

**TO: Winsome Gayle  
Civil Rights Division  
Special Litigation Section  
US Department of Justice**

**Honorable Dan Michael  
Presiding Judge, Memphis-Shelby Juvenile Court**

**Honorable Mark H. Luttrell, Jr.  
Mayor, Shelby County, Tennessee**

**Katherine Pascover  
County Attorney**

**FROM: Sandra Simkins  
Due Process Monitor**

**DATE: June 6, 2018**

**RE: Compliance Report #11 - April 2018**

Juvenile Court Memphis Shelby County (Juvenile Court) entered into a Memorandum of Agreement (Agreement) with the United States Department of Justice Civil Rights Division (DOJ) on December 17, 2012. According to the Agreement, compliance shall be assessed by two monitors and a facility consultant. I was named the Due Process Monitor and have subject matter expertise in the area of due process and juvenile delinquency. The regularly scheduled compliance review and site visit occurred April 2, 2018 – April 5, 2018. This report evaluates the extent to which Juvenile Court has complied with each substantive provision of the Due Process sections of the Agreement. The original Agreement between Shelby County and the DOJ contained 15 separate sections and a total of 56 compliance provisions. As per the Agreement, once substantial compliance is reached, it must be maintained for at least 12 months. Since the last compliance visit I am pleased to report that Shelby County has maintained substantial compliance in five additional subsections, within the sections of Transfer Hearings and Juvenile Defenders, and these subsections will no longer be under review.<sup>1</sup>

## **Format**

1. Executive Summary
2. Remaining Key Areas of Concern
3. Discussion of Compliance Findings

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<sup>1</sup> DOJ letter dated March 28, 2018, Response to 3<sup>rd</sup> Request to Terminate Select Provisions of Memorandum of Agreement.” In the Due Process Category the following provisions were terminated: Transfer Hearing provisions III.A.1 ( c)(i)(f) and (g), Juvenile Defenders Provisions III.A.1 ( e)(i)(b) and (d), and Juvenile Defenders Provisions III.A.1 ( e)(ii)(d)

## Executive Summary

In my last compliance report I called on Shelby County stakeholders to “renew previous commitment to collaborative efforts toward meaningful progress.” I am pleased to report that there has been movement and collaboration in several key areas which have been significant challenges to the completion of the Agreement. In addition, I recently received a report *Toward a Comprehensive Plan for Juvenile Defender Services*,<sup>2</sup> which appears to create a viable plan to achieve substantial compliance in the area of Public Defender and Panel Attorney Independence.

This report will address the following remaining issues:

1. Independence for the Shelby County Public Defender. Since the Mayor’s March 23, 2017 “Executive Order,” substantial steps have been taken to realize solutions in line with recommendations originally proposed in “Blueprint to Achieve Compliance in Juvenile Defender Services,” to ensure an adequate level of independence necessary to achieve substantial compliance with the Agreement. Once achieved, the Agreement requires at least 12 months of sustained substantial compliance.
2. Independence of Conflict Counsel Panel. *Toward a Comprehensive Plan for Juvenile Defender Services*, (hereinafter “The Plan”) proposes a viable local option for conflict counsel independence. As noted in previous compliance reports, independence is particularly important because the conflict panel represents approximately 40% of all delinquency complaints in which the accused is indigent. If the proposed Plan is embraced and implemented by the County, I believe substantial compliance can be achieved in this area.
3. Ensuring the availability of attorneys to advise youth at probation conferences. I am pleased to report that a pilot project to address this issue was launched on March 1, 2018. Initial signs are promising and demonstrate productive collaboration between representatives of the Court and the Shelby County Public Defender. I agree with an April 10, 2018 email from the DOJ that if this project were to be taken to scale, substantial compliance could be met in this area.<sup>3</sup>
4. Transfer Issues. Unfortunately, significant problems remain in this area. Not only have numbers of youth facing transfer continued to climb to above 2013 levels, inconsistent discovery practices continue and recent changes in court practices have caused new issues regarding psychological evaluations.

The Court’s and County’s compliance status is as follows:

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<sup>2</sup> This report was submitted by Shelby County Public Defender Stephen Bush on March 2, 2018.

