criminal defense, juvenile defense is a unique area of practice that requires dedicated training and resources in line with the specialization required of appellate advocacy or death penalty defense. Unfortunately, public defense delivery systems too often fail to treat it as such.

One of the primary limitations of the juvenile defense system in New Hampshire is the devaluation of juvenile defense-specific practice. Through this assessment, our teams found a range of issues with the juvenile defense system that, while discrete issues on their own, were part of a larger concern that there is no systemic specialization of juvenile defense in the state. How juvenile cases are weighted for financial reimbursement purposes, high and mixed caseloads with attorneys traveling among multiple towns and courts, and the use of juvenile court as a training ground for inexperienced defense attorneys all contribute to this problem.

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<sup>152</sup> *In re Gault*, 387 U.S. 1, 30-31 (1967).

<sup>153</sup> DEFEND CHILDREN, *supra* note 136, at 22; TEN CORE PRINCIPLES, *supra* note 15, at 2-3.

<sup>154</sup> NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at 9; DEFEND CHILDREN, *supra* note 136, at 22.

### a. CASE WEIGHTING & PAYMENT RATES

Case weighting systems in public defense are used to estimate the needed time and effort for attorneys to effectively handle cases.<sup>155</sup> In New Hampshire, juvenile defense cases are weighted the same for contract counsel and public attorneys.<sup>156</sup> While adult felony cases can be weighted as high as 8.30 units, juvenile delinquency cases of any kind are valued at just 1.00 unit.<sup>157</sup> In other words, an entire juvenile defense case is systematically allotted less than one-eighth of the time and resources.<sup>158</sup> Adult misdemeanor cases are also valued at 1.00 unit, which belies the fact that adequately defending youth often exceeds in complexity and time what is required to defend adult misdemeanors.

Contract attorneys are paid, and families are charged, \$300 per unit.<sup>159</sup> This means that contract attorneys are paid up to \$2,490 for an adult felony case but only \$300 for their work on a young person's case, regardless of whether it is a misdemeanor or felony, regardless of the complexity of the evidence or case, and regardless of the child's social factors or the many other aspects of the youth's life that must be taken into consideration in both defending the case and advocating for a tailored, client-focused, community-based disposition. There could be no clearer systemic disincentive for high-quality juvenile defense.

*There could be no clearer systemic disincentive for high-quality juvenile defense.*

The undervaluing of juvenile defense does not end there. Juvenile review hearings and related work are valued at 0.33 units for contract attorneys and 0.40 units within the public defender office.<sup>160</sup>

When the success of the rehabilitative plan ordered by the juvenile court comes into question, these case weights suggest that defense attorneys are expected to give these only cursory attention, even if a young person's liberty is at stake.

To suggest—whether overtly, through policy decisions, or through case weights—that every juvenile case is equal in time and effort to an adult misdemeanor or less is to fundamentally misunderstand what is required to provide effective constitutional defense of youth. There are, without question, situations in which a juvenile misdemeanor case requires many more hours, motions, investigation, research, dispositional planning, and other specialized work than some adult felony cases. As one defender put it, “Juvenile cases are not appropriately counted for the amount of work they are.”

What a system is willing to pay for and the policies it puts in place are an indication of what its leadership values. In New Hampshire, juvenile defense appears to be gravely undervalued.

*In New Hampshire, juvenile defense appears to be gravely undervalued.*

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155 JOAN E. JACOBY, CASE WEIGHTING SYSTEMS: A HANDBOOK FOR BUDGET PREPARATION 9 (1985).

156 N.H. JUDICIAL COUNCIL, CONTRACT FOR ATTORNEY SERVICES, STATE FISCAL YEAR 2019 (2019), <https://www.nh.gov/judicialcouncil/documents/indigent-defense-attorney-contract.pdf>; Email from New Hampshire Public Defender to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (May 13, 2020) (on file with author) (one difference for juvenile cases is that for NHPD juvenile reviews are weighted at .40 and for contract attys at .33).

157 N.H. JUDICIAL COUNCIL, CONTRACT FOR ATTORNEY SERVICES, STATE FISCAL YEAR 2019 (2019), <https://www.nh.gov/judicialcouncil/documents/indigent-defense-attorney-contract.pdf>.

158 Email from New Hampshire Public Defender to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (May 13, 2020) (on file with author).

159 N.H. JUDICIAL COUNCIL, CONTRACT FOR ATTORNEY SERVICES, STATE FISCAL YEAR 2019 (2019), <https://www.nh.gov/judicialcouncil/documents/indigent-defense-attorney-contract.pdf>.

160 *Id.*; Email from New Hampshire Public Defender to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (May 13, 2020) (on file with author) (one difference for juvenile cases is that for NHPD juvenile reviews are weighted at .40 and for contract attys at .33).

## b. MIXED CASELOADS

In New Hampshire, all defense attorneys who practice in juvenile court also carry adult caseloads. The assessment team learned that these defenders are managing cases that are often heard not only in different courthouses, but also in different towns. Adult and juvenile case dockets may be scheduled on the same day and even at the same time. Many stakeholders agreed that the demands of this caseload made it extremely difficult for defense attorneys to meet with their youth clients in advance of a hearing.

A court clerk noted that juvenile defense attorneys are seemingly required to prioritize adult cases and that they are often pulled into criminal court hearings and forced to use substitute attorneys to cover their delinquency cases, which negatively impacts all facets of the attorney-client relationship and the quality of defense youth receive. A handful of stakeholders also reported that these mixed caseloads often make attorneys late or even miss juvenile court altogether.

*Juvenile defense attorneys are seemingly required to prioritize adult cases.*

Another court clerk gave an example of a child who planned to plead true to eight charges, but who did not understand what they were pleading to at the time of the hearing. The child's attorney was in adult court, and the attorney who was filling in could not provide the necessary explanation to the child. The child was upset their original attorney was not there, the case was continued, and the child and family had to come back to court on another day.

A prosecutor said that the adult cases "seem to be distracting [defense attorneys] and it's time consuming." Similarly, another prosecutor said, "public defenders are stretched thin between various courts." Defense attorneys across jurisdictions admitted this was a problem. As one remarked, "I have kids sitting waiting for me and

I have the adult court telling me they are more important, so I need to go there first."

*"I have kids sitting waiting for me and I have the adult court telling me they are more important, so I need to go there first."*

Beyond scheduling, multiple stakeholders believed that high and mixed caseloads had a negative impact on the quality of juvenile defense representation. One defense attorney said they could not go to treatment team meetings or do any school advocacy because their time was split between adult and juvenile cases. The attorney also noted the adult caseload made it difficult to find the time to visit youth clients placed out of their homes. Another defense attorney proposed that if they had a lower caseload they could file more motions and do more investigation on their juvenile cases. Judges agreed that defender caseloads affect their ability to be effective advocates, with one specifically stating that "they are overloaded."

One judge suggested that defense attorneys were not meeting with their youth clients because the defense attorneys believed they needed to prioritize adult felony drug charges or adult felony assaults and that even a felony juvenile case would "just get probation and nothing happens." The judge pointed out the danger of this way of thinking, given the fact that youth could be on probation for months or years, that there may be a risk of incarceration for failing on probation, and that the barriers a juvenile adjudication can create to education, employment, housing, and state and federal benefits can have an overall negative impact on a young person's future.

Another judge noted concerns about this perceived "hierarchy" of cases among defense attorneys and how the culture of informality of juvenile court meant juvenile cases—even trials—lost out to adult cases. This judge noted: "The lack of having people who are devoted to juvenile work gets in the way." A defender stated, "There need to be specialized juvenile defenders who only represent

kids.” A defender in a different jurisdiction noted a lack of understanding within the public defender office itself about what is required to provide effective juvenile advocacy, and a defender in a third jurisdiction said, “Juvenile defense needs to be taken more seriously; it would be good to have a team of people who do it all the time. [We] need to have experienced attorneys practicing juvenile defense.”

*“There need to be specialized juvenile defenders who only represent kids.”*

Other stakeholders agreed. One probation officer stated, “more experienced public defenders generally do an excellent job with client (and family) preparation. Unfortunately, we don’t see many experienced defenders in juvenile court.” Another probation officer reported a belief that the public defense office should have juvenile defense-specific attorneys. A third probation officer noted, “Every three to four years, there are new attorneys rotating in before they move on to the felony/adult cases.”

High and mixed caseloads prevent defense attorneys from spending the time necessary to adequately prepare a defense in their juvenile cases. In the jurisdictions visited, a majority of juvenile defenders and stakeholders agreed that juvenile defenders do not have the time or support to get to know their youth clients and family or to engage in the necessary pre-trial advocacy—such as tracking down records, investigating the facts of the case, and filing pre-trial motions—that are critical to zealous defense of a child at any stage of a case. New Hampshire’s children deserve a defense system that provides for all the components necessary to defend their rights and interest at every stage of the case.<sup>161</sup> No child in the Granite State should feel that they are less deserving of protection than adults.

### c. JUVENILE COURT AS A TRAINING GROUND

Further diminishing the perceived value of juvenile defense practice, the assessment team learned that the public defense structure treats juvenile court as a “training ground” for newer attorneys. Most new public defenders begin by taking juvenile cases before they can “move up the ladder” to adult misdemeanor and then felony cases. While more seasoned attorneys may be permitted to maintain a juvenile defense practice in some instances, they are still required to also carry an adult caseload. And most defenders reportedly move to adult cases within a few years.

Perhaps nothing is more telling about how devalued juvenile defense is in New Hampshire than how the practice of student attorneys is administered. Across the country, law students represent clients in actual cases, and with proper supervision, this is one of the best mechanisms for students to engage in practical learning. Administrative Rule 36 of the Supreme Court of New Hampshire governs when and how law students may engage in such practices,<sup>162</sup> and requires all student attorneys to be supervised by an attorney licensed within the state.<sup>163</sup> The attorney must appear with the student in court when “in the supervising attorney’s judgment, the nature of the case requires the supervising attorney’s presence.”<sup>164</sup> There are certain cases for which the supervising attorney’s presence is required, but not juvenile delinquency hearings.<sup>165</sup>

According to both defense attorneys and judges in different jurisdictions, third-year law students represent clients in delinquency hearings with no supervising attorney present in the courtroom. One judge noted that this contributed to a lack of effective trial advocacy, as students were not sufficiently versed in the rules of evidence and their cross-examination skills were lacking. Without supervision in and out of the courtroom, there is no one to ensure the students live up to

161 TEN CORE PRINCIPLES, *supra* note 15; NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8.

162 N.H. SUP. CT. R. 36 (2020).

163 N.H. SUP. CT. R. 36 (1) (2020).

164 N.H. SUP. CT. R. 36 (2)(d) (2020).

165 N.H. SUP. CT. R. 36 (2)(e) (2020).



ethical standards of competency and diligence representation requires. This lack of supervision is also a disservice to the students, who would otherwise be mentored to develop their skills as effective juvenile defense attorneys.

*Juvenile court should not be used as a training ground for new attorneys and law students.*

When it comes to youth clients, the most vulnerable defense population, the state, the courts, and the New Hampshire Public Defender must ensure that a qualified attorney is representing them. Juvenile court should not be used as a training ground for new attorneys and law students. Treating juvenile court as “kiddie court” must change. Such a devaluing of the rights and interests of young people flies in the face of ensuring adequate legal representation for youth as envisioned by the Supreme Court in *Gault*.

## 2. Lack of a Specialized Juvenile Defense Unit

Stakeholders in every jurisdiction visited for this assessment indicated a deep-seated interest in and need for juvenile defense specialization. When asked about what they would like to see changed in the defense or the juvenile justice system, the most common answer was the creation of a specialized unit of juvenile defense attorneys. Comments like “There should be attorneys dedicated solely to defending kids,” were repeatedly heard by our assessment team members in every jurisdiction, from judges, probation officers, prosecutors, and defenders alike.

Although some defense attorneys liked having a mixed caseload, many more who practice in juvenile court—public defenders and contract attorneys alike, across all jurisdictions—said they would prefer to be able to specialize or that they saw a need for some defense attorneys to

specialize in juvenile practice. “We need more resources and dedicated juvenile defenders,” said one defender. “There need to be specialized juvenile defenders who only represent kids,” said another attorney. A third said, “I would [like to] have a juvenile defender system—a specialized practice group of juvenile defenders who only do juvenile work and are not compromised by also doing adult work.” Another added, “Juvenile defense needs to be taken more seriously. It would be good to have a team of people who do it all the time. Experienced attorneys.”

