



# BJA Bureau of Justice Assistance Bulletin

Nancy E. Gist, Director

## Providing Effective Representation for Youth Prosecuted as Adults

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### About This Bulletin

This bulletin describes successes in public defenders' attempts to provide high-quality representation to youth prosecuted in adult criminal courts. It uses the experiences of defenders across the country to identify key elements of defender programs that effectively meet the needs of transferred children.

In recent years, private and public defenders have handled cases involving children automatically transferred into adult criminal court without the benefit of independent review by a judicial officer. These automatic transfers occur under a variety of state laws, which either assign youth charged with certain offenses to criminal court or allow prosecutors to decide who will be prosecuted as adults.<sup>1</sup>

Child advocates and public defenders are alarmed about automatic transfers. Juveniles prosecuted in adult criminal court include a high percentage of abuse victims, mentally ill and educationally limited children, and children

of color.<sup>2</sup> Children convicted in adult courts face more severe, often mandatory, penalties than children convicted in juvenile courts. In some states, these children stand to lose collateral rights such as the right to vote before they have had a chance to enjoy them.<sup>3</sup> These children's cases must be handled judiciously because so much is at stake for both defendants and the state.

Defense attorneys, however, including organized public defenders, are ill-prepared to handle the cases of children who appear in criminal courts. They, like judges, prosecutors, and probation officers assigned to criminal courts, are generally untrained and inexperienced in recognizing the needs and characteristics of young defendants. In addition, almost no one involved has thought through the administrative, logistical, or case-handling implications of moving children, many of them detained, from juvenile to criminal courthouses.

The policymakers who created this new class of child defendants failed to address the implications of prosecuting youngsters in courts designed for adults under procedures that linked

adult defendants with adult jails, bail and bonding, attorneys familiar with adult behavior, and adult correctional programs. Children have been relegated to adult court on the theory that the enhanced punishment of adult court will benefit society more than the individualized therapeutic approach that is the juvenile court ideal.

It has not helped matters that most children transferred into adult court have been moved without fanfare. Young children charged with violent crimes gain a great deal of media attention. But many children are transferred for relatively minor drug, weapons possession, or property crimes.<sup>4</sup> These children appear one or two at a time before preliminary hearing and felony court judges who may have 30 or more felony cases involving adults on their docket that day. As a result, these children are almost invisible, too small a part of the judge's caseload to merit special attention or treatment.

Public defender offices have responded in different ways to the automatic transfers. Some have initiated new programs with new staff; others have taken no special action. Some defenders' efforts to change the way

children are represented in criminal court have failed; other efforts have worked, but under such unique circumstances that they are not universally applicable. Some public defenders developing new programs have encountered staff who resist assignments that take them back and forth between juvenile and criminal courts. Others have discovered that it is difficult to forge a collaboration between social workers from juvenile court and attorneys in criminal court.

After a review of leading defender programs in the country, some defenders observed how difficult it has been for them to form a different model of representation or to be the prime mover in changing the daily routine of court and their own office. After all, they noted, the usual function of defense attorneys is to attack the case of the opposing party rather than put an affirmative plan in place for their own clients.<sup>5</sup> Moreover, defenders are often skeptical of reforms that hurt their own clients, and the “reform” of prosecuting children as adults does nothing to allay that skepticism.

Despite these problems there have been successes in public defenders’ attempts to provide high-quality representation to youth prosecuted in adult courts. This bulletin describes these successes and identifies the key elements of defender programs that effectively meet the needs of transferred children.

**The Work of the Model Program Advisory Team**

The task of defining the elements of a defender advocacy program for juveniles transferred to criminal court was undertaken by a committee of experienced advocates and defenders, the Model Program Advisory Team. This team met in Miami, Florida, on February 22–23, 1999, and again in Chicago, Illinois, on July 28–29, 1999. It heard from representatives of both established and new defender

programs serving children in adult courts and reviewed documents between meetings.

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After reviewing programs from across the country, the advisory team identified the elements it considered essential for a strong, effective public defender program serving youth prosecuted as adults. It concluded that no single model would work for a majority of defender programs. It also recognized that most defender programs are limited in the number of new staff they can hire to represent children in criminal courts and in the extent of program changes they can make on short notice. The advisory team recommended program elements for defenders to consider when designing new programs. If adopted at the outset, these elements could be augmented as the program matures.

