

January 29, 2016

**Written Testimony by the National Juvenile Defender Center Related to Kansas Senate Bill No. 367**

Thank you for giving the National Juvenile Defender Center (NJDC) the opportunity to provide written testimony on this important Bill aimed at reforming the juvenile justice system in Kansas. We applaud this comprehensive reform effort and thank those who have invested so much time, energy, and thoughtfulness in the Kansas Juvenile Justice Workgroup and the drafting of this Bill.

NJDC's mission is to promote justice for all children by ensuring excellence in juvenile defense. NJDC believes that all youth have the right to ardent, well-resourced representation. NJDC acknowledges the unique and special status of childhood and the impact that immaturity, disabilities, or trauma may have on that representation. NJDC works to improve access to and quality of counsel for all young people in delinquency court, provides technical assistance, training, and support to juvenile defenders across the country, and supports the reform of court systems and policies that negatively impact our nation's youth. NJDC also supports effective and developmentally appropriate juvenile court reform through state assessments of access to and quality of juvenile indigent defense counsel. NJDC has conducted twenty-one state assessments, which are available on our website, and include Kansas' neighboring states of Nebraska, Colorado, and Missouri.<sup>1</sup>

Given the breadth of the Bill and the brief window of time available to submit comments, I am going to limit my remarks to just a few specific areas of national best practices regarding developmentally informed juvenile justice systems, and would request to reserve comment on other aspects of the Bill. As an overall reform measure, NJDC believes the steps taken in this Bill move Kansas in the right direction toward research-based principles that reduce recidivism and improve outcomes for youth.

**Recognition of Juvenile Justice Practice as a Special Practice that Requires Dedicated Training**

NJDC believes that the requirement in the Bill's New Sec. 11(a) for juvenile-specific training for judges, county and district attorneys, and defense attorneys who work in juvenile court is consistent with and promotes national best practices. For too long, juvenile courts across the country have suffered from a pervasive perception that they are less important than criminal courts or are simply a training ground for inexperienced attorneys or judges. In fact, all juvenile justice stakeholders have a responsibility to understand how a child's developmental stage, education, experience, disabilities, history of trauma, and ability to communicate can affect his or her progress in juvenile court and develop appropriate ways of dealing with these challenges. Because successful juvenile court proceedings also require successful rehabilitation and reintegration of youth into their communities, all juvenile court stakeholders must not only understand juvenile-specific laws, rules, and procedures, they must also have a full comprehension of the variety of child-serving systems that may impact a juvenile case, such as the education, mental health, and child welfare systems. The Supreme Court of the United States has repeatedly delineated that juveniles cannot be treated as small adults in our justice system and that age is "far more than a chronological fact."<sup>2</sup> Particularly, this Bill's requirement of juvenile-specific training for defense attorneys is in line with national best practice standards.<sup>3</sup> Even the United States Department of Justice—the nation's highest law enforcement agency—has said, "the unique qualities of youth demand special training, experience and skill for their advocates" and that providing less may violate a child's Due Process right to counsel.<sup>4</sup>

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<sup>1</sup> See <http://njdc.info/our-work/juvenile-indigent-defense-assessments>

<sup>2</sup> J.D.B. v. North Carolina, 131 S. Ct. 2394, 2404 (2011)

<sup>3</sup> NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012); JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (Institute for Judicial Administration/American Bar Association, ED., 1980)

<sup>4</sup> Dep't of Justice Statement of Interest for N.P. et al. v. Georgia, No. 2014-CV-241025 (Ga. Super. Ct. 2014)

## **Presumption of Juvenile Court Jurisdiction Is in Line with the Science of Adolescent Development and Supreme Court Jurisprudence**

NJDC also believes that the proposed changes in Sec. 39 of the Bill that create a presumption that youth between 14 and 18 years of age be tried in juvenile court is a significant step toward making Kansas's justice system more developmentally appropriate. Relying on behavioral studies and adolescent brain research findings that children are categorically different from adults, the United States Supreme Court has held that children must be treated differently from adults in contexts ranging from sentencing to custody determinations.<sup>5</sup> Requiring the prosecution to prove why a child should be treated like an adult, rather than the child proving he or she should be considered a child, is in line with this reasoning and fundamental notions of fairness. This year marks the 50<sup>th</sup> Anniversary of *Kent v. United States*,<sup>6</sup> the United States Supreme Court decision that required due process protections and access to counsel for youth facing the potential of adult prosecution. In the words of the Court, "It is clear beyond dispute that the waiver of [juvenile court] jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile."<sup>7</sup> Passage of this Bill will ensure that this "critically important action" be thoroughly vetted and justified.

## **Pre-File Diversion Will Improve Recidivism and Prevent Unnecessary Juvenile Prosecutions**

Sec. 38 of this Bill proposes a new statewide "immediate intervention" program that would act to divert low-risk youth from formal prosecution in juvenile court. Programs like these around the country have been instrumental in promoting public safety while also limiting the formal processing of youth in the juvenile delinquency system. Studies show that this is incredibly beneficial and that diversion practices can be "significantly more effective in reducing recidivism than the traditional justice system."<sup>8</sup> Moreover, the Bill's standard of "substantial compliance" for determining success within the program, rather than some notion of absolute compliance, demonstrates a thorough understanding of child and adolescent developmental science and research that shows the normative child will make mistakes in judgement, but with appropriate redirection can succeed.

