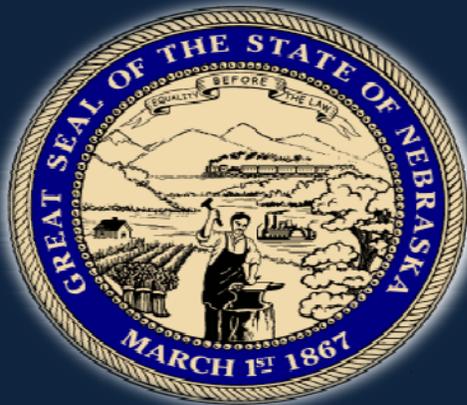


# NEBRASKA



JUVENILE LEGAL DEFENSE:  
A REPORT ON ACCESS  
TO COUNSEL AND  
QUALITY OF  
REPRESENTATION FOR  
CHILDREN IN  
NEBRASKA

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**National Juvenile Defender Center**  
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## EXECUTIVE SUMMARY

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In 1967, in *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court extended the right to counsel to young people accused of crimes, explaining that youth need “the guiding hand of counsel” to respond to the charges leveled against them and to navigate the complicated justice system. This assessment of access to counsel and quality of representation for youth in Nebraska is part of a nationwide effort to address deficiencies and identify strengths in juvenile indigent defense practices. The goal of this assessment is to arm policymakers, judges, defender managers and others with the knowledge to improve the management and implementation of juvenile indigent defense services.

The information in this report was collected by a team of experts from across the country, with the guidance of two knowledgeable and dedicated advisory boards of national and Nebraska stakeholders, and with the support of the University of Nebraska’s Public Policy Center (PPC). Assessment team investigators traveled to 9 geographically diverse counties, chosen after extensive consultation with the University of Nebraska Public Policy Center and the national and state advisory boards, to observe courtroom proceedings and to interview judges, prosecutors, probation staff, public defenders and private attorneys, detention personnel, court administrators, support staff, youth, parents, and other key system stakeholders. The selected sample of counties represents at least 60% of the youth who go through Nebraska’s juvenile delinquency courts.

## SIGNIFICANT FINDINGS

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While assessment team investigators observed examples of model practices and effective defense advocacy, as in many other states, Nebraska’s juvenile justice system has deep-rooted systemic and practice deficiencies that impede the delivery of fair and balanced outcomes to system-involved youth. Many of Nebraska’s own judges, defense attorneys, county attorneys, probation officers, policy makers, detention center staff, and others expressed concerns about the quality of defense representation that Nebraska’s youth receive.

### *Excessive Waiver of Counsel*

The right to counsel in delinquency proceedings is a constitutional right. Fundamental fairness requires that defense counsel: is appointed early in the youth’s case; has a meaningful opportunity to consult with the youth, and investigate and test the strength of the government’s case; explain potential short- and long-term consequences of a conviction; review the sufficiency of the case prior to the court’s accepting a plea agreement; and, is afforded facilities, including interview rooms or other private areas in the courthouse, to hold confidential client meetings. Regardless of the alleged offense, youth who would

not otherwise be able to vote, drink, marry, or enter into binding legal contracts should not be able to enter into plea agreements or navigate their cases without the assistance of counsel. In addition, the fact that the length of detention does not necessarily correlate with the severity of the charge, since many youth charged with minor offenses end up detained for long periods of time because of probation violations or because they are awaiting placement, means that the severity of the charge is unrelated to the need for defense counsel.

Although juvenile system participants did identify specific situations in which youth were generally not allowed to waive counsel – for example, in cases with perceived mental health issues, or serious felony allegations – waiver of counsel was the rule, not the exception. In Nebraska, the vast majority of youth charged with law violations waives counsel, pleads guilty at the initial hearing, and is sentenced immediately, usually to several months of probation with conditions. Most of these youth are facing their first court appearances, though some of the most egregious instances of waiver of counsel were observed in the cases of children who were charged in adult criminal court. Allowing youth to waive the right to counsel means that children not yet old enough to drive, vote, drink, or, in many cases, sign a binding contract, navigate the justice system alone. In light of the facts that the United States Supreme Court has held that due process and fundamental fairness require that youth accused of crimes have the right to counsel; that an ever-expanding body of research reveals that juveniles lack the knowledge and decision-making capabilities of adults; and that the consequences of waiving counsel can be devastating, every child, regardless of the severity of the allegations, should be discouraged from waiving counsel.

