

**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: December 22, 2016

RE: Compliance Report #8 - September 2016

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 September 26, 2016 – September 29, 2016. This report evaluates the extent to which Juvenile Court has complied with each substantive provision of the Due Process sections of the Agreement.

Format

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Executive Summary

As previously noted, many significant improvements have been sustained including progress toward an independent indigent defense system.¹ I commend the Mayor for his continuing commitment to the terms of the Agreement and to seeking local solutions. *The Blueprint to Achieve Compliance in Juvenile Defender Services*² ("*Blueprint*") filed by the Public Defender outlines a promising course of action to guide local solutions toward a comprehensive, independent indigent defense system. Many recommendations in *Blueprint* are critical to establishing a minimum level of independence that is essential to achieving substantial compliance with the Agreement.

The *Blueprint* was the subject of many conversations during the site visit, and I was encouraged in meetings with Chief Administrative Officer Harvey Kennedy and representatives of the County Attorney's office. Once implemented the local solutions proposed will enhance independence and ensure the Public Defender can meet ethical obligations. For example, the *Blueprint* recommends increasing capacity to permit the Public Defender to represent all juvenile delinquency cases where there is no conflict of interest. This is a practical step toward addressing the concerns I have raised in previous reports about deficiencies in the panel system. The *Blueprint* also recommends providing assurances to safeguard the ability of the Chief Public Defender to act independently despite the political controls that are codified in the County charter.

On November 17, 2016 I received a Memorandum from the County Attorney's Office. I am pleased that the County Attorney's Office is responding to the *Blueprint* and researching issues found in the Shelby County Charter.

For this reporting period, I am also pleased to report the following: 1) the successful launching of the University of Memphis Cecil C. Humphreys School of Law Children's Defense Clinic, 2) the increased capacity of the Public Defender Juvenile Unit which currently handles 57% of cases 3) Dr. Tucker-Johnson's Clinical Services has eliminated the backlog of evaluations, and 4) the Probation Department's adjusted graduated sanctions grid continues to achieve positive outcomes for youth.

¹See SANDRA SIMKINS, COMPLIANCE REPORT #6—OCTOBER 2015 (2015), page 4 [hereinafter SIMKINS #6], available at http://www.justice.gov/crt/about/spl/documents/shelby_firstmtrpt_6-5-13.pdf.

In particular, the Mayor took steps to remove the Public Defender from direct oversight of the County Attorney and affirmed the Public Defender as the appointing authority for assistant public defenders. Ratification by the County Commission of an existing local ordinance (Article XI, Section 10-731) clarifies the role of the Public Defender in this important area and reverses the long-standing practice of assistant public defenders serving as appointees of the elected Mayor. This is a significant achievement."

² *Blueprint* is attached as Exhibit "A"

While the majority of data points are maintaining substantial compliance, issues remain regarding court motions and orders. This continues to result in unnecessary and time-consuming obstacles for defense counsel. In addition, I have highlighted concerns regarding the current discovery practices in transfer hearings.

Overall, of the 55 Due Process Provisions assessed pursuant to the MOA, Juvenile Court's compliance status is as follows:

Compliance Standards	April 2013	Oct. 2013	April 2014	Oct. 2014	April 2015	Oct. 2015	April 2016	Oct. 2016	
Substantial Compliance	0	0	0	24	38	43	50	48	
Partial Compliance	1	26	44	23	16	11	3	5	
Beginning Compliance	25	17	10	5	1	1	0	0	
Non Compliance	3	0	0	1	0	0	2	2	
Insufficient Information/pending	5	2	1	2	0	0	1	1	
Total # of Due Process Provisions in Agreement	34	45	55	55	55	55	56*	56*	

Definitions regarding compliance standards are found in the "Methodology" section of this report.

*I have divided one compliance measure into two parts given nature of progress, see p. 12.

