Shelby County Attorney's Office

Memorandum

TO: Ms. Sandra Simkins, Due Process Monitor
(VIA EMAIL & U.S. MAIL)

FROM: Kathryn W. Pascover, Shelby County Attorney
John Marshall Jones, Assistant County Attorney

DATE: December 7, 2017

RE: Response to Draft Due Process Compliance Report #10 – October 2017
Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County, December 17, 2012

Pursuant to the Memorandum of Agreement, this memorandum sets forth the comments of Shelby County, Tennessee and the Juvenile Court of Memphis and Shelby County to Draft Compliance Report #10, dated November 14, 2017.

While we are pleased with the recognition of the significant progress made by the Court in many Due Process areas of the MOA, we are very concerned with the view expressed in the draft report that "progress seems to have stalled for this compliance period[.]" In his October 26, 2017 letter to Mayor Luttrell, Judge Michael, and Sheriff Oldham, Acting Assistant Attorney General John M. Gore expressed that "[t]his steady movement toward sustained, substantial compliance with the entire Agreement is promising." Further troubling is the discussion in the draft compliance report of matters that have nothing to do with whether the Court is in compliance with the Due Process provisions of the MOA. For example:

> In June of this year, on the eve of my ninth report, Shelby County directed a letter to U.S. Attorney General Jeff Sessions requesting termination of the Agreement between the County and the DOJ. Longtime Settlement Coordinator Bill Powell resigned in protest of that letter. (footnote omitted)

Shelby County responds as follows to the issues of concern related to the Court, as discussed in Draft Compliance Report #10:

Independence of Public Defender

The MOA requires Shelby County and the Juvenile Court of Memphis and Shelby County to ensure independence of the defense function from both undue judicial and political involvement. At DOJ's recommendation, Shelby County hired the Sixth Amendment Center to assist in devising appropriate solutions.

It was determined that two obstacles would require intervention by the State of Tennessee – not changes by the Court or the County – before the requirements of the MOA could be met. The first was found in the County Charter, which gives the Mayor the authority to appoint the Chief Public Defender, who would then serve at the pleasure of the appointing Mayor. Further, the Charter does not provide for establishment of an independent commission to oversee the provision of indigent defense representation by the Public Defender's office.[1] The second is the Tennessee Supreme Court (over which Juvenile Court and the County have no control), which provides, via Rule 13, for the appointment, qualifications, and payment of attorneys in cases not handled by the Public Defender.[2] The bottom line is that the County and Juvenile Court could not completely free the Public Defender's office from political involvement because of the Charter. Nor could the assigned panel attorney system[3] be completely freed from judicial involvement because of Rule 13.

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[1] Tenn. Code Ann. § 5-1-203 grants counties authority to adopt a local Charter of self-government within the parameters of the state constitution and state law. Tenn. Code Ann. §§ 5-1-204, 5-1-213 lay out the process of creating and/or amending the home rule Charter adopted by the County in 1984.

[2] Tenn. Sup. Ct. Rule 13(1)(b) directs that each trial court shall "maintain a roster of attorneys from which appointments will be made." The rule does not lay out qualification parameters in non-capital cases, leaving it to trial court discretion to determine whether or not a lawyer is qualified to be on the roster. As to payment of appointed counsel, the trial judge must "approve" the lawyer's bill but payment is made by the State Administrative Office of the Courts out of State funds.

[3] Despite multiple meetings with the Memphis Bar Association, National Bar Association, and Tennessee Bar Association with the assistance of the Sixth Amendment Center and Public Defender in 2015 and 2016, the local bars declined to participate in creating or overseeing an assigned attorney panel system because of concerns over liability, time requirements, and "competing" rules and requirements of the Board of Professional Responsibility, a body under direction of the Tennessee Supreme Court. The Juvenile Court sought guidance from the Federal District Court for the Western District of Tennessee. Juvenile Court copied the process used by the Federal Court and adapted its own software system to mimic the federal version, but amending it further to remove almost all of the Juvenile Court Judge's authority and influence over the panel and the appointment process. The software randomly generates a name for appointment and the panel coordinator may override the program only in case of a conflict, a violation of work load restrictions, if an attorney declines the appointment, or if a seasoned attorney is required for serious charges which might be subject to transfer to adult court. The Judge takes no part in this appointment process but does hire

