

Written testimony of Michelle Weemhoff
Submitted to the Michigan Indigent Defense Advisory Commission
December 16, 2011

Mr. Chairman and Commission members,

First and foremost, I want to thank you for your leadership and commitment toward improving Michigan's public defense system. My name is Michelle Weemhoff and I am the Senior Policy Associate for the Michigan Council on Crime and Delinquency (MCCD). For over a decade, MCCD has been involved in public defense reform, convening and chairing the Michigan Public Defense Task Force since 2001. I greatly appreciate the opportunity to speak with you today about Michigan's juvenile defense system, including current practices, areas for improvement, and opportunities to enhance our system.

David Carroll summed it up succinctly in the NLADA report when he wrote, "As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse."¹ This line resonated with me because our work is not just about "systems," but rather it is about the people, especially children, who rely on these systems. The myth of the dangerous child "superpredators" has simply not come to fruition; in fact, the juvenile justice population is overwhelming made up of the most vulnerable and marginalized children in our communities: fifty to seventy-five percent of children in the juvenile justice system have a diagnosable mental illness; over sixty percent have a substance abuse disorder; the majority have educational delays or learning disabilities; and a significant number have been raised in the child welfare and foster care systems due to abuse and neglect.

Each year, tens of thousands of these children enter Michigan's juvenile justice system. The representation of children in delinquency proceedings is a complex specialty in the law that is different from, but equally as important as, the representation of adults in criminal proceedings. As such, it is best to give due consideration to the unique characteristics of juvenile defense when discussing the need for reform.

As you know, the Constitutional right to counsel was established in the landmark decision, *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel was affirmed for juveniles in *In re Gault*, 387 U.S. 1 (1967): "Under our Constitution, the condition of being a boy does not justify a kangaroo court." Yet *Gideon*'s promise remains unfulfilled in Michigan, failing to establish standards and provide adequate representation to youth or adults.

¹ "A Race to the Bottom; Speed and Savings Over Due Process: A Constitutional Crisis." (2008). National Legal Aid and Defender Association. Page 34.

Background

In Michigan, the Family Division of the Circuit Court has original jurisdiction over juveniles for delinquency acts through age 16. The right to counsel is guaranteed by statute (MCL 712A.17c(5) and Court Rule. A child may waive his/her right to counsel if the waiver is made on the record in open court, and the court finds on the record that the waiver was voluntarily and understandingly made (MCL 712A.17c(3)). A waiver is disallowed if it is opposed by the child's parent or guardian ad litem or if the court determines that the best interest of the child or the public require appointment of counsel. The appointment of counsel is a local responsibility, with each trial court in the state responsible for compensating counsel who represent indigent youth.

Juvenile Defense

The juvenile court was originally established to provide rehabilitation and guidance for wayward youth, recognizing that children are different than adults and, with appropriate intervention, can grow up into productive, law-abiding citizens. While the juvenile court does provide necessary and helpful services for many youth and families, it is important to remember that a juvenile adjudication is incredibly serious and can have lifelong consequences. Adequate legal representation during delinquency proceedings ensures that a young person's Constitutional rights are upheld and that appropriate services are provided. It can also mean turning the page in a youth's life toward rehabilitation.

In 2003, Paul Holland, University of Michigan Law School, conducted a survey of juvenile court jurisdictions throughout Michigan to assess juvenile defense services. His unpublished findings reveal significant deficiencies in the juvenile defense system, including no requirements related to caseload, compensation, experience, or training, nor are any specifications concerning the work to be performed by appointed counsel.² A 2005 analysis conducted by the National Juvenile Defender Center identified Michigan as one of only twelve states that had neither a statewide juvenile defense system nor an established entity to supervise indigent defense delivery.³

In Michigan, only one of the five county or non-profit public defender offices represents children in juvenile delinquency proceedings. The majority of counties assign delinquency representation through a court appointment process or contract. Unfortunately, there is no consistent data collection or analysis so we do not have a clear picture about the appointment process, the quality of representation, and the outcomes of each case.

Without consistent standards for juvenile defense services, there is a great likelihood that the Constitutional rights of youth are violated in delinquency proceedings. As quoted in the 2008 NLADA report, "Juvenile justice representation is considered in many ways as an afterthought all across the state of Michigan. As inadequate as adult representation is, the treatment of kids in delinquency proceedings is far worse" (*A Race to the Bottom*, NLADA, 2008, page 34).

² Holland, Paul (2003). Unpublished Draft Report on Delinquency Defense in Michigan.

³ Juvenile Indigent Defense and Oversight Systems (2005). National Juvenile Defender Center.

In 2008, the National Juvenile Defender Center partnered with the National Legal Aid and Defender Association to publish the *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*.⁴ This document provides some overlap with the *Eleven Principles of an Effective Public Defense Delivery System* adopted by the State Bar of Michigan but also introduces new concepts specific to delinquency proceedings.

