

...And
Justice
for all *Kids*



A Child's Right to "the Guiding Hand of Counsel"
and the State of Defense Representation for Children in Utah's Juvenile Courts

A Joint Report by Voices for Utah Children &
The University of Utah S.J. Quinney College of Law
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This report is the product of a yearlong collaboration between Voices for Utah Children and the University of Utah S.J. Quinney College of Law's Public Policy Clinic.⁽¹⁾ It follows two prior reports examining the state of the right to counsel in Utah, Failing Gideon: Utah's Flawed County-by-County Public Defender System, released by the ACLU of Utah in August 2011, and The Right to Counsel in Utah: An Assessment of Trial Level Indigent Defense Services, released by the Sixth Amendment Center in October 2015. Both reports focused on the systemic quality of Utah's public defender system as related to district and justice courts, shedding little light on the right to counsel in juvenile delinquency matters.

This report seeks to begin to fill the persistent gap in information regarding the right to counsel for children facing formal proceedings against them in juvenile court.

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*“The juvenile needs the assistance of counsel
to cope with problems of law,
to make skilled inquiry into the facts,
to insist upon the 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.”*

U.S. Supreme Court Justice Abe Fortas
In re Gault, 387 U.S. 1 (1967)

Executive Summary

More than 50 years ago, the US Supreme Court decided *In re Gault*, 387 U.S. 1 (1967), the landmark case which granted the right to legal representation for children (age 18 and younger) accused of crimes in juvenile court.

In recent years there has been much discussion among Utah policymakers and the public about Utah's struggles to meet its constitutional obligation to provide indigent defense services to adults. However, Utah's similar obligation to children, and its struggles to meet that obligation, have received less attention.

The State of Utah collects little data about if and when children are appointed counsel, or when they waive their right to counsel. To help fill these gaps in data, the Public Policy Practicum at S.J. Quinney College of Law, in collaboration with Voices for Utah Children, have set out to interview stakeholders and visit every juvenile court in the state to observe how the process of appointment of counsel works - or doesn't.

What we found is that while appointment practices in felony cases are generally good, wide variation in appointment practices and rates of representation persist in misdemeanor cases. Our observations and interviews indicate that youth will experience different levels of access to legal representation depending on the county in which they are charged, and the courtroom in which they appear. Of the 196 proceedings we observed, 57 (29%) involved a young person who was without legal counsel including in proceedings where the child was at risk of detention or actually detained.

We also found that even when young people have legal representation, appointed defense attorneys are not consistently present at key junctures of court jurisdiction, including when young people may be at risk for state custody or confinement. Even in felony cases,

depending on where a young person lives, legal representation is inconsistent in post-disposition hearings.

The purpose of this report is to describe, through qualitative data developed from court observation and stakeholder interviews, the circumstances surrounding appointment of delinquency counsel in Utah's juvenile courts, and to inform a broader discussion about how our state can ensure this constitutional right in both policy and practice.

Our hope is that by revealing these variations and inconsistencies in our state's juvenile court system, we can contribute to an empirically-driven process of reform that will result in comprehensive juvenile representation and respect for the constitutional right to counsel for all youth. For the convenience of the reader, we have condensed our findings into the following key points.

1. Youth experience better legal outcomes when they have a public defense attorney representing them in juvenile court proceedings.

Lack of legal counsel is problematic not just as matter of formal procedure; appearing without a defense attorney holds real and serious consequences for children in court. Juvenile court proceedings, including those related to misdemeanor offenses, can result in a child being removed from the family home, or detained in a secure state facility. Even misdemeanor juvenile proceedings may result in far-reaching collateral consequences that can negatively impact a youth's ability to join the military, pursue higher education, obtain housing, or secure certain types of employment in the future.

Many Utah juvenile court judges believe that youth experience different outcomes in their court proceedings, depending on whether they are represented by defense counsel. The most obvious difference, and perhaps the most disturbing, is in the severity of the punishment meted out by the court. One judge shared an experience in which this was starkly evident: the judge had presided over a case with two co-defendants, one of whom was unrepresented, the other of whom had legal counsel. According to the judge, the co-defendant who had an attorney received a “better” deal from the prosecutor. This judge expressed a strong conviction that defense attorneys are able to work out practical compromises on behalf of their clients, than the client would be able to secure on their own.

Most youth and their families are inexperienced with the judicial process, and unaware that negotiation is possible during the adjudication process. This lack of knowledge on the part of youth and their families can result in perhaps unnecessarily severe dispositions or collateral consequences that could have been avoided, if only for the intervention of a knowledgeable defense attorney.

2. Young people in rural counties face greater barriers to legal representation than youth in urban counties.

In many of Utah’s less populous counties, young people are more likely to face a delay in their court proceedings, should they request to be represented by an attorney. In some of those counties, because the court does not presume to appoint a defense attorney immediately when a court petition is filed, young people often appear at initial hearings without any defense attorney present in the courtroom. If the youth opts to exercise their right to be represented, this request may result in a delayed proceeding, with perhaps an additional two- or three-hour roundtrip drive required for a new appearance in court when a defense attorney is available.

Such logistical realities create a unique pressure on rural youth to waive their right to counsel. In counties where juvenile court proceedings are only held once a week or even once a month, request for counsel can effectively ensure that a young person’s time in juvenile court will be lengthier than that of a young person in an urban area, even for the same delinquent behavior. This is particularly disturbing in the case of young people who are detained prior to arraignment. In such cases, any delay means additional time in a secure state facility, away from their home. The desire to avoid additional unnecessary detention creates an overwhelming pressure to waive the assistance of an attorney.

Additionally, public juvenile defense attorneys serving in rural counties commonly face substantial burdens of travel, making it more likely that a young person will appear in juvenile court unrepresented for many types of important court proceedings, including detention hearings. In populous urban counties with more resources (particularly those with formal public defender associations), defense attorneys typically are able to attend all or most proceedings with their young clients. Additionally, we observed that in these larger urban counties, it is common for juvenile defenders to be incidentally and conveniently available to step in for hearings as necessary, even for youth who are not their formal clients. This is much less likely to be the case in rural counties, where public defenders must plan much more carefully how to allocate their time between courtrooms and clients.

3. Because appointment of counsel practices vary significantly across Utah, particularly in misdemeanor cases, youth are present without the assistance of a defense attorney at key junctures of their court experience.

The actual practice of appointment of defense counsel for youth – how and when a judge assigns a defense attorney to represent a young person in their juvenile

court experience - varies from county to county, and from courtroom to courtroom, across the state. These include variations with regard to: which court petitions for delinquent behavior trigger the automatic appointment of a defense attorney by a judge; the point at which legal counsel is appointed; and the process by which a defense attorney is or is not appointed.

One of the most dramatic variations occurs with regard to whether appointment of counsel is presumed in misdemeanor cases. In some counties, judges presume that every young person charged with a misdemeanor will need a defense attorney, and automatically appoints counsel accordingly. In other counties, appointment of counsel is contingent upon a young person affirmatively asserting their right to counsel, declining to waive that right, and also participating in a process to determine their family's financial eligibility for court-appointed counsel.

In accordance with Utah statute, youth facing a felony-level court petition are automatically appointed a defense attorney, regardless of ability to pay or formal request. Consistent with that statutory requirement, Utah juvenile courts do appoint a defense attorney for nearly every young person facing a felony-level charge.

However, in many counties, youth charged with misdemeanors often appear in court unrepresented. At least one judge confirmed that most of the youth appearing in his court to answer for misdemeanor charges were unrepresented for the entirety of the juvenile court's jurisdiction over the youth. In other counties, judges reported that appointment of defense counsel is automatic, regardless of the offense charged; youth are required to take no action to secure a defense attorney to represent them.

Several judges take a "middle-of-the-road approach," choosing to extend the practice of automatic appointment to include youth charged with any Class A misdemeanors, citing the immense legal implications associated with that level of offense (i.e. submitting

fingerprints and DNA samples for use in law enforcement databases). One interviewed judge reported that they automatically appoint counsel in any case where the youth's parents are the victims of the youth's misconduct, to alleviate potential conflicts of interest.

4. In the absence of automatic appointment of a defense attorney, and even when judges advise young people of their right to counsel, certain practices and logistical realities may present unintentional barriers to exercising that right.

Judges in all counties were observed – if they did not automatically appoint-- to consistently inquire, in the early stages of court jurisdiction, as to whether a charged youth would like to waive their right to counsel or to apply for an attorney. In most counties, judges would wait until the young person was present in the courtroom for the proceeding, then explain their options – to either apply for counsel or waive the right to counsel – to the youth.

In many cases, the judge reads questions from the application for counsel form out loud to the youth, and completes the form on the young person's behalf. Once or twice, a judge was observed to hand the application for appointment of counsel directly to the young person, then wait while the young person completed the application on their own.

In at least one county, we observed that youth are asked to complete (prior to entering the courtroom) a written document that expresses either their request for a defense attorney or their waiver of the right to counsel. The timing of this process means that a young person must decide whether they want an attorney, before the judge has an opportunity to advise them of the consequences of such a decision.

For those jurisdictions without automatic appointment, there remains a burden on youth to request legal representation and some current processes and logistical issues may unintentionally incentivize waiver of counsel. In rural counties, limited resources and, sometimes, extensive travel requirements, mean that in many courtrooms, invoking the right to counsel necessarily means a delay in the process of adjudication. If an unrepresented youth requests counsel at one of these hearings, the judge typically is compelled to delay the hearing until a later date, at which point a defense attorney can be present on behalf of the youth.

5. Though judges consistently advise youth of their right to have an attorney, the content of that advisement varies greatly from courtroom to courtroom.

All judges are required to inform any youth appearing before them of that youth's right to defense counsel. Judges are also required to determine whether a youth who waives the right to counsel, is doing so voluntarily and knowingly. The actual content of this explanation of the right to counsel was observed to vary dramatically from judge to judge, as well as from proceeding to proceeding in the same courtroom.

We observed several judges who vigorously emphasize the importance of a defense attorney, providing precise examples of ways in which a defense attorney could help a young person appearing in court. Other judges are neither so descriptive nor emphatic in their explanations of the importance and purpose of legal representation. After a youth states that they wish to waive, these judges may simply proceed with the hearing without further inquiry, despite potentially serious legal consequences for the youth.

6. Many Utah juvenile court judges are concerned that youth who waive their right to have a defense attorney are not doing so in a "knowing and intelligent" manner, but in response to logistical and familial concerns.

Most juvenile court judges to whom we spoke expressed doubts that the young people who appear before them and waive their right to counsel, do so with sufficient understanding of the potential implications for their future court proceedings. Judges expressed that, overwhelmingly, a youth's decision to waive counsel involved a significant lack of understanding as to the role and influence of a defense attorney in the court process. Judges expressed consistent concern that even when a young person is insistent upon proceeding without legal counsel, that young person generally does not comprehend the potential consequences of waiving the right to counsel.

One judge emphatically expressed his belief that representation is needed for every young person in every hearing, because juveniles lack the "experience and capacity" to understand the full ramifications of waiving. "I believe it is a legal fiction," the judge told us, "to say that a juvenile can knowingly and competently waive their right to counsel."

Specifically in rural areas of the state, judges mentioned that young people would waive counsel simply to avoid a delay in proceedings. In these areas, the distance to the courthouse and the frequency of proceedings can mean both a long wait and a lot of inconvenience, should the proceeding be continued until a defense attorney is available. Young people in rural counties appear more likely to waive counsel than young people in more populous counties, due to these added barriers to speedy resolution.

In our interviews with judges, we learned of several other justifications for waiver of counsel by youth appearing in juvenile court. Based on their experience and opinions, judges shared the following overarching reasons as to why youth appearing in their courtrooms choose to waive their right to an attorney: the youth (and/or sometimes their parents) believe the situation will be more quickly resolved if they waive and immediately proceed without an attorney; the youth mistakenly believes asserting the right to counsel means they will be perceived as not wishing to take accountability or admit to the charges; and parents or other family members do not wish to retain counsel for any number of other reasons (including financial concerns and a desire to make their child “take responsibility”), and these adults then directly or indirectly influence the youth to waive.

7. The process by which a court determines a young person’s financial eligibility for a public defense attorney can present obstacles to young people realizing their right to legal counsel.

The practice of determining indigency (the financial inability to retain a private attorney) varies from courtroom to courtroom. As post-disposition hearings comprised the bulk of our court observations, we did not have occasion to witness many procedures for determining indigency. What we did learn, however, indicates there is cause for concern.

In some counties, youths are required to fill out a form attesting to their indigency. These forms ask for family financial information that might not be readily available to a young person. While many young people appear in juvenile court accompanied by a parent or other guardian who might provide assistance, others do not have such support. The unaccompanied youth, presumed to be not indigent at the outset of proceedings (as per Utah statute), must either proceed without counsel until a determination of indigency can be made, or delay court proceedings.

In one county where counsel is automatically appointed, a judge informed us that if the court determines, after speaking with a youth and the youth’s family, that the family does not qualify as indigent, defense counsel will request to terminate appointment. By contrast, in a different county where counsel also is automatically appointed, the youth will be represented at all hearings, regardless of the family’s financial circumstances.

8. Defense attorneys appointed by the court are not consistently present at key stages of court jurisdiction, including when young people may be at risk for removal from their home and/or detention in a secure state facility.

Of the 196 proceedings we observed, 57 (29%) involved a young person who was without legal counsel. These proceedings included all types of hearings, from arraignment to review hearings; at least four were detention hearings.