Stakeholders from every side of the system – judges, prosecutors, probation officers, as well as defense attorneys – all reported that waiver of counsel is an important fact of practice in their jurisdictions. System participants reported a range in estimates of youth waiving the right to counsel – with some counties reporting that 60-75% of children waive, while others reported that only 25% waive – a fact that suggests that local custom or preference, and not any statutory provision, dictates the percentage of children waiving counsel.

Youth are encouraged to waive counsel by a combination of individual and systemic factors. In the counties with high waiver rates, assessment team investigators observed practices by judges that subtly encouraged youth to waive counsel – for example, giving youth the impression that children who waived counsel would be treated more leniently, or arranging the docket so that the cases of youth who will waive counsel are heard first, and the youth who follow are encouraged to waive by the example of the earlier cases. Parents also encourage youth to waive counsel, sometimes applying substantial pressure. Finally, there were systemic practices that encouraged youth to waive counsel.

Assessment team investigators observed that the portion of the hearing in which children waived counsel tended to be perfunctory and rushed, so that children and their parents did not fully understand the significance of waiving counsel. These truncated waiver colloquies mean that poorly-informed youth who waive counsel do not understand the long- and short-term consequences to waiving counsel or to proceeding alone and representing themselves.

### ***Ethical and Role Confusion***

Although the practice varies from county to county, Nebraska attorneys representing youth in law violation hearings often act as both legal counsel and guardians *ad litem* for the child (GAL). Role confusion among defenders was identified as a significant problem by over two thirds of the investigative team, and some investigators highlighted questionable ethical conduct. These roles are very distinct, with different, often opposing, ethical mandates. Ethical canons require defense counsel to act in the child's expressed interest, serving as the child's voice in court proceedings and zealously advocating for what the child wants. In contrast, the GAL, independent from the child's expressed interest, acts in the child's best interest. In other words, the GAL can substitute her own judgment for the child's, and advocate for what she believes should happen in the case, regardless of the child's wishes.

Many defense attorneys expressed a clear understanding that their mandate was to serve their clients' expressed interests; others demonstrated that they erroneously thought that their role was to act in their clients' best interests. Moreover, defense attorneys do not struggle with this issue alone: other stakeholders also muddle the defense attorney and guardian *ad litem* roles. However, ethical canons are clear and require juvenile defense attorneys to act in the child's expressed interest. This requirement does not mean that a juvenile attorney does not counsel the client about choices that might perhaps be better for the youth, in instances in which the youth's expressed interest and the youth's best interest diverge. It simply means that, as the Model Rules of Professional Conduct mandate, juvenile defenders owe their clients the same ethical duties of loyalty, communication, and confidentiality that adult criminal defense attorneys owe their clients.

### ***Lack of Zealous Advocacy***

Assessment team investigators observed instances of juvenile defenders providing diligent, creative, client-centered advocacy for their young clients; however, this level of practice was not the norm. For example, many system stakeholders, as well as system-involved youth, reported that juvenile defense attorneys did not fulfill their ethical responsibility to maintain regular communication with youth. There is little to no litigation of competency to stand trial, discovery issues, or Fourth or Fifth Amendment violations. Preparation for adjudication and disposition hearings was rushed, and characterized by minimal investigation. There are very few written pre-trial motions. There are very few

trials. There are very few appeals. In general, defense representation was well-meaning, and even caring, but not necessarily client-centered or zealous.

### ***Excessive Guilty Pleas***

Observers found, and participants estimated, that only a small fraction of Nebraska’s delinquency cases actually proceed to an adjudication. The high rates of waiver of the right to counsel are accompanied by a high rate of plea agreements: the vast majority of juvenile cases is resolved by pleas, usually at the detention hearing, usually unrepresented, and usually without the benefit of any legal advice, examination of discovery, or independent investigation. Several factors contribute to this outcome. First, many stakeholders suggested to youth that they plead early in cases in order to avoid triggering the time-consuming and invasive court evaluation process that precedes placement in a youth facility. Others suggested that youth pled so that they could move the case along and get home to their families and friends. Also, under Nebraska laws that grant prosecutors the discretion to file certain cases in adult criminal court, prosecutors used the threat of transfer to extract guilty pleas from youth. In such a plea-heavy system, the quality of plea colloquies is critical to the preservation of due process rights. Assessment team investigators observed dozens of plea colloquies, some good – some even excellent – and some inadequate. Inadequate colloquies were insufficient in several ways: many judges did not use age-appropriate language, did not provide complete plea colloquies that advised youth of all the constitutional rights they were relinquishing, or did not explain the short and long term consequences of pleading.