*“We need more resources and dedicated juvenile defenders.”*

One prosecutor wanted the system to “allow some defenders to carry exclusively juvenile caseloads.” A probation officer thought it was crucial to have “specific people for juvenile cases, with someone who is passionate about it—but also gets it, understands the juvie system.” One judge believed the solution was to “have a designated juvenile attorney” in the courtroom. Yet another wanted to see “change [in] the hierarchy of cases. Don’t treat juvenile [cases] as less important than adult, and have a separate office for juvenile defenders or, at least, a separate division.”

The consensus among stakeholders calling for a specialized juvenile defense practice is a call to action for the state of New Hampshire. The sheer number of stakeholders who believe this change is necessary was telling.

New Hampshire should create a juvenile defense office. Where autonomous juvenile defense offices are not feasible, juvenile units within public defense offices should be created.<sup>166</sup> These offices and units must be fully funded and resourced and require specialized juvenile defense practitioners and supervisors who effectively advocate for the rights and interests of New Hampshire youth.

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166 DEFEND CHILDREN, *supra* note 136, at 22-25.

### 3. Juvenile Standards & Training

Whether a state has a dedicated unit or office of specialized juvenile defense attorneys, any attorney who represents a child in court should receive specialized training and be monitored against specific juvenile defense standards that guide their practice.<sup>167</sup> Guidelines or performance standards specific to juvenile defense provide defenders, supervisors, and other stakeholders with indicators for measuring the strength of juvenile defense, both at systemic and individual attorney levels. Moreover, they provide attorneys with valuable guidance on what good practice in juvenile court looks like and how it differs from other types of defense practice.

At least 21 states have standards or guidelines specific to juvenile defense practice.<sup>168</sup> But as stakeholders confirmed, New Hampshire has no juvenile defense specific standards and very limited juvenile-specific training to bolster practice.

Some stakeholders described the juvenile training defense attorneys receive as good but noted the amount of training was so limited it was not comprehensive enough for effective representation in juvenile court. A probation officer stated, “New public defenders are trained up on the legal aspects of juvenile court, but little else.” A judge noted that no stakeholders in New Hampshire had received enough training regarding the research on current evidence-based practices and that all stakeholders in the juvenile system needed more training on adolescent development. As one member of the assessment team pointed out, “Part of a juvenile defender’s job is to know more about their clients and their clients’ circumstances than anyone else in the courtroom. That means educating other stakeholders about issues like adolescent development, cognitive capacity, or whatever scientific factor has a bearing on the client’s case. When defenders don’t know this stuff, advocacy will fall flat.”

*Juvenile training defense attorneys receive was described as good, but limited and not comprehensive enough.*

Other specific training needs identified by stakeholders included trauma-informed lawyering, implicit racial bias, youth-focused client counseling, cultural humility, available resources for youth clients, and trial advocacy skills, particularly juvenile-specific law, cross-examination, rules of evidence, and negotiation. Some stakeholders also noted a need for more training on the actual practice in juvenile court and how it differs from adult criminal court.

Numerous stakeholders described a two-day juvenile-specific training for all new attorneys, which is part of a larger five-week new-attorney training program, as one of the best parts of the program. While most contract attorneys reported having access to the two-day juvenile training, at least one reported never knowing about any juvenile-specific training until this past year when they received an invitation to the New England Juvenile Defender Center Summit. While that program was not run by the state, the New Hampshire Public Defender and Judicial Council supported attendance at the program. Although contract attorneys were invited, they were not mandated to attend. And unlike NHPD attorneys, contract attorneys are not salaried and receive no compensation for training time or travel costs.

Juvenile defense attorneys need access to the necessary training, support, and oversight to zealously advocate for their clients.<sup>169</sup> Juvenile defense representation requires training for new attorneys, as well as ongoing training on a wide variety of topics, from detention, trial, disposition, and post-disposition advocacy, to education about various systems youth may be involved

167 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8; DEFEND CHILDREN, *supra* note 136.

168 *Juvenile Defense Standards*, NAT’L JUVENILE DEFENDER CTR., <https://njdc.info/our-work/juvenile-defense-standards/> (last visited Apr. 13, 2020).

169 Dep’t of Justice Statement of Interest in N.P., *supra* note 4, at 14; NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standards 1.3, 9.2.

in, to an understanding of child and adolescent development and communication issues particular to youth, how to appropriately work with parents and guardians during their youth client cases, challenges facing certain populations of youth, and youth services, programs, and placements.

New Hampshire should enhance and increase its juvenile defense training program and opportunities and mandate that anyone (whether public defender or contract counsel) who represents youth in delinquency courts receive certain ongoing juvenile-specific training. New Hampshire should also develop its own juvenile defense standards, or adopt national juvenile defense standards, and develop a process for monitoring implementation of those standards of practice.

## 4. Defender Data System

“Establishing effective juvenile defense services requires the development of juvenile defense data collection systems and a comprehensive research agenda.”<sup>170</sup> Data makes defender managers’ jobs easier by allowing for informed decision-making to improve programmatic effectiveness and produce better outcomes for clients.<sup>171</sup> It can not only improve client representation, but also be used to justify additional funding and resources for defense systems and offices, as well as to advocate for improved policies and practices within the legal system.<sup>172</sup>

New Hampshire does not have a robust juvenile defense data system. Public defenders and contract attorneys alike submit closing sheets for each juvenile case. These sheets capture very basic information about the type of case, disposition, and attorney time in and out of court.<sup>173</sup> Public defenders’ assistants input the information to close the case and submit the forms to their managing attorneys, who in turn submit them to the

Executive Director of the New Hampshire Public Defender. Every managing attorney interviewed noted that they only utilized their databases to review attorney caseloads within their office and submit their reports to the state, nothing else.

NHPD and contract attorneys submit case information to the Judicial Council, but the Judicial Council’s database does not have the ability to report aggregate data. While some minimal defender data is collected, it falls far short of the kind of data needed to monitor and evaluate the performance of juvenile defense attorneys, track trends in juvenile defense, or provide information to assess issues such as disparities or outcomes.

New Hampshire should enhance its case management and data systems. It is critical that the system allow case information to be reviewed and compared for both public defenders and contract attorneys and capture comprehensive information at the aggregate level, not merely the most basic case resolution information.

## 5. Social Workers for Juvenile Cases

Comprehensive defense representation includes a team of professionals in addition to defense attorneys, such as social workers, education advocates, investigators, paralegals, and office support staff. Such defense teams provide more effective representation to young people.<sup>174</sup> Social workers, in particular, can help develop client-driven defenses that consider underlying factors that may have contributed to youth coming into contact with the justice system.<sup>175</sup>

In New Hampshire, the assessment team found an absence of social workers for juvenile defense. The majority of defense attorneys interviewed

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170 DEFEND CHILDREN, *supra* note 136, at 47.

171 NAT. LEGAL AID & DEF. ASS’N, BASIC DATA EVERY DEFENDER PROGRAM NEEDS TO TRACK: A TOOLKIT FOR DEFENDERS 5 (2014), <http://www.nlada.org/sites/default/files/pictures/BASIC%20DATA%20TOOLKIT%2010-27-14%20Web.pdf>.

172 *Id.*

173 See Appendix C, #4.

174 JAMES M. ANDERSON ET AL., HOLISTIC REPRESENTATION: AN INNOVATIVE APPROACH TO DEFENDING POOR CLIENTS CAN REDUCE INCARCERATION AND SAVE TAXPAYER DOLLARS—WITHOUT HARM TO PUBLIC SAFETY (2019), [https://www.rand.org/pubs/research\\_briefs/RB10050.html](https://www.rand.org/pubs/research_briefs/RB10050.html).

175 TEN CORE PRINCIPLES, *supra* note 15; DEFEND CHILDREN, *supra* note 136, at 22.

identified access to defense social workers as a key resource they lacked in their practice. Statements regarding the need for social workers included: “Every [other resource asked about] is available *but* a social worker;” “There is only one for the whole state;” “There are things we wish we could do and having [a social worker] that is involved would help us avoid litigating things that should not be in court;” “It would be nice to have a social worker. Please, please.”

New Hampshire should fund and support not only specialized juvenile defenders but also social worker positions that are solely dedicated to juvenile cases.

## 6. Access to Counsel at Arrest & Diversion

In New Hampshire, as in many states, there is an absence of legal representation for youth who have been arrested but who have yet to see the courtroom, even as decisions are being made about their waiver of constitutional and statutory rights and restraints on their liberty.<sup>176</sup>

### a. ACCESS TO COUNSEL AT INTERROGATION

Developmental research and United States Supreme Court precedent agree that children are more susceptible to interrogation tactics than adults.<sup>177</sup> As long ago as 1948, the Supreme Court asserted:

[W]e cannot believe that a lad of tender years is a match for the police [during interrogation]. He needs counsel and support

if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.<sup>178</sup>

More recently, the Supreme Court held that age informs the *Miranda* analysis for custodial interrogations because children subjected to police questioning often feel more pressure than adults to comply with authority.<sup>179</sup> The Court aptly stated, “By its very nature, custodial police interrogation entails inherently compelling pressures. Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.”<sup>180</sup>

The Court has repeatedly affirmed that “[a]dmissions and confessions of juveniles require special caution.”<sup>181</sup> These recognitions have inspired a handful of jurisdictions around the country to institute additional legal protections for youth by requiring an opportunity to consult with counsel prior to interrogation.<sup>182</sup>

New Hampshire law has no such protections requiring counsel for youth at interrogation. However, the state does have caselaw requiring that any *Miranda* warnings given to youth prior to a valid waiver of those rights must be in “language understandable to a child.”<sup>183</sup> The decision provided sample language in an appendix juvenile rights form.<sup>184</sup> That form, called a *Benoit* form, is used by law enforcement today in New Hampshire.

One defense attorney reported that they thought police use of the *Benoit* form was strictly enforced and that if police failed to abide by the form,

176 ACCESS DENIED, *supra* note 3.

177 *Haley v. Ohio*, 332 U.S. 596 (1948); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

178 *Haley*, 332 U.S. at 599-600.

179 *J.D.B. v. North Carolina*, 564 U.S. 261 (2011).

180 *Id.* at 269.

181 *In re Gault*, 387 U.S. 1, 45 (1967); *Haley*, 332 U.S. at 596; *Gallegos v. Colorado*, 370 U.S. 49 (1962).

182 See 705 ILL. COMP. STAT. ANN. § 405/5-170(a) (2020) (“[A] minor who was under 15 years of age at the time of the commission of [certain enumerated offenses] must be represented by counsel throughout the entire custodial interrogation of the minor.”); CAL WEL & INST CODE § 625.6 (a) (2020) (“Prior to a custodial interrogation, and before the waiver of any *Miranda* rights, a youth 15 years of age or younger shall consult with legal counsel in person, by telephone, or by video conference. The consultation may not be waived.”).

183 *State v. Benoit*, 490 A.2d 295, 304 (N.H. 1985).

184 The court suggested that a child should be told, “You have the right to remain silent. This means that you do not have to say or write anything. You do not have to talk to anyone or answer any questions we ask you. You will not be punished for deciding not to talk to us.” *Id.* at 306-307.



suppression of a statement was possible. The attorney was of the opinion that police in New Hampshire generally followed the required form. Other defense attorneys, however, had greater concerns. As one shared, “There is no system. And it should not be that the parent tells the child to talk to the police. There should absolutely be a right to counsel at interrogation. We could have on-call lawyers. We do have on-call judges, so why not have on-call lawyers and have them be accessible immediately?” A judge also acknowledged that having a defense lawyer involved up front may limit the possibility for abuse of the child’s rights or increase their access to diversion programs.

**“There should absolutely be a right to counsel at interrogation.”**

The use of the *Benoit* form clearly indicates an awareness of the need for additional legal protections for youth during interrogation. However, while the form provides some level of protection by including language and vocabulary that attempt to make constitutional rights more understandable to young people, it is not enough. Vocabulary is only one aspect of overall comprehension, either written or oral. Even if a young person understands the words, that does not equate to an understanding of their rights in context and an appreciation of the consequences of waiving those rights.