<sup>3</sup> See probation conference section, p. 7.

Compliance Standards	April 2013	Oct.2013	April 2014	Oct. 2014	April 2015	Oct. 2015	April 2016	Oct. 2016	April 2017	Oct. 2017	April 2018
Substantial Compliance	0	0	0	24	38	43	50	48	14	9	4
Partial Compliance	1	26	44	23	16	11	3	5	4	5	2
Beginning Compliance	25	17	10	5	1	1	0	0	0	0	0
Non Compliance	3	0	0	1	0	0	2	2	2	3	0
Insufficient Information/pending	5	2	1	2	0	0	1	1	1	0	3
<b>Total Due Process Provisions Remaining in the Agreement</b>	<b>34</b>	<b>45</b>	<b>55</b>	<b>55</b>	<b>55</b>	<b>55</b>	<b>56*</b>	<b>56*</b>	<b>21*</b>	<b>14*</b>	<b>9</b>

\*I have divided two compliance measures into two parts given nature of progress.

## Remaining Key Areas of Concern

### 1. Public Defender Independence

Public Defender independence which is critical to the original purpose of the Memorandum of Agreement, has also been one of the most difficult to address given the County's interpretation of the limitations of the County Charter and Rule 13. I am pleased to report continuing progress in this area. Building on Mayor Luttrell's Executive Order of March 23, 2017,<sup>4</sup> recent developments demonstrate that adequate assurances of independence appear to be in place and Shelby County is on the path toward substantial compliance.

The following assurances of independence appear to be in place:

- a. Fall Back Provision. In the event the Chief Public Defender is removed from the position, he or she has the right to fall back into any open and vacant appointed position for which he or she qualifies.
- b. The Public Defender holds the office in a *de jure* capacity. In order to be replaced, the Mayor must name a new Public Defender appointee and that appointee must be approved by a majority of the Board of Commissioners before assuming office.
- c. Dual method of appointment applies across mayoral terms. The Public Defender who holds the position at the end of the current Mayor's term will continue to hold it until a new appointee is named and approved by a majority of the Board of Commissioners before assuming office.
- d. Compensation. The salary of the Public Defender is now tied to an objective standard that is not subject to modification by the elected appointing authority and will be

<sup>4</sup> Mayor Luttrell's Executive Order was titled: "Recognizing, Affirming, and Approving the Public Defender Office of Shelby County Tennessee as an Independent Ethical and Zealous Provider of Defender Services in Shelby County," (which was necessary to operationalize the Public Defender's 2016 *Blueprint to Achieve Compliance in Juvenile Defender Services*).

based on Tennessee Code Annotated section 8-14-207(b) which governs the compensation of other district Public Defenders in Tennessee.<sup>5</sup>

None of these assurances constitutes an ideal solution, however, collectively the assurances provide important safeguards to the Chief Public Defender. As stated in the Plan, “these protections provide balance against undue judicial and political interference, and help assure that the Chief Public Defender can act ethically at all times despite the potential consequences for doing so.”<sup>7</sup> Specifically, the assurances provide the Chief Public Defender safeguards against removal by the elected County Mayor, ensure continuation of employment in the event of replacement, permit defender leadership to carry-over when a new Mayor is elected, and remove from the appointed authority control over compensation and provide balance against undue judicial and political interference.<sup>8</sup>

In addition to the above, recent actions taken by the Shelby County Public Defender to restructure defender services, which include taking steps to create a central administrative office to oversee defense services, demonstrate that adequate assurances of independence appear to be in place:

Independent Hiring and Restructuring. After the signing of the Executive Order, the Public Defender has been able to restructure his office to enhance service delivery. Additional attorneys have been hired on an hourly rate that expands the ability of the Public Defender to fill service gaps such as juvenile probation conferences. The attorney, who is responsible for the new probation conference pilot project, is currently compensated under this new structure. Finally, the Public Defender was able to appoint an expert in legal ethics, professional responsibility and the regulation of legal practice.

Public Defender Appeals. Since the Mayor’s Executive Order the Shelby County Public Defender has appealed several cases that demonstrate independence from juvenile court and political pressure. For example there was an appeal which involved the removal of a juvenile public defender from a transfer case and a recent juvenile appeal regarding a youth who was held without bond.