Similar to the *Eleven Principles* addressing criminal defense, the juvenile standards require timely appointment of counsel, adequate resources, appropriate workload standards, professional supervision, and ongoing training. I would like to emphasize issues related to appointment of counsel, training, and treatment to illustrate some of the unique aspects of juvenile defense.

Access to and Appointment of Counsel

Many children charged in Michigan often proceed without the guidance of counsel at their side. Parents sometimes tell their children to waive their right to counsel – for some, because of the cost they are told they will have to pay afterward; for others, because there is a clear conflict of interest, such as domestic violence or other problems at home. In other cases, children are just not informed that they can speak with an attorney to decide whether or not to have an attorney appointed.

When a youth (or parent) makes an uninformed decision to waive counsel, they are often unaware of the numerous consequences stemming from a delinquency adjudication, such as limitations on employment, housing, federal financial aid, and military involvement.

In Michigan, youth who received appointed counsel often do not fare much better. To be clear, there are many excellent juvenile defense attorneys in Michigan. However, even the best attorney cannot provide adequate representation if under-resourced and overwhelmed. Due to high caseloads, youth may meet their attorneys for just a few minutes before hearings. It is often viewed as common practice for public defense attorneys to advise their juvenile clients to plead guilty before the lawyer has conducted any factual investigation of the case. According to data from the State Court Administrative Office (2001), 92.5% of juvenile cases ended in guilty pleas. These figures rise to 97.5% when Wayne County is not included in the calculation.⁵

Training

Another critical issue is that many attorneys lack training or experience specific to handling juvenile delinquency cases. Frequently, attorneys who specialize in criminal defense or child welfare will take court-appointed delinquency cases, even if they are not familiar with the unique policies and procedures specific to juvenile justice. At a basic level, some attorneys are unclear about whether the client is the youth, the youth's parents, or the court, resulting in some attorneys making decisions "in the best interest of the child," even if different from the expressed wishes of their client.

⁴ Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems (2008). National Juvenile Defender Center and National Legal Aid & Defender Association.

⁵ cf. Holland, Paul (2003). Unpublished Draft Report on Delinquency Defense in Michigan.

While areas such as child protection have government-funded trainings financed by such projects as the Governor's Task Force on Children's Justice and Court Improvement Program, there is no such resource in the delinquency realm. There is rarely, if ever, a training program dedicated to representing juveniles in delinquency proceedings; and even more infrequently does a court actually require that these attorneys receive a certain amount of training or have a certain level of experience in order to receive court appointments.

According to the NJDC, juvenile defense systems should provide and mandate training that addresses the specialized advocacy required to deliver juvenile defense like detention advocacy, issues related to juvenile competence, the nuances of juvenile interrogations and confessions, mens rea as it relates to youth, transfer proceedings, disposition advocacy, and post-disposition practices. These training sessions are necessary in addition to generalized defense training on topics like litigation and trial skills, appellate advocacy and administrative hearing representation.

Additionally, youth in the juvenile justice system may be involved in other systems, requiring expertise from specialists in disciplines as diverse as child welfare, special education, mental and physical health, and substance abuse. Juvenile defenders must stay abreast of these issues on their own because, unfortunately, there is little to no funding for experts or specialists and providing an adequate defense of juveniles requires understanding the impact of these other systems on their client's alleged delinquency.

Juvenile defenders also must be trained on emerging research on human development and risk reduction to be able to incorporate child and adolescent development, culture, gender, and family dynamics into their advocacy. In particular, new findings indicate that brain development continues into one's early twenties, and that such development has significant implication for community efforts toward rehabilitation. Understanding the individualized needs of youth, and their respective developmental stages, is pertinent to legal issues as diverse as school suspension and expulsion, competency and capacity, and transfer to the adult criminal court.

Treatment and Disposition Alternatives

Representation should not cease if and when a youth has been adjudicated. The rehabilitative nature of the juvenile court is such that attorneys play an important role in seeking out and advocating for treatment and disposition alternatives that serve the unique needs and expressed wishes of the client. For example, there are a range of community-based interventions, which are far less costly and proven to be more effective in reducing recidivism. Attorneys who know their clients' needs can help identify and even facilitate appropriate referrals for mental health, substance abuse, or counseling, which ultimately benefit the youth, the family, and the public.

Opportunities

Throughout 2011, MCCD has worked with the National Juvenile Defender Center (NJDC) to explore training and resources for juvenile defenders in Michigan. In August 2011, MCCD, in partnership with NJDC, the University of Michigan Law School, Washtenaw County Office of the Public Defender and the Campaign for Justice, hosted a training, entitled, "Youths' Legal

Capacities in Court.” The training was registered at capacity within a week. The overwhelming response to both the training and a Michigan juvenile defense attorney survey, which MCCD and the Campaign for Justice disseminated over the summer, encouraged us to launch the Michigan Juvenile Defense Network listserv in October 2011.