Moreover, developmental research suggests that youth tend to have a preference for short-term rewards over long-term gains,<sup>185</sup> can be less likely to think about the future and anticipate future

consequences of decisions,<sup>186</sup> are more apt to have difficulty making thoughtful decisions in emotionally charged situations,<sup>187</sup> and can be cognitively underdeveloped to an extent that makes the validity of waivers of *Miranda* rights questionable.<sup>188</sup> These developmental considerations make it vital for youth to have the advice and guiding hand of counsel at this critical juncture.

There is currently no structure in New Hampshire for attorneys to be present when youth are interrogated and no system for notifying attorneys or for paying them to defend youth during interrogation. Such a system should be created in any state that is serious about protecting the rights of young people accused of an offense. Requiring access to and consultation with counsel prior to questioning by law enforcement upholds children’s constitutional right to counsel and ensures the integrity of investigations involving children.

New Hampshire should adopt legislation to require that children have an opportunity to consult with counsel prior to interrogation, and police departments and defense attorneys should create a mechanism to allow for such consultation and representation.

## **b. DEFENSE ATTORNEYS’ ROLE IN DIVERSION**

Nearly one million youth are processed and formally charged through the United States’ court systems every year.<sup>189</sup> Research has shown that the adolescent brain is not fully developed until people are well into their twenties.<sup>190</sup> Engaging in risky behavior is a normal part of adolescent development,<sup>191</sup> and most youth engaging in such behavior do not end up in handcuffs. Unfortunately, though, arrest is more common for some youth,

185 Steinberg et al., *supra* note 45.

186 *Id.*

187 Laurence Steinberg et al., *Are Adolescents Less Mature than Adults? Minors’ Access to Abortion, the Juvenile Death Penalty, and the Alleged APA “Flip-Flop”*, 64 AM. PSYCHOL. 583 (2009).

188 Viljoen & Roesch, *supra* note 54.

189 SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2016 6 (2016), <https://www.ojjdp.gov/ojstatbb/njcda/pdf/jcs2016.pdf> (noting that in 2016, 850,000 delinquency cases were processed across the country).

190 LAURENCE STEINBERG, *THE AGE OF OPPORTUNITY* (2014).

191 See generally, Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008); Elizabeth P. Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 LAW & HUM. BEHAV. 412 (2013); Michael Dreyfuss et al., *Teens Impulsively React Rather than Retreat from Threat*, 36 DEVELOPMENTAL NEUROSCIENCE 220 (2014).

particularly youth of color in certain zip codes.<sup>192</sup> And where there are opportunities to be diverted from the formal system after arrest, is it not usually youth of color who benefit from these opportunities.

There is strong evidence for diverting youth away from the juvenile court system whenever possible. Research indicates that many youth would be better served by no interventions at all or through programs entirely outside of the jurisdiction of law enforcement or the courts.<sup>193</sup>

New Hampshire law provides for both pre- and post-arraignment diversion, but does not codify a role for defense attorneys in the process.<sup>194</sup> Post-arraignment diversion stays the court proceedings for up to six months from the time of referral, unless that time is extended by the court.<sup>195</sup> The court may also require additional conditions of the youth and/or their parents during this time.<sup>196</sup> According to the New Hampshire law, the criteria for referral to a juvenile diversion program, regardless of whether it is pre-arraignment or post-arraignment, include: “the facts of the case warrant a court hearing, referral of the case is in the best interests of the public and the minor, and the minor and the parents/guardians give informed and voluntary consent.”<sup>197</sup> Some individual programs may add additional requirements such as: that it is the minor’s first offense, that it is a misdemeanor, or that the minor accepts responsibility for the offense.<sup>198</sup>

According to defense attorneys, post-arraignment diversion only happens in rare instances. Pre-arraignment diversion, according to most stakeholders, was much more common. Such diversion programs are run primarily by individual town police departments.<sup>199</sup> Defense attorneys were rarely involved in pre-arraignment diversion cases, so most stakeholders interviewed reported not having much knowledge about the process.

Stakeholders did agree that diversion options varied widely across the state and typically charged youth \$100 to participate. This required fee for the opportunity to not be prosecuted seems to put poor youth and families on unequal footing compared to families with financial means. One prosecutor stated that not all police departments have the funds to offer diversion programs, resulting in justice by geography, where youth in certain jurisdictions did not have the same opportunities to avoid formal prosecution and participate in diversion programs.

*This required fee for the opportunity to not be prosecuted seems to put poor youth and families on unequal footing compared to families with financial means.*

Though stakeholders could not provide much information regarding diversion, some did note that having attorneys present prior to youth entering diversion agreements with police departments would be beneficial. One defense attorney said that he had been made aware of an increase in diversion failure rates and suggested that if the defense attorneys were present to negotiate the terms of diversion on the front end, it would help avoid unsuccessful outcomes. Another defense attorney believed that attorneys should be available throughout the diversion process, stating, “The kids should understand what a diversion agreement is. I’m sure [the police] are explaining it, but they really need to know what happens if they fail the diversion.” On the other hand, at least one

192 MODELS FOR CHANGE JUVENILE DIVERSION WORKGROUP, JUVENILE DIVERSION GUIDEBOOK 7 (2011), <http://www.modelsforchange.net/publications/301>.

193 *Id.*; NAT’L JUVENILE JUSTICE NETWORK, REDUCING YOUTH ARRESTS: PREVENTION AND PRE-ARREST DIVERSION (2019), [http://www.njjn.org/uploads/digital-library/Reducing%20Youth%20Arrests%20Prevention%20and%20Pre-Arrest%20Diversion%20Jan%202020\\_1.pdf](http://www.njjn.org/uploads/digital-library/Reducing%20Youth%20Arrests%20Prevention%20and%20Pre-Arrest%20Diversion%20Jan%202020_1.pdf).

194 N.H. REV. STAT. ANN. § 169-B:10 (2020).

195 N.H. REV. STAT. ANN. § 169-B:10 (IV) (2020).

196 N.H. REV. STAT. ANN. § 169-B:10 (V) (2020).

197 N.H. REV. STAT. ANN. § 169-B:10 (III) (2020).

198 N.H. JUDICIAL BRANCH, JUVENILE DIVERSION FREQUENTLY ASKED QUESTIONS, <https://www.courts.state.nh.us/fdpp/Juvenile-Diversion-FAQ.pdf>.

199 *Benefits of Juvenile Court Diversion*, NH JUVENILE COURT DIVERSION NETWORK, <http://nhcourtdiversion.org/> (last visited Apr. 13, 2020).



defense attorney in another county reported that diversion failure rates were extremely low in their area, and they did not see the need for attorneys to be present for pre-court diversion. This contrast in perceptions further reinforces young people's experience of justice by geography across the State of New Hampshire.

Even if diversion is largely successful, protecting the rights of all youth should be paramount for New Hampshire. Youth should have an opportunity to have the assistance of counsel in diversion, to ensure that children's due process rights are protected and that children are able to participate in diversion programs equitably.

Having legal counsel to assist in the decision about whether to enter a diversion agreement or program—particularly those that require admissions of guilt—and to ensure understanding of the program requirements, is critical to a youth's participation in the proceedings against them. New Hampshire should increase its pre-filing diversion options, partner with community organizations to provide those services outside of law enforcement agencies, create opportunities for attorneys to participate in the diversion process to protect young people's due process rights, and eliminate fees for youth to participate in diversion programs.



## B. Juvenile Court System Barriers to Justice & Fairness for Youth

Though this assessment is about New Hampshire's juvenile defense system, certain juvenile legal system barriers directly impact the system of juvenile defense in a state. Fees and costs related to accessing counsel and to juvenile system involvement more broadly, disparities in treatment and outcomes of particular demographics of youth, a lack of available juvenile system data, and other structural barriers can all impede access to justice for young people.

### 1. Fees & Costs

Children and families in New Hampshire can be charged for every facet of their involvement in the legal system. The imposition of costs and fees begins at the initial point of contact with the system, continues at every point along the way, and does not stop even with release from the system, given that there are charges for things like record clearance.

The sum of potential fees and costs that can be imposed on youth and families in New Hampshire is staggering. Fees and costs are imposed for everything from court-appointed counsel to placement and services to accessing diversion programs to simply accessing the courts. There are also fines for certain charges. The potential financial obligations can total in the tens of thousands of dollars, even though most children do not have incomes of their own and most are deemed to be poor enough to qualify for appointed

counsel. In recognition of the lasting harm that such financial obligations can cause for youth and families, organizations across the country have begun to call for abolition of all such financial obligations.<sup>200</sup> Several state courts and jurisdictions have heeded the call and eliminated such fees, fines, and costs in juvenile court.<sup>201</sup>

*The sum of potential fees and costs that can be imposed on youth and families in New Hampshire is staggering.*

In New Hampshire, three entities can impose costs and enforce collections from youth and families stemming from juvenile court involvement: 1) the state Office of Cost Containment oversees reimbursement for appointment of and costs associated with counsel;<sup>202</sup> 2) the state Department of Health and Human Services enforces reimbursement for costs of court-ordered programming it provides to youth;<sup>203</sup> and 3) local police departments or individual counties or programs impose costs to participate in diversion programs.<sup>204</sup> Children may also be assessed fines when adjudicated delinquent in juvenile court,<sup>205</sup> although these are reportedly used less frequently. Many of the costs associated with operating the juvenile court system are imposed directly on the state's youth and their families.

200 NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, RESOLUTION REGARDING SHACKLING OF CHILDREN IN JUVENILE COURT (2015), <https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-shackling-of-children-in-juvenile-court.pdf>.

201 See, e.g., *Fees Established by State Law*, JUVENILE LAW CTR., <https://debtorsprison.jlc.org/#!/map> (last visited Apr. 15, 2020) (some locations that have eliminated fines, fees, and costs include California, Washington, Philadelphia, Pennsylvania, Dane County, Wisconsin, Orleans Parish, Louisiana, Nevada, and Ohio). See also N.J. STAT. ANN. § 2C:46-4 (2020).

202 N.H. REV. STAT. ANN. § 604-A:9 (1)(a) (2020).

203 N.H. REV. STAT. ANN. § 169-B:40 (2020); N.H. Dep't of Health and Human Servs., Div. for Children, Youth and Families, Financial Notification Range of Rates (Jan. 2018) (on file with author); N.H. Dep't of Health and Human Servs., Div. for Children, Youth and Families, Frequently Asked Questions About Parental Reimbursement (May 2017) (on file with author).

204 See, e.g., *Locations*, NH JUVENILE COURT DIVERSION NETWORK, <http://nhcourtdiversion.org/locations/> (last visited Apr. 14, 2020); NH JUVENILE COURT DIVERSION NETWORK, GRAFTON COUNTY JUVENILE RESTORATIVE JUSTICE (2018), [http://nhcourtdiversion.org/wp-content/uploads/2018/09/GRAFTON-Profile\\_08.18.pdf](http://nhcourtdiversion.org/wp-content/uploads/2018/09/GRAFTON-Profile_08.18.pdf).

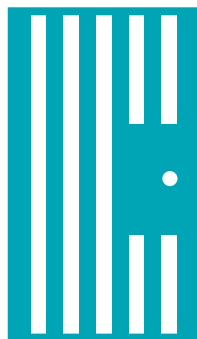
205 N.H. REV. STAT. ANN. § 169-B (2)(a).



## COST COMPARISON SECURE FACILITY VERSUS UNIVERSITY

**COST PER YEAR IN A**  
New Hampshire  
Secure Facility  
(365 days)

**\$198,512-  
\$286,112**



**TUITION & FEES PLUS  
ROOM & BOARD AT**  
University of New  
Hampshire (2020-2021)



**\$34,830**

### a. COSTS OF COUNSEL

As affirmed by the Supreme Court more than 50 years ago, attorneys are not a luxury but a fundamental right for children facing the juvenile court.<sup>206</sup> However, in New Hampshire, young people and their parents or guardians are responsible for paying the cost of legal services.<sup>207</sup> Though youth are presumed indigent for purposes of appointing counsel, after appointment they are required to reimburse the state for the cost of that counsel.<sup>208</sup> The amount they pay is the equivalent to the state's rate for contract attorneys.<sup>209</sup> This includes not only the cost for appointment of counsel, but also the costs of "defense services other than appointed counsel,"<sup>210</sup> such as experts and investigation.