Creation of Central Administrative Office. During my compliance visit I was able to tour a new space being renovated by the County for use by the Shelby County Public Defender that is in a separate building from Public Defender staff. It is my understanding that this space will be used as a Central Administrative Office that could oversee various Public Defender functions and would better enable the Public Defender to implement the ethical screens that are required to operate as a single agency model. A central administration office is important because it will allow for the creation of an office for independent conflict counsel. It will also be able to conduct staff training, handle personnel issues and perhaps advocate for system-wide reforms. I encourage the County to explore this proposal as a source of independent

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<sup>5</sup> This adjustment will go into effect April 1, 2018 per Shelby County CAO Harvey Kennedy memo of March 7, 2018

<sup>7</sup> Id.

<sup>8</sup> *Toward a Comprehensive Plan for Juvenile Defender Services*, at 6.

conflict counsel in delinquency proceedings. In my opinion, if implemented, this approach could remedy noncompliance concerning the lack of independence over conflict counsel.

The assurances reported in the Plan and recent Public Defender actions collectively lead to my determination that the Shelby County Public Defender is presently able to act with sufficient independence. I commend Mayor Luttrell and all others who have worked to achieve this milestone. While I understand that the current structure is still imperfect, the recent progress in this area is commendable and demonstrates a renewed commitment to achieving full compliance in this area.

While I am optimistic, I am also aware that these improvements could be altered by a new Mayor. For example, there is nothing to prevent the next Mayor from rescinding Mayor Luttrell's Executive Order, which is the lynchpin of the current structure. If that happens or if the new administration chips away at the assurances by creating obstacles to the autonomy of Public Defender, what has been created will collapse and the Public Defender will no longer be independent. The Agreement requires that substantial compliance be maintained for over one full year. I will be monitoring this issue during the upcoming transition.

## *2. Independence of Conflict Counsel and of the Broader Defense Bar*

Previous reports addressed the persistent problem of conflict panel attorney independence. Currently the structure of the panel is substantially the same structure that was in place when the Agreement was signed. (The panel is overseen by the Panel Coordinator, an attorney who is appointed by, and serves at the pleasure of the Juvenile Court Judge. All the attorneys on the panel are assigned and supervised by the Panel Coordinator.) I want to emphasize that a compelling need for panel independence remains, as was detailed in my previous compliance report citing a disturbing trend of direct judicial control over the defense bar that was undermining the goals of the Agreement. There is ample evidence that the current process for appointment of counsel infringes on the due process rights of juveniles. This evidence was extensively detailed in the original 2012 Department of Justice findings and an entire section of the findings was dedicated to the issues of lack of independence, lack of zealous advocacy and "role confusion" on the part of the panel, including the failure to ask for discovery, file motions or take appeals.<sup>9</sup>

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<sup>9</sup> See U.S. DEP'T OF JUSTICE, INVESTIGATION REGARDING THE JUVENILE COURT OF MEMPHIS & SHELBY COUNTY (APR. 2012), available at <http://www.shelbycountyttn.gov/DocumentCenter/Home/View/5759>, at Excerpts from 48-50. "Against the backdrop of a court culture that frequently discourages an adversarial testing of facts for children and misinterprets the proper role of defense counsel, the Juvenile Defenders in JCMSC are challenged to meet ethical and professional obligations to their clients. Although we observed several defenders who are experienced and engaged advocates, we also found some instances where defense attorneys failed in their duties to be competent and zealous advocates... During stakeholder interviews, we learned that JDs do not consistently request discovery from ADAs...From court observations and in transcripts, it was clear that the majority of JDs did not challenge probable cause when the government moved to detain their clients, even when seemingly viable arguments were available, such as self-defense or mis-identification. ... It was clear from our inspection and interviews that appeals and written motions by defense counsel are rare in JCMSC...During interviews, stakeholders acknowledged that appeals are practically non-existent at JCMSC...Finally, we are concerned about the structure of Juvenile Defender's Office ("JDO"). The JDO is not an independent agency, nor is it affiliated with the county public defender's office. Instead, JCMSC operates it entirely, and the Chief Juvenile Defender is appointed by, and reports directly to, the Juvenile Court Judge. This organizational structure, while not unconstitutional *per se*, creates an apparent conflict of interest, as a juvenile defender must balance the duty of representing the child client with the inherent duty of loyalty to his or her employer. National standards for public defender systems strongly encourage independence from the judiciary to avoid conflicts of interest and judicial interference