Lack of representation at detention hearings, one of the most critical junctures of a delinquency case, is particularly concerning. Here is another area where variation in practice across counties and courts is stark. Early representation is generally not an issue in courts that practice automatic appointment for all youth appearing in formal proceedings. A defense attorney would be available to assist a young person whose pre-trial detention is being reviewed before arraignment, as well as at the subsequent arraignment.

By contrast, in counties where an attorney is not appointed until after a financial eligibility determination can be made, young people are likely to have no defense counsel available to help them navigate detention hearings. This is because financial assessments do not occur until the arraignment stage, which will occur after the detention hearing.

Defense attorneys are not consistently present after a court disposition has been determined and imposed by the judge, including in felony matters. In a few counties, the appointed public defender is present for all proceedings, including review hearings, until the court's jurisdiction over the youth is officially terminated. This practice appears to be the exception to the rule, and primarily in use in the most populous, resource-rich counties. In those counties, defense attorneys are present and available to present arguments against detention, file motions to adjust fines or extend deadlines for restitution payments, expedite review hearings in instances when a child is ready to leave placement and file motions for reductions in charges.

In other counties, even when public defenders are required to represent their young clients past the disposition stage, some opt not to attend subsequent review hearings. Some judges reported that they release the public defense attorney from representing a youth immediately after the disposition of that youth's case, typically due to resource and logistical issues. The public defender then attends no subsequent hearings, despite the fact that determinations can be made at those hearings that impact a youth's freedom.

9. The vast majority of youth appearing in juvenile court with legal representation are represented by a public defender.

Our observations revealed that for every nine youth who appeared in court with a public defender representing them, only one youth appeared with a privately-hired defense attorney. Judges generally expressed confidence in the public defenders who appeared before them. At least two judges felt that public defenders were able to resolve cases more quickly than private defense counsel, and that private attorneys were more likely to take a case to trial. Others explained that public counsel have a rapport with the prosecutor that allows for more effective negotiations, and also a familiarity with judges that produces plea deals more likely to be approved by the court.



Methodology

The observations and interviews conducted for this report all occurred during the 2018 calendar year, with the bulk of the work occurring between April and November.

Court observations were conducted by members of the staff of Voices for Utah Children who had familiarity with criminal and juvenile justice issues, and law students in the Public Policy Practicum of the University of Utah S.J. Quinney College of Law.

All interviews with juvenile court judges, prosecutors and public defenders were conducted by law students enrolled in the Public Policy Practicum.

The observations and interviews specifically focused on: how and when appointment of counsel is made in delinquency cases; how and when young people are informed of their right to an attorney; court practice regarding waiver of counsel by youth appearing in juvenile court; and the duration of representation in relation to the duration of court jurisdiction (i.e. at what time is appointed counsel terminated).

Court Observations

We observed 196 distinct proceedings (which occasionally included one or more aspects of court business within a single proceeding, with one youth as the subject of all business). These 196 observations were made in 27 of Utah's 29 counties.(2)

Observers took freeform notes, primarily on laptop computer, and then applied the information in the notes to the Observation Form within one (typically) to three (seldom) weeks from the time of the observations. Present in juvenile courts to observe delinquency proceedings, our observers had occasion to also observe child welfare and custody proceedings, which

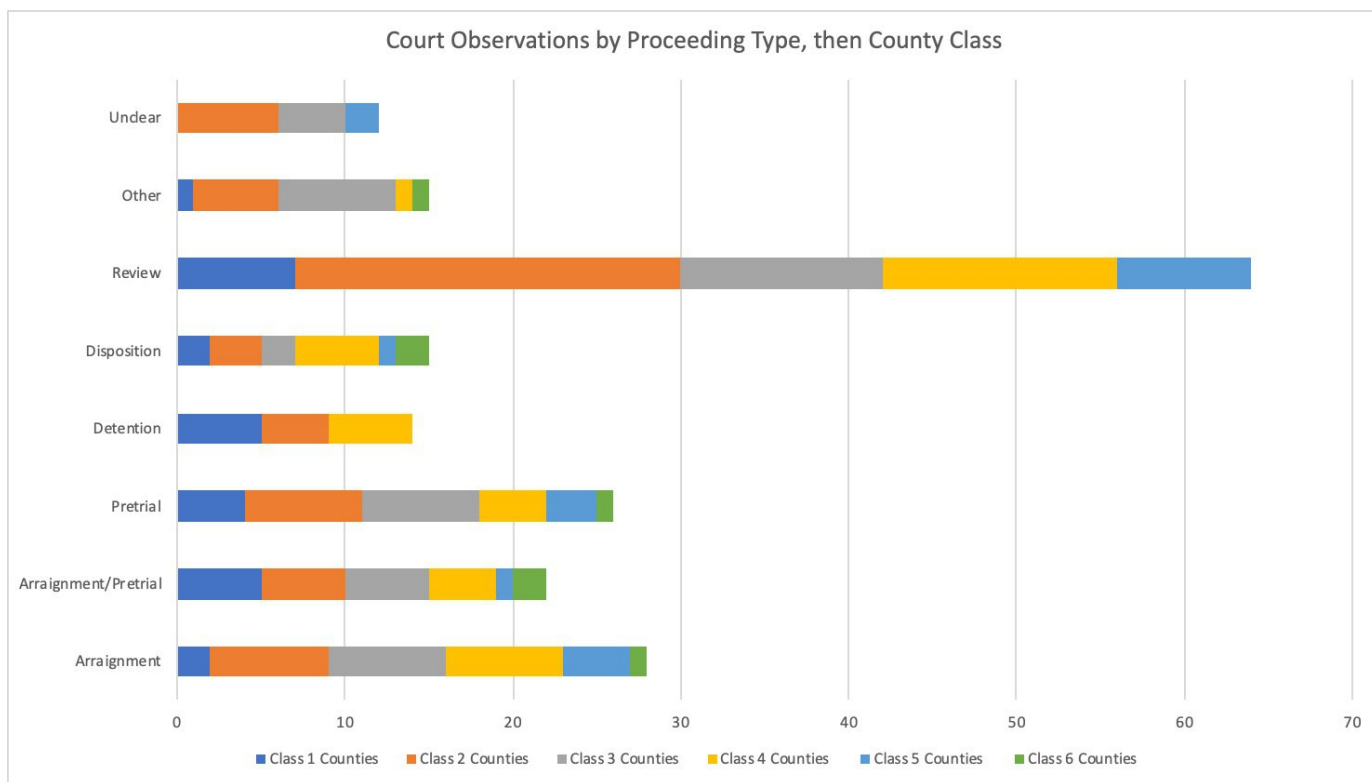
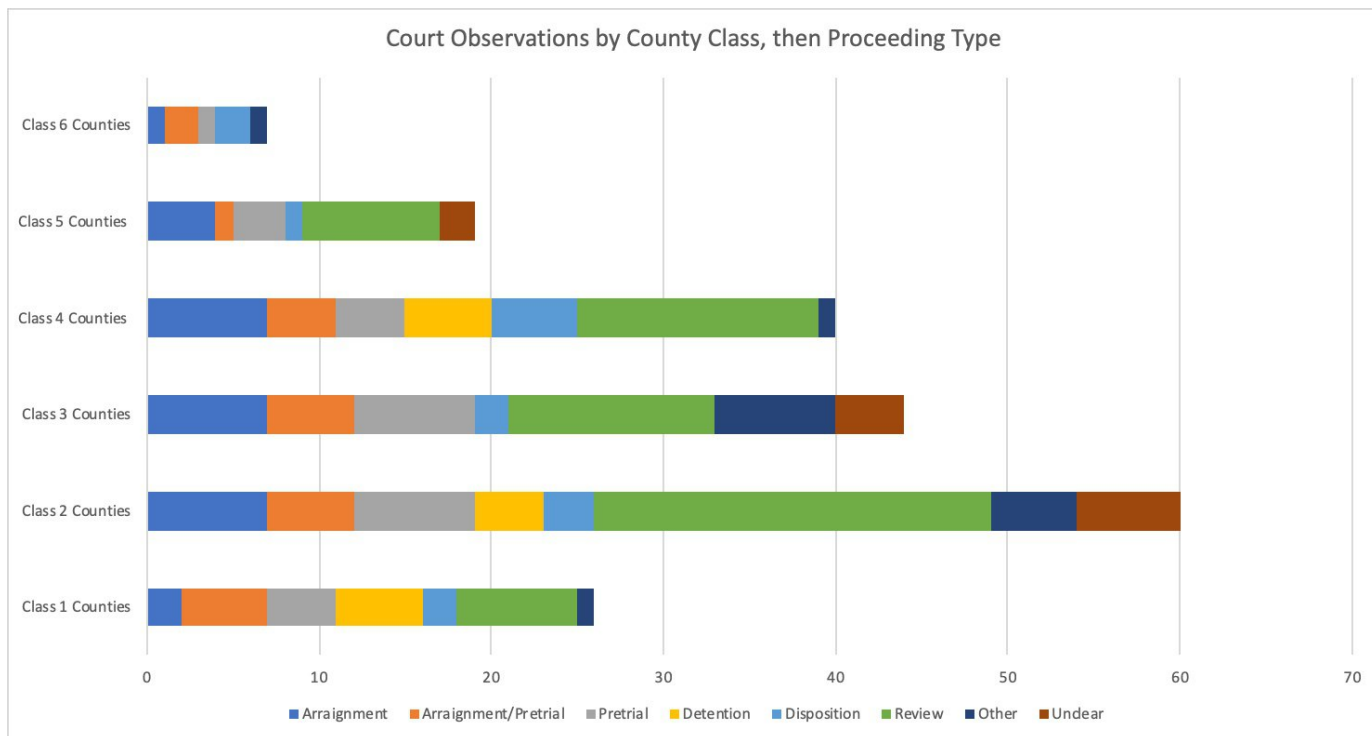
are also the purview of the juvenile courts.

Observations of proceedings solely dedicated to child welfare and custody are not included among the 196 proceedings that inform this report.

Location of Observed Proceedings

Rather than group observations by Judicial District, individual county or specific courtroom by city location, we instead have opted here to group observations by the county classification of the county in which the observation was made (see next page). We have used the county classification system established by the Utah State Legislature's Political Subdivisions Interim Committee, current as of June 2018.

This categorization is used for two main reasons. First, it is not the aim of this report to suggest that the conduct or practice of individual juvenile court judges, prosecutors or public defenders is to blame for inconsistencies and insufficiencies with regards to appointment of counsel for young people appearing in juvenile court. Thus, we have used a system of categorization that reflects the relative rural and urban nature of counties, without providing information that leads to identification of specific judges, prosecutors or defense attorneys. Second, our interviews and observations confirmed our hypothesis that availability of resources as well as travel demands contributes to the inconsistencies in juvenile court representation across the state. We selected this classification to reflect the relative size, density and financial resources of the various counties in which the observations were conducted. The county classifications used are based on county population and also county government budget, making this a helpful proxy for the aforementioned resource issues.



Guide to County Classes in Utah

(Most Urban/Most Populous (1) to Most Rural/Least Populous (6))

Class One (1) Counties: Salt Lake

Class Two (2) Counties: Cache, Weber, Davis, Utah, Washington

Class Three (3) Counties: Box Elder, Tooele, Summit, Wasatch, Uintah, Iron

Class Four (4) Counties: Duchesne, Carbon, Juab, Millard, Sanpete, Sevier, San Juan, Morgan

Class Five (5) Counties: Emery, Grand, Beaver, Garfield, Kane

Class Six (6) Counties: Piute, Wayne, Daggett, Rich

Of the 196 court proceedings observed: 26 occurred in Class One Counties; 60 in Class Two Counties; 44 in Class Three Counties; 40 in Class Four Counties; 19 in Class Five Counties; and seven in Class Six Counties.

Type of Observed Proceedings

We used a Standardized Court Observation Form shared with us by the National Justice Defender Center (NJDC), and categorized the proceedings we observed according to those listed on the form (see opposite page).

Of the 196 court proceedings observed: 28 were determined by the court observer present to be arraignment hearings; 22 were a combination of pre-trial and arraignment hearings; 26 were pretrial hearings; 14 were detention hearings; 15 disposition hearings; 64 were post-disposition review hearings; 15 were “other”; and 12 were “unclear.”

The category of “Other” includes such proceedings as a full trial, the transfer of juvenile between facilities, and discussion of restitution related to an adjudicated offense. Proceedings were marked as “other” if and when they did not fall under one of the major categories proffered on the NJDC’s standardized Court Observation Form.

The category of “Unclear” is meant to reflect proceedings, the nature of which could not be easily distinguished based upon observation, and for which clarification from the judge or court clerk was not available. “Unclear” proceedings can be explained by two primary factors: 1) the relative inexperience of court observers with juvenile court proceedings and 2) the nature of juvenile court proceedings, which often combine multiple types of system interactions. It is not uncommon for a young person to appear in juvenile court for a review hearing for an adjudicated offense, and at the same time, have to answer for new charges, allegedly committed while still under court jurisdiction. In addition, a young person may be in court for a

combination of child welfare and juvenile delinquency proceedings. Rather than explain the nature of every proceeding or combination of proceeding, judges and present attorneys regularly refer to court documents that are not available for review by court observers. The less familiar an observer is with the nature of juvenile delinquency proceedings, the more difficult it can be to determine what, precisely, is occurring during a brief proceeding without access to descriptive court documents.