### ***Inadequate Resources***

Nebraska’s juvenile defense system lacks adequate resources, and this deficiency permeates the entire system. For example, across the state, there were few courthouses with facilities that allowed confidential communications between defense attorneys and their juvenile clients. Most juvenile defense attorneys do not have investigators, social workers, mental health experts, and other experts at their disposal to help prepare their cases for trial or for disposition. There is a paucity of juvenile-specific training opportunities. Some large offices provided training on juvenile defense, but most small and mid-sized offices lacked the capacity to do so. These resources, unavailable to most of Nebraska’s juvenile defense attorneys, are indispensable for the provision of holistic and effective defense advocacy.

## **CONCLUSIONS AND RECOMMENDATIONS**

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The fact that Nebraska’s legislature has undertaken to fund this in-depth assessment of Nebraska’s juvenile defense delivery system reveals a political environment eager for thoughtful change. Improvements to Nebraska’s juvenile

indigent defense system are attainable through collaborative action to address systemic deficiencies at the state, regional and local levels. Creativity and leadership will go a long way toward solving problems and highlighting best practices. As a starting point, this assessment offers a series of comprehensive recommendations including:

## **Core Recommendations:**

### ***1. Revise Nebraska's Juvenile Code***

For several reasons, Nebraska's juvenile code should be relocated and renumbered together in one section that is easily accessible to juvenile defenders. First, it should be reformed for the sake of clarity. As it stands, Nebraska's juvenile court provisions are scattered throughout Nebraska's statute. The Supreme Court itself has called Nebraska's juvenile code "a maze of statutory redundancy." *In re Interest of A.M.H.*, 233 Neb. 610, 619 (NE 1989). A consolidated and revised code could also take into account the ever-expanding body of adolescent development psychology and other social scientific research that illuminate the impact that legal practices have on children and youth - including practices concerning, for example, waiver of counsel, interrogation, review of *Miranda* warnings, and competency.

### ***2. Increase Youth's Access to Counsel***

The right to counsel in delinquency proceedings is a constitutional right. Fundamental fairness requires that defense counsel: is appointed early in the youth's case; has a meaningful opportunity to consult with the youth, investigate and test the strength of the government's case, explain potential short- and long-term consequences of a conviction, and review the sufficiency of the case prior to the court's accepting a plea agreement; and is afforded facilities, including interview rooms or other private areas in the courthouse, to hold confidential client meetings. Regardless of the alleged offense, youth who would not otherwise be able to vote, drink, marry, or enter into binding legal contracts should not be able to enter into plea agreements or navigate their cases without the assistance of counsel. In addition, the fact that the length of detention does not necessarily correlate with the severity of the charge, since many youth charged with minor offenses end up detained for long periods of time because of probation violations or because they are awaiting placement, means that the severity of the charge is unrelated to the need for defense counsel.

Accordingly, Nebraska should either prohibit juvenile waiver of counsel altogether, or follow the leads of Florida and Washington, whose Supreme

Courts have recently enacted juvenile court rules requiring that youth have a meaningful opportunity to consult with counsel about the waiver decision before being allowed to waive counsel. Limits on the waiver of counsel will lead to improvements in many other areas. For example, the early and timely availability of counsel at detention hearings will discourage the troubling practice of allowing youth to enter pleas at the initial hearing in law violations, of employing mass arraignments, and will complement insufficient judicial colloquies with a defense explanation of plea provisions.

### **3. *Address Ethical and Role Confusion***

The Nebraska Supreme Court Commission on Children in the Courts should clarify the ethical and role confusion that characterizes juvenile court practice in many counties. Consistent with the American Bar Association's (ABA) Model Rules of Professional Conduct, the Institute for Judicial Administration/ABA *Juvenile Justice Standards*, and the National Coalition of Juvenile and Family Court Judges *Delinquency Court Guidelines*, the Commission on Children in the Courts should take the position that youth in law violation proceedings must be represented by defense attorneys who advocate for the clients' stated interest and protect their clients' due process rights, and acknowledge that juvenile courts are adversarial fora in which zealous advocacy is expected and not penalized.