The Administration then authorized the Chief Public Defender to draft a "Blueprint,"[4] **[Attachment 1]** or action plan, to achieve compliance with the MOA, with two guiding principles: (1) increase capacity by the Public Defender Juvenile Unit to representation of 100% of all delinquency cases where there was no ethical conflict of interest, and (2) identify achievable local solutions to enhance Public Defender independence. The Blueprint was presented by the Public Defender to the Due Process Monitor on August 15, 2016. The County and the Court advanced the goals of the Blueprint in the following ways:

* On March 23, 2017, the Mayor signed an Executive Order granting the Public Defender the greatest degree of autonomy possible under the Charter. **[Attachment 2]**. Even before the Blueprint was created, the Shelby County Board of Commissioners made the Public Defender's Office a Division of Shelby County Government, reporting directly to the Mayor rather than to the County Attorney, as had previously been the case. The Public Defender now has the power to advocate for funding and present his own budget proposals to the County Commission; to hire and fire staff; to develop and ensure compliance with the guidelines, policies and standards of practice for the administration of public defense services; and to engage necessary services. Further, if removed from his position, the Public Defender was given "fall back" rights to any open appointed position for which he was qualified.

* Funding was increased, additional legal and support staff were hired by the Public Defender, and capacity increased to allow the Juvenile Unit to handle all assigned, non-conflict delinquency cases. The conflict panel coordinator's November 2017 year-to-date data reflect that the Public Defender has handled 61% (933) of the pending delinquency cases and the panel attorneys handled 39% (586) of the cases, percentages which appear to be holding steady given the expected ratio of ethical conflicts. **[Attachment 3]**.

* Shelby County provided an additional $500,000 to the Public Defender in fiscal 2017 and affirmed a plan to add supplemental capacity by appointing private attorneys to serve as part-time assistant public defenders.

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and pay the panel coordinator from Court funds.

[4] See generally, Blueprint to Achieve Compliance in Juvenile Defender Services, Aug. 15, 2016, by Stephen Bush, Shelby County Public Defender.

* For the period of May 1, 2015 through June 30, 2017, the Public Defender obtained Federal Grant Funds of $406,250 to operate a specialized juvenile delinquency law clinic in conjunction with the University of Memphis School of Law. The contract [**Attachment 4**] contains renewal options subject to the adoption of the corresponding fiscal year's Operating Budget by the Board of County Commission. The purpose of the contract is to expand juvenile defender capacity in priority areas including pre-petition representation, post-disposition advocacy for incarcerated youth, transfer cases, appeals, and revocation of supervised release cases. (As discussed further herein, the Juvenile Court is not a party to this contract.)

* David Carroll, executive director of the Sixth Amendment Center, began work with the Tennessee Supreme Court to propose legislation for an independent statewide indigent defense commission, a statewide appellate defender office, and the first increase in twenty years in assigned counsel compensation rates. In October 2017, the Tennessee Supreme Court announced its unanimous support for comprehensive reform. This legislation will be presented to the Tennessee Legislature when it convenes in 2018. A copy of *Liberty & Justice for All: Providing Right to Counsel Services in Tennessee*, the report prepared by the Indigent Representation Task Force and issued in April 2017, is available by visiting http://tsc.state.tn.us/IndigentRepresentationTaskForce and clicking on the link there.[5]

It has been over a year since the Blueprint was submitted by the Public Defender. The Due Process reports indicate an ongoing request for information from the Public Defender as to implementation or "operationalization" of the Blueprint.[6]

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[5] A paper copy of the Indigent Representation Task Force is being provided (by mail only) with the original of this response (but not to the persons copied).