The advisory team also recognized that defenders who represent children in criminal court have concerns about issues that are beyond their direct control. For example, in some jurisdictions one court or judge is assigned all cases of juveniles transferred to adult court.<sup>6</sup> Advisory team members disagreed among themselves about the wisdom of this policy, the implementation of which is controlled by other parties in the court system, and refrained from making a recommendation. The advisory team decided to make recommendations that defenders, with adequate resources, are able to implement on their own and to endorse specific elements that are adaptable to any programmatic structure. These elements are organized into four categories:

- ❑ Defining the scope of defender representation of youth transferred into adult criminal court.
- ❑ Forming and maintaining a stable team of juvenile defenders.
- ❑ Ensuring child-focused advocacy.
- ❑ Supplying the public and policy-makers with information.

**Defining the Scope of Defender Representation of Youth Transferred Into Adult Criminal Court**

Most defender programs recognize that the needs and structure of offices that represent children in juvenile court differ from those that represent adults in criminal court. The advisory team concluded that the needs and structure of a defender program that serves children in adult court are different as well. Its members heard of failed attempts to provide children in adult criminal courts the same attorneys who represented them in juvenile court.

The advisory team concluded that representing children prosecuted as adults requires a blend of the services provided in both adult and juvenile courts, taking into account factors such as the location of services, the logistics of having children in criminal courtrooms, and the special needs of children as they participate in their defense. The scope of representation changes for these children. The following sections describe the elements of a program that provides juveniles with adequate representation in adult court.

**A multidisciplinary team approach to representation.** The overarching recommendation to defender programs representing children transferred into criminal court is to adopt a team approach with multidisciplinary capabilities. The advisory team found that children present a variety of issues and challenges that require time and expertise that few attorneys have. Each child’s

defense team will differ, as will the time required of each team member. Defender programs should have access to social workers, child psychologists, investigators, and other service professionals who know about residential, clinical, educational, and treatment resources available in the community and through private and state agencies. The defendant's team must use these resources as sources of information about its young client.

Lawyers working with children encounter problems that their adult clients have compensated for or overcome. Many transferred children have suffered trauma, loss, or abuse, which may not have been diagnosed, and which may interfere with their ability to communicate. They often suffer from behavioral problems, family crises, poverty, learning disabilities, asthma or other health problems, alcohol or drug abuse, or emerging mental illness.

In addition, most lawyers trained for practice in adult criminal court are unfamiliar with the field of child development. Adequate representation requires defenders to understand and explain a child's competency to waive his or her rights, to make an admission, or to confess. An attorney representing a child must be able to explain how child development issues apply to the case as part of a defense. Having professionals on the team with training in these areas is essential.

Moreover, adequate representation requires that attorneys have access to community, educational, and treatment resources suitable and available for children. The defense attorney cannot assume that adult probation and medical staff experts will be any better prepared to work with youngsters in their own professional areas than will be the criminal court prosecutor or judge. Few attorneys have the skills to meet these requirements. Few have the time to call the various program resources, to understand and investigate child abuse, or to make appropriate referrals to a drug or alcohol program.

And even fewer have the time to obtain vital information from a confused, inarticulate child.

To ensure a successful team approach, lawyers must work with social workers and other nonlawyer staff, such as paralegals or sentencing experts. The advisory team recognized that some defenders are not used to working with professionals from other fields, so integration and collaboration may be difficult to achieve. Public defender office staff may have encountered difficulty defining the roles of different professions in the process, but they must do so for the program to work.

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**Vertical representation.** The advisory team's second major recommendation for defender advocacy programs for children is to incorporate a vertical model of representation. Vertical representation means assigning one attorney, or attorney team, to a defendant from the outset through the conclusion of the case. By contrast, in horizontal representation a defendant is represented by the lawyers assigned to different courts that the case is heard by, so each stage involves a different lawyer. Horizontal representation is common in large public defender jurisdictions.

Vertical representation has obvious advantages for most defendants, particularly children who have the greatest need for continuity in representation. Children are more dependent upon adult support, they need time to build trust and to open channels for communication, and they are likely to become depressed and despondent while awaiting trial. Every successful program reviewed by the advisory team employed some form of

vertical representation, even in offices that were set up to provide horizontal representation to adult felony clients.<sup>7</sup>

Recognizing that vertical representation is not possible in all defender offices, the advisory team proposed that the team approach be used to provide vertical representation by nonlawyer staff. A student, intern, or social worker can be assigned to a juvenile defendant and brief newly appointed case attorneys. This approach seems to work effectively in several offices.<sup>8</sup>

**Early representation.** The advisory team recommended that representation begin at the earliest moment possible. A child's memory can be unreliable; therefore, a defender's office must work with its young clients to identify witnesses, gather evidence, prepare motions, learn about their families, and begin to explore educational and sentencing options as soon as possible. In most public defender offices, counsel should have contact with child defendants immediately after arrest and be present at the first court appearance. In jurisdictions with community defender offices, representation could begin before arrest or arraignment, when defendants or their intermediaries contact the defender agency. Early representation is key to a defender office establishing a productive relationship with its young clients.