Recent Positive Developments

1. Plan for Comprehensive Independent Juvenile Indigent Defense

In response to my request the Shelby County Public Defender submitted a *Blueprint to Achieve Compliance in Juvenile Defender Services* ("Blueprint") on August 15, 2016⁵. The *Blueprint* is a key step toward a comprehensive plan for juvenile defender services required under the MOA. The solutions recommended in the Blueprint propose active steps and timelines to achieve substantial compliance before August 31, 2017. I expressed my opinion to Mr. Kennedy that taking the steps proposed in the Blueprint would allow Shelby County to meet its juvenile defender obligations required under the MOA before the end of Mayor Luttrell's term. I was encouraged by County Attorney's attention to these issues and the willingness of the Administration to implement the recommendations set out in the *Blueprint*.

The *Blueprint* proposed local solutions in key areas. After conversations conducted during the site visit and review of the *Blueprint*, it is my opinion that if the following solutions are implemented and sustained, substantial compliance would be reached:

- The Public Defender must be able to ethically do the job despite the prospect of dismissal for doing so. This requires that adequate assurances be developed. This is consistent with Principal 1 of the ABA 10 Principals which demands the Public Defender Office be free from political interference. If adequate assurances were developed (i.e. some type of severance and a defined term of service) it would ensure the independence necessary to satisfy the MOA.

⁵ *Blueprint*, page 1. (See Appendix "A")

- The Public Defender must be able to act independently in state and local budget proceedings to advocate for funding.
- The Public Defender must be able to run their own office in a manner that meets ethical obligations. This includes the ability to hire and remove staff, set and enforce performance standards, maintain workload controls and determine the best structure for service delivery.
- Public Defender compensation should be based on an objective standard rather than be subject to modification by the appointing authority.
- The Public Defender must increase capacity to provide all juvenile delinquency services where there is no conflict of interest, in order to decrease the issues previously stated with the panel structure.

Request for Administration Plan: I am requesting that the Administration outline steps for implementing a plan in these key areas by January 24, 2017. I am also recommending that a meeting be convened (via teleconference or in person) of the relevant parties (including the Public Defender, the County Attorney, DOJ and myself) after the receipt of the Administration's outline, to clarify the issues in the *Blueprint* and *Memorandum*.

2. *Inaugural Class of Children's Defense Clinic at University of Memphis
Cecil C. Humphreys School of Law*

As mentioned in my last report, the University Of Memphis Cecil C. Humphreys School Of Law opened a new Children's Defense Clinic--a first for the state of Tennessee. The concept of an academic partnership was endorsed in the original DOJ Agreement in 2012 and I am pleased to report that students now routinely appear in Shelby County Juvenile court. I cannot overstate the value of the clinic program toward sustaining long term reforms in Shelby County.

Under the leadership of Dean and Professor Peter Letsou and Clinic Director Lisa Geis, students now engage in experiential learning while defending Shelby youth charged with delinquency cases. The clinic has received very positive media attention. In particular there was a "ribbon-cutting" ceremony that was well attended by Shelby County juvenile justice stakeholders.⁸ In addition to training students on best practices and national juvenile defender standards, the Children's Defense Clinic is actively collaborating with the Shelby County Public Defender and has begun to serve as a training resource for the region. For example, the clinic is hosting informal, monthly training sessions open to all juvenile defenders. "Classroom to Courtroom – Using the IDEA in Delinquency Court" was held on September 20, 2016. The next installment of Juvenile Training Immersion Program ("JTIP") was hosted by the law school on December 9, 2016. I want to specifically encourage participation of the private bar and juvenile panel attorneys in these important trainings.

