



Shelby County Government

MARK H. LUTTRELL, JR.
MAYOR

KATHRYN W. PASCOVER
COUNTY ATTORNEY

January 18, 2018

VIA EMAIL & U.S. MAIL

Ms. Sandra Simkins, Due Process Monitor
School of Law – Camden
Rutgers, The State University of New Jersey
217 North 5th Street
Camden, NJ 08102

Re: *Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County—December 17, 2012*

Dear Ms. Simkins:

I write on behalf of the Juvenile Court of Memphis and Shelby County to request clarification and/or correction of two items in Due Process Compliance Report #10 – October 2017, the final version of which was issued January 3, 2018.

First, on Page 1 of the Report (copy included in Collective Exhibit A hereto), the final sentence of the substantive paragraph states: “In addition, certain provisions within the remaining five sections have also been terminated, and will be indicated within this report.” Our review indicates there are only three (3) sections remaining – Transfer Hearings, Protections Against Self-Incrimination, and Juvenile Defenders – in which there are Due Process provisions not yet in substantial compliance.

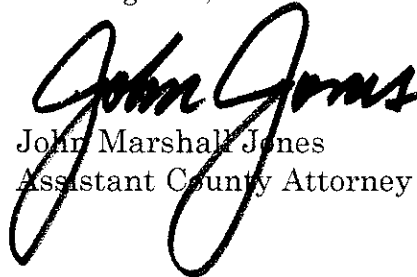
Second, the Compliance Standards table at the top of Page 3 (copy included in Collective Exhibit A) states that the Total Due Process Provisions Remaining in the Agreement is 17. Our review indicates there are fourteen (14) Due Process provisions remaining. (See notated copies of Pages 11-14 included in Collective Exhibit A). Of those remaining provisions, we will shortly be asking the Department of Justice to terminate five (5) (our numbers 3, 4, 8, 10, and 14).

Ms. Sandra Simkins
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If our review and counts are in any way incorrect, please clarify what we might be missing. Otherwise, the Court and I respectfully request that Compliance Report #10 be corrected as noted.

Thank you for your consideration.

Best regards,



John Marshall Jones
Assistant County Attorney

/JMJ

cc: Winsome G. Gayle, Esq. (VIA EMAIL)
Richard C. Goemann, Esq. (VIA EMAIL)
Emily Keller, Esq. (VIA EMAIL)
Magistrate Garland Erguden, Juvenile Court (VIA EMAIL)
Pamela Skelton, Esq., Juvenile Court, CAO (VIA EMAIL)
Kathryn W. Pascover, Esq., Shelby County Attorney (VIA EMAIL)

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: January 3, 2018

RE: Compliance Report #10 - October 2017

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 October 1, 2017 –October 5, 2017. 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. Since the last compliance visit I am pleased to report that Shelby County has maintained substantial compliance in two additional sections, Probable Cause and Training, and these sections will no longer be under review. In addition, certain provisions within the remaining five sections have also been terminated, and will be indicated within this report.

Format

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

Executive Summary

In June of this year, longtime Settlement Coordinator Bill Powell resigned and a new coordinator, Judge Paul Summers, was appointed. In late October, the DOJ responded to two

However, recent strides toward operational independence are empty if other pressures prevent public defenders from advocating ethically and zealously for their clients. In 2017 Juvenile Court filed three complaints with the Board of Professional Responsibility of the Supreme Court of Tennessee against three juvenile defense attorneys. Each of the three lawyers had over eight years of defense experience and had never before been the subject of a disciplinary action or ethical complaint. In addition, it is my understanding that such actions against defense counsel are extraordinarily rare in the other forums of Shelby County, such as adult criminal court proceedings.³

The filing of an ethics complaint against an attorney can result in long term negative consequences for the attorney's career. According to the Tennessee Board of Professional Responsibility, when an ethics complaint is filed against an attorney potential consequences include reprimand, suspension of the right to practice law and disbarment.⁴ In addition, each time a complaint is filed with the Board of Professional Responsibility it triggers an investigation resulting in a recommendation by Disciplinary Counsel for the Board to a District Committee Member of the Board of Professional Responsibility. I have received information that following proper inquiry by the Board of Professional Responsibility of the Supreme Court of Tennessee, each of the three complaints filed by Juvenile Court against juvenile defense attorneys was dismissed by Disciplinary Counsel.

While the Court should take genuine ethical issues seriously,⁵ the pattern of filing ethics complaints appears to be having a direct negative effect on a fledgling defense bar and compliance with the Agreement. I am advised that, in the past several months, the Public Defender has experienced an unusual number of departures from its juvenile unit.⁶ The Agreement's mandate to create an independent defense function was motivated by the original DOJ investigation, which found a constitutionally-deficient and submissive juvenile defense culture in Shelby County Juvenile Court. To be independent, lawyers must be able to practice free of inappropriate pressure or the fear of judicial reprisal. The overuse of judicial sanctions against the juvenile defense community can harm due process and diminish access to quality

³ These types of complaints are rare in Shelby County. For seven years the current Public Defender has been supervising more than 80 lawyers, and this appears to be the first instance in which a judge has filed ethics complaints against assistant public defenders.