**Early and sustained efforts to obtain pretrial release.** Defender programs serving transferred children can provide early and repeated advocacy for release from detention or jail on bond or with special conditions. Programs must be designed to enable presentation of bond motions at appropriate points in the criminal court proceedings. Programs should take into account that the information required at a bond hearing for a child is different from information about income and property required at a bond hearing for an adult. Defense teams must be familiar with alternative programs and probation services available to children, as well as the services and requirements of child welfare agencies.

**Caseload limits for attorneys and other staff.** The caseloads of attorneys and of social workers or other staff in programs serving transferred children should be lower than the caseloads of attorneys handling adult felony cases in the same offices. The advisory team has not established recommended caseload limits for program staff.

**Method of identifying juvenile-aged defendants; communication between juvenile court and criminal court defenders.** In some jurisdictions, children who are to be automatically transferred to criminal court appear first in juvenile court until a transfer decision has been made by the changing authority.<sup>9</sup> For these children, their defenders in juvenile court ordinarily initiate a file, conduct client interviews, and collect case and personal information about the defendant. Defender programs must decide whether the attorney assigned in juvenile court will represent the client in criminal court, taking along the file information.<sup>10</sup> If the attorney does not continue to represent the client in adult court, a mechanism must be established for prompt transmittal of case information to the attorney who will represent the child after transfer to criminal court.

Perhaps more challenging are cases in jurisdictions in which children who are automatically transferred to criminal court never appear in juvenile court. The criminal court defender has no advance notice that a child will be appearing in the preliminary or first appearance court. Defender programs in these jurisdictions must design a mechanism to alert criminal court defenders that a child's case has entered the system and that appropriate services should be provided on schedule.

In either case, the advisory team recommended that a child's case file be marked clearly to indicate the defendant's age and status as a youth in adult criminal court. Data management systems should be modified to identify and process information for a child's case in criminal court.

**Provision of expert services for children.** Children in juvenile court are frequently evaluated by court-appointed experts, and mechanisms and funding are set up to provide those services. Defendants in adult criminal court are not routinely evaluated except to answer specific questions to inform an attorney of their competency to assist in their defense. Defender programs must ensure that children in criminal court are provided with appropriate independent and qualified assessments and expert evaluations that are equal to the services provided to children in juvenile court.

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The advisory team learned that defender programs in some jurisdictions have convinced funding authorities that the costs of defense evaluations of children transferred to adult criminal court should be drawn from the same budget that pays for these services in the juvenile court system. Doing so ensures that neither criminal courts nor defender agencies are unfairly burdened because of a prosecutor's decision to charge a child as an adult.

**Team resources for dispositional/sentence planning.** Defender programs should include staff who have the skills necessary to ensure children are provided vigorous advocacy at sentencing. This provision usually requires participation by social workers, experts in child developmental and educational issues, and professionals who can develop mitigation arguments and alternative sentencing plans for children in plea discussions and postconviction.

**Appropriate appellate resources.** Appeals of juvenile court decisions are

notoriously rare. However, with the increased consequences for children sentenced in criminal court, and with new and hastily written statutes inviting challenges to criminal court decisions, defender programs should be able to take up cases and issues on direct and interlocutory appeals. In addition, prosecutors in states that allow for reverse waiver or decertification frequently appeal rulings returning children to juvenile court. Therefore, programs must be prepared to defend appeals brought against their juvenile clients.

### **Forming and Maintaining a Stable Team of Juvenile Defenders**

In forming a program to defend children prosecuted as adults, the overriding goal is to develop a cadre of attorneys, social workers, investigators, and others to provide the representation needed by these children. Two program elements, assignment status and salary parity, were recommended by the advisory team.

**Assignment status.** Representing a child in adult criminal court is a challenging and demanding assignment. Attorneys who staff defender programs for youth prosecuted in criminal court should be consistently and, to the extent possible, exclusively assigned to represent children in delinquency and criminal cases. Attorneys who find representing young defendants in a tough punitive court system professionally satisfying should be selected for these assignments.

**Salary parity.** Program staff should have salary parity with colleagues with similar experience and responsibilities who litigate major adult felony cases.