⁸ <http://www.commercialappeal.com/news/courts/law-students-earn-courtroom-experience-with-childrens-defense-clinic-3bdd0d66-dca1-0d00-e053-0100007-392802081.html>

Ongoing Due Process Concerns

1. *Transfer Hearing Discovery and Recently Enacted Tennessee Rules of Juvenile Practice and Procedure*

On July 1, 2016, the Tennessee Administrative Office of the Courts released the Tennessee Rules of Juvenile Practice and Procedure (“Rules”) including specific rules on discovery and transfer (Rules 206 and 208 respectively).¹ During my last visit I learned that the District Attorney’s office frequently denies discovery to the youth’s attorney until after the transfer decision is made by the Court and while the District Attorney’s office is considering filing a Notice of Transfer. This is concerning for a number of reasons, in particular because the prosecutors has a duty to provide exculpatory evidence according to *Brady v. Maryland*, 373 U.S. 83 (1963).

Obstacles to Defense Practice: Motions, Orders, Docket Numbers

This issue has been highlighted in several previous reports but has yet to be resolved.² I continue to hear complaints regarding the processes for filing motions, receiving court orders and obtaining docket numbers. I understand that these issues involve overlapping duties between the court, the office of the clerk, and the probation department. I have enlisted the assistance of settlement coordinator Bill Powell to address these important issues.

¹ Rule 206 Discovery: (a) Each juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure. (b) An informal request for discovery is encouraged, but if the parties cannot agree as to discovery, then a formal discovery request shall be made.

Advisory Commission Comments. In drafting this rule, the Commission was concerned with potential burdens and delays that might be caused if existing criminal discovery methods were applied without modification to juvenile court proceedings. This does not preclude adoption by each court of local rules of procedure to implement the discovery mechanisms found in the Tennessee Rules of Criminal Procedure. The Commission emphasizes the mandate of Supreme Court Rule 18, which limits local rules to those “not inconsistent with . . . the Rules of Juvenile Procedure[.]” *State v. Willoughby*, 594 S. W.2d 388 (Tenn. 1980) holds that discovery rules do not apply to preliminary examinations 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. **Please note that some discovery may be critical in a transfer hearing.** The Court should use its discretion in granting access to information necessary to defend or prosecute a transfer case. The state must disclose any exculpatory evidence to the child’s attorney per *Brady v. Maryland*, 373 U.S. 83 (1963).....(<http://www.tncourts.gov/rules/rules-juvenile-procedure/206>

² See SIMKINS #7 at 17, SIMKINS #6 at 7.

Discussion of Compliance Findings

Methodology

The information for this compliance report was obtained using the same methods as the previous seven compliance reports. I have relied on information from a variety of Juvenile Court stakeholders. I have reviewed "Committee A" minutes and have maintained email correspondence with Juvenile Court. 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, probation conferences and the major crimes docket including a transfer hearing. During the site visit I had meetings with the following: Juvenile Court staff, individual probation officers, panel attorneys, and the entire staff of the new public defender juvenile unit, the juvenile defender panel attorney coordinator, the Public Defender, the Clinical Services Director, and the chief of the District Attorney's juvenile unit. I also reviewed the eighth compliance report prepared by Settlement Coordinator Bill Powell. 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.

PROBABLE CAUSE DETERMINATIONS	APRIL 2013	OCT. 2013	APRIL 2014	OCT. 2014	APRIL 2015	OCT. 2015	APRIL 2016	OCT. 2016	
Within 90 days: revise policies to require prior to detaining a child Magistrate makes proper probable cause determination	BC	PC	PC	SC	SC	SC	SC	SC	
Within 90 days: insure PC determination within 48 hours of warrantless arrest	BC	PC	PC	SC	SC	SC	SC	SC	
Within 90 days: insure no child detained for more than 48 hours prior to Detention Hearing if Court has not made PC determination	BC	PC	PC	SC	PC	SC	SC	SC	
Within 90 days: insure every child has meaningful opportunity to test PC by revising practices to	BC	PC	PC	SC	SC	SC	SC	SC	
a. Appoint defense attorney to represent any indigent child. Indigence should be presumed unless information to contrary is provided									
b. Require govt to prove existence of PC with reliable evidence or affidavit of complaint	BC	BC	PC	PC	PC	PC	SC	SC	
c. Allow defense attorneys opportunity to challenge PC	BC	PC	PC	PC	SC	SC	SC	SC	
d. Require record be maintained reflecting when defense counsel appointed, forms of evidence used, & whether defense attorney challenged evidence or provided alternative evidence. Such record should be accessible from the info system	II/P	BC	PC	PC	SC	SC	SC	SC	
Each month, Judge or designee shall review a sampling of case files to determine whether requirements regarding notice of charges are being followed. Shall also include periodic observations of Detention & Adjudicatory hearings. If not, immediate corrective action shall be taken.	II/P	BC	PC	PC	PC	PC	SC	SC	