Stakeholder Interviews

Interviews were arranged primarily via court clerks and other administrative staff within the juvenile court system. Interviews were conducted almost entirely in judges’ chambers and in the respective offices of both defense and prosecuting attorneys.

We spoke with 20 out of 30 sitting juvenile court judges: one of two judges in the First Judicial District (comprising Box Elder, Cache and Rich Counties); four of the six judges in the Second Judicial District (Weber, Davis, Morgan); three of the ten judges in the Third Judicial District (Salt Lake, Tooele, Summit); all five judges in the Fourth Judicial District (Wasatch, Utah, Juab, Millard); both judges in the Fifth Judicial District (Beaver, Iron, Washington); the sole judge in the Sixth Judicial District (Sanpete, Sevier, Piute, Wayne, Garfield, Kane); both judges in the Seventh Judicial District (Carbon, Emery, Grand, San Juan); and both judges in the Eighth Judicial District (Duchesne, Uintah, Daggett).

Additionally, we spoke with county attorneys who prosecute juvenile offenders in the First, Third and Fourth Judicial Districts. We spoke with public juvenile defense attorneys in the Third and Fifth Judicial Districts. In lieu of speaking with one judge in the First District, we spoke with an experienced court administrator.

Indigent Defense and Juvenile Justice Reform Efforts: The Landscape in Utah

Recent Efforts to Improve Utah's Indigent Defense System

The past decade has seen much attention paid to the topic of the right to counsel in Utah. The Sixth Amendment guarantees each person a constitutional right to be represented by legal counsel when one's liberty is threatened in court, regardless of that individual's ability to pay for the services of an attorney.

In 2011, the American Civil Liberties Union (ACLU) of Utah released a report entitled *Failing Gideon: Utah's Flawed County-by-County Public Defender System*.^[5] This report, produced with substantial contributions from students and faculty at the University of Utah's S.J. Quinney College of Law, detailed uneven funding of public defender contracts across the state, and attendant variation in the practical availability of state-appointed counsel to meet the state's constitutional obligation.

In 2015, the Utah Judicial Council commissioned a study by the Sixth Amendment Center, a nationally-recognized organization committed to ensuring the full realization of American's right to defense counsel, entitled *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services*.^[6] This report provided extensive observations of both constructive and actual denial of counsel occurring throughout Utah's district and justice courts. The Sixth Amendment Center corroborated the ACLU of Utah's previous observations regarding persistent issues with insufficiently funded public defender contracts, lack of structural accountability and independence, and public defender workloads in excess of the American Bar Association's recommended standards.

The two reports, and subsequent concern from state policymakers, resulted in unprecedented legislative investment in the state's struggling public defender system. During the 2016 session of the Utah legislature, SB 155, "Indigent Defense Commission," was passed to establish a new Indigent Defense Commission charged with creating standards and providing oversight for the improvement of the state's public defender system. ^[7] While arguably underfunded in relation to the scale of the issue, the Commission has made commendable progress in its few short years of existence.

Neither *Failing Gideon* nor *The Right to Counsel in Utah* addressed the specific issues related to Sixth Amendment rights in the context of the juvenile courts. Because a number of counties include both juvenile delinquency and adult criminal defense responsibilities in the scope of a single public defender contract, some observations made in each of the reports related, by extension, to juvenile indigent defense. For example, juvenile delinquency cases contributed to inappropriately large workloads for some public defenders who handled all public defense responsibilities (including district, justice and juvenile court cases) in a single county. One public defender, who held such a contract in his rural county, reported that in order to sufficiently represent a juvenile client, he had to access and pay for technical assistance from a more experienced juvenile defender in a county with a formal public defender association.

Due to these overlaps in representation and contracting, particularly in smaller and more rural counties, the Indigent Defense Commission quickly realized that juvenile indigent representation must be

placed explicitly within its purview. Such an expansion was also strongly supported by the Judicial Council's Juvenile Indigent Defense Committee. This expansion in mandate was accomplished via SB134, "Indigent Defense Commission Amendments," passed during the 2017 legislation session. [8] The Commission hired an experienced lawyer with specialized expertise in juvenile indigent defense and began to address issues of indigent juvenile representation alongside those present in the district and justice courts.

During the 2018 legislative interim period, the Indigent Defense Commission convened a working group of juvenile court stakeholders, representing a broad range of perspectives. The working group included prosecutors, juvenile court judges, and juvenile justice services leadership. The working group developed a proposal to improve the process of appointment of legal counsel for young people appearing in juvenile court. This proposal was drafted into potential legislation, then presented to the legislature's Judiciary Interim Committee. Sponsored by Senator Todd Weiler (R-Woods Cross), this legislative proposal would work to ensure that young people facing delinquency charges have more consistent legal representation over the entire timeline of their involvement with the juvenile justice system. The proposal would also strengthen requirements for consultation with legal counsel before a young person waives the right to have a defense attorney represent them, and create a presumption of indigency for all young people appearing in juvenile court on charges of delinquency.

The legislature's Judiciary Interim Committee approved the proposal with near unanimous support, and the bill (SB 32, "Indigent Defense Act Amendments") will be considered during the 2019 legislative session. Voices for Utah Children has been vocal in its support of this legislative proposal (SB 32, "Indigent Defense Act Amendments"), and this support is reflected in the recommendations section of this report.(9)

Recent Efforts to Improve Utah's Juvenile Justice System

While discussion of juvenile indigent defense improvement is in the beginning stages in Utah, more general reform of the overall juvenile justice system is well underway. Certain aspects of this reform effort created positive changes in the nature of legal representation for young people appearing in juvenile courts.

Beginning in 2016, state policymakers, legislators, public administrators and other system actors undertook a statewide juvenile justice system analysis with the support of national technical and policy experts from the Pew Public Safety Performance Project. (10) This comprehensive system analysis resulted in an ambitious legislative proposal (HB239, "Juvenile Justice Amendments") that was signed into law by Governor Gary Herbert in the spring of 2017. (11)

Implementation of HB239 was staggered, with various aspects of the legislation taking effect at different times between the summer of 2017 and the fall of 2018. Subsequent legislation (HB132, "Juvenile Justice Modifications") delayed implementation of at least one specific reform element until summer of 2020.(12) Nonetheless, several changes in the system occurred quickly enough that we observed their impact in juvenile courts during 2018.

During the 2016 juvenile justice system analysis, researchers and policymakers discovered that youth were being held in detention or secure care for relatively minor offenses. Additionally, it appeared that being held in state custody – in fact, being involved in the system at any level – was producing poor outcomes for young people (as measured in recidivism

rates and changes in a youth's risk-to-reoffend profile). These poor short-term individual outcomes were associated with similarly negative long-term individual and societal outcomes, including: high taxpayer expense; decreased future educational attainment; future criminal justice system involvement; increased antisocial behavior and lack of respect for authority; and little demonstrable improvement in present or future public safety.

Hence, one key reform element included in HB239 was an end to the practice of referrals of young people, by public school administrators and school-based law enforcement, to juvenile court for low-level offenses committed on school property. Such offenses include truancy, possessing and/or smoking tobacco and "disorderly conduct." Though this reform was adjusted via HB132 to allow for a longer implementation and experimentation period by schools, many judicial districts nonetheless saw a significant drop in the number of minor delinquency petitions to juvenile court.

Utah's juvenile justice reform efforts also emphasized offering young people more opportunities to resolve delinquency charges without formal court involvement. HB239 dictated that first-time offenders, excepting those who are charged with more serious offenses, be offered a non-judicial adjustment ("NJ") in lieu of a petition to appear before a judge. An NJ provides a chance to make restitution and correct behavior without accumulating a formal juvenile record; it also reserves the time of juvenile court judges, prosecutors and public defenders for more consequential delinquency situations.

HB239's prohibition on court referrals for very minor offenses, coupled with an increase in the use of NJ interventions, resulted in fewer petitions to juvenile court

for low-level offenses. Interviews with juvenile court judges revealed that because most petitions to juvenile court post-HB239 were of a more serious nature (felony offenses, as well Class A and B misdemeanors), juveniles were much more likely to have appointed legal representation in 2018 than in the past. Due to the greater proportion of serious charges, judges also expressed that, more often than in prior years, they would question a young person's waiver of their right to have a public defender, or emphatically stress the collateral consequences of a potential disposition.

Current State of Data Collection Regarding Juvenile Representation

Due to a variety of factors, some of which are mentioned in this report, longitudinal quantitative data on appointment of counsel for Utah juveniles is lacking. Tracking of when a public defense attorney is appointed to, or released from, a juvenile delinquency case varies from district to district. While Utah's Administrative Office of the Courts deserves praise for generally excellent data collection and tracking, complexities in the juvenile justice system do not always align perfectly with available online data systems. This results in persistent gaps in information about whether a young person is represented by a defense attorney, public or private, at various stages of juvenile court jurisdiction.

This report offers largely anecdotal and qualitative information to begin to address basic issues of legal representation for young people appearing in juvenile court, partly because there is little reliable quantitative data available via the courts. One aim of this report is to further the conversation about data collection regarding appointment of counsel in juvenile courts. This is reflected in our recommendations. Some simple technical adjustments could improve future efforts to assess progress made in efforts to improve juvenile representation in Utah.

Legal Overview: The Right to Counsel for Youth in Juvenile Court

The Constitutional Right to Counsel for Children

The landmark case *In re Gault*, 387 US 1 (1967) established juveniles' right to be represented by legal counsel. In that case, the Supreme Court clearly articulated a number of due process rights to be afforded to children who are facing charges in the juvenile court.

As Justice Fortas wrote on behalf of the court: "Neither the 14th amendment nor the Bill of Rights is for adults only... The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the 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." (13)

In addition to Fourteenth Amendment due process under which *Gault* was decided, the Sixth Amendment also protects children's rights to assistance of defense counsel regardless of ability to pay for an attorney (*Gideon v. Wainwright*, 1963), and also to effective assistance of counsel (*Strickland v. Washington*, 1984) (14,15).

Under the law, children share more than due process protections with adults. During the last decade, the Supreme Court has repeatedly affirmed that children are to be afforded additional protections in the justice system. Young people must be afforded these extra

protections because "the features that distinguish children from adults also puts them at significant disadvantage in criminal proceedings" (*Graham v. Florida*, 2010). (16) For example, children must be afforded special consideration in the context of Miranda waivers, because "they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." (*J.D.B. v. North Carolina*, 2011). (17) These same vulnerabilities make children, even more so than adults, dependent upon qualified counsel to navigate the justice system.

Despite these clearly established rights, many states persist in struggling to implement the promises of *In re Gault*, including Utah. In Utah, youth often appear in juvenile court without a defense attorney to represent them, leaving them to navigate, on their own and without expert counsel, the legal intricacies of plea offers, trial proceedings, the requirements and compromises of court orders, and more. They are also left without any legal advice about how their court interactions and agreements may impact their future.

Utah's Current Statutory Framework for Juvenile Appointment of Counsel

Utah Code Ann. §78A-6-1111 ("appointment statute") is the statutory authority on how and when minors, parents, and legal guardians are eligible to receive court-appointed counsel in juvenile court proceedings. (18) Utah Code Ann. §77-32-202 ("standards for determining indigency") is also relevant to the discussion of determining financial eligibility for appointed defense services under the existing statutory framework. (19)

Advisement on the Right to Counsel

Utah's appointment statute makes clear that any delinquency action in juvenile court requires that the parent, legal guardian ("guardian") and the minor (when applicable) be informed of the child's right to be represented by counsel in every stage of the proceeding.

Appointment for Felonies

When a delinquency petition is filed, alleging felony-level offenses by a minor, the court must appoint counsel to appear for the minor, unless or until counsel is retained on the minor's behalf. The minor may not waive this right to counsel unless the court determines that the minor has first had a meaningful opportunity to consult with a defense attorney. If a minor wants to waive the assistance of counsel even after attorney consultation, the court must take into consideration the minor's unique circumstances and attributes in deciding whether to accept the waiver.

Appointment for Misdemeanors

In all other non-felony cases, the statute makes no presumption that the court is to assign defense counsel to represent a juvenile in delinquency proceedings. A youth charged in a misdemeanor petition would need to affirmatively act to ask in order to have counsel appointed. Due to the structure of the statute, a young person charged with a misdemeanor-level offense will be asked by the court whether they waive their right to counsel, before the young person has a chance to speak with an attorney (who could explain how legal representation may benefit the youth in future proceedings).

Financial Eligibility Determination

Assuming the child invokes the right to counsel, and does not waive, the actual appointment of counsel is still dependent upon a determination of financial eligibility.

When determination of indigency is being made for a minor, the court must follow the guidelines described in Utah Code. Ann. §77-32-202.27. Specifically, when dealing with a potentially-indigent minor, the court must consider the income and financial ability of the juvenile's household to obtain counsel on behalf of the juvenile. This almost always means that the finances of parents or household, rather than the assets of the juvenile directly, will direct the determination of indigency.

Indigency is defined by statute as being "without sufficient income, assets, or credit to provide for necessities" while also making payment for legal counsel. A defendant may also be deemed indigent if they have an income level at or below 150% of the poverty level and have not transferred or disposed of any assets since the commission of the offense to establish eligibility for appointment of counsel.