In October 2011, Michigan delegates attended the National Juvenile Defender Summit. During this meeting, we compiled resources and discussed the need for ongoing training for juvenile defense attorneys in Michigan. At the NJDC Midwest Caucus meeting, it was decided that Michigan would receive \$3,000 for Fiscal Year 2012 to support the ongoing development of the Network, mostly to support state and local trainings. While these resources are helpful to bring attorneys together, they fall far short of providing an adequate training structure.

In order to make substantial and lasting changes, we need a data-driven process to identify and implement juvenile defense improvements. The National Juvenile Defender Center, for example, conducts comprehensive statewide assessments of access to counsel and quality of representation for children in delinquency proceedings. Their primary goal is to provide policy makers and practitioners with information that can be used to enhance the structure, recommend improvements, and highlight best practices of juvenile defense in respective states. To date, nineteen state assessments have been completed and two more are currently ongoing. NJDC will likely seek a new state to assess in Fall 2012, which, if Michigan leaders were inclined, could be a tremendous opportunity to focus on juvenile defense in our state.

Juvenile courts have a distinctly different structure and purpose than adult courts. Likewise, improvements in the public defense system may not necessarily translate as the most effective solutions to address concerns in the juvenile defense system. As you continue your work on this important issue, I encourage you to consider the unique struggles faced by children in the justice system, their families, and the attorneys who are asked to represent them. Please consider MCCD as a resource to assist you in accomplishing this important work. Thank you again for this opportunity to present testimony and I welcome any questions you might have.

Respectfully submitted,



Michelle Weemhoff, MSW
Senior Policy Associate
Michigan Council on Crime and Delinquency
517-482-4161
mweemhoff@miccd.org



A History of Public Defense Reform in Michigan

Gideon Initiative

In November 2000, the Michigan Council on Crime and Delinquency (MCCD) was approached by the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defendants to determine if MCCD was interested in assisting them with a Gideon Initiative in Michigan. The purpose of the ABA Gideon Initiative was to be a catalyst in fostering systemic improvements in the area of public defense.

All of the states participating in the Gideon Initiative looked at funding, standards, and accountability of defense services. The project developed by MCCD differed from the other state initiatives in three ways: defense services for juvenile offenders was included; a strong emphasis was placed on support services and the role of the defense system in reducing recidivism; and the initiative was driven by a Task Force which included representatives of non-lawyer groups whose constituencies are dramatically affected by the justice system.

Michigan Public Defense Task Force

In June 2001, MCCD convened a group of interested people from around the state to share their concerns about Michigan's public defense system. At that meeting a statewide citizen's group (the Michigan Public Defense Task Force) was established to develop a model for improving Michigan's defense services for citizens who cannot afford counsel. The 50-member Task Force is geographically representative of the state and includes service providers, state and local elected officials, professors, foundation staff, attorney and citizens. The common thread among Task Force members is a commitment to assuring fair and effective justice and the recognition that Michigan's public defense system must be strengthened.

The Task Force began by gathering information. This process included examining best practices from around the country, as well as in Michigan Circuit Court jurisdictions. The Task Force also surveyed current Michigan criminal defense attorneys and heard from local and national experts. The first action of the Task Force was to adopt the following vision statement: "Michigan will have a comprehensive, fair, effective, efficient, and independent system for providing public defense services to juveniles and adults who cannot afford an attorney."

In 2002, the Task Force published *The Eleven Principles of a Public Defense Delivery System* ("Eleven Principles"), patterned on the American Bar Association's (ABA's) *Ten Principles of Indigent Defense*. The Eleven Principles were subsequently adopted by the State Bar of Michigan's Representative Assembly in 2002 and its Board of Commissioners in 2005. These Principles serve as the fundamental elements of a public defense delivery system that can provide effective, efficient, quality, and ethical representation to those charged in criminal or

delinquency proceedings who cannot afford to hire an attorney. Unique to the state of Michigan, the Eleventh Principle strives to engage public defenders in the process of exploring and advocating for programs that improve the system and reduce recidivism.

Campaign for Justice

From 2001 to 2007 the Task Force continued to educate the public and the legislature on the need for reform. In 2007, this reform effort gained the attention of Atlantic Philanthropies, a foundation interested in promoting public defense system reform. Thanks to funding by Atlantic Philanthropies, the work of the Task Force is now being spearheaded by the Campaign for Justice. The Campaign is a 501(c)(4) organization working for legislative reform to establish a constitutionally sound system of public defense in Michigan.