Affidavits of Complaint (AOC):

This topic has been addressed in a number of prior compliance reports. At this time substantial compliance has been maintained.

NOTICE OF CHARGES	APRIL 2013	OCT. 2013	APRIL 2014	OCT. 2014	APRIL 2015	OCT. 2015	APRIL 2016	OCT. 2016	
Within 90 days: revise policies to insure children & defense attorney receive copies of AOC as soon as available but at minimum before Detention Hearing. Also, insure Magistrates formally arraign children at all Detention Hearings.	BC	PC	PC	SC	SC	SC	SC	SC	
When changes are made to charges as set forth in petition prior to adjudicatory hearing that could increase the penalty, Juvenile Court shall provide notice of final charges by providing copies of new Petition at least 14 calendar days in advance of hearing unless advance notice is waived.	BC	PC	PC	SC	SC	SC	SC	SC	
When changes are made to charges as set forth in petition prior to adjudicatory hearing that could reduce the penalty, Juvenile Court shall provide notice of final charges by providing copies of new Petition within 24 hours of change in charges.	BC	PC	PC	SC	SC	SC	SC	SC	
Each month, Judge or designee shall review a sampling of case files to determine whether requirements regarding notice of charges are being followed. Shall also include periodic observations of Detention & Adjudicatory hearings. If not, immediate corrective action shall be taken.	II/P	PC	PC	SC	SC	SC	SC	SC	

Comments

Juvenile Court continues to be in compliance with this section. Nothing in the data, observations or meetings with various stakeholders raised concern in this area.

TRANSFER HEARINGS	APRIL 2013	OCT. 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
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	
<i>b.</i> Children have right to attorney whose role is to represent their stated interest	BC	PC	PC	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*	
<i>d.</i> Children, through attorney, provided opportunity to confront evidence & witnesses	NC	BC	PC	PC	SC	SC	SC	PC*	
<i>e.</i> Children are protected from self-incrimination	BC	PC	PC	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/P C	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♦	
Each month, Judge, or designee, shall review all files related to Transfer Hearings to insure Hearings followed Agreement. Review shall include periodic observations of Transfer Hearings to insure Magistrates follow policies.	II/P	BC	PC	PC	SC	SC	SC	SC	

*See comments. Lack of discovery curtails the youth's lawyer ability to provide representation and impacts due process.

♦Substantial compliance is based on Shelby's practice of obtaining a psych evaluation prior to hearing. Evaluation is critical to determine amenability/ 7 factors.

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

Comments

In the executive summary, I mentioned the lack of discovery at transfer hearings. The lack of discovery impacts the attorneys' ability to investigate the case which also limits ability to present evidence and cross examine witnesses. The current data for transferred youth is as follows:

Shelby County	2008	2009	2010	2011	2012	2013	2014	2015	2016 to 10/20
# of children transferred to adult court*	225	194	151	121	99	90	77	47	57

*Data provided by JCMSC

Shelby County Notice of Transfers	
2014	182
2015	153
2016 (up to 10/20)	108

Continued Excellence of Clinical Services (newly hired staff has decreased backlog)

Clinical Services continues to deliver high quality evaluations. At the time of my visit there were no cases in "backlog" status. According to Dr. Tucker-Johnson, clinical services should soon be on track to complete evaluations within 30 days of receiving the court order.