### **Ensuring Child-Focused Advocacy**

The advisory team emphasized that defenders must recognize that representing a child is qualitatively different from representing an adult. This work requires a concentration on and familiarity

with different bodies of knowledge, as well as traditional litigation skills. Programs designed to serve children prosecuted as adults must provide lawyers and other professionals special information and resources. Several elements make up such a program:

**Assessment.** Programs must have the testing resources, staff, materials, and screening instruments to assess delinquent behavior and the educational and mental health needs of their clients and to inventory their clients' strengths and internal resources. These programs must have the funds to obtain consultants and expert witnesses.

**Communication with the client.** Staff must be motivated to work with children and allowed sufficient time to get to know their young clients, their situations, and their cases, as well as build relationships with them. This element is a critical part of providing early representation, as previously discussed in the section on a multidisciplinary team approach to representation.

**Knowledge of children's issues.** Staff in programs representing children in criminal court need to know about the susceptibility of children to influences from accomplices and the intricacies of gang involvement. They should be familiar with the research on issues such as the credibility of children's testimony, how these issues and other factors relate to police interrogation strategies, and the reasons juvenile confessions are often suspect. Staff should be familiar with youth culture, such as the role of gangs, peer pressure, and drug use in influencing children's behavior, and with dysfunctional or pathological family dynamics.

**Information about the decision-making limitations of a child.** The advisory team noted the difficulty of having a child as a client who must participate in making legal and strategic decisions. Program staff must be familiar with issues of competency, the emotional and cognitive limitations of children, and their own ethical responsibilities to child clients.

**Communication with a child's family.** Children are members of families, be they traditional, extended, or headed by a nonrelative. Whatever the structure, it is important to form a relationship with the child's family. Programs must account for this activity, teaching staff how to develop relationships with adults who are important to their clients.

**Ability to hold service agencies accountable.** Defenders must carry their clients' causes to the agencies responsible for providing support and services, such as schools, mental health clinics, and social service agencies. Often, these agencies have failed the children now charged with criminal offenses. Under new policies and legislation, some school districts routinely suspend children arrested by police or convicted on criminal charges. The children's best interests and criminal defense strategy often require that these decisions be reversed or modified. A defender program may need access to civil attorneys to guarantee their clients' rights.

**Different substantive defenses.** Children may use defenses rarely employed in adult cases, including infancy, incompetence, lack of culpability, or lack of criminal intent. For children, defense attorneys need to be aware that incompetence may be based on developmental psychological issues, rather than mental illness, and that the measures of competency used for adults in the criminal justice system may not hold the same value for children. Programs need to keep legal staff aware of these defenses.

**Pleadings libraries.** Programs for children who are prosecuted as adults should house libraries of special pleadings for children in juvenile and criminal courts.

**Means to protect children's frail egos.** Many judges and other court staff speak condescendingly, negatively, or critically to children. Programs can offset the damage done by people who are careless of what they say in front of

children and by courts that allow child defendants to hear diagnoses and prognoses that they should not hear. Programs must allow their staff time to prepare children for what they might have to do or say in court and to help them understand the proceedings.

**Access to resources for children.** Communities provide children with limited resources. Program staff must acquire the latest information about available services and resources to keep these children out of jail. This activity is vital in programs that take sentencing work seriously.

### Supplying the Public and Policymakers With Information

The fate of defender clients does not rest solely in each court case, but rather in the marketplace of public opinion. A defender program that aspires to serve children transferred to adult court must inform the public about the nature of children in juvenile and criminal courts. An effective defender program includes three elements that inform public opinion.

**Information on racial disparity and other issues of concern.** A disproportionate number of children transferred to adult court are youth of color.<sup>11</sup> A defender program for transferred children should collect data that can inform the public about trends, disparities, and irregularities in sentencing outcomes that relate to ethnicity or class. In addition, it is believed that learning disabilities and mental health problems affect a large number of children who are transferred to adult court. Many transfers are for nonviolent offenses. By documenting these facts, defender programs may be able to persuade lawmakers to develop effective, less costly sanctions for youthful offenders and to reject automatic transfer to adult criminal court, mandatory sentencing for children, and punitive incarceration of children in all but exceptional cases.

**Preservation of the voice of the child.** Children prosecuted as adults have compelling stories that offer a context for their unlawful conduct. Their stories suggest that responses other than prosecution and punishment would improve community safety. Defender programs are encouraged to inform the media and the public about the immaturity of the offenders they represent. In so doing, they may reduce the fear that drives current juvenile justice policy.

**Networking with parents and community organizations.** Programs should maintain ties with the parents of former clients and community groups, especially those that have had positive experiences with program clients.