While there have been many obstacles to finding a solution to this issue, recent developments strengthening the independence of the Shelby County Public Defender create opportunities for a local solution. There have been many attempts to find a solution to this issue and I will briefly describe the history here.

Since 2015 there has been consensus among all stakeholders that a “single-agency” indigent defense model was preferred. This “single-agency” indigent defense system would contain both primary and conflict services and ideally be overseen by an independent commission as has been modeled in other states. Mr. Carroll, Executive Director of the Sixth Amendment Center, who served as a consultant to Shelby County wrote a letter in 2015 regarding “Overcoming undue political and judicial interference in the representation of children charged with delinquency offenses in Shelby County, Tennessee.”<sup>10</sup> This letter described the efforts of the County to date, provided an overview of Supreme Court case law, and analyzed previously proposed plans. In this letter he states that “Though all stakeholders agree that a single agency model would be best, the assigned counsel panel could not be moved out of the Court and into the indigent defense division until ethical screens are constructed between the primary and conflict system.”<sup>11</sup> In this letter David Carroll also stated that he believed this single agency model was possible despite the limitations of Rule 13 and the County Charter. At the time of his 2015 letter, the single agency model that was under consideration contemplated the creation of an independent oversight commission. Despite his expertise in this area, progress stopped when the County approached Justice Holder and Libby Sykes who opined that Rule 13 could not be used to create an independent oversight commission.<sup>12</sup>

The recently received report, *Toward a Comprehensive Plan for Juvenile Defender Services* (“the Plan”) **proposes a viable option** that addresses previous concerns about Rule 13 and the County Charter. It envisions a single agency system that operates alongside of the existing structure. As I understand it, under the Plan the Public Defender, as reorganized, could oversee two separate divisions (the existing Public Defender and Conflict Counsel). Under this proposal the Court’s Rule 13 panel of lawyers can still exist as a vehicle for Court appointments as needed.<sup>13</sup>

As of 2017 the Public Defender handled 67% of delinquency petitions and the panel handled 33%. If Public Defender and Conflict Counsel, under the single independent umbrella of the Public Defender’s Central Administrative Office, were handling a large majority of the cases while the smaller, Rule 13 panel was handling a smaller number of remaining cases, I

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<sup>10</sup> David Carroll Letter October 2, 2015. (Attached as Exhibit “A”).

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Rule 13 (4)(A)-(C) When appointing counsel for an indigent defendant pursuant to section 1(e)(3), the court shall appoint the district public defender’s office, the state post-conviction defender’s office, or other attorneys employed by the state for indigent defense (herein “public defender”) if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary. Appointment of public defenders shall be subject to the limitations of Tennessee Code Annotated sections 8-14-201 et seq.(B) If a conflict of interest exists as provided in Tennessee Rules of Professional Conduct 1.7 or the public defender is not qualified pursuant to this rule, the court shall designate counsel from the roster of private attorneys maintained pursuant to section 1(b).(C) The court shall appoint separate counsel for indigent defendants having interests that cannot be represented properly by the same counsel or when other good cause is shown.

believe that would adequately assure the independence of Conflict Counsel. If the majority of public defenders and conflict counsel had adequate assurances of independence, it would serve as ballast to the entire system and hopefully create a zealous defense culture where due process rights were protected.