⁴ Tennessee Board of Professional Responsibility of the Tennessee Supreme Court, <http://www.tbpr.org/>

⁵ According to Rule 2.15 of the Tennessee Code of Judicial Conduct, judges have an obligation to address misconduct. "[The rules] impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer." However, the Comment to Rule 2.15 also details the following continuum of responses a judge may take when concerned about a lawyer's fitness: *Appropriate action may include, but is not limited to.....communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.* " *Id.*

⁶ During my compliance visit I interviewed one of the lawyers who was the subject of a complaint and who has since left the Public Defender Juvenile Unit. The lawyer indicated that the complaint was a contributing factor in the decision to seek other employment.

Transfer Hearings	April 2013	Oct. 2013	April 2014	October 2014	April 2015	October 2015	April 2016	October 2016	April 2017	October 2017
Within 90 days, require Transfer Hearings comport with due process requirements. Specifically, shall insure all Transfer Hearings include: <i>a.</i> Asst DA presents evidence in support of petition for transfer	BC	PC	PC	SC	SC	SC	SC	SC	SC	SC
<i>b.</i> Children have right to attorney whose role is to represent their stated interest	BC	PC	PC	SC	SC	SC	SC	SC	SC	SC
<i>c.</i> Children, through their attorney, are provided opportunity to present evidence on their own behalf	NC	II	BC	PC	PC	SC	SC	PC *	PC	PC
<i>d.</i> Children, through attorney, provided opportunity to confront evidence & witnesses	NC	BC	PC	PC	SC	SC	SC	PC *	PC	PC
<i>e.</i> Children are protected from self-incrimination	BC	PC	PC	SG	SC	SC	SC	SC	SC	SC
<i>f.</i> Judge or Magistrate makes written findings that: child committed delinquent act, child is not committable to an institution for persons with developmental disability or mental illness and interests of community require Child be put under legal restraint or discipline	BC	BC	PC	PC	PC	SC / B / C	SC **	SC	SC	SC
<i>g.</i> Judge or Juvenile Court Magistrate considers & documents consideration of factors relevant to findings including 7 factors	NC	BC	PC	PC	SC	SC	SC	SC	Completed	

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*See "Remaining Key Areas of Concern." Lack of discovery curtails the youth's lawyer ability to provide representation and impacts due process.

** (for written findings) However There is no place in TN for DD youth

Comments

Transfer Issues: See "Remaining Key Areas of Concern"

Protections Against Self-incrimination	April 2013	Oct 2013	April 2014	Oct 2014	April 2015	Oct 2015	April 2016	Oct 2016	April 2017
Within 90 days: prevent POs or other staff from eliciting info about Children's involvement in alleged delinquent act outside presence of Child's defense attorney	BC	PC	PC	SC	SC	SC	SC	SC	Complete
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
Within 90 days: insure POs advise Children of Miranda rights. Shall include	BC	BC	PC	PC	SC	SC	SC	SC	Complete
a. Description of role of defense attorney	BC	BC	PC	PC	SC	SC	SC	SC	Complete
b. Statement Child is entitled to attorney & maybe at no cost	BC	BC	PC	PC	SC	SC	SC	SC	Complete
c. Statement that Child's statements regarding offense can be included in Probation report	BC	BC	PC	PC	SC	SC	SC	SC	Complete
d. Statement that Child's statement can be used against them.	BC	BC	PC	PC	SC	SC	SC	SC	Complete
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/PC*
Consider partnership w/non-profit or academic organization to provide advice and support to children during the probation intake process	S/ NR	S/ NR	S/ NR	S/ N R	S/ N R	S/ NR	S/ N R	S/N R	Complete
Within 30 days: prohibit adverse use of information obtained from child during probation conference	BC	PC	PC	SC	SC	SC	SC	SC	Complete
Within 30 days: insure Magistrates do not permit the govt to call Children as witnesses in Child's own Adjudicatory or Transfer Hearing	BC	PC	PC	SC	SC	SC	SC	SC	Complete
Within 30 days: Magistrates required to give oral advisement of rights against self-incrimination to any Child wishing to testify at own hearing	BC	PC	PC	SC	SC	SC	SC	SC	Complete
Each month the Judge or designee shall review sample of files to determine rights against self-incrimination are	II	II	BC	PC	PC	SC	SC	SC	Complete

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protected. This shall include periodic observation of probation conferences by appropriate supervisory staff of the probation dept. as well as observation of Adjudicatory & Transfer Hearings										
Immediately cease providing Visit & Contact forms to Magistrates prior to Adjudicatory Hearings.	PC	PC	PC	SC	SC	SC	SC	SC	Complete	

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

Comments

See "Remaining Key Areas of Concern"

Juvenile Defenders	April 2013	Oct. 2013	April 2014	Oct. 2014	April 2015	Oct. 2015	April 2016	Oct. 2016	April 2017	Oct. 2017	
Within 1 year insure independent, zealous advocacy by juvenile defenders. This shall include: h. 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	7
i. Support Juvenile Public Defender Training	N/A	N/A	BC	PC	PC	SC	SC	SC	SC	SC	8
j. 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	9
k. Implement attorney practice standards for juvenile defenders	N/A	N/A	BC	BC	PC	PC	SC	SC	SC	SC	10
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	11
b. Establish Panel System Overseen by independent body to handle conflicts	N/A	N/A	II	NC	BC	BC	NC	NC	NC	NC	12
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	13

d. Insure juvenile defender has confidential meeting space to confer with clients within the facility	N/A	BC	PC	PC	SC	SC	SC	SC	SC	SC
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** SC for timely appointment, NC because not independent, ***unclear if new PC can enforce defense standards due to structure

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Comments

See "Remaining Key Areas of Concern"