The current statutory process for determining indigence in Utah requires the defendant to file a complete and notarized affidavit with the prosecuting entity (in the case of offenses that are Misdemeanor Class A and higher). In juvenile court, the burden is on the young person accused of delinquent behavior, and their family, to ensure that the affidavit provides all factual information required by the statute to prove their indigency.

Concerns Regarding Existing Statutory Framework

The statutory framework provides safeguards similar to those afforded for adults charged who face charges in criminal court. However, these safeguards can be insufficient to ensure the right to an attorney for children, as children have substantively different capabilities, experience, financial capacity, and decision-making authority within the family. Due to the unique characteristics and social position of young people, existing statutory authority can, in some cases, operate as a practical barrier to accessing legal representation in a delinquency case.

Lack of valid waiver in misdemeanor cases

The US Department of Justice has taken the position that courts cannot ensure that a waiver of counsel from a young person is knowing, intelligent, and voluntary, when juveniles are not first provided counsel with whom they can consult.(20)

Several judges and representatives of the court have echoed the same position to us. As the law already recognizes fundamental developmental and intellectual differences between adults and juveniles, these juvenile court representatives assert, it may be inappropriate to assume that a young person can make a valid waiver of the right to counsel in any case where that youth has not first been counseled by an attorney.

Lack of presumption of appointment in misdemeanor cases and the process of determining financial eligibility
A young person's ability to pay for legal representation is currently assessed relative to their parents' financial means. According to statute, before a young person can be assigned a public defense attorney, the minor and/or their family must present to the prosecuting attorney or judge sufficient information and disclosures to qualify as an indigent person. In effect, minors in Utah are statutorily presumed not indigent until they affirmatively prove otherwise.

Several issues are created by this presumption against indigence. For example, a young person who is, in fact, unable to afford a private attorney, will likely receive no legal counsel at initial hearings (including proceedings related to pre-trial detention), because that young person has not yet proven that they are not able to afford an attorney. It is also possible that a young person facing delinquency proceedings, as well as their family members, may feel overwhelmed at the prospect of obtaining family financial information, and simply waive the right to counsel to avoid the difficulties of accessing information not readily known or available to them.

An additional issue is the appropriateness of linking a young person's right to counsel to their family's financial status. The household finances are the shared responsibility of all household members, and yet the constitutional right to counsel (and all the legal perils of waiving that right) belongs to the child, and to the child alone. Parents may intentionally or unintentionally influence a child's waiver of the right to counsel, given the financial burden of legal representation. A child typically does not have the power to make financial decisions for the family, but must experience the short- and long-term consequences of navigating the juvenile court system without legal assistance.



Findings:

Appointment of Counsel

We discovered that the practices of appointment of counsel varied not only from county to county, but from courtroom to courtroom. Variations were observed with regard to: which charged offenses incurred appointment of a defense attorney; the point at which legal counsel was appointed (and subsequently released) for a young person who had become involved in the system; and the process by which a defense attorney was appointed to represent a young person appearing in juvenile court.

Appointment by Charged Offense

In accordance with Utah statute, youth charged with misconduct that would be considered a felony offense if committed by an adult, are appointed counsel automatically, regardless of ability to pay or formal request. Several judges reported that they extended this statutory requirement to include youth charged with any Class A misdemeanors.

Other judges noted that they prefer to go even further, appointing counsel to any youth who come before them in a delinquency proceeding, regardless of the offense classification. Additionally, at least one interviewed judge reported that they automatically appoint counsel in any case where the youth's parents are the victims of the youth's misconduct, to alleviate potential conflicts of interest.

We observed that youth charged with a felony offense usually have legal representation during detention hearings and arraignments (or the proceeding is continued at a later date to allow for legal representation).

In one Class Two County, we observed an initial appearance for a youth facing felony charges, at which no defense counsel was present. The prosecutor explained that he had attempted to contact defense counsel with information about the hearing, but was unable to reach the public defender. The prosecutor asserted that he had not discussed the case, or even spoken with, the juvenile because he had been unable to contact the public defender. The judge stated that defense counsel must be present, and set a new date for the hearing, two weeks later.

However, in many counties, we observed that youth charged with misdemeanors often appear in court unrepresented during these critical, early stages of the proceedings.

Judges in some counties reported that they appoint counsel for youth during detention hearings and arraignments for misdemeanor offenses, in addition to those for felony offenses. Some judges told us that if a public defender is already present in the courtroom (for another case) or the courthouse (for other business), they may immediately appoint that defense attorney as counsel for a young person, at least for the duration of the current proceeding.

At an arraignment hearing in one Class Two County, a young person appeared to answer to a charge of possession with intent to distribute a controlled substance, a third degree felony. Her mother was also present in the courtroom. Due to the felony nature of the delinquency, the judge provisionally appointed a defense attorney to represent the youth at the proceeding.

The Judge explained to the youth that if she wanted to keep the attorney after the statutorily required consultation, she must qualify under the statutory definition of indigency. The juvenile's mother was then sworn in by the Judge, who proceeded to ask the mother questions about her income and family financial situation. Based on the mother's answers, the judge determined that the young person did not qualify as indigent, advising her and her mother that they would need to find a private attorney to represent her at future proceedings.

The public defender, who was present in the courtroom to be appointed to represent the young person provisionally for the day's arraignment, entered a denial of the charges on behalf of the juvenile, in order to preserve her rights in future proceedings. The judge explained to the young person that making a statement of "not guilty" would give the juvenile and her family some time to secure private representation before proceeding further.

Timing of Appointment

Youth charged with a felony offense usually, but not always, have representation during detention hearings and arraignments. However, in many counties, youth charged with misdemeanors are left unrepresented during these critical, early stages of the proceedings. If a youth requests counsel at these hearings, usually the judge must continue the hearing until counsel can be present, delaying the process of determining delinquency. In other counties, judges appoint counsel for youth during detention hearings and arraignments for misdemeanor offenses or if counsel is present to be immediately appointed.

At a detention hearing in a Class Six County, a young person appeared before the court with no legal representation. The youth's father was present in the courtroom, and struggled to advocate for the

release of his son without any legal assistance beyond the advice and explanations offered by the judge. English was not the father's first language, and the resulting language barrier created additional confusion and frustration for both father and son.

The presiding judge indicated that because the juvenile is in custody for a felony, the young person had the right to be represented by an appointed public defender, free of charge. The judge explained that the family also had the right to hire a private attorney to represent their son, if they so desired. The father was quick to assert that he would not be able to pay for a private attorney, and that his son would like to have an appointed public defender to represent him.

The judge then explained that the young person had the right to be represented by an attorney at the current detention hearing, but that obtaining such representation (a public defender was not present in the small, rural courthouse that day) would most likely entail an additional two-day wait in detention. The judge said that most young people appearing in court under such circumstances chose to waive their right to be represented at the detention hearing and let the judge proceed for just the one hearing only. The judge asserted that he didn't want the young person to say anything about the underlying allegations, and that the clerk would provide contact information to the father for the appointed public defender immediately following the hearing.

The young man and his father agreed to proceed in this manner. The father asked the judge to release his son, because he needed his son's help to financially provide for the family; with the son in



custody, only the father was able to work. Despite the father's pleas, the judge accepted the prosecutor's assertion that the young person was a threat to the community and granted the state's request to continue to hold the youth in detention until the charge could be resolved.

An attorney in this case likely would have been able to make an argument as to whether there was probable cause to detain the youth (by law, there are limited offenses for which a juvenile may be detained). Additionally, an attorney could have advocated for alternatives to detention, such as home detention or monitoring program such as Probation Assessment Supervision Services (PASS).

In addition to the situation described above, we also observed a review proceeding in a Class Four County for a young person who had been transferred from detention to a secure hospital setting, due to erratic behavior. While the young person's legal guardian was represented by an attorney, there was no defense attorney speaking on behalf of the young person.

Appointment Process

Judges in a few counties reported that their appointment of a defense attorney is automatic, with no application necessary, regardless of the offense with which a young person is charged. This practice was the exception, rather than the rule, across the state. In many counties, youth are required to affirmatively act in order to assert their right to be represented by an attorney.

In one county, we observed that youth are asked to complete (prior to entering the courtroom) a written document that expresses either their request for a defense attorney or their waiver of the right to counsel. The timing of this process means that a young person must decide whether they want an attorney, before the judge has an opportunity to advise them of the consequences of such a decision.

In several counties, we observed that once a young person enters the courtroom for an initial appearance, judges made further inquiry on the matter of appointment of counsel (sometimes in addition to provision of written request or waiver). Judges were observed to consistently inquire, in the early stages of court jurisdiction, as to whether a charged youth would like to waive the right to counsel or to apply for an attorney. In some cases, and almost exclusively in very rural areas, we observed that judges proactively cautioned that appointment of defense counsel would delay proceedings.

If the youth then reiterates the desire to waive their constitutional right to counsel, and the judge accepts that waiver, proceedings then continue. We observed that both the substance and intensity of judicial inquiry

on the matter of waiver of counsel varies widely from courtroom to courtroom, as well as from proceeding to proceeding (discussed below).

When a charged youth indicates the desire to be represented by a defense attorney to be provided by the state, we observed judges in multiple counties following one of two general course of action: 1) the judge will ask the youth to fill out an application for counsel on the spot during the court proceeding, or 2) the judge will ask the application questions out loud in court, and record the young person's answers on the application, completing the form on the youth's behalf.

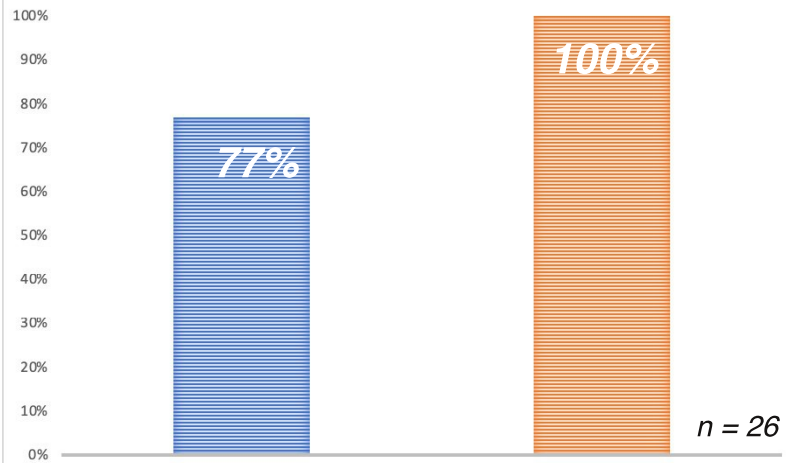


Prosecuting Attorney

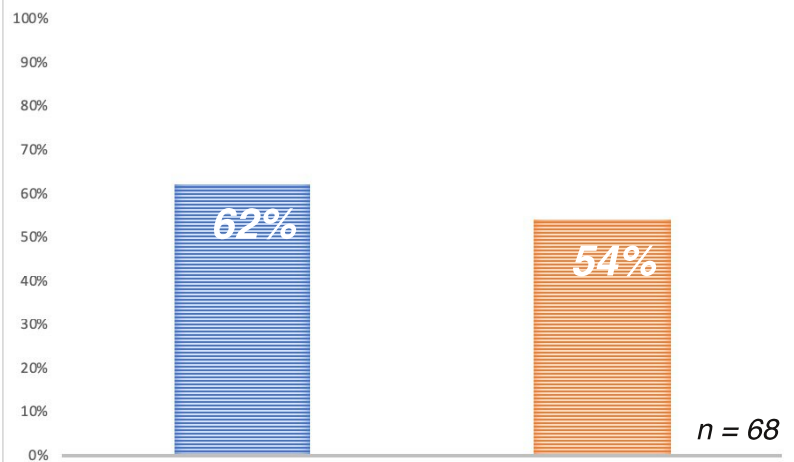


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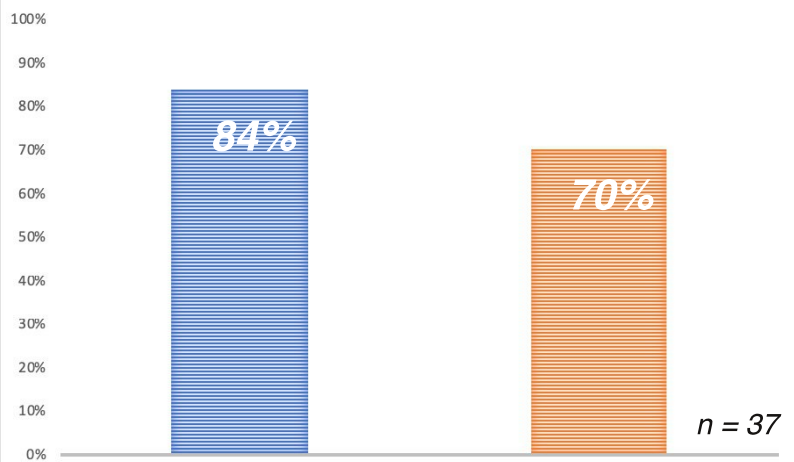
**PRESENT AT OBSERVED HEARINGS
IN *CLASS ONE* COUNTIES**