The Plan proposed is not unique--the concept is a common way to deliver indigent services. For example, the state of Delaware recently restructured their indigent defense delivery system and created a similar single-agency model without an oversight commission. The Delaware Office of Defender Services, which was created in 2015, oversees the Office of the Public Defender and the Office of Conflict Counsel. In Delaware, the Office of Defense Services makes conflict determinations and case assignments to both the Delaware Public Defender and Delaware Conflict Counsel.<sup>14</sup>

Prior to finalizing this report, I received a letter from Assistant County Attorney John Marshall Jones dated May 22, 2017, on behalf of Juvenile Court and the County that is adversarial to the proposed solution. The concerns raised by the County Attorney underscore the importance of constructing the necessary ethical screens between direct and conflict systems. This should be the next step – constructing the ethical safeguards that are necessary before the proposed solution can be implemented. Similar to other states, it will of course be the Public Defender’s responsibility to implement a single agency approach in a manner that comports fully with the Rules of Professional Conduct. With the assistance of expert ethics counsel, I am confident that the Public Defender understands the ethical obligations that are implicated in proposing the solution under consideration. I suggest the parties direct any advance concerns in this area to the Public Defender for consideration.

It is clear that this single agency proposal will further independence by removing conflict counsel from the control of the court, which was a concern of the original 2012 findings and stands in violation of the *ABA 10 Principles of Public Defense Delivery System*.<sup>15</sup> It was exactly this issue that motivated Delaware create its single agency system.<sup>16</sup>

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10 The [Delaware] Office of Defense Services (ODS) was established in 2015 by Senate Bill 47. The ODS is comprised of three divisions: Central Administration, the Public Defender’s Office, and the Office of Conflicts Counsel. The Office of Defense Services was established, in part, to expand and restructure Delaware’s public indigent defense system. As a result, the ODS can better defend clients while furthering the vision for indigent defense. Delaware’s conflict attorneys are not public defender employees, rather they are private lawyers who have an annual contract. Divisions of the Office of Defense Services include: Central Administration. This division provides administrative and executive oversight and support to the Public Defender’s Office and the Office of Conflicts Counsel. Staff within the division plays key roles to develop and implement policies and procedures for the Office of Defense Services, handle personnel and legal issues, advocate for criminal justice reform, and plan and conduct staff training and continuing legal education programming. The Public Defender’s Office The Public Defender’s Office is the law firm within the ODS, consisting of Assistant Public Defenders and support staff. All of the attorneys with the Public Defenders Office are members of the Delaware Bar. The office employs a full staff of support services, including investigators, paralegals, psycho-forensic evaluators, forensic nurses, and mitigation specialists. Assistant Public Defenders represent clients in all courts in all three of Delaware’s counties. The Office of Conflicts Counsel Lawyers within the Office of Conflicts Counsel (OCC) represent people when the Public Defender’s Office cannot provide legal representation due to conflicts of interest. The OCC is comprised of a network of private practice attorneys. <https://ods.delaware.gov/office-defense-services>. See also, <http://sixthamendment.org/know-your-state/delaware/>

<sup>15</sup> See American Bar Association Ten Principles of a Public Defense Delivery System (2002), Principle 1, [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)

<sup>16</sup> I received this information during my phone conversation with Stephanie Vultoro Esq on April 19, 2018 who currently heads the office of conflict counsel for the state of Delaware.

In addition to being a viable local option, execution of the Plan can begin immediately without allocating additional funds. If the County embraces and begins to execute this model the Public Defender could start to create the ethical screens necessary for a conflict office to open in the summer of 2018. After five years of struggling with this issue, I believe the Plan is a viable local option when coupled with the previously mentioned assurances of Public Defender independence. Based on the Plan and the County's positive response to the Plan during my recent visit, I was prepared to change the compliance rating to "Beginning Compliance." However, given the recent correspondence, I am not clear if the County continues to maintain a positive response to this viable local option, therefore I believe I have insufficient information to make a determination.