While the statute does not specify the exact amount youth and families can be charged for defense services, stakeholders reported that amount to be \$300. Additional costs for post-disposition review hearings, appeals (\$2,000), and other defense services may also be charged. This money goes to the Office of Cost Containment (OCC), whose sole purpose is to collect payment for costs of counsel from indigent persons. A parent's liability for repayment to OCC ends when a child reaches the age of majority.<sup>211</sup>

As discussed in Section I.B. on waiver of counsel, costs related to accessing counsel are likely playing a significant role in whether a child waives their right to counsel. While New Hampshire courts are statutorily prohibited from charging youth and families a fee to have a lawyer appointed to advise them on whether

206 *In re Gault*, 387 U.S. 1 (1967).

207 N.H. REV. STAT. ANN. § 169-B:12 (III) (2020); N.H. REV. STAT. ANN. § 546-A:2 (2020).

208 *Id.*

209 N.H. REV. STAT. ANN. § 604-A:9 (I) (2020).

210 N.H. CODE ADMIN. R. ANN. 1003.01 (c) (2020).

211 N.H. REV. STAT. ANN. § 604-A:9 (I)(a) (2020); N.H. CODE ADMIN. R. ANN. 1005.01 (2020).

to waive counsel,<sup>212</sup> if the youth does not choose to waive their right to a defense attorney, they may be charged the \$300 fee, unless the court finds the family is financially unable to pay.<sup>213</sup>

*Costs related to accessing counsel are likely playing a significant role in whether a child waives their right to counsel.*

Data collected during the assessment indicated that in Fiscal Year 2018, OCC received notice of 606 new juvenile cases at a rate of \$300/each and 368 new juvenile cases at a rate of \$275 (the disparity in the rates is due to a rate increase during that time). In Fiscal Year 2018, OCC collected \$110,709 from juvenile cases, which includes payments on debts incurred that year and in prior years, as some children and families request payment plans. The cost of operating OCC in Fiscal Year 2018 was approximately \$556,000.<sup>214</sup> This includes the salaries of six staff. OCC has requested a budget increase to hire a seventh person for Fiscal Years 2020 and 2021.<sup>215</sup> Annually, in total, including adult and juvenile cases, OCC collects about \$1.5 million.<sup>216</sup> OCC functions solely as a collection agency that the State of New Hampshire uses to force its poorest citizens to pay for a service the state is constitutionally obligated to provide.

Charging children and their families a fee to access the constitutional right to counsel runs counter to the promise of due process of law and the goals of a system premised on rehabilitation and setting a youth up for future success.

## **b. DIVERSION COSTS**

Diversion programs in New Hampshire are primarily run by individual towns or counties. Because these operate on a local level and because they commonly operate prior to formal court involvement, the assessment team was unable to gather much information on diversion. Anecdotally, however, most localities charge approximately \$100 for youth to participate in a diversion program. Those who are unable to afford this fee are reportedly ineligible for the programs and cannot be diverted from the juvenile court system, raising significant questions about equal access to justice for youth and families.

One stakeholder reported that most diversion programs require payment up front, and the amount varies from \$100 to \$200. The stakeholder said that, “Parents will refuse diversion because they do not have the ability to pay the amount up front and opt for going to court with an attorney where they are charged more but can do a payment plan.”

## **c. DHHS COST OF SERVICES**

In addition to the upfront costs related to counsel or diversion, there are a wide range of program and other fees that the Department of Health and Human Services (DHHS)—which oversees probation, detention, commitment, and most court-ordered services—can impose. These fees are assessed against the parent or guardian of the youth. Payments are ordered to begin when youth begin participating in the court-ordered programs and can continue for up to four years after their participation ends and the case is closed.<sup>217</sup>

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212 N.H. REV. STAT. ANN. § 169-B:12 (II-b) (2020).

213 N.H. REV. STAT. ANN. § 604-A:2-a (2020).

214 STATE OF N.H., 2020-2021 BIENNIAL BUDGET REQUEST 317, [https://das.nh.gov/budget/Budget2020-2021/2020B01\\_budget\\_book\\_Agency.pdf#pagemode=bookmarks&page=13&zoom=100](https://das.nh.gov/budget/Budget2020-2021/2020B01_budget_book_Agency.pdf#pagemode=bookmarks&page=13&zoom=100).

215 *Id.*

216 Todd Bookman, *Poor? Found Not Guilty? N.H. Sends You a Bill, Anyway*, N.H. PUB. RADIO (MAR. 20, 2019), <https://www.nhpr.org/post/poor-found-not-guilty-nh-sends-you-bill-anyway#stream/0>.

217 N.H. Div. for Children, Youth and Families, Reimbursement for Services and Placements (2017), <https://www.dhhs.nh.gov/dcyf/documents/dcyfpolicy2740.pdf>.

### *i. Out-of-Home Placement Prior to Arraignment*

When a young person is released to an out-of-home program prior to arraignment, the parents must reimburse DHHS if the young person is placed in foster care, a crisis home, a shelter, a group home, or an alcohol crisis center.<sup>218</sup> These costs can be as high as \$520 per day.<sup>219</sup> A one-month stay in such a placement could conceivably cost as much as \$16,120. This cost assessment is mandatory, and by statute should be ordered by the court only after considering the youth's or family's ability to pay.<sup>220</sup> Parents must submit a financial statement each year, and the order of reimbursement continues until the obligation has been paid.<sup>221</sup> The money goes to DHHS, and DHHS may apply to the district court for a lien on the parent's real or personal property if the parent does not pay.<sup>222</sup>

### *ii. Pre-Adjudication Interventions*

Prior to adjudication, families may be responsible for reimbursing DHHS for a number of court-ordered evaluations or service placements. These include mental health and substance abuse evaluations and physical examination and treatment.<sup>223</sup> Like the reimbursement requirements for the placements described above, these are mandatory financial assessments against the youth and family, and the court must consider their ability to pay when establishing the payment arrangements and reimbursement obligations; failure to pay on time may result in a lien on the parent's real or personal property.<sup>224</sup>

### *iii. Disposition & Commitment*

At disposition, a young person may be ordered to have a mental health or substance abuse evaluation or to receive physical or mental health programming.<sup>225</sup> Unlike the pre-adjudication stage, if at disposition a mental health or substance abuse evaluation is ordered, it must be paid by private insurance or by the parent directly to the evaluator.<sup>226</sup> The evaluation can be provided for free or at a reduced cost if the court determines the family has limited financial means.<sup>227</sup> If the defense or the family objects to the ordered evaluation, the court must hold a hearing and may excuse the evaluation.<sup>228</sup> However, according to attorneys interviewed, families do not make objections to these evaluations and there are no hearings on these issues. The court can also order the family to reimburse DHHS for other programming, such as mediation, parenting classes, "or any other such program or programs the court determines."<sup>229</sup> Secure care alone can cost as much as \$783.87 per day.<sup>230</sup>

### *iv. Time Extension Fees*

If the court extends the time for payment of a fine, it must add a fee of at least \$25.<sup>231</sup> In other words, if a child or family is having difficulty making payments under their repayment schedule, their financial burden is increased because they need more time to pay.

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218 N.H. REV. STAT. ANN. § 169-B:11 (2020); N.H. REV. STAT. ANN. § 169-B:40 (l)(c) (2020).

219 N.H. Dep't of Health and Human Servs., Div. for Children, Youth and Families, Financial Notification Range of Rates (Jan. 2018) (on file with author).

220 N.H. REV. STAT. ANN. § 169-B:40 (l)(c) (2020).

221 *Id.*

222 N.H. REV. STAT. ANN. § 169-B:40 (V) (2020).

223 N.H. REV. STAT. ANN. § 169-B:40 (l)(c) (2020).

224 N.H. REV. STAT. ANN. § 169-B:40 (V) (2020).

225 N.H. REV. STAT. ANN. § 169-B:21 (2020); N.H. REV. STAT. ANN. § 169-B:19 (l)(c) (2020).

226 N.H. REV. STAT. ANN. § 169-B:21 (l) (2020).

227 *Id.*

228 *Id.*

229 N.H. REV. STAT. ANN. § 169-B:19 (l)(c) (2020).

230 N.H. Dep't of Health and Human Servs., Div. for Children, Youth and Families, Financial Notification Range of Rates (Jan. 2018) (on file with author).

231 N.H. REV. STAT. ANN. § 490:26-a (2020).





#### d. RESTITUTION

At disposition, the court may impose restitution and fines against the young person, the parent, or both. The court may impose a fine directly on the child, not to exceed \$250 for the entire disposition, but the amount of restitution is not specified.<sup>232</sup> The child can pay this money to DHHS, the court, or an agency designated by the court.<sup>233</sup> The child must pay restitution before their 18th birthday (or 19th birthday if petition was filed after their 18th birthday).<sup>234</sup> Failure to pay restitution may lead to prosecution as an adult for contempt of court.<sup>235</sup> Parents may be required to pay a portion or the full amount of the fine or restitution if the court finds that it is in the interest of justice and rehabilitation.<sup>236</sup> For a parent, failure to pay is treated as criminal contempt, punishable by a fine up to \$1,000 and 90 days imprisonment.<sup>237</sup>

#### e. OFFENSE-SPECIFIC FINES

Two offenses carry specific fines and costs when a young person is adjudicated delinquent. If adjudicated for vandalism, the child could be ordered to pay an amount that includes restoration of the property or restitution to the victim.<sup>238</sup> While there is no amount specified for the child, parents could be ordered to pay up to \$10,000.<sup>239</sup> The court can order payment by money, by property repairs, by service to the injured party, or by service to the community.<sup>240</sup> While the statute is silent on whether the ability to pay must be considered, the court is allowed to permit payments in installments

for up to seven years.<sup>241</sup> All payments go to the victim.<sup>242</sup> If unpaid, the parent or child can be found guilty of contempt.<sup>243</sup>

If adjudicated delinquent for possession of marijuana or hashish, the young person could be ordered to undergo a substance abuse evaluation.<sup>244</sup> This is to be paid for by the parent directly to a licensed drug and alcohol counselor.<sup>245</sup> The evaluation can be provided for free or at a reduced cost, and the assessment can be waived if a similar assessment has already been completed.<sup>246</sup>

#### f. THE IMPACT OF FEES & COSTS

The array of financial requirements imposed upon youth and families in New Hampshire is vast. The sheer number, the staggering amounts that can be imposed, the penalties for nonpayment, and the lack of transparency about the process surrounding these financial obligations are of serious concern when considering young people's access to justice in the state.<sup>247</sup> Most court stakeholders had limited or no knowledge of these requirements, and among those interviewed who did try to provide information, it became apparent through the assessment process that many of them had inaccurate information.

New Hampshire's Juvenile Code starts with an explicit statement of the purpose of its juvenile court system. This includes "providing the protection, care, treatment, counselling,

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232 N.H. REV. STAT. ANN. § 169-B:19 (I)(b) (2020).

233 *Id.*

234 N.H. REV. STAT. ANN. § 651:67 (II) (2020).

235 *Id.*

236 N.H. REV. STAT. ANN. § 169-B:2-a (I)(d) (2020).

237 N.H. REV. STAT. ANN. § 169-B:2-a (II) (2020).

238 N.H. REV. STAT. ANN. § 169-B:45 (IV)-(V) (2020).

239 *Id.*

240 *Id.*

241 N.H. REV. STAT. ANN. § 169-B:45 (VII) (2020).

242 N.H. REV. STAT. ANN. § 169-B:45 (IV) (2020).

243 N.H. REV. STAT. ANN. § 169-B:45 (VI) (2020).

244 N.H. REV. STAT. ANN. § 169-B:21 (III) (2020).

245 *Id.*

246 *Id.*

247 Mark Hayward, *Pay to Stay: Families of juvenile offenders are forced to pay for cost of care*, N.H. Union Leader (Feb. 16, 2019), [https://www.unionleader.com/news/crime/pay-to-stay-families-of-juvenile-offenders-are-forced-to-pay-for-costs-of-care/article\\_7b87556d-2712-569e-adad-7885d984ab5d.html](https://www.unionleader.com/news/crime/pay-to-stay-families-of-juvenile-offenders-are-forced-to-pay-for-costs-of-care/article_7b87556d-2712-569e-adad-7885d984ab5d.html).