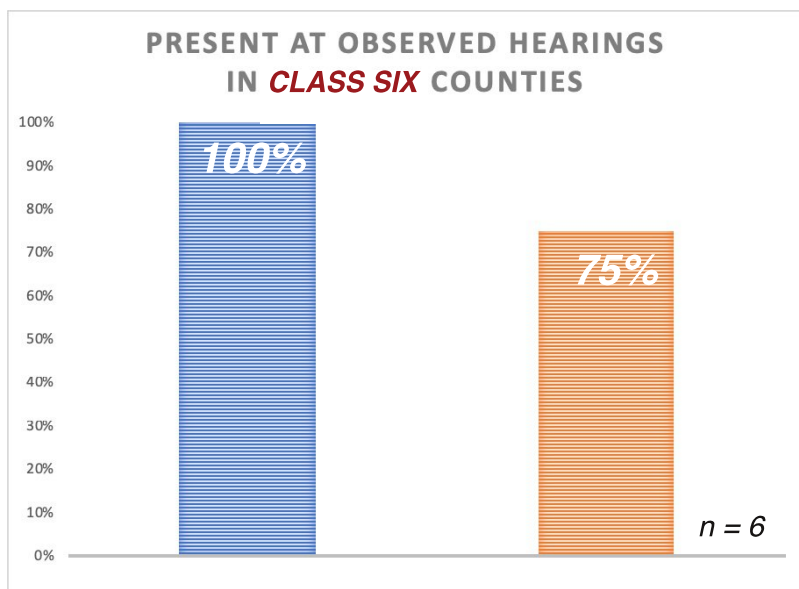
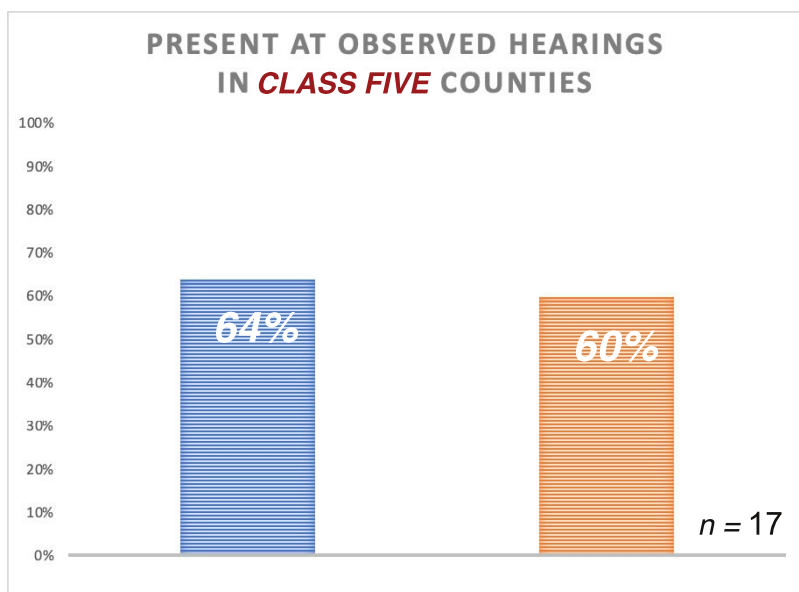
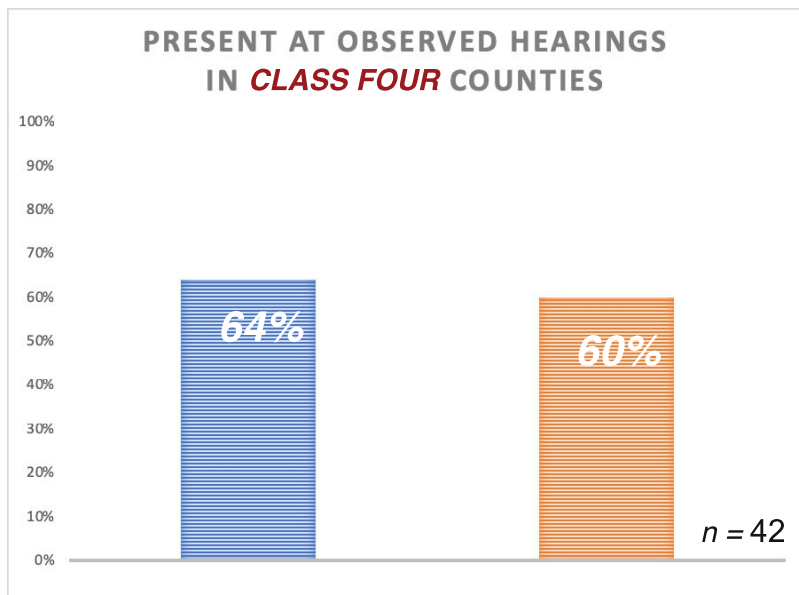


**PRESENT AT OBSERVED HEARINGS
IN *CLASS TWO* COUNTIES**



**PRESENT AT OBSERVED HEARINGS
IN *CLASS THREE* COUNTIES**





Unequal Representation Based on Geographic Location

We have separated the 196 court proceedings we observed by County Class, and provide here an accounting of how often a prosecuting attorney appeared in court for a hearing in certain counties, and also of how often a defense attorney appeared in court for a hearing in those same counties. The manner in which this information is presented is not meant to imply that every time a prosecuting attorney was present, a defense attorney was present, or vice versa.

With the exception of Salt Lake County (the sole Class One County in Utah), it is more common for a prosecuting attorney to be present during a juvenile delinquency proceeding than a defense attorney. Only in Salt Lake County did we observe youth to be represented at every court proceeding.

Findings: Explanation of the Right to Counsel

All judges are statutorily required to inform any youth appearing before them of that youth's right to be represented defense counsel.⁽²¹⁾ However, the actual content of this explanation of the right to counsel varies dramatically from judge to judge, as well as from proceeding to proceeding in the same courtroom.

Judges may, but do not always, emphasize the benefit and importance of having an attorney. During the course of our observations, we saw many judges vigorously emphasize the importance of a defense attorney, while providing precise examples of ways in which a defense attorney could help a young person appearing in court (e.g. help negotiate a plea on the youth's behalf, identify legal issues or potential defenses that could benefit the youthful offender or insist on a full trial to assert a youth's innocence).

Some judges are neither so descriptive nor emphatic in their explanations of the importance and purpose of representation. After a youth states that they wish to waive, these judges may simply proceed with the hearing without further inquiry (despite potentially serious legal consequences for the youth).

In one observed arraignment hearing in a Class Three County, a young person appeared, without legal representation, to answer to charges of reckless endangerment and criminal mischief, both Class A misdemeanors. The judge first explained to

the young person what an arraignment was, then asked the juvenile if he had seen the petition. The juvenile said he had not, so the judge allowed him time to read it before moving forward with the proceeding. When the young person was done reading, the judge reviewed and explained each allegation in detail, and informed the young person that he would need to either admit or deny each of the charges.

After reviewing the charges with the young person, the judge asked him if he knew what an attorney was. The young person responded that an attorney "was someone that helps you when in court." When the Judge then asked the youth if he wanted to be represented by such a person in future proceedings, he responded affirmatively. The judge committed to appointing a public defender for the youth, and indicated that he would delay having the youth admit or deny any charges until after the youth had a chance to speak with appointed counsel.

Occasionally, we observed judges asking multiple times during a single proceeding whether the youth would like the assistance of a defense attorney (either for full representation for the duration of jurisdiction or at least for consultation before the proceeding). One judge in a Class Three County explained to a young person in her court that **"needing an attorney is like needing a doctor. You would go to a doctor if you needed medical care, why wouldn't you go to a lawyer when you needed legal help?"**

Findings: Waiver of the Right to Counsel

By statute judges must also determine whether a youth who waives the right to counsel is doing so voluntarily and knowingly.⁽²²⁾ The methods by which youth convey their waiver of right to counsel vary little from county to county; almost always the waiver is made verbally, sometimes in place of, and sometimes in addition to, a written waiver of counsel. If the youth then reiterates their desire to waive their constitutional right to counsel, and the judge accepts that waiver, proceedings then continue. We observed that both the substance and intensity of judicial inquiry on the matter of waiver of counsel varies widely from courtroom to courtroom, as well as from proceeding to proceeding (discussed below).

In one county, we observed that youth are asked to complete (prior to entering the courtroom) a written document that expresses either their request for a defense attorney or their waiver of the right to counsel. The timing of this process means that a young person must decide whether they want an attorney, before the judge has an opportunity to advise them of the consequences of such a decision. We found this timing problematic, as it might be difficult to “knowingly” waive right to counsel before having any access to an explanation of the potential benefits or consequences. We do not know whether, in some cases, youth have obtained advice about waiving counsel prior to arriving at the courthouse.

In every courtroom we observed, once a young person enters the courtroom for an initial appearance, judges made inquiry on the matter of appointment of counsel. Judges in every county were observed to consistently inquire, in the early stages of court jurisdiction, as to

whether a charged youth would like to waive their right to counsel or apply for an attorney.

In a few cases, we observed that a prosecutor would approach and speak to young people before court proceedings, outside of the courtroom. The prosecutor would explain that the young person had a right to an attorney but if the youth wanted to waive that right, the prosecutor could speak with them right away and maybe discuss a plea. We did not observe their subsequent conversation (which usually took place in an adjacent, private conference room). Once in the courtroom, we observed that the prosecutor would report to the judge that a conversation had taken place with the juvenile, that the prosecutor had explained the youth’s right to be represented by a defense attorney, and that the young person had decided to proceed without a lawyer. Typically, the judge would then ask the youth to verify that the waiver had indeed been made, and proceed to provide further explanation of the right to counsel. We could anticipate some issues with a prosecutor approaching a juvenile in this way; it seems more protective of the youth to ensure that a discussion about waiver of counsel occurs with a defense attorney rather than a prosecutor.

In at least one county, we observed a judge appoint counsel, even after the juvenile had stated their intent to waive their right to a defense attorney. After making several inquiries, the judge stated their determination that the youth did not fully understand the consequences of waiving counsel, and assigned a public defender to represent the child.

During one court observation in a Class Two County, we observed a proceeding in which the judge accepted a youth's waiver of counsel with no explanation or caution to the youth. When asked later, the judge explained that the young person had appeared before him in court several times previously, and during those interactions, the judge had gone into further detail about the right to counsel. Hence, at the present proceeding, judge felt comfortable that the youth had knowingly waived that right.

A judge in a Class Two County told us that sometimes when a young person expresses that they want to waive counsel, the judge will ask the youth if they are comfortable having their parents help them (in lieu of an attorney). The judge will then also ask the parent(s) if they are comfortable with helping their children in this way.

In one rural courtroom, we observed a proceeding in which a minor facing two criminal charges pled guilty to both. The youth's mother, who was present in the courtroom and appeared eager to finish the proceeding, audibly advised her son to waive his right to an attorney. Before accepting the youth's waiver of counsel, the judge cautioned the youth that he would be held to the same standard as a practicing attorney if he represented himself. The youth then proceeded to admit to both charges, even while asserting to the judge that he had committed only one of the offenses, and was only admitting to the other in order to protect a friend.

Stated Explanations for Waiving Counsel

Explanations for why young people would waive their right to legal representation were not commonly observed during court proceedings. Rather, in almost every case where counsel was waived, youth appearing in juvenile court would not volunteer reasons for their waiver of counsel, nor would judges press the youth for additional explanation.

Thus, our understanding of why young people waive this right came mainly from our interviews with judges and other representatives of the court. Judges expressed that, based on their experience and opinions, youth choose to waive counsel for a few general reasons:

First, the youths (and/or parents) believe that the situation will be more quickly resolved if they waive and immediately proceed without an attorney. One Class Two County judge said that cases for unrepresented youth are "the fastest cases, because the kids just want to get it all over with as quickly as possible. Another judge who presides in a Class Three County shared, "The biggest reason youth waive counsel seems to be because they don't want to come back at a later date. These hearings happen in the middle of the day, way out in (the county seat). It's hard for the kids and their parents to get all the time off. They just want to solve the issue and get it taken care of." Often, and especially in rural areas, a public defense attorney is not readily available to consult with the young person. In those situations, requesting to speak to a public defender would mean a delay in proceedings for the young person, as the judge would be required to continue the proceedings until a public defender could be present.

This leads into the second general reasons that youth reportedly waive their right to counsel: parental influence. It is not uncommon for parents or other family members who do not wish to retain counsel (for a variety of reasons) to then directly or indirectly influence the youth to waive. Judges report that parents may pressure their child to waive their right to counsel due to: concern over having to take more time off work for court proceedings; a desire to make the child "take accountability" for what they have done; or concerns that, despite assurances that the attorney will be provided at the state's expense, there will be some financial obligation by the family after the fact.

One judge in a Class One County described to us how “juveniles that don’t already have representation will look back at their mother and father, and the parents will shake their heads ‘no,’ because they know their kid is guilty and they want them to face the consequences. Or they don’t want to miss work and just want to get it over with. Or, sometimes, the parents know they wouldn’t qualify for a publicly-appointed attorney and don’t want to pay for private counsel.”

Third, youth apparently waive counsel out of a mistaken belief that asserting the right to counsel means they will be perceived as skirting accountability or not admitting to the charges. Our observations and interviews revealed that in the majority of cases, juveniles appear in court ready to take responsibility for what they have done. Many young people are more than willing to admit to charges that they feel correctly reflect the behavior they engaged in, and, thus, don’t see the value of having legal counsel. While this inclination is admirable, many prosecutors bring charges with the intent to negotiate with defense counsel; youth who don’t understand the expectation to negotiate, may admit to more charges than necessary.

Commonly intertwined within each of these and other reasons is the simple fact that the youth does not understand the role and influence of a defense attorney in the court process, nor the consequences of waiving their right to counsel. As one Class Two County judge explained, “I can only speculate that the underlying reason most kids waive representation is due to their lack of knowledge about what an attorney could do or how they could help their case. Most of the kids’ knowledge of what an attorney does is from what they see on TV or in movies.”