Protections Against Self-incrimination	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
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	
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	
Within 90 days: insure POs advise Children of Miranda rights. Shall include	BC	BC	PC	PC	SC	SC	SC	SC	
a. Description of role of defense attorney									

b. Statement Child is entitled to attorney & maybe at no cost	BC	BC	PC	PC	SC	SC	SC	SC	
c. Statement that Child's statements regarding offense can be included in Probation report	BC	BC	PC	PC	SC	SC	SC	SC	
d. Statement that Child's statement can be used against them.	BC	BC	PC	PC	SC	SC	SC	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*	
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/ NR	S/ NR	S/ NR	S/ NR	S/NR	
Within 30 days: prohibit adverse use of information obtained from child during probation conference	BC	PC	PC	SC	SC	SC	SC	SC	
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	
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	
Each month the Judge or designee shall review sample of files to determine rights against self-incrimination are 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	II	II	BC	PC	PC	SC	SC	SC	
Immediately cease providing Visit & Contact forms to Magistrates prior to Adjudicatory Hearings.	PC	PC	PC	SC	SC	SC	SC	SC	

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

Comments

Success of Probation Unit:

Downward Adjustment and Continued Success of the Graduated Sanctions Grid: In my last report I noted the downward adjustment to the graduated sanctions grid. The new grid is in the process of being validated.

Lack of Attorneys at Probation Conferences: There has yet to be attorneys at probation conferences. This area of the MOA has not been met.

JUVENILE DEFENDERS	APRIL 2013	OCT. 2013	APRIL 2014	OCT. 2014	APRIL 2015	OCT. 2015	APRIL 2016	OCT. 2016	
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	
i. Support Juvenile Public Defender Training	N/A	N/A	BC	PC	PC	SC	SC	SC	
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	
k. Implement attorney practice standards for juvenile defenders	N/A	N/A	BC	BC	PC	PC	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 **	
b. Establish Panel System Overseen by independent body to handle conflicts	N/A	N/A	II	NC	BC	BC	NC	NC	
c. Support attorney practice standards for juvenile defenders including training and evaluation.	N/A	N/A	BC	BC	PC	PC	I/I ***	I/I ***	
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 for timely appointment, NC because not independent

***unclear if new PC can enforce defense standards due to structure

Comments

The *Comprehensive Plan for Independent Indigent Defense System* and the *Blueprint* was discussed in the executive summary.

The Public Defender continues to add attorney and staff capacity toward the goal of providing representation for 100% of all juvenile delinquency cases where there is no ethical conflict of interest. As for the recent site visit the Public Defender is now providing 57% of all delinquency defender services.

	2016
Juvenile Defender	312
Public Defender	43%
	414
	57%
Total Distinct Complaints	725

In previous reports I have raised specific concerns about the lack of independence in the present panel attorney structure, and in particular about the role of the panel coordinator. Efforts underway to increase public defender capacity are intended to reduce the scope of the panel problem as much as possible, and according to the proposed timeline in the *Blueprint* should be complete by January 15, 2017.

CONFIDENTIALITY OF JUVENILE DELINQUENCY PROCEEDINGS	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 30 days: revise policies to protect confidentiality in delinquency proceedings	BC	PC	PC	SC	SC	SC	SC	SC	
Insure only person properly concerned with child's case are admitted into any delinquency proceeding	BC	PC	PC	SC	SC	SC	SC	SC	

Comments

The policies continue to be incorporated into practice without incident.

PLEA COLLOQUIES	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 6 months: establish procedure for plea colloquies that is age-appropriate and clear to the Child	N/A	PC	PC	SC	SC	SC	SC	SC	

Insure Magistrates conduct interactive oral colloquy w/ child that includes: Nature of delinquent act charged, Child's right to attorney, Right to plead not guilty & have Adjudicatory hearing, Child's waiver of right to trial on merits & an appeal	N/A	PC	PC	SC	SC	SC	SC	SC	
Within 6 months: insure children have a right to counsel whenever entering a plea of guilty	N/A	PC	PC	SC	SC	SC	SC	SC	

Comments

Substantial compliance has been maintained.