## **Focusing on In-Home Interventions Is Developmentally Appropriate and Cost-Effective**

The new Bill's amendments to the Sec. 41 are a strong recognition that out-of-home confinement of youth is unnecessary and ineffective for most children because it is detrimental to their development, inhibits rehabilitation and reentry into society, and contributes to recidivism. As the National Academy of Sciences has recognized, the most appropriate intervention strategies for youthful offenders are ones that promote positive, pro-social peer interactions; place youth in environments that have positive adults who care for and support youth; and include activities that create opportunity that promote autonomous decision making and critical thinking in real life situations.<sup>9</sup> It is clear that secure detention provides none of these.

While secure confinement is developmentally harmful for youth, it also is a financial burden on the state. A 2015 Kansas Department of Corrections report concedes that Youth Residential Center II placements are costly and ineffective.<sup>10</sup> And while NJDC was unable to ascertain the exact costs of Juvenile Correctional Facilities, the Kansas report states that the costs of these facilities are even greater. By reserving the commitment of youth to a secure facility only in cases where a judge makes written findings that he youth is "a significant risk of harm to another, and that the juvenile is otherwise eligible for commitment" pursuant to statute, Kansas is not only promoting better rehabilitation and stronger public safety, it is also being fiscally responsible.

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<sup>5</sup> *Roper v Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 130 S.Ct. 2011 (2010), *J.D.B. v. North Carolina*, 131 S. Ct. 2394, (2011), *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>6</sup> 383 U.S. 541 (1966)

<sup>7</sup> *Id* at 556.

<sup>8</sup> Holly Wilson and Robert Hoge, *The Effect of Youth Diversion Programs on Recidivism: a Meta-Analytic Review*, Criminal Justice and Behavior May 2013, vol. 40 no. 5 497-518.

<sup>9</sup> *See Reforming Juvenile Justice: a Developmental Approach*, National Academy of Sciences, Committee on Assessing Juvenile Justice Reform, p 3 (2013).

<sup>10</sup> Kansas Department of Corrections, *Cost Study of Youth Residential Centers for Juvenile Offenders*, p 2, January 15, 2015, available at: <https://www.doc.ks.gov/publications/juvenile/ycr>

### **Hearings via Audio-Video Communication Do Not Comport with National Best Practices**

At both detention hearings (Sec. 36) and initial hearings on the petition (Sec. 37) the Bill allows for the proceedings to be conducted via an audio-video communication system, with the child in a location other than the courtroom. This practice infringes on the child's due process rights and the right to effective representation by counsel. It should be amended if Kansas hopes to be providing developmentally appropriate justice for juveniles.

Children in the juvenile justice system suffer in high numbers from barriers to communication including mental illness, developmental delays, and learning disabilities. Conducting hearings in which the child is a distant spectator raises the very real fear that children will be securely detained, plead guilty, or be subject to sanctions without understanding what is happening to them or why it is happening. At present, the current Bill only places the choice of whether to use audio-video communications at the discretion of the court, without outlining any of the factors the court should weigh in making that determination. As it stands, judges could conceivably choose to use audio-visual communication as a time- or cost-saving measure without any consideration of developmental factors or the constitutional rights of a child.

With respect to the right to effective counsel, video hearings place defense attorneys in a catch-22. If a lawyer chooses to be with the client in order to ensure free and confidential real-time communication with the client, he or she must do so by sacrificing the advantages of being with the other stakeholders in court. Among other things, a lawyer must be physically present in court to effectively negotiate with judges, prosecutors, and probation officers; review court files and records; examine physical evidence; cross-examine witnesses effectively; and consult with defense witnesses and family members who are at the court. None of this can be effectively done if the attorney chooses to be present where the client is watching the proceedings. Conversely, choosing to be in the courtroom cuts the attorney off from the client and leaves the child without an advocate who can ensure the child's comprehension of the proceedings. While the statute provides that in-court lawyers be provided with secure and confidential means of communicating with their clients, true respect for this provision would require a recess in the proceedings every time the child had a question or the lawyer needed to ensure the client understood something that was transpiring in the hearing. While important, such interruptions are unlikely to be practical. In fact, reports from jurisdictions that do permit video hearings tell us that judges, prosecutors, and even defense attorneys often simply ignore the child in such proceedings.

Concededly, there are times in which the child or defense counsel may find it appropriate to waive a child's presence in court. The right to be present, however, is the child's right and like any right, can only be waived by the child. A judge should not be permitted to unilaterally deprive a child of that right for court efficiency or to save transportation costs. Therefore, NJDC recommends that if Kansas intends to maintain a developmentally appropriate detention and initial hearing statute, then the audio-visual communications sections should be amended to make their use possible solely with the consent of the child and his or her attorney.

### **Conclusion**

NJDC appreciates the opportunity to provide comment on these critical issues affecting the youth of Kansas. Many of the provisions in this Bill go a long way toward reforming Kansas's juvenile code to reflect a greater appreciation of developmentally appropriate juvenile justice. While there was insufficient time to provide input on many other important aspects of the Bill, please know that NJDC welcomes any questions or follow-up by Senators or their staff. Please do not hesitate to contact us if you require further information. Thank you.

Respectfully submitted,



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