One judge emphatically expressed his belief that representation is needed for every juvenile in every hearing, because juveniles lack the “experience and capacity” to understand the full ramifications of waiving. “I believe it is a legal fiction,” the judge told

us, “to say that a juvenile can knowingly and competently waive their right to counsel.”

Another judge stated simply, “They are kids. Kids don’t know they law, they don’t know their rights, they don’t know what evidence is good evidence, and they don’t know if they are being treated fairly. They need someone to advocate for them.” This judge, interestingly, also felt that unrepresented youth typically saw the same legal outcomes as youth who have defense counsel.

Concerns About Parental Influence

Before conducting observations and interviews, we anticipated issues with a minor’s access to the right to counsel, given the design of Utah’s appointment statute. As mentioned previously, Utah case law binds the financial situation of a minor to that of their parents and/or household. Perhaps more important, even older youth appearing in court may have relationships with their parents in which little decision-making power is afforded the young person

One scenario might manifest when parents, who are financially capable of hiring counsel (hence precluding public representation at the state’s expense), refuse to do so, effectively depriving their child of the right to counsel. For example, parents might refuse to pay for a defense attorney to represent their child, mistakenly assuming that to do so would somehow dilute the child’s obligation to “take responsibility” or “face the consequences” of the delinquent actions. During an interview with a Class Three County judge, the judge described precisely this scenario as having happened in his courtroom:

“Often, the juvenile will look at mom and dad when asked if they want counsel, and mom or dad will shake their heads, indicating not to ask for counsel. At this point I will try and specify, that it is not the parents’ decision, but the minor’s. But

the problem is that the parents are going to be paying for the counsel the juvenile requests, if they don't qualify for a public defender. I've had a couple of cases where I appoint, even when they say no, because I can tell there is outside pressure."

A second scenario might occur when a young person is reluctant to ask for representation by a public defender, because of pressure from their parents (either due to a desire to "get things over with" or fear that public representation will result, somehow, in financial costs for the family).

Such interference by a parent with a young person's waiver of right to counsel can be hard to assess from observation alone. Most of our observations were of post-disposition hearings, long after waiver of counsel would have been made. We were not privy to pre-court conversations between youth and their families regarding waiver of right to counsel.

Judges did report, however, that they suspected this occurred at times in their courtrooms. One judge in a Class Two County acknowledged that parental influence is sometimes evident in court when a youth decides to waive counsel. If the parent or guardian seems disproportionately overbearing in their influence, the judge said she would take that fact into consideration when deciding whether to grant the waiver of counsel.

"Unless the parent is the victim, though," she reflected, "they usually have their kids' best interests at heart, so I do consider the parents' wishes." Another judge, also presiding in a Class Two County, said that the court should "show more confidence in families. Except when a family member is a victim, we need to take the wishes of the family as a whole into consideration."

In addition, we did see at least a few occasions of apparent parental influence. There was the aforementioned circumstance, in which a mother audibly advised her son, during the court proceeding, to waive his right to an attorney (the judge did not appoint in that case). We also observed one arraignment hearing in a Class Two County wherein a young person pointedly looked back into the court gallery, to his mother, before responding to the judge's question about waiving counsel. Rather than an emphatic "yes" or "no," the youth said "I guess so." The judge pushed the youth for a more substantive response. After looking back at his mother, who shook her head, the youth clearly declined counsel. The judge did not explore the nature of the waiver of counsel at that time, question the mother's influence over the decision, nor explain any consequences related to such a decision. Later, the judge explained that the young man had appeared in his courtroom several times previously and was familiar with the system; for that reason, he accepted his waiver without further inquiry or explanation.



Findings:

Timing of Release

We observed, and judges reported to us, a variety of approaches to the court's release of defense counsel from the obligations of representing a young person under the court's jurisdiction. We learned that in several counties, especially (but not limited to) rural counties with fewer resources and available public defenders, the public defense attorney is released from representing a youth immediately after the disposition of that youth's case. In these instances, the public defender attends no subsequent review hearings, despite the fact that it is possible that determinations could be made at those hearings that would directly impact a youth's liberty interests.

We quickly learned during court observations that it is not uncommon for several aspects of case business to be addressed during a single proceeding for the same individual. One reason for this is that young people do occasionally attract new delinquency petitions while still under court jurisdiction for an earlier offense. An "Order to Show Cause" may be filed against a youth, by the judge, for failing to fulfil certain requirements of a prior disposition.⁽²³⁾ Or, a young person may be involved in a new incident, while under court jurisdiction, resulting in new charges on top of the original charges. In these cases, we observed that judges will typically reappoint defense counsel to represent the youth on the new charges, or simply request defense counsel be available during the proceeding to help the youth address the new charges.

In several counties, public defenders are not considered to be officially released after a youth's disposition. Nonetheless, in at least one county, representatives of the court reported that these appointed public defenders – though technically still representing their young clients – do not attend all subsequent hearings.

Rather, defense counsel typically will appear with the young person only at review hearings where it is known or anticipated that reports provided by JJS staff or other officials will be negative for the youth. The reasoning for this approach is that defense counsel should be present if there is a new legal threat to the young person's liberty (e.g., if a caseworker recommends that a young person be penalized with detention for a violation of probation conditions).

Judges in select (Class One and Two) counties reported that public defense counsel is expected to be present for all proceedings, including review hearings, until the court's jurisdiction over the youth is terminated. We observed multiple review hearings in which this appeared to be the case; despite a generally positive report, with no anticipated negative consequences for the youth's liberty, the public defender appeared with the youth in court.

One highly relevant factor affecting the early release of a juvenile's representation appears to be the geographic location of the court proceedings. One judge in a Class Three County stated that it is difficult for juveniles to obtain representation in the more rural areas of the state. He believed that this was due primarily to the fact that so few attorneys are willing to work in rural areas, and that public defenders in particular face the heavy burden of substantial and inconvenient travel requirements between far-flung courthouses: "It is a matter of resources and practicality."

Hence, in Class Four, Five and Six Counties – and in some Class Three Counties – it appears less likely that a defense attorney will be present for post-disposition review or adjudicatory hearings. One judge in a Class Three County noted that, in addition to

geographic distance between courthouses, the lack of an official public defender association in a county also seems to correlate with a lack of defense counsel in attendance at post-disposition hearings. Another judge, who presides in Class Four and Five Counties, reported that it is common for both defense and prosecuting attorneys to “appear” by telephone, which is typically pre-arranged. Some contracted defenders reported having to travel up to three hours, one-way, to appear in person at a hearing.

A conclusion that attorneys are not needed after the juvenile’s disposition hearing is an oversimplification of juvenile proceedings. When defense attorneys are at post-disposition hearings, they are able to formulate arguments against detention, file motions to adjust fines, file motions to extend deadlines for restitution payments, expedite review hearings when a child has sufficiently satisfied certain court requirements, and otherwise assist a young person in navigating the full process of court jurisdiction.

We spoke with one judge in a fairly rural county who insisted that, at least when felony charges were involved, appointed attorneys appear at every hearing after they are appointed, until the case is terminated by the court. This judge stated emphatically that “review hearings involve the rights of the youth, so it is therefore important that they have representation at these later stages of their cases, as well.”

We observed a review hearing in a Fifth Class County wherein a misunderstanding about a prior verbal agreement had the potential to attract an “order to show cause” for a young person on probation. At this hearing, the unrepresented young person in question was not present for a scheduled review hearing. The judge appeared disappointed and annoyed, questioning what signals the youth was sending with his absence.

Fortunately, and completely by coincidence, a defense attorney was in the courtroom for an unrelated matter while this situation unfolded. The defense attorney stated that he had been present at the disposition hearing for the young person in question, at which time the judge and the juvenile had made a verbal agreement that the youth’s presence at the scheduled review hearing would be only tentative.

According to the defense attorney, in that prior conversation, the judge had conveyed to the youth that his presence at the review hearing would not be mandatory. While any alternative outcome is speculative, we could easily imagine that, had the defense attorney not been present during both proceedings, the young person – previously excused by the judge – might have been held in contempt of court, based on a moment of forgetfulness rather than actual contempt.

Juvenile courts are often regarded as “problem-solving courts,” in which multiple actors – the judge, family members, a caseworker, a guardian ad litem, even the prosecutor – all work together to help the young person in question correct their delinquent behavior. For example, one judge in a Class Three County told us that having defense representation is important, but that “the prosecutors in this county are great in trying to reach good outcomes for kids.” Another judge in a Class Four County admitted to missing the “old, traditional method, where it was just the juvenile probation officer and the judge, trying to work through things and come up with a solution.”

However, the realities of our adversarial legal system inevitably push through this conception of juvenile court; one of the “problem solvers” may have to recommend an action that, fairly or not, threatens a young person’s liberty interests. We observed that when defense counsel is either not appointed or not

present for the duration of a youth's entire time under court jurisdiction, young people can experience confusion about who in the courtroom is "on their side."

We observed in more than one courtroom, situations in which individuals who were not providing legal defense counsel would nonetheless sit at the "defense table" with an adjudicated youth. In one such case, observed in a Class Two County, a Juvenile Justice Services caseworker occupied the traditional defense attorney seat next to a youth. While we understand the importance of a caseworker showing support for a young person under their care, we were concerned that this arrangement might be misleading and potentially confusing to the youth.

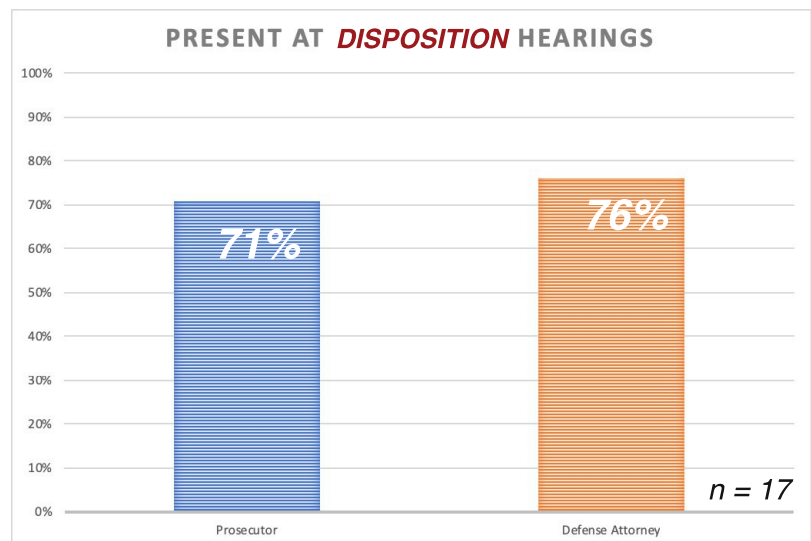
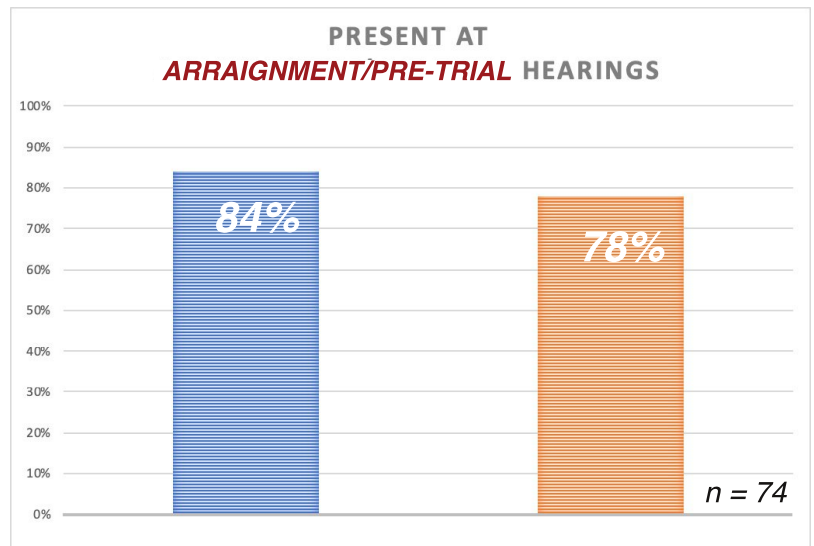
A case manager does not represent an adjudicated young person in any legal sense. In fact, a case manager may be professionally obligated to make recommendations that go directly against the desires of the young person in their care. A young person may wish to make a plea to be released from custody, for example, while a caseworker may recommend that the youth remain in custody to finish a particular program. A defense attorney would be ethically obligated to represent the youth's desires above other, even well-meaning, interests.