[6] The draft compliance report dated Nov. 14, 2017 notes "I have not received the requested written report. I am now repeating my request, and I hope to receive the report soon." A review of letters written in response to Due Process compliance reports by the Shelby County Attorney's Office reflects repeated efforts, both before and since The Blueprint, to have the Public Defender provide information: (1) 12/16/15: "I [then County Attorney Ross Dyer] reached out to him twice prior to filing this response in hopes that he would provide some feedback on issues you raised that directly related to his office and on the independence issue overall. As of the date of this memo, the only response I have received from the Public Defender is that he likes to respond to your reports 'informally.' However, because he has been placed in charge of the stakeholders meeting, I have asked that he provide me and Juvenile Court with his thoughts, in writing, of any ideas on how the County can further address the independence of the defender panel as well as his office. I have asked that those be provided by January 8, 2016." [**Attachment 5**]; (2) 5/26/16: Assistant County Attorneys John Jones and Marlinee Iverson noted that they "looked forward to Mr. Bush's progress report on July 15th and share your desire for feedback on that report." [**Attachment 6**]; (3) May 25,

It is counter to the notion of independence for anyone but the Public Defender to develop the operational features of the Public Defender's Office. As noted above, the Public Defender is an independent entity not under the control of Juvenile Court. Neither the Court nor the County (via the Mayor or otherwise) can ensure compliance with this request without vitiating the aforementioned achievements toward Public Defender independence.

Boundaries

Since the MOA was signed, there have been consistent forays into areas not contemplated by the Agreement: new compliance standards are proffered; programs and/or training not part of the MOA are strongly suggested "in order to reach compliance"; efforts are made to interfere with the Court's internal personnel decisions, such as whether appointee jobs are posted or whether an appointed employee is deemed appropriate for the job; decisions of the magistrates are challenged despite 100% compliance with due process in the individual case; or calls are made to intervene in a defender's case when the ruling is disagreed with, rather than simply telling the defender to file an appeal or to ask for a rehearing as provided by law. This most recent draft report includes complaints about the Court filing bar complaints against attorneys it found deficient, which interferes with inherent court authority in a way never contemplated by the MOA. Further, the factual basis of these *public reports* is consistently incomplete, in error, or inappropriate. A difficult by-product of this is found in the insistence that the Court is responsible for the actions of elected officials, such as the District Attorney, Clerk of the Juvenile Court, Sheriff, and various Memphis Police Department or school officials, despite the fact that it has only limited persuasive influence with these entities. This extends to complaints about programs and/or conditions in State of Tennessee facilities, an area in which the Court has even less ability to influence the outcome.

The most problematic issue is rooted in disapproval of state law, which is in line with the majority of states and federal law, on the discovery required in preliminary matters.[7] The County and the District Attorney have repeatedly

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2017: letter from Assistant John Jones pointed out the Court's lack of control over "operationalizing the executive order through The Blueprint," and noted that the ball was in the Public Defender's 'court'. [**Attachment 7**].

[7] Tenn. R. Juv. Practice & Procedure, R. 206: Court shall ensure that parties have access to any discovery materials consistent with R. 16 of the Rules of Criminal Procedure. *State v. Willoughby*, 594 S.W.2d 388 (Tenn. 1980), "holds that discovery rules do not apply to preliminary examinations

explained the requirements of state law. It has also been repeatedly explained that the Court is bound by the law and has no ability to change it. The Due Process compliance reports nevertheless retain the posture that the Court must order open file discovery in a preliminary matter to come into compliance with the MOA. Such action would immediately put the Court into an adversarial position with the District Attorney, who would appropriately file both a likely successful lawsuit and a likely successful complaint with the Court of the Judiciary. Even assuming that all other jurisdictions in Tennessee provide full discovery prior to transfer hearings (they do not), such a decision is solely within the discretion of the district attorneys for those respective jurisdictions. The juvenile courts in those counties have no power to order full discovery at transfer hearings without the agreement of their respective district attorneys.

The County and Juvenile Court are being tasked with "correcting" issues not properly considered under the terms of the MOA, or which do not comply with state law, in order to reach substantial compliance. Indeed, the Due Process reports have removed substantial compliance rankings in this circumstance. A review of written comments by the County Attorney in response to Due Process reports illustrates this point:

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and hearings. Therefore, this rule would not apply to any probable cause hearing in juvenile court, with the caveat that this rule is not the exclusive procedure for obtaining discovery." Tenn. R. Crim. P., Rule 16, Discovery & Inspection, only applies after the case has been indicted and is before the Criminal Court. The manual on Juvenile Delinquency Guidelines published by the National Council of Juvenile and Family Court Judges, in conjunction with OJJDP, discusses discovery issues in relation to transfer hearings and states, "Juvenile delinquency courts, by statute and court rule, should specifically define obligations with regard to discovery. As a result, only under the most unusual circumstances should it be necessary for the court to be involved in discovery disputes." (Pp. 95-97, 2005). The US Attorneys Criminal Resource Manual (https://www.justice.gov/usam/criminal-resource-manual-130-hearing-motion-transfer) notes "The Federal Rules of Evidence do not apply to an 18 U.S.C.A. sec. 5032 transfer hearing (citations omitted) . . . It is deemed analogous to a situation covered by Rule 1101(d)(3) for the Federal Rules of Evidence, which provides that the Rules of Evidence do not apply to preliminary examinations in criminal cases except in respect to privileges (citation omitted)." *United States v. Dennison*, 652 F.Supp. 211 (D.N.M. 1986), dealt with challenges raised about the transfer process, based upon discovery under Rule 16 being necessary to provide effective assistance of counsel. It stated: "Although this Court recognizes that a juvenile is entitled to fundamental fairness and due process in the transfer hearing setting, this Court is unwilling to hold that the criminal discovery devices should be available in juvenile proceedings." *Id. See also, Com. v. Deweese,* 141 S.W.3d 372 (Ky. Ct. App. 2003), which dealt with whether a juvenile subject to transfer was entitled to discovery prior to the transfer hearing. The juvenile court ordered discovery and the State appealed. The appellate court explained that the criminal rules governing preliminary hearings apply to preliminary transfer hearings in juvenile courts, but that the entirety of the criminal rules do not apply until after a determination has been made that transfer was appropriate.

* June 4, 2015: The County objected to suggested new compliance standards for: (1) the proposed creation of the law school juvenile clinic, and (2) the Court's proposed trauma training for all staff, as neither topic was part of the MOA. There was further objection to the complaint that there was no official job posting when the new panel coordinator was hired, noting that personnel decisions made by the Court were not covered by the MOA and were within the Judge's purview as an elected official. There was objection to the recommendation that panel attorneys begin developing a program of post-disposition representation, and statement that this was "envisioned" by the MOA. It was pointed out that while this was an objective of the Public Defender's (in the respective MOA section), it was not a part of the MOA section involving panel attorneys. The County objected to the challenge of a magistrate's decision to detain a child rather than looking to whether the child's due process rights were protected by ensuring he was provided counsel, informed of the charges, advised of his rights, given a hearing within the proper time frame, and provided with an avenue of appeal – all of which had been done in the case. **[Attachment 8]**.

* December 16, 2015: The report contained an extensive section of concerns about access to education and dental care at a Tennessee Dept. of Child Services facility in middle Tennessee. The County asked that the report acknowledge that such concerns were not part of the MOA, that this was a State issue rather than a local one, and an issue over which the Court had little to no control. The County objected to "dictating and micro-managing" the process of developing a comprehensive plan for defender independence. This came after the County had hired a subject matter expert, held meetings with stakeholders, and sought guidance from a former Tennessee Supreme Court justice and a former director of the Administrative Office of the Courts, only to learn that the comprehensive plan could not be accomplished under the constraints of the Charter and Tennessee Supreme Court Rule 13. The County objected again to challenges to both the sufficiency of affidavits of complaint and decisions made by magistrates based upon those affidavits. **[Attachment 9]**.

* May 26, 2016: In response to a complaint that, as a Court employee, the panel coordinator was not sufficiently independent, the County cited the constraints imposed by Tennessee Supreme Court Rule 13. It objected to a statement that the monitor had "watched the Court hire and fire panel coordinators at will." The County noted that there had been only three panel coordinators since the MOA was signed, that the first was fired, one died,

that one was temporary (a Juvenile Court employee) who stepped in until a replacement was hired after that death, and that the present coordinator was highly qualified with long experience as both an assistant district attorney and Dept. of Children's Services attorney. In response to complaints about the hiring process of the panel coordinator, an appointed position, the County stated that the MOA did not pertain to hiring decisions made by the Court. It continued by noting that the report failed to explain how the hiring of this coordinator violated the due process rights of any child before the Court. Finally, it responded to the complaint that three panel attorneys had been terminated. Two of the lawyers consistently missed court dates even after being counseled, one asked to be removed from the panel, and one failed to enter data about his cases in the system as required and then asked to be removed because of conflict with other obligations.