#### *4. Attorneys at Probation Conferences*

The Agreement requires that "children receive the advice of counsel about their rights against self-incrimination and the meaning of any waiver before signing a waiver, and that those children must acknowledge their waiver in writing in order for the probation conference to proceed." The Agreement also includes a provision that probation conferences be open to defense attorneys, who must be given written notice of the conferences in advance.<sup>17</sup>

As noted in *Toward a Comprehensive Plan for Juvenile Defender Services*, there was a meeting on January 29, 2018 between Shelby County CAO Harvey Kennedy, Settlement Agreement Coordinator Judge Paul Summers and Shelby County Public Defender Stephen Bush. Stephen Bush indicated that he was able to address this unmet need and has since appointed an attorney to spearhead a pilot project. During my compliance visit, I was able to meet with the attorney and observe a probation conference. In terms of logistics, the attorney works with several probation officers who schedule the conferences in specific "blocks" of time. Before the conference, the attorney meets privately with the child and the parent and explains the child's rights, the collateral consequences of an admission and answers any questions. The attorney then accompanies the child and parent into the conference. In the probation conference that I observed, the attorney was thorough and engaging and both the mother and the child seemed to appreciate his guidance. After meeting with the child and parent the attorney spoke with the probation officer and due to the child's outstanding grades the child received a verbal warning instead of admitting to the retail theft for a "warn and counsel."

It was reported by the pilot project attorney that since March 1, 2018, 80 youth have had probation conferences scheduled under the pilot. The current plan is to take this pilot to scale by July 1, 2018. I believe this pilot project, if taken to scale, would meet the requirements of the Agreement. The Department of Justice also submitted an email to Shelby County and the Settlement Coordinator on April 10, 2-18 which advised, "It is our position that once implemented, the Public Defender's provision of counsel at the probation conferences will

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<sup>17</sup> As noticed in Compliance Report 10, probation conferences are important tools for diverting youth away from formal prosecution – but it is critically important that fairness come first in these conferences, too, especially since admission to a diversion program can involve an admission of guilt and many youth, due to age or special education issues, may not understand the legal rights they are asked to waive.



constitute substantial compliance with the Agreement, Protection against Self-Incrimination provision III.A.1(c) (ii) and (iv).”<sup>18</sup>

**5. Transfer Issues:**

While I have repeatedly stated my many concerns about due process in this area,<sup>19</sup> noting the significance of transfer hearings in Shelby County given the very high numbers of youth facing transfer,<sup>20</sup> the only remaining subjects in the Agreement under review are:

- 1) Whether or not Children, through their attorney, are provided opportunity to present evidence on their own behalf, and
- 2) Whether or not Children, through attorney, provided opportunity to confront evidence & witnesses

<sup>18</sup> The complete statement in the email stated as follows: Additionally, we wanted to provide some insight into our position on the probation conference counsel issues. First, you should know that we are in receipt of the March 2, 2018 report submitted to the Due Process Monitor by the Public Defender titled, *Toward a Comprehensive Plan for Juvenile Defender Services*. In that report (p.9), a solution was proposed to have attorneys with the Public Defender’s Office provide defender services in probation conferences, starting in March 2018 and fully implemented by July 2018. This solution is also described in Compliance Report #11 (p.6) of the Settlement Agreement Coordinator, Honorable Paul G. Summers. It is our position that once implemented, the Public Defender’s provision of counsel at the probation conferences will constitute substantial compliance with the Agreement, Protection Against Self-Incrimination provision III.A.1(c)(ii) and (iv).

<sup>19</sup> In the last compliance report I detailed many concerns related to transfer discovery practices, including: 1) Shelby County is out of step with the rest of Tennessee and is the only county I have found that does not routinely provide discovery to youth facing transfers, and 2) that there “are many inconsistencies in discovery practices [that] seem to depend on the individual personalities of defense attorneys and prosecutors.” I remain concerned that, too frequently, children and their lawyers in Shelby County are not being given the information that they need to defend themselves in transfer hearings.

<sup>20</sup> Shelby County transfers 3x as many youth to criminal court than any other county in Tennessee and numbers are increasing. Data provided by the Shelby County Juvenile Court show that transfer numbers declined for 7 consecutive years until a low of 47 in 2015, but are nearly twice that in 2017 with 92 youth transferred.