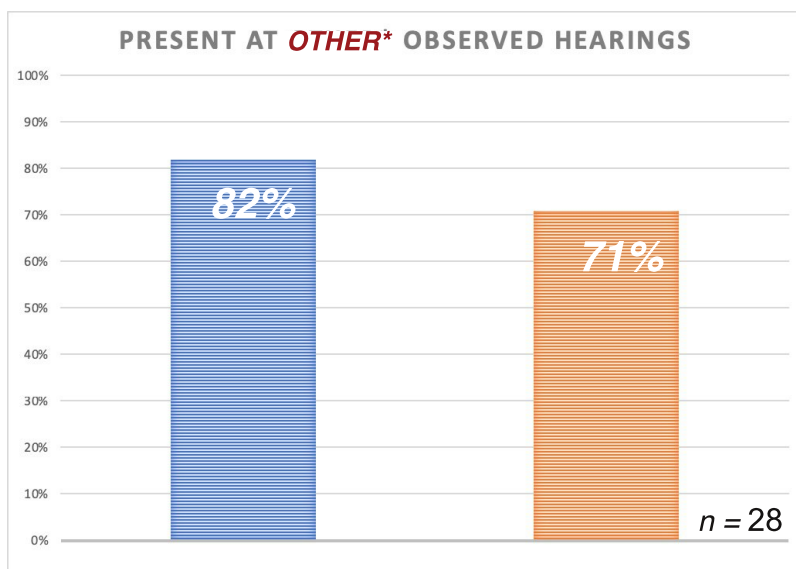
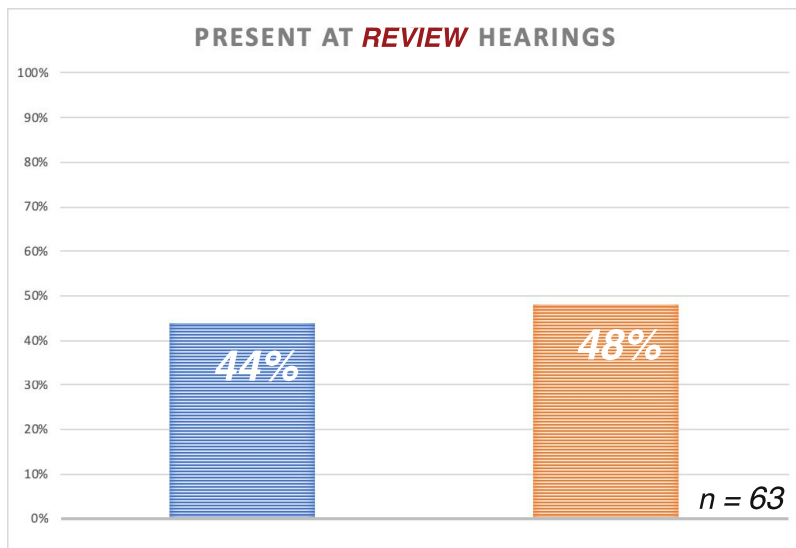
We heard from at least one judge in a Class Two County that when there is no defense counsel available, the judge is less likely to receive all the relevant information about a minor's case for review hearings. For example, in the case of a theft at a grocery store, a defense attorney may have information others do not, such as that the youth is living in an intensely food insecure situation. In these cases, the judge has to rely on probation officers for the information. This judge felt that defense attorneys are able to give more background about the juvenile, as well as more explanation of

mitigating circumstance, from which the judge can then develop the most appropriate orders. In one situation observed in a Class One County, the defense attorney explained that the target of the client's delinquent behavior had been bullying the client for several months prior to the incident being adjudicated. This information provided important context for the judge when considering an appropriate disposition.

We also observed proceedings in which an unrepresented youth appeared to have a supportive, even friendly, rapport with the judge. This is ideal for a problem-solving court, but it can lead to confusion and even potential legal missteps for a young person under court jurisdiction. In one Class Two County courtroom, we witnessed a young person voluntarily admit to the judge that he had engaged in delinquent activities that were not even the subject of the proceeding. This occurred when the county prosecutor was present in the courtroom, meaning the young person was essentially, if not knowingly, representing himself vis a vis an experienced prosecutor.

In another case, also in a Class Two County, we observed a young person engaged in what felt like a conversation with the judge about a new incident that occurred while the youth was under court jurisdiction for an already adjudicated offense. As the judge reviewed the official report of what happened in this new incident, the youth corrected him several times, in one case admitting to at least one of the charges as part of his correction of the facts.





* Category includes both "Other" and "Unclear" proceedings as described on page 11.

Unrepresented at Key Stages of the Delinquency Process

We have separated the 196 court proceedings we observed by type of proceeding, County Class, and provide here an accounting of how often a prosecuting attorney appeared in court for a certain type of hearing, and also of how often a defense attorney appeared in court for that same type of hearing. The manner in which this information is presented is not meant to imply that every time a prosecuting attorney was present, a defense attorney was present, or vice versa.

Youth were most likely to be unrepresented at post-disposition review hearings, as well as at detention hearings (though the latter sample size is small). Prosecuting attorneys were more likely than defense attorneys to be at most types of hearings, except for review and disposition hearings.

Findings: Impact of Legal Representation on Outcomes for Youth

When young people are deprived, either constructively or actually, of their Sixth Amendment right to be represented by a defense attorney, the implications are not merely theoretical. Yes, it is inappropriate for the state to leave unfulfilled its constitutional obligation to ensure counsel for young people appearing in juvenile court, regardless of their financial means. But this failure attracts consequences in the real world, as well. As one judge specifically noted that for unrepresented juveniles, there are serious “collateral, administrative and even immigration consequences.” Both our interviews and our observations led us to conclude that lack of legal representation has very real and negative impacts for young people.

Of the 195 proceedings we observed, 57 (approximately 29%) involved a young person who was without legal counsel. These proceedings included all types of hearings, from arraignment to review hearings; at least four were detention hearings. By comparison, judges estimated that between 0% and 40% of youth who appeared before them were unrepresented. Typically, the more rural and less affluent the county, the higher the estimated percentage of unrepresented youth. One Class Five County judge, however, said that 100% of the juveniles in his courtroom appeared with defense counsel.

Several judges felt strongly that youth experience significantly different outcomes in their court proceedings, depending on whether or not they are represented by defense counsel. The most obvious

difference, and perhaps the most disturbing, is in the severity of the punishment meted out by the court.

One judge shared an experience in which this was starkly evident: **the judge had presided over a case with two co-defendants, one of whom was unrepresented, the other of whom had legal counsel. According to the judge, the co-defendant who had an attorney received a “better” deal from the prosecutor. This judge felt strongly that defense attorneys are able to work out more advantageous deals on behalf of their clients, than the client would be able to secure on their own.**

Most members of the general public are inexperienced with the judicial process, and this lack of experience is particularly pronounced among young people. According to our interviews with representatives of the court, young people generally do not know that it is possible, even expected, for them or their defense counsel to negotiate with the judge and the prosecutor during the adjudication process. Terms such as “plea in abeyance” are unknown to most young people appearing in court for the first time, and some youth are so willing to take responsibility for their behavior that they don’t consider the prospect of negotiating with a prosecuting attorney to drop some charges in exchange for admission of guilt on others. A defense attorney, on the other hand, will almost always pursue such negotiations to the benefit of the youth.

We expected to find that the results of waiving counsel might include that a youth would face terms set entirely by a prosecutor in a plea deal, or by a

probation officer in initial or review hearings. Our interviews with judges seemed to confirm this expectation, as judges reported that unrepresented youth typically realized fewer benefits from plea negotiations with the prosecutor.

As one judge in a Class One County reported, **“when the juvenile doesn’t have counsel, they don’t get as good of a deal. Defense counsel if adept at negotiating the dismissal of some charges, having the youth plead to others. Without counsel, the juvenile will have too much going on to make quality negotiations in this matter. Attorneys will advocate much harder for the juvenile than the juvenile can for themselves. Kids get better treatment and better deals when they are represented.”**

This was borne out in our observations. We observed many instances of public or private defense counsel suggesting a compromise disposition that involved dropping at least one, and often more than one, of the charges in the petition against a young person. We also observed that in multiple courtrooms, judges accepted and ordered all actions recommended made by prosecutors and probation officers, after the youth in question had waived representation and entered pleas. We observed no cases of an unrepresented young person asking for or receiving a plea in abeyance.

The absence of negotiations, as well as requests for delays or additional case information, on the part of an unrepresented young person has very real consequences. Several judges expressed during interviews their belief that youth experience significantly different outcomes in their court proceedings, depending on whether or not they are represented by defense counsel. According to these judges, the most obvious difference – and perhaps the most troubling, in our opinion – is in the severity of the disposition received by that young person.

Without the counsel and advocacy of a defense attorney, a young person is likely to incur a greater

number of adjudicated incidents on their record for a single instance of delinquency. That is, a young person is more likely to admit to all original charges brought by the prosecutor, rather than to a smaller number of charges, as might be negotiated by an experienced defense attorney.

This accumulation of charges can influence future dispositions, as previous adjudicated incidents are factored into the risk assessments that guide court action. Additionally, contrary to popular belief, the record of these charges can follow a young person into adulthood. A juvenile record is neither private nor automatically expunged when a person reaches adulthood.(24)

As one Class One County judge observed, **“Even when juveniles are charged with a low-level offense, like stealing a case of beer, I still recommend they get an attorney. I explain that when those charges start to stack up, they can eventually result in a felony, which can more severely effect their rights and freedoms.”**

Our observations and interviews reveal that unrepresented youth are more likely to receive dispositions that guarantee longer involvement with the juvenile justice system, as well as put them at risk for confinement in secure facilities. Harsher dispositions will also follow these youth into their adulthood, with serious ramifications.(25) Hence, we conclude that uneven and inconsistent legal representation for young people in Utah’s juvenile courts is likely resulting in unnecessary expense to taxpayers for very little public safety benefit.

Unsurprisingly, some judges observed that court proceedings generally run much more smoothly when young people have legal representation, and that the youth themselves are able to formulate a better understanding of what is happening when they have access to counsel.

Recommendations

Based only on our many court observations and interviews with court stakeholders, we make the following four recommendations to Utah state policymakers, in order to address some of the issues we observed regarding juvenile indigent defense. Our intention is that this report form the basis of future policy discussions and system assessment.

1. Improve data collection related to defense counsel appointment and hearing attendance.

The qualitative and anecdotal nature of this report is necessitated in part by the paucity of quantitative data on juvenile attorney appointment as collected by our juvenile court system. While the Court Agency Record Exchange (CARE) system provides a great deal of helpful data related to the juvenile court system more generally, there is insufficient and inconsistent recording of whether, when and which defense attorneys are 1) appointed to represent a particular young person entering court jurisdiction, 2) present in court with their clients, either physically or by phone/videoconference, and 3) released from their appointment obligation.

In order to best assess progress in the area of juvenile defense representation, we strongly recommend that the CARE system be better utilized in the tracking of this information, and updated as necessary to allow for collection of pertinent representation information. We know that such improvements are possible, with the political will and technical attention. For example, thanks in large part to efforts by the Utah Judicial Council in recent years, two fields were added to the CARE system, allowing for entry of 1) the name of the attorney representing a young person, and 2) whether that attorney was privately retained or a public defender appointed by the court.

We believe that efforts to improve and continually monitor juvenile representation would be served by tracking in CARE the following information as well:

1) The date of appointment of counsel, in order to understand at which stages of court involvement young people may not be represented and to focus improvement efforts on these stages;

2) The appearance of appointed or retained counsel for each court proceeding, including the name of the attorney appearing (to capture instances of defense attorneys “filling in” for one another based on availability, and perhaps shed light on whether consistency of representation is an issue to be addressed); and

3) Whether a court proceeding involved a young person who was present by video (as is common for youth detained in some rural facilities) or by phone (which we observed occasionally when the young person had moved to another state during court jurisdiction). This information would help us understand to what extent remote appearance is correlated with lack of representation, and may have implications for the attorney-client relationship and quality of representation.

2. Create a Presumption of Indigency for Youth Appearing in Juvenile Court

Due process and principles of fundamental fairness dictate that no child should be placed in the position of representing themselves in proceedings that can affect their liberty and their long-term, not -yet-imagined future. Due process and principles of fundamental fairness also dictate that children in Utah should have equal access to counsel.



Accordingly, we recommend changes to the existing statutory framework for appointment by creating a statutory presumption that a minor is indigent, thus necessitating automatic appointment at the earliest stages of a delinquency proceeding.

This recommendation is consistent with recommendations at a national level. In a 2017 study, the National Juvenile Defense Center (“NJDC”) found that eleven states have a presumption that children are presumed eligible for a court appointed attorney based on their minority and not their financial status. (26) Some of these states have provisions that require the parents to pay if they are deemed able, after the fact. The study states that, “Onerous, arbitrary, and unclear eligibility determinations prevent children from accessing their right to representation. And thus, their right to be heard.” (27)

The NJDC report describes how conditioning a minor’s access to an attorney on the minor’s family’s financial situation raises many serious issues. Some of these issues, as described in NJDC’s report include: lengthy investigations into parental incomes while the children were being held in custody without counsel, creating

fear in the child and their family that they will have to pay for an attorney, families falling just above the indigency threshold who are unable to pay, and parents not providing an attorney despite being able to pay for their own various reasons.

The NJDC study also found that when parents incurred the costs for an attorney for their child, it often created a conflict between the juvenile’s attorney, the juvenile client, and the paying parents. (28) The NJDC concluded that the only way to truly safeguard a child’s rights is to make every child eligible for appointed counsel regardless of financial status.

The idea of a presumption of indigence for all juveniles is not a novel one. Several state legislatures, supported by child protection and advocacy organizations, have adopted the presumption of indigence for all juveniles facing juvenile court proceedings. Here are some examples of how state legislatures have designed state statute to provide for optimal juvenile defense:

Delaware: “Any person under the age of 18 arrested or charged with a crime or act of delinquency shall be automatically eligible for representation by the Office of Defense Services.”(29)

North Carolina: “A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency.”(30)

Pennsylvania: “All juveniles are presumed indigent. If a juvenile appears at any hearing without counsel, the court shall appoint counsel for the juvenile prior to the commencement of the hearing.”(31)

The Pennsylvania statute continues to read that this presumption may be rebutted but only if the court ascertains that the child has sufficient financial resources to provide counsel of their choosing. Finally, the statute states that financial resources of the parent or guardian may not be considered in ascertaining whether the child has the financial resources to provide themselves counsel. (This approach could eliminate the issue described above involving tension between the attorney, paying parents, and the child client.