***“I got hit by a ton of bricks when I got that first bill.”***

***“They don’t want to pay for it, and they try to get the money any way they can.”***

***“I do just like any other single parent. I rob Peter to pay Paul. I do without.”***

Mark Hayward, *Pay to Stay: Families of juvenile offenders are forced to pay for cost of care*, N.H. Union Leader (Feb. 16, 2019),

criminal convictions for failing to pay, the system is creating new obstacles to New Hampshire’s young people being able to successfully move forward in their communities.

Beyond these overarching and systemic inconsistencies, the fees and costs in New Hampshire create real impediments to the implementation of justice in juvenile courts. Fees and costs imposed on youth and families surrounding the services of defense counsel are, according to those within the system, likely incentivizing waiver of counsel. One defense attorney even reported advising clients to waive counsel so they would not have to pay. Other stakeholders reported seeing parents encourage their children to waive counsel because of the costs.

***One defense attorney even reported advising clients to waive counsel so they would not have to pay.***

supervision, and rehabilitative resources which such minor needs” and “preserving the unity of the family” whenever possible and “consistent with the protection of the public.”<sup>248</sup> The current regime of costs and fees is entirely anathema to these stated goals. This assessment found that instead of providing rehabilitative resources youth need, the system imposes obligations for which the youth and family themselves must pay. By imposing sanctions such as liens and criminal prosecution on both youth and families, the system is more likely to drive wedges between parents who feel the burden of newly incurred financial crises and the youth who they may blame.

In a juvenile system that, by all accounts, has made significant strides toward maintaining youth in their communities, it seems counterproductive to public safety to place families in financial crisis. Ultimately, by saddling large numbers of young people and their families with years of debt or

Assessment team members heard multiple reports of parents rejecting services they were unable to pay for, but the court ordering those services anyway. One probation officer estimated about 40 percent of parents in cases have changed their minds about engaging in services as soon as parental reimbursement was discussed. Others reported that over the years, they have known of parents who have had to secure second jobs, access children’s college funds, and take money out of retirement to make ends meet due to the financial reimbursement obligations imposed by the juvenile court system.

Assessment teams learned of parents having to pay \$650 in court-imposed obligations per month, despite having four other children to care for, and another family in the process of foreclosing on their home, after losing social security income due to their child’s out-of-home placement. The family had tried unsuccessfully to lower their monthly

248 N.H. REV. STAT. ANN. § 169-B:1 (2020).

reimbursement amount and were six months behind on their payments.

The overall breadth of court-related costs can put families, even those deemed “able to pay” into a long-term downward financial spiral that impacts the family’s ability to afford other living expenses and creates confusion and distrust of the court system. One stakeholder reported overhearing parents saying “what my son did six years ago is harming their siblings” because they don’t have money to pay for things for their other children. Exacerbating these issues is some judges’ perception that they lack discretion to waive most financial sanctions, other than fines. One judge highlighted these issues by stating:

Youth and parents are on the hook for money for everything. I just had a conversation with a woman crying downstairs saying, ‘I can’t afford this.’ They get a bill and are told what they need to pay based on income. I told her—and tell all of them—to request a hearing. I think it is ridiculous that they have to pay in the first place, but it is not my call. They collect so little that it probably doesn’t pay to collect it. They probably spend more trying to collect than they get.

This assessment found a complete lack of understanding among stakeholders of what is and is not permitted related to the costs imposed on youth and families. The assessment team heard misinformation and contradictory information across the state, among nearly every stakeholder group about what fees, fines, and costs were assessed against youth and their families involved in the juvenile legal system. If the professionals cannot navigate the system, young people and families cannot be expected to succeed at it or to challenge its impact.

New Hampshire should provide more clarity about the costs and fees that are imposed and should require, rather than merely allow, attorney consultation prior to waiver of counsel for youth without any fees imposed.<sup>249</sup> The fees

and costs charged to youth and families create significant barriers to moving past juvenile court involvement and toward financial independence. New Hampshire should eliminate all fees and costs related to counsel for youth, as well as those related to all facets of court intervention such as evaluations, programming, probation, and placements in the juvenile legal system.

### g. LIMITED DEFENDER ADVOCACY

The impact of fines, fees, and costs is compounded by the inconsistency with which juvenile defenders challenge the imposition of financial assessments on youth and families.

Of the defenders interviewed, almost half reported advocating against financial obligations, stating that they argued primarily against fines. These reports were in alignment with judges and prosecutors who responded to such questions (about half of those interviewed) and reported observing juvenile defenders advancing arguments against the imposition of financial assessments. One judge said they have had defenders present arguments about a youth’s or family’s ability to pay. A judge in another county said that defenders will ask the court to pay for evaluations. A couple prosecutors in one county noted that defenders have raised financial obligation issues in their case negotiations.

However, a little more than half of defenders interviewed said they did not challenge the imposition of fees, fines, or costs. Some defenders reported not engaging in advocacy in this area, saying, for example, the issue “had not come up,” or they “probably could, but haven’t.” One defender reported confusion, “I am not totally sure about what is imposed or waived for kids, or put on the parents,” while a couple of the defenders interviewed believed the court did not have discretion in this area. A few others suggested that they, as defenders, did not have a role to play in advocating against fees, as these were levied against the parents as opposed to their clients.

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249 At the time of this report, legislation aimed at addressing some of these issues was pending in New Hampshire’s state legislature. Please see the Promising Approaches section for more information.



Probation officers' responses were similar to those of the defenders. The majority said that they did not see defenders getting involved in advocacy related to fees and costs and that youth and families were often unclear about their obligations or the ramifications of non-payment. A probation officer in one county said that defenders did not "have a say in it." The probation officers who said they saw defenders advocating against financial obligations came from two counties and noted advocacy around fines.

Given the breadth of financial obligations that can be imposed against youth and families in New Hampshire, it is critical that juvenile defenders not only clearly understand them but also firmly assert their clients' rights regarding their inability to pay. An absence of consistent advocacy opposing fees and costs in juvenile court leaves youth and families vulnerable to the long-term consequences of these financial obligations. Juvenile defenders must lead the charge to become knowledgeable of and zealously advocate against the broad range of financial obligations levied against youth and families in juvenile court unless and until they are eliminated across New Hampshire.

## 2. Youth Equity

While all stakeholders must ensure equitable treatment and outcomes for youth involved in the juvenile legal system, juvenile defense attorneys play a unique role in advancing equity. National standards call for defense attorneys to "strive to protect clients from individualized or systemic disparate treatment, especially with regard to clients from populations that face a greater likelihood of unequal treatment. Counsel should challenge bias impacting these clients and argue for individualized responses to meet their specialized needs."<sup>250</sup> In addition to advancing equity in their individual advocacy, defense attorneys must also "address any systemic injustices or mistreatment of specific populations."<sup>251</sup> Defenders advocacy regarding youth equity and justice should include individual case strategy, policy advocacy, and community education.

While there is limited data available about marginalized populations of youth in New Hampshire and because the overall population is relatively small, it is difficult to fully assess the nature of disparate treatment in the state. However, based on the limited data, interviews,

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<sup>250</sup> NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 2.7.

<sup>251</sup> *Id.* at Standard 10.5; See, generally, *Racial Justice for Youth: A Toolkit for Defenders*, GEO. LAW JUVENILE JUSTICE INITIATIVE & NAT'L JUVENILE DEFENDER CTR., [www.defendracialjustice.org](http://www.defendracialjustice.org) (last visited Apr. 14, 2020); Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 694 (2017).



and observations available, it appears that while New Hampshire stakeholders have seen some decreases in disparities and an increased understanding and awareness of various populations in the state in recent years, there remains a need to focus on eliminating racial and ethnic disparities, eliminating disparate treatment and discrimination of LGBTQ youth, and improving services for youth who do not speak English as a first language and for youth with disabilities.

The population of New Hampshire is primarily white.<sup>252</sup> Yet, as is true across the country, racial disparities in the juvenile legal system persist, particularly for Black and Latinx youth.<sup>253</sup> While recent estimates report that Black youth make up just 1.7 percent of New Hampshire's population, 2018 juvenile court data indicates that Black youth account for nine percent of delinquency petitions filed, ten percent of delinquency findings, and 11 percent of youth placed on probation. Similarly, recent estimates suggest that Latinx youth make up just four percent of New Hampshire's population, but account for 12 percent of cases petitioned, 13 percent of delinquency findings, and 18 percent of youth placed on probation.<sup>254</sup>

When stakeholders were asked by assessment teams about racial disparities in New Hampshire's juvenile legal system and differential treatment of youth based on race, only slightly more than half of stakeholders believed there were some disparities and expressed concerns about differential treatment. Nearly half of those interviewed across the state did not express any concerns with how youth of color were treated, despite the fact that Black and Latinx youth make up a disproportionate share of youth in the legal system as compared to their population in New Hampshire overall.

Stakeholders who did express concerns about racial disparities and differential treatment of youth of color in New Hampshire's juvenile court

system reported that, anecdotally, they were more likely to see youth of color charged with an offense, particularly in school settings, than white youth. As one defense attorney questioned, "Why are the Black and Latinx kids being charged with possession and not the white kids?" In line with the racial disparities data mentioned above, other stakeholders reported observing higher levels of court involvement at all stages for youth of color, including a higher likelihood of being placed on probation or committed to the Sununu Youth Services Center.

### *"Why are the Black and Latinx kids being charged with possession and not the white kids?"*

Additionally, stakeholders shared experiences of how a lack of awareness of racial disparities and differential treatment based on race has limited defenders' ability to raise issues of race in their advocacy. There is recent evidence that many stakeholders across the country find raising such topics uncomfortable.<sup>255</sup>

In New Hampshire, one defense attorney provided an example of a case in which a Black youth was charged with shoplifting. The defense attorney argued against the school district joining the case, because the client did not want the school involved, in part because the client already felt the school treated them differently because of their race. When the defense attorney made the argument, the judge reportedly found that "offensive" and, in an extraordinary move and without any evidence proffered to support the judge, "took judicial notice that there is no racism in New Hampshire schools." Another defense attorney felt that negative perceptions of youth of color led to the delinquency system having "a lack

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252 QuickFacts: New Hampshire, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/NH> (last visited Apr. 14, 2020).

253 *Black Disparities in Youth Incarceration*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/publications/black-disparities-youth-incarceration/> (last visited Apr. 14, 2020).

254 Email from the Office of the Child Advocate to Christina Gilbert, Senior Staff Attorney & Policy Counsel, Nat'l Juvenile Defender Ctr. (Mar. 20, 2020) (on file with author).

255 THE ANNIE E. CASEY FOUND., TRANSFORMING JUVENILE PROBATION 14 (2018), <https://www.aecf.org/resources/transforming-juvenile-probation/>.

of hope for the child's future" when looking at youth of color.

One attorney also raised concerns that the increasing African refugee populations in the state were being targeted and drawn into court more frequently, estimating that they made up most of their clients of color. Regarding refugee populations, stakeholders also identified challenges when youth or families could not fully understand their rights, making it more difficult to participate in the process, access services, or communicate generally.

As one public defender said, "Non-English speakers get interpreters at court and our appointments, but I think there are still challenges. I'm not sure they are getting enough assistance. Our letters to them are in English and I worry about their dealings with the police, how they engage with discovery, etc." Other concerns cited included a belief that non-English speakers may not have the same case resolutions available to them as English speakers because of an inability to participate in required programs or classes. Some stakeholders raised concerns that the courts lack translators for certain languages, particularly those other than Spanish. This was of particular concern for clients from Nigerian, Congolese, and Bosnian families, as well as those who spoke Swahili.

Another layer of disparities exists for lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) youth, particularly those of color, as they face an increased risk of court involvement and disparate treatment in the juvenile court system.<sup>256</sup> While there was no data available about this population in New Hampshire, stakeholders expressed some concerns about the disparate treatment of this population, particularly regarding the placement of transgender youth. Nonetheless, interviewees did report improvement in the treatment of LGBTQ youth in recent years, specifically citing examples of the court using the child's appropriate pronouns to address them

even when the child's parents would not do so. Defenders must advocate against and challenge disparate treatment or discrimination of LGBTQ youth in juvenile court.<sup>257</sup>

In discussing another population commonly overrepresented in juvenile court systems nationwide,<sup>258</sup> nearly every stakeholder interviewed identified concerns about the differential treatment of youth with disabilities. One attorney felt that the overrepresentation of youth with disabilities in the delinquency system was because "people are using the system as a way of getting services for kids." Another specifically noted that the needs of youth with disabilities were sometimes ignored, as he had trouble getting the commitment facility to implement IEPs.