### **4. *Reduce the Overreliance on Transfer to Adult Criminal Court***

The cases of the vast majority of 15- and 16-year olds charged with felonies are direct filed in adult criminal court. The 2007 research study conducted by the Centers for Disease Control and Prevention showed that transfer policies are largely unsuccessful, as they do not lead to either specific deterrence (i.e., they do not prevent the transferred youth from reoffending) or general deterrence (i.e., they do not prevent youth who may have observed the example of the transferred youth from reoffending). The authors added that "The findings in this report indicate that transfer policies have generally resulted in increased arrest for subsequent crimes, including violent crime, among juveniles who were transferred compared with those retained in the juvenile justice system. To the extent that transfer policies are implemented to reduce violent or other criminal behavior, available evidence indicates that they do more harm than good."<sup>1</sup>

There is another troubling result of Nebraska's overreliance on the use of direct file provisions. The system that is left when all the felonies are transferred out is the second class juvenile system tilted towards a non-

due process based courtroom culture and best interest practice that encourages pleas and discourages zealous, client-based legal advocacy. It is easier for a “kiddie court” mentality to thrive when most of the cases processed in juvenile court are misdemeanors. The sense that there are no real consequences for the youth is buttressed by the impression that most youth get probation – although their liberty is easily jeopardized if they are accused of violating a court order. Limiting the use of direct file provisions might have the ancillary benefit of changing a juvenile court culture that diminishes youth’s rights.

## ***5. Establish Ongoing Oversight and Monitoring***

Nebraska’s indigent defense systems have been subjected to numerous studies throughout the past two decades. “The Indigent Defense System in Nebraska,” also referred to as the Spangenberg Report, was released in 1993 and identified 23 areas in need of improvement.<sup>2</sup> In 1995, L.B. 646 was signed into law, creating the Commission on Public Advocacy to provide assistance to counties in major cases by offering the services of staff attorneys.<sup>3</sup> In 2004, the Nebraska Minority and Justice Task Force/Implementation Committee published “The Indigent Defense System in Nebraska: An Update.” This extensive study compared the state of indigent defense to the recommendations outlined in the Spangenberg Report more than ten years prior, and found some improvements but also highlighted several deficiencies still present in the delivery of indigent defense services. Although the state of juvenile indigent defense was not the focus of any of these reports, it was the focus of a 2006 report by the Attorneys Representing Children and Youth, a subcommittee of the Nebraska Supreme Court Commission on Children in the Courts, titled, “Legal Representation in Delinquency and Status Offense Cases in Nebraska.” That report, finalized three years ago, contains many of the recommendations included in this report.

A mechanism or commission should be created to provide ongoing oversight and monitoring of the juvenile defense system in Nebraska to ensure the equitable and fair distribution of resources; to collect data; to promulgate and implement best practice standards; to ensure the availability of juvenile defender-specific training; and to identify, develop, and implement specific policies and practices that will improve juvenile defense as required.

### **Implementation Strategies:**

#### ***1. The Nebraska Legislature should:***

- Enact a code provision that allows for the development and use of graduated sanctions for probation violations that casts detention, either as a sanction or while awaiting placement, as a last resort.
- Allocate more funding for judicial resources, and create more judgeships, so that the pressures of judicial economy are not so onerous as to require immediate plea agreements, lack of advisements, and mass arraignments. Concomitant with these resources, additional resources also need to be allocated to juvenile defenders and prosecutors accordingly.
- Promulgate guidelines on the length of stay in detention for youth awaiting service placements or those held on probation violations.
- Increase access to and improve the quality of mental health and substance abuse services available for system-involved youth by providing appropriate additional funding.
- Increase access to and improve the quality of pre-trial and post-disposition community based services by providing appropriate additional funding.
- Amend discovery provisions to allow filing of *ex parte* motions for funds for experts in law violation cases.
- Enact a code provision creating the automatic sealing of juvenile records for youth who have not been rearrested for two years after the end of the completion of their disposition, and for adult court convictions where the youth was younger than 21 years of age at the time of conviction; and,
- Replace direct file provisions with provisions that allow transfer to adult criminal court only after a hearing before a judge;
  - If the legislature will not repeal direct file provisions:*
    - Create a minimum age for direct file in adult criminal court;
    - Create a narrowly-delineated list of specific crimes for which direct file is eligible;
    - Prohibit judges from considering a previous finding that a youth is not amenable to rehabilitation from being allowed as evidence in a subsequent amenability proceeding.