[http://www.tncourts.gov/sites/default/files/docs/2014\\_annual\\_juvenile\\_court\\_statistical\\_report.pdf](http://www.tncourts.gov/sites/default/files/docs/2014_annual_juvenile_court_statistical_report.pdf), See appendix “B”

Shelby County	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
# of children transferred to adult Court*	225	194	151	121	99	90	77	47	71	92

\*Data provided by JCMSC

Shelby County Notice of Transfers	
2014	182
2015	153
2016	149
2017	221

Outcomes of Transfer Notices 2017				
	Black	Mixed Race	White	Total
Notice of Transfer	210	2	9	221
Notice of Transfer Denied	24	0	1	25
Notice of Transfer withdrawn	77	1	2	80
Waived criminal Court-motion for transfer granted	80	1	11	92

Previously, my report indicated “partial compliance” because I was very concerned about inconsistent discovery practices and that attorneys were not being provided sufficient discovery to adequately represent youth at transfer hearings. Prior reports urged the Court to address this issue, however, there has not yet been a resolution. There was a meeting between the Court and Juvenile Defenders in March of 2018 and proposed language was exchanged between parties, but there is not yet an agreement on uniform practices.

In a recently received email the Department of Justice states their position on the issue of transfer hearing discovery as follows:

... [w]e wanted to alert you to our position on the transfer discovery issue. It is our understanding that at the behest of the Due Process Monitor, court leadership has been working with a representative from the Shelby County Public Defender’s Office to resolve transfer discovery matters. We encourage you to come to a resolution that can be consistently applied to these matters. It is our understanding that representations have been made by the District Attorney’s Office that they provide items subject to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), disclosure.

We understand from the Due Process Monitor’s reports, however, that there is disagreement as to whether such discovery is occurring and whether there is consistency in cases. It is our position that the Agreement, Transfer Hearing provision III.A.1(c)(i)(d), requires only disclosure of *Brady* and *Giglio* materials for transfer hearings. Such material is constitutionally required for juveniles in transfer proceedings to “meaningfully confront evidence presented against them, including cross-examining adverse witnesses.” We encourage you to develop a consistent policy or guideline to address discovery practices in transfer hearings. In our view, such action would remove the discovery issue identified by the Monitor as a barrier to achieving substantial compliance.[*April 10, 2018 email from Winsome Gayle to Shelby County.*]

I completely disagree with the DOJ’s opinion and maintain that full discovery is necessary to adequately represent youth at this critical stage. However, in light of the DOJ’s opinion I have changed my rating to substantial compliance, which must be maintained for at least a year to meet the terms of the Agreement

Finally, I want to express concerns that in 2018 there have been eight documented cases where attorneys made requests for psychological evaluations prior to the transfer hearing and the request was denied. In one case the child’s grandfather expressed concerns about the child’s mental health issues, yet the request for a psychological evaluation was denied.<sup>27</sup> In addition, there was a case where the Court refused to wait for the evaluation to be completed and

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<sup>27</sup> The date of the hearing was 2-16-18. In that hearing, the judge asked if the child had ever been treated for a psychological issue, the attorney stated that the child has not been treated, but referenced the fact that members of the family had been, including his guardian/grandmother, and indicated that the child has started to exhibit many similar behaviors. The judge asked the grandfather if he was a physician. When the grandfather responded that he was not, the judge denied the motion.

proceeded to have the child's transfer hearing when a psychological evaluation was pending. I am not aware of any other jurisdiction that refuses to provide psychological evaluations to youth facing transfer, and I find this practice troubling given the consequences at stake.

## Discussion of Compliance Findings

### Methodology

The information for this compliance report was obtained using the same methods as the previous nine compliance reports. I have relied on information from a variety of Juvenile Court stakeholders. I requested and reviewed numerous documents before and during the site visit.

During the four-day site visit, I observed delinquency hearings, detention/probable cause hearings, and the major crimes docket. During the site visit I had meetings with the following: Juvenile Court staff, Public Defenders from the juvenile unit, the juvenile defender panel attorney coordinator, the Public Defender, the Settlement Coordinator, and others. I also reviewed the tenth compliance report prepared by Settlement Coordinator Judge Summers. All of the above provided useful information about current Juvenile Court operations, the progress that has been made toward compliance with the Agreement, and the areas where continued attention is needed.

The Agreement does not conceptualize or require specific compliance levels; however experience in other jurisdictions suggests that the following levels are useful in evaluation. Note, “significant period” of time means longer than one year.