The County objected to the Due Process report raising detention conditions and citing outdated statistics when that area (Protection from Harm), was being handled by another monitor, Dr. Roush.

The County objected to the inclusion of a complaint about the "growing rate of Notices of Transfer" filed by the District Attorney. It explained again that the Court had no control over the District Attorney, a non-party to the MOA who, as an elected State official and constitutional officer, applied the law as she saw fit.

The County again pointed out that the MOA did not require panel attorneys to provide post-disposition representation, and that the Administrative Office of the Courts would not pay for this representation. It objected to the lack of context and explanation in the report. **[Attachment 10]**.

* December 1, 2016: The District Attorney wrote a detailed letter to the monitor about the legal requirements of discovery under the recently revised Rules of Juvenile Procedure, as well as the requirements of *Brady*. DA Weirich objected to the contention that Shelby County was out of step with procedures followed in the 31 judicial districts of the State. As to the judicial districts following a different procedure cited by the Monitor, the DA noted that: (1) Davidson County (Nashville) provided open file discovery before transfer, with the caveat that not all discovery was complete at that time; (2) Knox County (Knoxville) adopted the new rules of procedure and follows the process used in Shelby County; and (3) Hamilton County (Chattanooga)

instructs law enforcement (not the court) to provide discovery in all cases directly to the defense attorney. The DA took umbrage to remarks finding unethical conduct by both the prosecution and judiciary in following applicable state law and rules on discovery. **[Attachment 11]**.

* March 13, 2017: The County objected to the reduction from substantial compliance to partial compliance in two areas dealing with discovery in transfer hearings: (1) children provided opportunity to present evidence on their own behalf (in substantial compliance Oct. & April 2016), and (2) children provided opportunity to confront evidence and witnesses (in substantial compliance April & Oct. 2015, and April 2016). Additionally, the County provided detailed information on four cases raised in the report which documented that the Court had followed state law in all four instances.

  Further, the County pointed out that in addition to discovery from the District Attorney[8], the Court always provides all records pertaining to the child the State seeks to transfer – psychological examinations, school records, medical records (if relevant), Dept. of Children's Services (DCS) records from prior delinquency commitments to DCS custody (including any records regarding treatment while in DCS custody), and the like.

  Finally, the County objected to the strong implication that the Court and its magistrates were guilty of judicial misconduct as a result of discovery issues in transfer hearings. **[Attachment 12]**.

The boundary issue surfaces again in the October 2017 draft Due Process report. In the section labeled "2. Disturbing Trend of Direct Judicial Control Over Defense Bar," three bar complaints filed by the Court are described as a "pattern of filing ethics complaints" which has "a direct negative effect on a fledgling defense bar and compliance with the Agreement." The report continues, "To be independent, lawyers must be able to practice free of inappropriate pressure or the fear of judicial reprisal." Although the report gives a brief nod to Rule 2.15 of the Tennessee Code of Judicial Conduct which imposes "an obligation on the judge to report . . .

[8] At the Juvenile Court stage, the prosecutor's file generally consists of an arrest ticket/summons, an affidavit of complaint, the child's statement if one was given, and possibly some supplementary information about the investigation available only in Memphis Police Dept. databases. See Tenn. Code Ann. §§37-1-153 (court files and records available to attorneys) and -154 (law enforcement records in the Court's file available to attorneys). If the Juvenile Court were required to wait until full discovery was available (e.g., DNA results take 16-26 weeks to get from Tenn. Bureau of Investigation) for a preliminary matter, children would remain in detention for much longer periods, a due process and legal quandary.

misconduct . . . that raises a substantial question regarding the honesty, trustworthiness, or fitness of that . . . lawyer[,]" and notes the Court should take "genuine ethical issues seriously[,]" it then decries the failure to take "less drastic measures such as discussing the issue with the attorney or their supervisor." Finally, it should be noted that, rather than a pattern, these are the only three complaints the Court has made to the Board of Professional Responsibility since Judge Michael's election in August 2014. In the more than three years since he took the bench, hundreds of attorneys have appeared before the Juvenile Court.