*"People are using the system as a way of getting services for kids."*

A few attorneys expressed frustration with negative perceptions of children with disabilities in the delinquency system, as they observed youth with disabilities can often get labeled as "bad kids." Additionally, attorneys expressed frustration with some judges, who they thought overlooked or discounted the role disabilities can play in a young person's behavior. Stakeholders noted that many of the challenges facing youth with disabilities would be better served in the community or other non-sanction-based systems, rather than in the juvenile court system.

New Hampshire's stakeholders must collect data about the demographic identities of young people involved in the juvenile court system, be educated about the various populations of youth with whom they work, and strive to eliminate any disparities. Juvenile defense attorneys must consistently investigate their own biases, examine any biases of others in the system, and raise these issues with and on behalf of their clients.

256 CTR. FOR AM. PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN JUVENILE AND CRIMINAL JUSTICE SYSTEMS FAIL LGBTQ YOUTH (2016), <https://www.lgbtmap.org/file/lgbt-criminal-justice-youth.pdf>.

257 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 10.5.

258 ACT 4 JUVENILE JUSTICE, JUVENILE JUSTICE AND MENTAL HEALTH AND SUBSTANCE USE DISORDERS FACT SHEET (2014), <https://act4jj.org/sites/default/files/ckfinder/files/ACT4JJ%20Mental%20Health%20Fact%20Sheet%20August%202014%20FINAL.pdf>.

### 3. Court System Data

Collecting and analyzing data related to the treatment of young people in the juvenile court system is critical to maintaining an effective system of justice.<sup>259</sup> But it is not only juvenile defense data collection systems that are necessary. The entire court system must have a robust data collection and evaluation system. “Juvenile Justice Court judges should ensure the court has an information system that can generate the data necessary to evaluate performance, facilitate information-sharing with appropriate agencies, and manage operations.”<sup>260</sup>

An effective juvenile court data system should include certain fundamental data components and should be able to answer, at a minimum, questions such as how many youth are involved at different stages of the system, key characteristics of those youth, how the youth became involved in the system, and any long-term measures of success.<sup>261</sup> Courts should use data to inform judicial decision-making, gauge the impact of evidence-based practices, support positive outcomes for youth, identify opportunities for improvement, measure progress, and contribute to the narrative of juvenile court at statewide and national levels.<sup>262</sup>

The lack of available statewide reportable data is a severe limitation of the system in New Hampshire. Stakeholders reported that all New Hampshire trial courts use the same case management system, Odyssey. However, its primary function is to support case management, not data collection. According to stakeholders, data entry is focused on information that either serves to advance or manage the case or is needed for court performance evaluation, and the data is not easily aggregated. According to stakeholders, the standard information recorded includes the names of the parties, case status, whether any documents such as motions were filed (though

those documents themselves are not retained electronically), charges, hearing dates and types, and dispositions.

***The lack of available statewide reportable data is a severe limitation of the system in New Hampshire.***

Even with the information that is collected, no one at the court, county, or state level was able to provide aggregate data of the number of children who had waived counsel, the number of motions filed in juvenile cases, the number of juvenile cases resolved by pleas versus those that went to trial, or the racial or gender demographics of the juvenile court-involved population. A lack of consistent definitions, training, and procedures complicates the problem. For example, when asked about data on waiver of counsel, one court administrator stated that whether that information even existed was up to for debate because, “The waiver form may be filed, but is not always coded consistently. Not all waivers filed are accepted by the judge, and a juvenile may still be assigned counsel later in the case.” So, even if the form was filed correctly, which this administrator doubted, there was reportedly no way to track whether counsel was later appointed. New Hampshire courts must improve their capacity to collect aggregate data at the individual court level and statewide so they can effectively evaluate performance, manage operations, and monitor outcomes. They must also develop clear definitions, procedures, and training on data collection.

259 NAT'L CONFERENCE OF STATE LEGISLATURES, PRINCIPLES OF EFFECTIVE JUVENILE JUSTICE POLICY (2018), [https://www.ncsl.org/Portals/1/Documents/cj/JJ\\_Principles\\_122017\\_31901.pdf](https://www.ncsl.org/Portals/1/Documents/cj/JJ_Principles_122017_31901.pdf); NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES & NAT'L CTR. FOR JUVENILE JUSTICE, 5 WAYS JUVENILE COURT JUDGES CAN USE DATA (2017), [http://ncjj.org/pdf/Model%20Data%20Series/NCJFCJ\\_5\\_Ways\\_Data\\_R9.pdf](http://ncjj.org/pdf/Model%20Data%20Series/NCJFCJ_5_Ways_Data_R9.pdf); NAT. LEGAL AID & DEF. ASS'N, *supra* note 171.

260 NCJFCJ JUVENILE JUSTICE GUIDELINES, *supra* note 41.

261 *Juvenile Justice Model Data Project*, NAT'L CTR. FOR JUVENILE JUSTICE, [http://ncjj.org/Projects/model\\_data\\_project.aspx](http://ncjj.org/Projects/model_data_project.aspx) (last visited Apr. 14, 2020).

262 NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES & NAT'L CTR. FOR JUVENILE JUSTICE, *supra* note 259.



## 4. Police Prosecutors

New Hampshire is one of a few states that allows non-lawyer police officers to prosecute certain cases,<sup>263</sup> including juvenile delinquency cases. This raises significant concerns. The New Hampshire Bar Association's constitution reads, "Except for the right reserved to litigants by statute no person other than an active member of this association shall practice law in this state or in any manner hold himself out as authorized or qualified to practice law in this state."<sup>264</sup> In fact, state statute prohibits non-lawyers from the practice of law: "No person shall be permitted commonly to practice as an attorney in court unless he has been admitted

by the court and taken the oath prescribed in RSA 311:6."<sup>265</sup> Under New Hampshire law, "admitted by the court" means admitted to the practice of law after having submitted an application to the state's Supreme Court.<sup>266</sup>

Assessment team members were distressed to observe non-lawyer police officers acting as prosecutors and arguing legal sufficiency in juvenile courts in New Hampshire.

"Legal experts and advocates say prosecution by police is an illegal and unjust practice that profoundly shapes the criminal legal system."<sup>267</sup> New Hampshire is one of only two states where courts have ruled explicitly that police officers

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263 See Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1378 (1998); Julia Rock & Harry August, *Rhode Island Police Don't Just Make Arrests. Some Also Act as Prosecutors*, THE APPEAL (OCT. 10, 2019), <https://theappeal.org/rhode-island-police-prosecutors/>.

264 N.H. BAR ASS'N CONST. ART. II, § 4.

265 N.H. REV. STAT. ANN. § 311:7 (2020).

266 N.H. REV. STAT. ANN. § 311:2 (2020).

267 Rock & August, *supra* note 263.



prosecuting criminal cases is not the practice of law.<sup>268</sup> However, these decisions do not appear to take into account the current state law prohibiting the practice of law by non-attorneys,<sup>269</sup> but rather analyze an older statute.<sup>270</sup>

Critics note both legal and ethical concerns with the practice of police officers engaged in prosecution. Police officers do not have to abide by the same ethical code and professional rules of conduct as prosecutors.<sup>271</sup> As non-attorneys, they are not governed by the New Hampshire Rules of Professional Conduct, with which all attorneys in the state must comply; they are not subject to bar complaints for ethical failures; and they may not be removed from the practice of law by the state Supreme Court for ethical failures. Additionally, police officers who have received no formal legal training cannot be expected to engage in a juvenile court proceeding in a manner that provides access to justice for litigants.

As one defense attorney noted during interviews, working with police prosecutors was sometimes an obstacle when filing motions, due to a lack of understanding of more complex legal issues. They felt that, in their jurisdiction, the police prosecutors did not understand the goals of juvenile court and the differences from adult criminal court, stating “It’s a mess,” and raising concerns that police prosecutors were afraid to admit what they did not know.

A judge agreed, stating, “Some police prosecutors don’t know what they’re doing. They can become impossible to deal with for the public defender.” The judge believed there would be far fewer cases filed if prosecutors were not law enforcement officers. To illustrate how police officers acting as prosecutors lacked legally informed perspective, the judge gave an example of a non-lawyer prosecutor filing 15 petitions against a youth for

an incident that stemmed from a simple schoolyard fistfight. Another judge reviewed the youth’s record saw a list of offenses instead of the single and relatively minor incident that it was. The judge explained, “The lack of professionalism in the prosecution is a major part of cases coming to court to begin with. There’d be far fewer cases.”

While New Hampshire’s courts have, in the past, ruled that it is legal for police to prosecute cases,<sup>272</sup> there is nothing stopping courts from creating policies prohibiting the practice in their jurisdiction or legislators passing laws against it, especially in juvenile court. In a legal system that holds the future of the state’s youth in its hands, legal decisions should be made by qualified lawyers. As one assessment team member commented, “It’s like using a school nurse to remove someone’s appendix. While some may have enough training to be competent, as a general rule, it’s a really scary idea.” New Hampshire’s children deserve better.

*In a legal system that holds the future of the state’s youth in its hands, legal decisions should be made by qualified lawyers.*

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268 See Horwitz, *supra* note 263; State v. Urban, 100 A.2d 897 (N.H. 1953); State v. LaPalme, 179 A.2d 284,285 (N.H. 1962); State v. Morin, 327 A.2d 702 (N.H. 1974); Biladou v. Antal, 455 A.2d 1037 (N.H. 1983).

269 N.H. REV. STAT. ANN § 311:7 (2020).

270 State v. Urban, 100 A.2d 897 (N.H. 1953) and its progeny focus their analysis the older statute “R.L. c. 380, § 23,” which now appears, for all intents and purposes, to be codified as RSA 104:25, and which prohibits law enforcement from acting as lawyers for individuals, particularly as a lawyer for a defendant in a criminal proceeding. However, RSA 311:7 requires all those who practice law in New Hampshire courts be barred attorneys.

271 MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983); Horwitz, *supra* note 263; See also Rock & August, *supra* note 263.

272 See Horwitz, *supra* note 263; State v. Urban, 100 A.2d 897 (N.H. 1953); State v. LaPalme, 179 A.2d 284,285 (N.H. 1962); State v. Morin, 327 A.2d 702 (N.H. 1974); Biladou v. Antal, 455 A.2d 1037 (N.H. 1983).

## 5. Youth in Adult Court

Children age 18 and under should be treated as children, and when they come into conflict with the law, they should remain under the jurisdiction of the juvenile court. However, across the country, youth are still frequently prosecuted, sentenced, and incarcerated in adult criminal courts.<sup>273</sup> While court involvement in any system can put youth at risk for harm, youth in criminal court face more dire conditions. Worse yet, it is youth of color who are disproportionately transferred to and confronted with the conditions of adult court.<sup>274</sup> Young people who face prosecution in criminal court must be represented by defense attorneys who understand the specialized nature of advocating for youth, regardless of the court system.<sup>275</sup>

In New Hampshire, when a young person is charged with a felony, youth under 18 years of age may be certified (transferred) to Superior Court prior to the adjudicatory hearing.<sup>276</sup> For certain offenses or when the youth is charged with any felony and, prior to the filing of the felony petition, has 1) been petitioned to the court on four or more occasions and adjudicated delinquent in four separate adjudicatory hearings, and 2) the alleged act occurred after their 15th birthday, there is a presumption that supports certification to the Superior Court.<sup>277</sup> Once a youth has been tried and convicted in adult court, any future petitions filed will automatically be heard in adult court.<sup>278</sup>

When the prosecution seeks to certify a child to adult court in New Hampshire, the delinquency court must conduct a hearing and consider a series of factors, including public safety, the maturity and sophistication of the youth, and the young person's amenability to treatment in the juvenile system.<sup>279</sup>

Across the country, best practices for representing youth facing transfer to adult criminal court include a multidisciplinary team approach and continuous representation.<sup>280</sup> If a young person is transferred to adult court and then assigned a different criminal defense attorney, the juvenile defense attorney must work with the new attorney representing the child in the adult criminal proceedings. The juvenile defense attorney has an obligation to provide all of the background information on the case and should be available to assist with questions of adolescent development, relevant juvenile law, and communicating with youth clients.<sup>281</sup>

Assessment team members heard from one defense attorney that children certified to adult court are frequently represented by public defenders who have not practiced in juvenile court in many years and whose understanding of adolescent development and other critical areas of youth representation seemed to be severely lacking.