Substantial Compliance means that Juvenile Court has drafted the relevant policies and procedures, has trained the staff responsible for implementation, has sufficient staff to implement the required reform; has demonstrated the ability to properly implement the procedures over a significant period of time and has ascertained that the procedures accomplish the outcome envisioned by the provision.

Partial Compliance means that Juvenile Court has drafted policies and procedures and has trained staff responsible for implementation. While progress has been made toward implementing the policy, it has not yet been sustained for a significant period of time.

Beginning Compliance means that the Juvenile Court has made initial efforts to implement the required reform and achieve the outcome envisioned by the provision, but significant work remains. Policies may need to be revised, staff may need to be trained, procedures may need continued implementation to accomplish outcome envisioned by the Agreement.

Non –Compliance means that Juvenile Court has made no notable compliance on any of the key components of the provision.

Insufficient Information/pending means that it is not possible to assess compliance at this moment.

<b>Protections Against Self-incrimination</b>	<b>April 2013</b>	<b>Oct 2013</b>	<b>April 2014</b>	<b>Oct 2014</b>	<b>April 2015</b>	<b>Oct 2015</b>	<b>April 2016</b>	<b>Oct 2016</b>	<b>April 2017</b>	<b>Oct 2017</b>	<b>April 2018</b>
Within 90 days: notify Child's attorney in writing of any probation conference or interview which shall be open to defense attorney.	BC	BC	PC	PC	PC	PC	PC	PC	PC	PC	PC/SC
POs have Children document understanding of rights against self-incrimination & must receive advice of attorney before waiving it.*	BC	BC	PC	PC	PC	SC	SC	SC*	SC/P C*	SC/P C*	SC/PC*

\*Children do document understanding, but do not routinely receive advice of attorney before waiving.

\*\* I am waiting confirmation about whether the Panel Coordinator now notifies lawyers every time there is a probation conference.

Comments

*See "Remaining Key Areas of Concern"*

<b>Juvenile Defenders</b>	<b>April 2013</b>	<b>Oct. 2013</b>	<b>April 2014</b>	<b>Oct. 2014</b>	<b>April 2015</b>	<b>Oct. 2015</b>	<b>April 2016</b>	<b>Oct. 2016</b>	<b>April 2017</b>	<b>Oct 2017</b>	<b>April 2018</b>
Within 1 year insure independent, zealous advocacy by juvenile defenders. This shall include: a. Creation of specialized unit for juvenile defense within Office of the Public Defender	N/A	N/A	BC	BC	PC	PC	PC	PC	PC	PC	SC
b. Insure Juvenile Public Defender has appropriate administrative support, reasonable workloads & sufficient resources. Representation shall cover all stages of case as long as juvenile Court has jurisdiction	N/A	N/A	BC	BC	PC	PC	PC	PC	SC	SC	SC
Within 1 year insure independent advocacy including: a. Appoint juvenile defender to represent children at detention hearings & probable cause determinations as soon as possible	N/A	N/A	BC	BC	PC	PC	SC/ NC **	SC/ NC **	SC/ NC **	SC/ NC **	SC/ II **
b. Establish Panel System Overseen by independent body to handle conflicts	N/A	N/A	II	NC	BC	BC	NC	NC	NC	NC	II
c. Support attorney practice standards for juvenile defenders including training and evaluation.	N/A	N/A	BC	BC	PC	PC	I/I	I/I	I/I	NC	II

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\*\* SC for timely appointment, NC because not independent, \*\*\*unclear if Panel Coordinator can enforce defense standards due to structure

Comments

See “Remaining Key Areas of Concern”

Transfer Hearings	April 2013	Oct. 2013	April 2014	October 2014	April 2015	October 2015	April 2016	October 2016	April 2017	October 2017	April 2018
c. Children, through their attorney, are provided opportunity to present evidence on their own behalf	NC	II	BC	PC	PC	SC	S C	PC *	PC	PC	SC
d. Children, through attorney, provided opportunity to confront evidence & witnesses	NC	BC	PC	PC	SC	SC	S C	PC *	PC	PC	SC

\*See “Remaining Key Areas of Concern.” Lack of discovery curtails the youth’s lawyer ability to provide representation and impacts due process.

Comments

See “Remaining Key Areas of Concern”