## ***2. The Nebraska Supreme Court should:***

- Adopt a court rule that allows a youth to waive counsel only after the youth has had a meaningful opportunity to fully consult with counsel about the consequences of waiving.
- The Nebraska Supreme Court Commission on Children in the Courts should clarify the different roles of the juvenile defense attorney and the guardian *ad litem*, possibly in the form of a standard or court rule adopted by the Court.
- In order to use resources most effectively, deploy attorneys where most needed, and to improve the overall functioning of the juvenile

defense system, the Supreme Court should create a mechanism to collect an additional range of data included but not limited to: the number of youth who waive counsel; the number of cases that result in plea agreements; the number of youth charged in juvenile court but transferred to adult criminal court; the number of youth charged in adult criminal court; the number of youth charged with first-time offenses in adult criminal court; the number of youth charged with misdemeanors in adult criminal court; and the number of youth transferred from adult criminal court to juvenile court.

- The Nebraska Supreme Court Commission on Children in the Courts should promulgate and adopt practice standards that:
  - Clearly describe the role of juvenile defense counsel in law violation cases;
  - Clearly describe the role of GALs in dependency cases;
  - Proscribe attorneys from acting as both defense counsel and GALs in a single case; and
  - Proscribe attorneys from acting as both defense counsel and GAL for a single client, even in different cases.
- Require people practicing in juvenile court to devote two of their newly-mandated CLE hours to juvenile-specific training in order to be allowed to appear on juvenile cases each year;
- Convene defenders, judges and others to draft a model waiver colloquy that is age-appropriate and grounded in principles of adolescent development for use by judges in juvenile proceedings; and,
- The Nebraska Supreme Court’s Judicial Branch Education Committee, which governs education for judges, court employees and probation officers, should offer juvenile-specific training.

### ***3. Juvenile Court Judges should:***

- Provide, in age-appropriate language, comprehensive plea colloquies that advise the child about each of the rights the child is relinquishing, and verify that the child understands the consequences of relinquishing those rights prior to accepting any waiver of counsel or guilty plea, in accordance with *State v. Shulte*, 687 N.W. 2<sup>nd</sup> 823, 827 (Neb. 1997), prevailing law, and rules.
- Insist on decorum and respect in the courtroom, discouraging the “kiddie court” mentality.
- Fully honor the due process rights of the youth before the court and encourage a culture of zealous defense advocacy; and,
- Insist that school officials make every reasonable effort to address a given student’s truancy issues before filing a case, and, if the school has not complied, dismiss the case.

#### ***4. Chief Public Defenders and Public Defender Offices should:***

- Dedicate appropriate resources, including funding for training and professional development, access to investigators, social workers, and support staff, for juvenile defense attorneys.
- Work with the legislature to ensure resource and pay parity for juvenile defense attorneys.
- Ensure a work environment that values due process and cuts out the “kiddie court” mentality so pervasive in juvenile courts.
- Implement appropriate supervision structure for juvenile defense attorneys and require periodic performance reviews.
- Adopt a case tracking system that logs and helps defenders remember to file motions at different points throughout their juvenile cases.
- Ensure adequate support for post-disposition representation.
- Ensure representation at probation violation hearings; and,
- Provide professional support and camaraderie to contract attorneys.

#### ***5. Public Defender and Contract Attorneys should work together to:***

- Create a state-based juvenile defense resource center.
- Create a model juvenile court training that focuses on juvenile-specific topics, including adolescent development and education.
- Create mentoring opportunities, whereby newer attorneys are mentored by more experienced attorneys familiar with juvenile court practice.
- Add juvenile-specific trainings to the statewide trainings held for judges, prosecutors, and probation officers – in particular, for those handling juvenile cases.
- Coordinate efforts across counties to share resources, information, and training opportunities; and,
- Receive training on the overlap and unique differences between status offender and delinquency cases.

#### ***6. Prosecutors should:***

- Develop uniform criteria for prosecutors for the cases in which transfer to adult criminal court is appropriate.
- Disallow the use of transfer or direct file as plea negotiation tools; and,
- Develop criteria concerning what school cases should be brought and which should be diverted, so that the vast majority of school cases, including minor assaults, are not referred to juvenile court.