It is critical that New Hampshire provide the necessary training and opportunities for collaboration among attorneys, support staff, and experts to effectively communicate with youth clients facing certification to adult court and provide them with the best representation possible. At the same time, New Hampshire stakeholders should work to eliminate any opportunities for certification and ensure that all youth under the age of 18 remain within the jurisdiction of the juvenile court when they are in conflict with the law.

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273 CAMPAIGN FOR YOUTH JUSTICE, LET'S GET CHILDREN OUT OF ADULT COURTS, JAILS, AND PRISONS (2018), [http://www.campaignforyouthjustice.org/images/factsheets/BasicFacts\\_Final1.pdf](http://www.campaignforyouthjustice.org/images/factsheets/BasicFacts_Final1.pdf).

274 MALCOLM C. YOUNG, PROVIDING EFFECTIVE REPRESENTATION FOR YOUTH PROSECUTED AS ADULTS 1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182502.pdf>.

275 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 8.1.

276 N.H. REV. STAT. ANN. § 169-B:24 (2020).

277 *Id.*

278 N.H. REV. STAT. ANN. § 169-B:27 (2020).

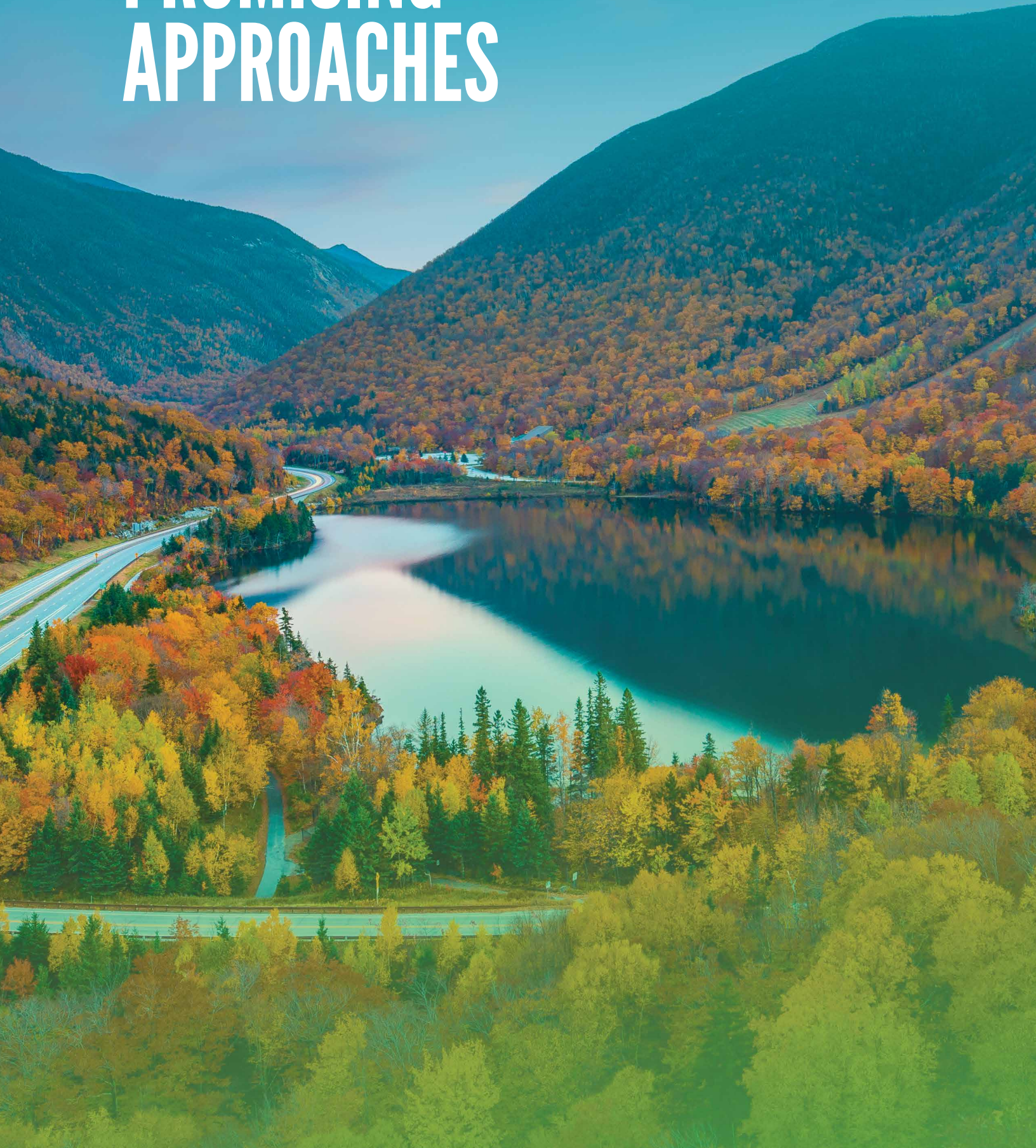
279 N.H. REV. STAT. ANN. § 169-B:24 (2020).

280 Young, *supra* note 274, at 2-4.

281 NATIONAL JUVENILE DEFENSE STANDARDS, *supra* note 8, at Standard 8.6.



# PROMISING APPROACHES





## New Hampshire's leaders have successfully advanced systemic reforms in juvenile defense and the juvenile court system in recent years.

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These reforms and other strengths evidence a commitment to improving the system of justice for children in the state. Indeed, several of the reforms stand as examples for other states to follow.

### Nearly eliminating the shackling of youth in court

The National Academy of Child and Adolescent Psychiatry has stated that shackling young people, in handcuffs, leg irons, belly chains, and other restraints, can cause long-lasting harm and exacerbate trauma that children in the juvenile court system have already experienced.<sup>282</sup> Shackling of children in court also interferes with a child's constitutional right to participate in their own defense and is counter to the rehabilitative goals of juvenile courts.<sup>283</sup>

Since 2010, New Hampshire law has limited the automatic use of shackles on youth in the courtroom:

A judge may subject a youth to shackling in the courtroom *but only when* he finds the restraint to be reasonably necessary to maintain order, prevent the youth's escape, and provide safety in the courtroom. If reasonable, the judge shall allow the youth and his or her attorney a chance to contest the use of restraints before ordering their use. If shackles or other mechanical restraints are used, the judge must make written findings of fact in his or her order.<sup>284</sup>

According to stakeholders, in recent years, the use of such restraints has become rare. One defense attorney noted only a single time they had ever seen a child in shackles, while covering a case for another attorney. Because the shackles came as a surprise to the defender, they said, "I didn't act, so he was in shackles. They were foot shackles. May have also been hands. I regret that I didn't say anything. I was caught off guard." Another defender noted, "Having kids shackled in holding puts the kids in a different headspace. It is stressful, and it is hard to have meaningful conversations with them. They are thinking about the shackles and not the case. But it is very rare they are shackled in the courtroom." Overall, nearly every stakeholder reported that children were almost never brought into the courtroom in any type of restraints. New Hampshire should be commended for being on the forefront of shackling reforms. However, defense attorneys must continue to advocate for shackles to be removed in the rare instances they are used in the courtroom, and all stakeholders should begin to review and address the shackling of children while being transported, while walking through the courthouse, and in holding cells.

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282 See, e.g. DAVID FASSLER, MD, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENT ON MANDATORY SHACKLING IN JUVENILE COURT SETTINGS (2015), <https://njdc.info/wp-content/uploads/2014/09/Mandatory-Shackling-2015-Final-Statement.pdf>.

283 See, e.g. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, *supra* note 200.

284 N.H. REV. STAT. ANN. § 126-U:13 (2020) (emphasis added).



## Reduced use of secure confinement

The Division for Children, Youth, and Families, within the Department of Health and Human Services, provides supervision and rehabilitative services to youth adjudicated as delinquent through Juvenile Justice Services (JJS). JJS operates the Sununu Youth Services Center (SYSC), which provides secure placement for committed youth between the ages of 13 and 17. The average length of stay is eight to 12 months.<sup>285</sup> Of the 1,974 delinquency cases opened in 2019, only 59 (three percent) resulted in youth being committed to SYSC.<sup>286</sup>

JJS also operates the Youth Detention Services Unit (YDSU) for youth awaiting adjudication. YDSU is a co-ed facility with 24 beds that houses youth up to age 17 pre-adjudication.<sup>287</sup> Throughout 2019, only 58 youth were detained at YDSU.<sup>288</sup> The assessment team was unable to obtain data on the average daily population or the average length of stay, but stakeholder interviews suggest that detention rates were low, with approximately six or seven youth held at any one time.

Many stakeholders reported, and recently available data confirmed, that the numbers of both detained and committed youth in New Hampshire have dropped by approximately 50 percent over the past five years,<sup>289</sup> while delinquency petitions filed have remained approximately the same.<sup>290</sup> In addition to the drop in the number of children held at SYSC, facility staff reported an increase in attorney involvement in cases of committed children.

Justice and children's advocates continue to work to further reduce the number of youth held in secure facilities. The decrease is promising, but needs to be closely monitored to ensure continued success.

## Legislation to increase youth access to counsel & reduce fees & costs

At the time of the writing of this assessment report, several bills that would improve young people's access to justice and reduce collateral consequences of juvenile court involvement have been introduced in New Hampshire's legislature. A recently enacted law also addresses the costs of counsel for young people.

House Bill 1138 would establish a commission to explore expanding young people's right to counsel.<sup>291</sup> House Bill 1249 would provide for continued legal representation throughout a child's court involvement and out-of-home placement.<sup>292</sup> House Bill 1657 would remove the requirement that parents and guardians reimburse the state for services provided to a child or family.<sup>293</sup> These are the fees and costs paid to DHHS discussed above in Section II.B.1.c. These bills are hopeful indicators of an interest in and appetite for improving juvenile defense and juvenile court in New Hampshire.

Effective July 1, 2020, reimbursement for costs of counsel has been limited to only "a defendant who has been convicted or a juvenile who has been found delinquent,"<sup>294</sup> rather than being assessed to every person who receives appointed counsel. This new law should reduce the number of young people who are assessed the costs of an attorney, and requiring reimbursement only after a finding of delinquency should help lessen the incentive for young people to waive their right to counsel and plead true at the initial arraignment. However, it is unlikely that youth and families will be aware of this distinction, and the costs of counsel will still be imposed on youth who are ultimately found involved. This new law is a step in the right direction but does not go far enough. As discussed in Section II.B.1. on fees and costs, children must never be charged for accessing their constitutional right to counsel.

285 *Juvenile Justice Services*, N.H. DEP'T OF HEALTH AND HUMAN SERVS., <https://www.dhhs.nh.gov/djjs/index.htm> (last visited Apr. 14, 2020).

286 N.H. DEP'T OF HEALTH AND HUMAN SERVS., DIV. FOR CHILDREN, YOUTH AND FAMILIES, ANNUAL DATA BOOK 2019 21 (2019), <https://www.dhhs.nh.gov/dcyf/documents/data-book-2019.pdf>.