We also strongly object to the factual omissions and/or errors in the recitation of these bar complaints. The first bar complaint was described simply as being filed when a defender appeared 15 minutes late. Nothing is mentioned about the habitual lateness of the lawyer involved, despite several prior, explicit warnings from the Court and the fact that this lawyer missed ("forgot") several court dates altogether.

The second complaint is presented as essentially punishment for a juvenile law clinic employee for releasing a flyer advertising a CLE event on the 50th anniversary of the *In re Gault* decision, using language about practice in a kangaroo court taken from the decision. There is no mention of the numerous internal complaints by magistrates of rudeness and a lack of knowledge of Tennessee law by this lawyer. There is no mention of an accusation by a law student (documented on court hallway cameras) that this lawyer knocked his books out of his hands, or that this student complained to the District Attorney, who considered filing assault charges against the lawyer until the student requested that the issue be dropped. There is no mention of social media comments by this lawyer such as "Judge Michael needs to stop locking kids in cages without a plan" or of a podcast (provided to the law school) which portrayed the Judge sitting in posh chambers while children in detention gagged on diesel fumes from a leak, or "sweated" or "shivered" when there was an air conditioning or heating problem. The facts that none of this was accurate and that the children had been removed from the building when HVAC problems arose were not mentioned.

The third bar complaint is presented simply as having been imposed "when the court deemed the attorney unprepared for a transfer hearing." The facts reflect that the teenager (turned 18 while in detention) was detained in February 2017 and set for a transfer hearing on April 6, 2017, for several serious Class A and B felonies, which would entail substantial incarceration time if transferred and convicted. The Court asked the child if she had spoken to her lawyer. The child said, "No, only once for a couple of minutes before the initial detention hearing,"

which occurred some six plus weeks before. The child had confessed to police in the presence of her mother, sufficient proof of probable cause. The only other hurdles under Tennessee law to transfer were a determination of whether the child was committable because of mental illness or retardation and whether there were State services sufficient, or other reasons to believe, that the child could be rehabilitated if retained in Juvenile Court. The lawyer in question had not asked for a mental evaluation and stated that she had no witnesses to call at the hearing, so had no way to meet either of those hurdles. The Court removed the lawyer, appointed new counsel, and filed a bar complaint.

In all three instances the Court attempted to discuss these issues with the ultimate supervisors of these lawyers, either by writing letters **[Collective Attachment 13]**, making phone calls, or having personal meetings. In each instance, there was either no response at all or the situation did not improve. Only after making those efforts did the Court file bar complaints. This contention in the report presents a classic Catch-22 situation. If the Court protects the child's rights, it is wrong. If the Court does nothing and allows an unprepared lawyer to proceed, it is wrong. If the Court maintains the lawyer's privacy by filing a confidential complaint, it is wrong. Independence does not mean that a lawyer may show up or not, meet with their client or not, convey the offer or not, or be unaware of statutory and case law governing the case, no matter how loudly one may proclaim otherwise. Furthermore, the outcomes of the disciplinary complaints are utterly irrelevant to the Court's compliance with the Due Process provisions of the MOA. The Court filed the complaints because it had an ethical duty to do so.

Finally, a bar complaint may be filed by a private lawyer, a government agency lawyer, or a judge. Such complaints may also be filed in the Court of the Judiciary against a judge by these same parties. The process simply has nothing to do with the independence issue. More fundamentally, this is <u>not</u> a topic encompassed within the MOA.

<u>Independence of Conflict Counsel and the Broader Defense Bar</u>

This most recent draft report takes the position that we are back to our starting point in 2012 despite all of the efforts made and results achieved (and documented). <u>It ignores the fact that of the original fifty-six (56) subsections in the Due Process portion of the MOA all but seventeen (17) have been deemed in substantial compliance and removed from the Agreement</u>. The Department of Justice is aware that the Court is constrained to follow state law and the dictates of

the Tennessee Supreme Court's Rule 13. The State was not made a party to the MOA by the DOJ and the changes demanded – an independent panel system overseen by an independent body – are simply impossible for either the County or Court to provide.