As one Utah court judge who presides in a Class Two County told us, “**Presumption of indigence for juveniles is a quality idea that I support. They should not have to ask for an attorney. And they do need one. The friction with parents and the juvenile when it comes to counsel is detrimental to the juvenile’s rights.**”

As one Class Three County judge put it, “All juveniles really are indigent, essentially, so a presumption of indigence would make the most sense. Court proceedings would run more smoothly, with fewer

delays, and the court wouldn’t need to grant continuances, to give juveniles time to speak with counsel.”

In addition, we strongly recommend that defense counsel be present for all formal court proceedings, including detention hearings and post-dispositional proceedings.

3. Adopt SB32, “Indigent Defense Act Amendments,” During 2019 Legislative Session

We strongly support and urge the legislature to adopt SB32, “Indigent Defense Act Amendments” during the 2019 legislative session. Sponsored by Todd Weiler (R-Woods Cross) and adopted by the Judiciary Interim Committee as a committee bill, SB32 originated from a working group of juvenile court stakeholders convened by the Utah Indigent Defense Commission.

SB32 creates presumptive appointment of counsel by defining as an “indigent individual” entitled to appointed counsel under the appointment code, any minor who is: 1) “arrested and admitted into detention for an offense” as already described in state law; 2) “charged by petition or information in the juvenile or district court”; or 3) “appealing a first appeal from an adjudication or other final court action.”

While the language of this proposed legislation is not as straightforward as juvenile- specific statutes adopted by other states, it would have the effect of ensuring that young people appearing in juvenile court would be assumed to be indigent and appointed a public defender, unless the right to counsel is waived.

The proposed legislation also states that waiver cannot occur without first consulting with an attorney: “(a)fter a minor consults with an indigent defense provider, the minor may waive the right to counsel if the court is satisfied that in light of the minor’s unique circumstances and attributes: the waiver is knowing

and voluntary; and the minor understands the consequences of waiving the right to counsel.” We appreciate that under this new language, young people would be required to consult with a public defender before they can waive counsel. Requiring a young person to speak with a defense attorney is likely, though not certain, to make a waiver of right to counsel more knowing, if nothing else.

4. Designate Additional State Funding for Juvenile Public Defender Services Statewide, Particularly Focused on Building Capacity in Rural Regions

We heard from at least one Class Four County judge that the most important changes to make to Utah’s juvenile indigent defense system would be to “provide more resources to ensure a better defense for each young person.” Not only could the system use funding to hire more public defenders in general, this judge shared, but “to hire more specialized attorneys with specific expertise in juvenile defense.” We could not agree more.

It is clear from our many observations and interviews that young people across the state of Utah have very different experiences of their right to counsel, based merely on the geographic location where they happen to live. Larger counties with greater resources and concentrated populations offer greater access to both private and public defense counsel. Less populous counties with fewer financial resources struggle to attract both private attorneys available for hire and also attorneys willing to accept public defender contracts. Additionally, public defenders in rural counties must commit to significant travel to serve the clients appointed to them by the state. This travel obligation is a drain on both time and money for public defenders.

Additionally, we observed that less populous rural counties are more likely to offer public defender contracts that combine responsibilities in the district, justice and juvenile courts. Such counties are even less likely to attract public defenders who specialize in

juvenile cases, or have familiarity with the various rehabilitative and community-based alternatives available in lieu of more traditional dispositions.

Only two counties in the state have the resources, population and political support to host professional Public Defender Associations. Only one of those counties has a dedicated Juvenile Public Defender organization that contracts with the county to provide only juvenile indigent defense services.

We recommend that state policymakers designate additional funding for the improvement of juvenile indigent defense in Utah. Technical assistance should be readily available to rural, resource-poor counties where public defenders may not have expertise in juvenile court proceedings. This technical assistance could be provided by the state’s Indigent Defense Commission, or via contracts with more populous and resource-rich counties nearby. Either approach will likely need to be funded through the Indigent Defense Commission.

As one Class Two County judge opined, “Public defenders should have reasonable caseloads. In (my district), public defenders do both child welfare cases and juvenile delinquencies. They take on too many cases, but not by choice. This is the danger of our current public defender system; the more cases a defense attorney has to take on, the more cases they are appointed, all this affects the quality of their work.”

While we appreciate that indigent defense services for district and justice court services remain woefully underfund, we believe it is critical to increase investment specifically in juvenile indigent defense. Research has shown strong correlations between involvement in the juvenile justice system, and future criminal justice involvement. We recommend investment earlier, rather than later, in our community members’ criminal justice system experiences, when available interventions are more costly and less effective.

Footnotes

(1) Primary research coordination and authorship of this report is credited to: Marina M. Peña (juvenile public defender for the Utah Juvenile Defender Attorneys in Salt Lake County and Juvenile Justice Fellow at Voices for Utah Children during 2018); Anna E. Thomas (Senior Policy Analyst at Voices for Utah Children); and Wyatt A. Kirk (law student at the S.J. Quinney College of Law at the University of Utah, Class of 2019). Court observations, stakeholder interviews and select written report segments were conducted and produced by the following students enrolled in the Fall 2018 Public Policy Practicum: Cambre C. Roberts, Alyssa Miller, Bradley Taylor, Christy R. Gilbert, Britny A. Mortensen; Jacolby C. Roemer; Kimberly J. Gale and Katie M. Cox. Additional support for this project was contributed by the following students enrolled in the Spring 2018 Public Policy Practicum: Brooke Ann Parrish, Mitchell A. Tate, Helena Jordan, Anabel M. Alvarado and Clayton T. Davis.

(2) No proceedings were observed in Garfield or Daggett Counties. According to county court staff in Daggett County, no juvenile court proceedings are held there; all serious cases are sent to be handled in Uintah County. Garfield County does hold juvenile court proceedings, but such proceedings are infrequent due to the small and dispersed population in the area. The timing of these infrequent proceedings did not coincide with the availability of our observers in 2018. One-way travel to Panguitch, the location of the Garfield County Courthouse, is approximately four hours from Salt Lake City.

(3) Utah Code Ann. § 17-50-501, available at <https://le.utah.gov/xcode/Title17/Chapter50/17-50-S501.html>

(4) To request a copy of the National Juvenile Defense Center's form mentioned here, contact the Center directly at 1 (202) 452-0010 or complete the online contact form available at <https://njdc.info/contact/>.

(5) ACLU of Utah (2011). *Failing Gideon: Utah's Flawed County-By-County Public Defender System*. Available as of January 2019 at <https://www.acluutah.org/resources/articles-position-papers/item/552-failing-gideon>.

(6) Sixth Amendment Center (2015). *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services*. Available as of January 2019 at <http://sixthamendment.org/utah-report/>.

(7) Utah Code Ann. § 77-32-801 to 809. Bill content, as passed, available as of January 2019 at <https://le.utah.gov/~2016/bills/static/SB0155.html>.

(8) *Id.* Bill content, as passed, available as of January 2019 at <https://le.utah.gov/~2017/bills/static/SB0134.html>.

(9) Knox, Annie. "Utah panel gives early OK to bill expanding juvenile access to public defenders." *The Deseret News* (Salt Lake

City) October 17, 2018. Article available as of January 28, 2019, at <https://www.deseretnews.com/article/900037441/utah-panel-gives-early-ok-to-bill-expanding-juvenile-access-to-public-defenders.html>; Proposed legislation available as of January 28, 2019, at <https://le.utah.gov/~2019/bills/static/SB0032.html>.

(10) Extensive information about the juvenile justice system analysis is available online at the Utah Board of Juvenile Justice (UBJJ) homepage, located as of January 2019 at <https://justice.utah.gov/Juvenile/hb239.html>. The section titled "Archived Information" provides relevant data and system analysis findings from throughout 2016; this information contextualizes the reforms of HB239.

(11) HB239 impacted many portions of Utah statute, including Utah Code Ann. § 32B-4-409 to 411; Utah Code Ann. § 58-3-8; Utah Code Ann. § 53A-1-403, 3-402, 11-103 and more. Full citation of all affected sections of Utah State Code would be lengthy and unnecessary. An overview of the legislation, and the analysis that led to it, can be found (as of January 2019) at <https://justice.utah.gov/Documents/CCJJ/Justice%20Policy/HB%20239/HB%20239%20Overview.pdf>. This presentation was given by Rep. Lowry Snow and others before House and Senate standing committees during the 2017 legislative session. In addition, the content of the bill, as passed, is available as of January 2019 at <https://le.utah.gov/~2017/bills/static/HB0239.html>. Annual reports on HB239 implementation efforts are also available at the UBJJ homepage, located as of January 28, 2019, at <https://justice.utah.gov/Juvenile/hb239.html>, as well as minutes for every meeting of the Juvenile Justice Oversight Committee.

(12) HB132 impacted several sections of Utah State Code, though not as many as were affected by HB239 from the proceeding year. A summary of the bill and its impact, created by the Juvenile Justice Oversight Committee and presented to stakeholders throughout 2018, is available as of January 2019 on the UBJJ website at <https://justice.utah.gov/Juvenile/HB239/HB%20132%20Detailed%20Bill%20Summary.pdf>. Bill content, as passed, available as of January 2019, can be found at <https://le.utah.gov/~2018/bills/static/HB0132.html>.

(13) *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527, 40 O.O.2d 378 (1967)

(14) *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 796 (1963).

(15) *Strickland v. Washington*, 466 U.S. 668 (1984).

(16) *Graham v. Florida*, 560 U.S. 48, 78 (2010).

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

(18) Utah Code Ann. §78A-6-1111

(19) Utah Code Ann. §77-32-202

(20) Statement of Interest of the United States, *N.P. v. State of Georgia*, No. 2014-CV-241025.

(21) Utah Code Ann. §78A-6-1111(1)(a).

(22) Utah Code Ann. § 78A-6-1111(1)(e)(i)-(ii)

(23) In lieu of “contempt charges,” Utah juvenile courts now instead use “Orders to Show Cause.” If a young person fails to follow court orders, a juvenile probation officer files with the court an Order to Show Cause, along with an affidavit describing the violation (as per Rule 51 of the Rules of Juvenile Procedure). Though the rule still refers to a probation officer’s ability to file a “Contempt Petition,” the Utah Board of Juvenile Justice has directed that “Orders to Show Cause” should be filed instead. The intent and consequences are similar, without the negative legal implications associated with an official charge of contempt.

(24) Juvenile delinquency records often contain sensitive information such as documents associated with the youth’s legal proceedings, records of encounters with law enforcement, academic records, mental health history, family history and personal associations. The notion that a juvenile record is somehow automatically and unimpeachably sealed – a notion often perpetuated in popular media – is demonstrably incorrect. Technically, juvenile records are considered “not public.” However, there are a number of individuals and agencies that legally are allowed to access juvenile records. The law allows for access to a juvenile’s record if there is a “legitimate interest in the proceedings,” or are “conducting pertinent research studies”(Utah Code Ann. § 78A-6-209(3)). Furthermore, depending on the age of the youth, some information is not protected by provisions of the Juvenile Act and Rules of Juvenile Procedure. In instances when a youth is 14 or older and charged “with an offense that would be a felony if committed by an adult, the court shall make available to any person

upon request the petition, any adjudication or disposition orders, and the delinquency history summary of the minor charged unless the records are closed by the court upon findings on the record for good cause.” (Utah Code Ann. § 78A-6-209(4)).

(25) Even after a juvenile record has been “sealed” through the expungement process, judges are able to use juvenile records as evidence in: subsequent adult court hearings, (§§ 77-40-105(4)); subsequent sentencing of adult crimes (§§ 77-40-109(4)(5)); in determining eligibility for expungement of a future adult conviction, or firearms prosecutions (*Thompson v. Dep’t of Treasury*, 557 F. Supp. 158 (D. Utah 1982)). For additional information about the limits of expungement of juvenile records, see: Mayfield, Michael D. “Revisiting Expungement: Concealing Information in the Information Age.” *Utah Law Review* 1997: 1057, 1058-60.

(26) The National Juvenile Defense Center (NJDC) reports that (as of 2017) six states (Indiana, Louisiana, Michigan, New York, North Carolina and Pennsylvania) “presume that all youth are indigent for the purpose of appointment of counsel,” and that seven other states (Arkansas, California, Idaho, Kansas, Kentucky, South Carolina and Virginia) “have an initial presumption of indigence, but may then require the juvenile or parents to reimburse costs.” Information reported on the NJDC website, specific webpage available at <https://njdc.info/indigence/>.

(27) National Juvenile Defender Center (2017). *Access Denied: A National Snapshot of States’ Failure to Protect Children’s Right to Counsel*, p. 10.

(28) *Id.*, p. 11.

(29) Del. Code Ann. tit. 29 § 4602(c)(2016).

(30) N.C. Gen. Stat. Ann. § 7B-2000(a)-(b)(West 2001).

(31) 42 PA. Cons. Stat. Ann. § 6337.1(b) (1)(2013).





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