## Conclusion

The prosecution of children in adult criminal courts poses particular challenges to defense counsel and to public defender offices. Children are different from adults and their representation in criminal court requires different skills, knowledge, and resources than those typically provided adults. They need multidisciplinary services, which means the support of lawyers, social workers, and other professionals whose services are not frequently required for adult defendants. Their cases should be handled on a different schedule. Their attorneys need access to resources that meet children's needs. Children in the adult court present different legal issues for resolution. They require more time and persistence to interview. Even the simple logistics of identifying their cases early in the criminal court process requires special communications among defender staff.

In this report, senior staff from public defender offices who have attempted to address the unique problems encountered when representing children in adult criminal court have defined the elements of a defender program that

starts to meet these challenges. By incorporating the elements described in this report into their own defender programs, defenders, court administrators, and local government officials should be able to minimize or circumvent many of the problems posed by the prosecution of children in adult court.

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## Notes

1. The laws and procedures that move children into adult criminal court vary from state to state, as does the terminology used to describe this movement: automatic transfer, waiver up, certified, and direct file. Descriptions such as reverse waiver and decertified apply to the process of returning children to the jurisdiction of the juvenile court. For a state-by-state analysis of transfer provisions, see Griffin, P., P. Torbet, and L. Szymanski, 1999, *Trying Juveniles as Adults in Criminal Courts: An Analysis of State Transfer Provisions*, Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, NCJ 172836.

2. Males, M., and D. Macallair, 2000, *The Color of Justice: An Analysis of Juvenile Adult Court Transfers in California*, San Francisco, CA: Justice Policy Institute, January, pp. 3–4. This report analyzes outcomes for juvenile defendants transferred to criminal court jurisdiction after a judicial transfer hearing in California. Within data limitations, it found that the Los Angeles County transfer rate for minority violent arrestees was twice the rate for white violent arrestees (p. 6). There is no reason to believe that a mandatory or discretionary transfer process instigated by police or prosecutorial decisions would produce less racially disproportionate outcomes than a judicial hearing process, which is usually initiated by the prosecution.

For a report of disproportionality in automatic transfers initiated by prosecutors, see Schiraldi, V.; and J. Zeidenberg, 1999, *The Florida Experiment: An Analysis of the Impact of Granting Prosecutors Discretion to Try Juveniles as Adults*, San Francisco, CA: Justice Policy Institute, July. Black youths are 2.3 times more likely to be transferred to adult court (p. 4).

3. Human Rights Watch and The Sentencing Project, 1998, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, New York, NY, and Washington, DC.

4. Amnesty International estimated that, in 1997, more than 200,000 children in the United States were prosecuted in adult criminal court.

5. These problems were vividly highlighted at the second meeting of the Model Program Advisory Team, Chicago, Illinois, July 28–29, 1999.

6. New York City assigns “juvenile offenders” to a “Youth Part” court in four boroughs. One judge hears the cases of all juveniles transferred into adult court in Philadelphia, Pennsylvania.

7. The Juvenile Special Defense Unit, Defender Association of Philadelphia, assigns an attorney and social worker to each juvenile-aged defendant charged in criminal court. This team remains with its client through all trial stages and, if successful in obtaining a reverse waiver to juvenile court, follows the client there to continue representation. In contrast, both criminal and juvenile units of the office are organized to provide horizontal representation. The State Public Defender Office in Baltimore, Maryland, assigns a lawyer and social worker to a juvenile-aged defendant prosecuted in adult criminal court. The assigned lawyer continues to represent the youth if, after a reverse waiver hearing, the youth is waived back to juvenile court. If the youth remains in adult criminal court, the lawyer passes the case to a criminal court trial attorney before relinquishing responsibility for it.

8. The Juvenile Transfer Advocacy Unit of the Cook County (Chicago, Illinois) Public Defender assigns a “litigation assistant” or social worker to juvenile-aged defendants automatically

transferred to criminal court. That person interviews the youth shortly after arrest, accompanies the youth to preliminary hearing courts, and then proceeds to work with the trial attorney in an office that otherwise is organized on a horizontal representation model.

9. For example, Florida transfer provisions allow the prosecutor 21 days to make a transfer decision, during which time the child is under the juvenile court’s jurisdiction. In other states, such as Illinois, children whose prosecution as an adult is determined solely on the charge against the child and the child’s age are never under the jurisdiction of the juvenile court.

10. Some defender offices that have tried both arrangements report finding juvenile defenders ill-equipped to handle plea negotiations and procedural issues in criminal court, whereas criminal court attorneys are poorly informed about resources for children, developmental issues, and other requirements for working with youth. A senior public defender cites union and seniority issues that cloud the decision on which attorneys should represent children in criminal court.

11. See note 2.

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