The report raises additional complaints about judicial control over the law school clinic. However, several key issues are not mentioned. First, students are only able to take cases during certain times during the semester and are never available during break periods or as exams near. This is, at best, problematic for the Court, as these children are sitting in detention until their cases are resolved. The Court cannot wait through Christmas break or tell a child that his attorney won't be available for two months in the spring or fall. Nor does the report mention that the clinic had only two students enroll during the last semester, which had an obvious effect on the number of appointments it would accept.

Further, the Due Process reports have insisted since this process began that substantial compliance could be reached only if attorneys were provided for children in probation conferences (cases are not before the Court in this informal process; nothing the child says can be used by the Court). This proved insurmountable when (1) the Administrative Office of the Courts (a State agency) refused to pay for these pre-petition meetings [**Attachment 14**], and (2) the Public Defender declined to handle these cases on anything other than an ad hoc basis, responding if a request for a lawyer was made and the panel coordinator was unable to snag an attorney in the hall. It is critical to understand that the contract for services [**Attachment 4**] between the Public Defender and the Law School – a contract to which the Court was not a party – had a stated purpose: "to expand juvenile defender capacity in priority areas including pre-petition representation," which means representing children in probation conferences before a petition is filed, and to "support efforts of meeting juvenile defender obligations required under . . . the MOA."

The Court expressed frustration to the law school about (1) the limited time periods students were available for court cases and the difficulties created by that limitation, and (2) the need for representation at probation conferences to comply with the MOA. Despite the Court's detailed explanations of the need and citing the contract's express provision for such representation, the law school declined repeated requests to handle these cases. These conversations occurred during meetings with the law school to discuss the issues detailed in the bar complaint section above. The draft compliance report also fails to recognize that the Court handles 60,000 cases per year and has limited resources which must be managed. It is not required to host a student program that creates difficulties; instead, the

Court does so as a courtesy and community service. In any event, it is not a requirement of the MOA. As such, the management of resources is not an appropriate topic for the Due Process report.

Finally, the report addresses the recent ethical opinion [**Attachment 15**] sought by the new settlement coordinator from Judge Alan Glenn, a member of the Court of Criminal Appeals and chair of the Judicial Ethics Committee. Judge Glenn was asked whether there can be deviation from Rule 13 regarding legal representation for indigent children. He said that in his 50 years of experience the public defender was always appointed unless there was a conflict, and that the only way to change the present procedure was for the Tennessee Supreme Court to amend its rule to require that all children be represented by the Public Defender. In cases of conflict, additional counsel would be employed by an office other than the Public Defender. Judge Glenn noted this would be a statewide change applying to hundreds of courts in the state's 95 counties, which would require funding by the Tennessee Legislature. Although it is possible to ask the Supreme Court to exempt Shelby County from certain Rule 13 requirements, Judge Glenn said he had never seen such an exemption being sought, and noted it would still require additional State funding. The report seems to indicate that this should be the County's next step to obtain substantial compliance, but it does not give any guidance on what exemption(s) should be sought, much less whether they are available and feasibly paid for.

Transfer Issues

Many of the difficulties created by the insistence upon open file discovery in a preliminary matter have been outlined in earlier sections. However, it is important to point out the additional difficulties, i.e., Catch-22 scenarios, created by shifting expectations given the particular circumstance. This section of the report acknowledges in a footnote that Tenn. Rule of Professional Conduct, Rule 1.1 Competence, requires a lawyer to possess the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation, a requirement which was ignored while criticizing the Court's filing of bar complaints to enforce that rule. Yet, when dealing with transfers, the Court is deemed responsible for forcing lawyers into ineffective assistance, a due process violation, by following state law as to the discovery rules. There is a logical disconnect in the argument that a lawyer could be found ineffective if he or she had complied with all applicable federal and state law, or that the Court could be at fault by insisting that such law be followed. In any event, open file discovery at transfer hearings is not part of the MOA.

Further, a quick review of every MOA or lawsuit listed on the DOJ website (found at https://www.justice.gov/crt/special-litigation-section-cases-and-matters) shows that none were found to have included requirements of open file discovery in transfer hearings.

Conclusion

We respectfully request that final Due Process Compliance Report #10 incorporate the comments and requests made above. We appreciate your consideration.

cc: John M. Gore, Esq. (VIA EMAIL)
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