287 N.H. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 78.

288 N.H. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 286, at 21.

289 *Id.*

290 *Id.*

291 H.B. 1138, 2020 SESS. (N.H. 2020).

292 H.B. 1249, 2020 SESS. (N.H. 2020).

293 H.B. 1657-FN-A, 2020 SESS. (N.H. 2020).

294 N.H. REV. STAT. ANN. § 604-A:9 (2020).

## Strong confidentiality protections in juvenile court

Many states provide a presumption of confidentiality for juvenile court proceedings and records. These presumptions can protect youth rights and prevent or mitigate the harms of court involvement, including school pushout, denial of housing, difficulties obtaining or maintaining employment, being denied acceptance to the military, and a host of other collateral consequences. Ideally, juvenile court records should remain entirely confidential and ultimately be destroyed. However, many states allow at least some public access to juvenile court and juvenile system records.<sup>295</sup>

In New Hampshire, both juvenile court proceedings and juvenile court records have strict limitations on who may access them.<sup>296</sup> By law, all juvenile case records are considered confidential.<sup>297</sup> Delinquency court records generally must be kept in books and files separate from all other court records, with few exceptions.<sup>298</sup> Such records are not available to the public, but are open to inspection by officers of the institution where the youth is committed; juvenile probation and parole officers; a youth's parent, guardian, custodian, and attorney; the relevant county; and others entrusted with the "corrective treatment" of the youth.<sup>299</sup>

Additional access to court records may be granted by court order or upon the written consent of the youth.<sup>300</sup> Once an adjudicated youth reaches age 21, all court records and individual institutional records, including police records, must be closed and placed in an inactive file.<sup>301</sup>

Police officers and prosecutors involved in the investigation and prosecution of criminal acts are authorized to access and use police records concerning delinquency, including the files of persons over the age of 18 at the time of the inquiry.<sup>302</sup> Prosecutors may access these same records of an individual who may be a witness in a criminal case.<sup>303</sup> The prosecutor may disclose an adjudication for delinquency only when disclosure is constitutionally required or after the court orders its disclosure.<sup>304</sup>

The Department of Safety, a division of the State Police, discloses youth registration information to law enforcement agencies if the court has found the youth is required to register as a sexual offender or offender against children.<sup>305</sup> A youth's requirement to register as a sexual offender or offender against children cannot be made available to the public.<sup>306</sup>

In New Hampshire, any unlawful disclosure of juvenile records is a misdemeanor.<sup>307</sup>

New Hampshire law does provide an exception to confidentiality when the young person has been adjudicated of a "violent crime." In these cases, the clerk may release the young person's name, the offense for which the young person was adjudicated, the custody status of the young person, and information about the final disposition.<sup>308</sup> This exception can cause significant harm to a young person's future, as it allows this information to be included in commercial background checks used by employers, landlords, and colleges.<sup>309</sup>

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295 *Compare States*, CLEAN SLATE CLEARINGHOUSE, <https://cleanslateclearinghouse.org/compare-states/> (last visited Apr. 14, 2020).

296 *New Hampshire*, CLEAN SLATE CLEARINGHOUSE, <https://cleanslateclearinghouse.org/states/new-hampshire/> (last visited Apr. 14, 2020).

297 N.H. REV. STAT. ANN. § 169-B:35 (2020).

298 *Id.*

299 *Id.*

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*

305 N.H. REV. STAT. ANN. § 651-B:2 (2020).

306 N.H. REV. STAT. ANN. § 651-B:7 (2020).

307 N.H. REV. STAT. ANN. § 651-B:36 (2011).

308 N.H. REV. STAT. ANN. § 169-B:36(II) (2020).

309 *See generally*, Joy Radice, *The Juvenile Record Myth*, 106 GEO. L. REV. 365 (2018).



# A CALL TO ACTION RECOMMENDATIONS



## **The recommendations that follow represent the principle areas in which New Hampshire can address gaps in access to and quality of defense representation for youth in the delinquency system.**

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### **Implement a strong, well-resourced, specialized system of juvenile defense**

New Hampshire should implement and enforce a system of specialized juvenile defense representation. The New Hampshire Judicial Council, through its authority to contract with an entity to provide indigent defense services or, alternatively, an alternate public defender system, should specify requirements for affording specialized juvenile defense services. The contract should support specialized juvenile defense training, ancillary defender services, and dedicated or specialized juvenile defense practice.

### **Establish & support juvenile defense leadership and require specialization in juvenile defense**

New Hampshire should create a statewide juvenile defense leadership position and juvenile units. The statewide position should oversee the development of juvenile defense as a specialty, juvenile defense training, and the provision of juvenile defense services across the state. Juvenile defenders and staff should have the same salary, promotion, and leadership opportunities as other defense attorneys and staff. Private attorneys appointed to juvenile cases should have access to training, support, and mentorship that allows them to develop expertise in juvenile defense.

### **Eliminate flat-fee contracts for private attorneys representing youth in delinquency court**

Flat-fee contracts provide a disincentive for attorneys to spend the requisite time and resources on a case and encourage attorneys to close cases quickly and move to the next case, regardless of the outcome. The New Hampshire Judicial Council's contracts with private attorneys for juvenile representation should include an hourly payment schedule, without caps, that adequately compensates contract counsel for the actual time spent working on each case. The payment schedule should, at a minimum, have parity with contracts for adult criminal defense.

### **Establish state standards for juvenile defense attorney qualifications & performance**

New Hampshire should promulgate and enforce state standards for juvenile defense attorneys that outline qualifications and guide ongoing performance. Juvenile defense representation requires not only the skills necessary to be a zealous criminal defense attorney and the meeting of legal ethical obligations, but also an understanding of a range of issues and systems



particular to representing youth. Standards should outline the training and qualifications necessary for attorneys to begin representing youth in delinquency proceedings, requirements for ongoing juvenile defense-specific training, and performance standards attorneys must abide by when representing youth. The state should establish a process to oversee implementation of and adherence to the standards.

### **Provide & require juvenile defense-specific training to public defenders & appointed counsel**

New Hampshire should require all attorneys, whether public defender or contract counsel, who represent youth in delinquency court or youth certified to adult court to receive ongoing, juvenile-specific training. The entity the Judicial Council contracts with to provide juvenile defense services should provide juvenile defense-specific training opportunities across the state. Such training should include, but not be limited to: delinquency law and procedure; the role of expressed-interest counsel in delinquency proceedings; child and adolescent development; youth competence to stand trial; communicating with and counseling youth clients; advancing racial justice; probable cause and detention advocacy in delinquency court; Fourth Amendment challenges specific to youth; challenging youth statements; guilty pleas and counseling youth clients; disposition advocacy; defending against transfer to adult court; defending juvenile sex cases; immigration consequences for youth; collateral consequences of delinquency court involvement; special education issues; defending against school-based offenses; adolescent mental health, trauma, and resiliency; and how to incorporate a client's identity (e.g. race, sexual orientation, gender, disability, immigration status) into advocacy when relevant. Trainings on topics such as communication skills, cultural sensitivity, and expressed-interest advocacy should incorporate the expertise of and guidance from youth who have experienced the juvenile legal system.

### **Eliminate all fees & costs associated with access to a publicly funded juvenile defender**

Youth should receive the benefit of appointed counsel regardless of their family's ability to pay for that attorney. The fees and costs New Hampshire charges youth and families to access a youth's constitutional right to counsel have a chilling effect on whether youth receive counsel and the amount of time the attorney works on the case, sometimes contributing to representation terminating prematurely. New Hampshire should abolish all fees and costs associated with young people's access to counsel.

### **Eliminate all fees & costs related to juvenile court & the juvenile justice system**

New Hampshire should eliminate all fees and costs assessed to youth and families as part of the youth's involvement in the juvenile court system, including fees and costs for evaluations, diversion, detention, programming, placement, and probation. No child should be denied the opportunity to participate in pre-trial, post-disposition, or diversionary programming because they are unable to afford it, and youth and families should not be saddled with financial burdens long after a young person's involvement in the juvenile legal system has ended.

### **Provide counsel to youth during law enforcement interrogations**

Police questioning is an especially fraught experience for youth. They face an inherent imbalance of power, they are particularly susceptible to manipulative strategies commonly used in interrogations, and they often waive their rights or offer confessions in response to unrealistic or short-term incentives. Interrogation should be recognized as a critical stage of the proceedings at which young people should be represented by publicly funded defense counsel. New Hampshire should pass legislation requiring that children consult with qualified juvenile defense counsel prior to interrogation.

## **Automatically appoint counsel for all youth prior to their first appearance.**

New Hampshire should ensure that juvenile defense attorneys are appointed prior to, rather than at the time of, arraignment in juvenile delinquency cases, to allow for sufficient attorney-client communication prior to the arraignment hearing. The state, juvenile courts, and defense counsel must create processes that allow for earlier, more frequent, and more significant attorney-client contact and protect youth's due process rights. Critically, under current practice in New Hampshire, a young person can be placed outside of their home without counsel present, in a blatant violation of those rights.

## **Allow youth to waive counsel only after consulting with a qualified juvenile defender**

Waiver of counsel in delinquency cases places youth in the untenable position of facing the power of the state and the authority of the court without an advocate who can guide them and protect their rights. Youth are particularly vulnerable to giving up their rights without fully understanding the consequences of doing so. New Hampshire should require that all children, regardless of age or charge, consult with a juvenile defense attorney prior to waiving their right to counsel at any stage of the proceedings.

## **Expand diversion options & include defense attorneys in diversion proceedings**

New Hampshire should increase its pre-filing diversion options, partner with community organizations to provide diversion services outside of law enforcement agencies, and eliminate fees and costs for youth to participate in diversion programs. Because defense counsel can help ensure youth understand diversion program requirements, make informed decisions about whether to enter a diversion agreement or program, and ensure the youth's due process rights are protected, the state

and juvenile courts should make juvenile defense attorneys available to consult with youth prior to the youth entering into diversion.

## **Ensure youth are represented throughout their involvement in the juvenile legal system**

New Hampshire should ensure that youth are represented by counsel throughout the entirety of their involvement with the legal system. Defense attorneys should not be removed from a case until the child is no longer under the supervision of the court or state. Attorneys must be compensated fairly for the work they do on cases post-disposition. Wherever possible, the same attorney who represents the youth in earlier phases of the case should represent the youth post-disposition.

## **Provide for increased confidentiality & earlier expungement of juvenile court records**

New Hampshire should increase the confidentiality of juvenile court records by removing exceptions to the sharing of certain case information and providing a clear pathway for law enforcement and court records related to juvenile system involvement to be expunged or destroyed soon after the closing of a case. A young person whose case records have been expunged or destroyed should be allowed to deny the offense ever happened, so that juvenile court involvement does not create obstacles to future achievements.

## **Provide & require multi-disciplinary stakeholder youth-specific training**

New Hampshire should provide multi-disciplinary training for stakeholders, including judges, defense attorneys, prosecutors, probation officers, and detention staff, that work in the juvenile legal system. Such trainings should include, but not be limited to: child and adolescent development, collateral consequences of delinquency court involvement, and disparities within the juvenile legal system based on race, ethnicity, gender, sexual orientation, disability, and immigration status.

## Eliminate the practice of police officers prosecuting juvenile cases

No non-attorney, including police officers who are not barred in the state of New Hampshire, should be permitted to prosecute cases or otherwise argue law or exercise legal judgment in juvenile courts. New Hampshire should eliminate the practice of police officers, who do not have sufficient legal training or ethical accountability, prosecuting cases against the state's children.

## Develop improved data systems

New Hampshire should enhance its case management systems to collect case and outcome metrics at the defense and court levels and data about the population of young people involved in the juvenile court system. Anonymized data should be available to be reviewed and analyzed by public defenders and contract attorneys. New Hampshire should publicly report on this data, and stakeholders should work to eliminate any disparities identified by the data.

## Eliminate systemic disparities in the juvenile court system

The state must engage in a comprehensive examination of existing disparities and develop actionable steps toward eliminating these inequities. Beyond keeping better data on disparities related to system involvement for youth of color, LGBTQ youth, youth with disabilities, and youth who are not native English speakers, New Hampshire must ensure all stakeholders are educated about these disparities, the policies that drive them, and strategies for overcoming implicit bias.

# APPENDICES

All Appendix documents are available online at:

<https://njdc.info/our-work/juvenile-indigent-defense-assessments/newhampshire/>.

## Appendix A: Judicial Branch Forms

1. Forms-Delinquency Petition
2. Forms-Juvenile Diversion Agreement
3. Delinquency Arraignment Order
4. Forms-Delinquency Acknowledgment and Waiver of Rights
5. Notification of Parental Responsibility in a Delinquency Case
6. Forms-Detention Assessment Screening Instrument
7. Forms-Delinquency Waiver of Counsel
8. Delinquency Hearing
9. Delinquency Dispositional Hearing Order
10. Notification of Eligibility, Liability & Repayment Order

## Appendix B: Financial Forms & Information

1. Forms-Financial Affidavit & Application for Court-Appointed Counsel
2. Indigent Defense Financial Eligibility and Liability Table (Eligibility Table)
3. DHHS Parental Reimbursement Financial Statement (Financial Statement)
4. DHHS Financial Planner
5. NH Fee Structure for Juveniles
6. DHHS Parental Reimbursement Brochure

## Appendix C: Other Related Materials

1. Sample Local Diversion Order (Manchester)
2. NHJC Contract for Attorney Services
3. Rules of Probation
4. Juvenile Closed Case Card



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