RESTITUTION GUIDELINES	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 6 months: establish guidelines for assigning restitution to any child adjudicated delinquent that provides the child a meaningful opportunity to Challenge the evidence of restitution. At a minimum the restitution guidelines shall: i. Require documentation to support the restitution request ii. Allow children adequate time to review the restitution request & opportunity to introduce evidence opposing the amount iii. Allow opportunity to request adjustment to restitution amount by introducing evidence of family income or obligations that would render the restitution an undue hardship	N/A	PC	PC	SC	SC	SC	SC	SC	

Comments

The restitution policy maintains substantial compliance.

BOND SETTING GUIDELINES	APRIL 2013	OCTOBER 2013	APRIL 2013	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 6 months: establish bond setting guidelines At minimum the guidelines shall: i. Prevent excessive bonds ii. Reasonably assure appearance in court iii. Take into account presumptive indigence of children iv. Allow parents to file statements of indigence	N/A	PC	PC	SC	SC	SC	SC	SC	

Comments

Bond amounts continue to be set in accordance to the guidelines and maintain substantial compliance.

LANGUAGE ACCESS PLAN	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 6 months: develop language access plan that complies with Title VI. Make summons & other crucial documents available in appropriate languages	N/A	PC	PC	II/P	SC	SC	SC	SC	
Implement language access plan within 1 year	N/A	BC	PC	II/P	SC	SC	SC	SC	

Comments

The language access plan remains in substantial compliance.

TREATMENT OF WITNESSES	APRIL 2013	OCT. 2013	APRIL 2014	OCT. 2014	APRIL 2015	OCT. 2015	APRIL 2016	OCT. 2016	
Within 6 months: revise procedures on treatment of witnesses to insure integrity of witness testimony is preserved. Include: All witnesses placed under oath All witnesses properly sequestered	N/A	PC	PC	SC	SC	SC	SC	SC	

Comments

This section has maintained substantial compliance.

JUDICIAL BENCH CARDS	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016	
Within 6 months: develop bench cards Bench cards shall be readily accessible documents. Should be available upon request Juvenile Court shall produce bench cards for the following: a. Detention Hearing, PC determinations and bond settings b. Adjudicatory Hearings c. Plea colloquies d. Transfer Hearings e. Disposition hearings, including procedures for setting restitution f. Post-dispositional hearings	N/A	BC	PC	PC	SC	SC	SC	SC	

Comments

Bench cards continue to be used and I did not observe or hear of any issues during my eighth visit.

RECORDINGS OF JUVENILE DELINQUENCY HEARINGS	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016
Within 6 months: all hearings shall be recorded by electronic means, Private court reporters may provide written transcripts	N/A	BC	PC	PC	SC	SC	SC	SC
Juvenile Court shall insure recordings are complete & of good quality								
Juvenile Court shall make recordings accessible at no cost to defense counsel representing indigent children								
Recordings shall be stored for 2 years								

Comments

I had the opportunity to listen to recordings of court proceedings. I found the recordings to be clear and of good quality. A standing order is in effect ensuring defense attorneys access to audio tapes.

WRITTEN FINDINGS	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	OCTOBER 2014	OCTOBER 2015	APRIL 2016	OCTOBER 2016
Within 6 months: require Magistrates to produce court orders containing the written findings of fact for each judicial decision made	N/A	BC	PC	PC	SC	SC	SC	SC
Written findings of fact shall include the relevant statutory requirements, legal reasoning that formed the basis for the court's decision and a narrative of the facts considered in decision								

Comments

During my eighth site visit I reviewed the files of all transfer hearings and randomly selected adjudicatory hearings files. Each file contained a detailed written finding of fact.

TRAINING	APRIL 2013	OCTOBER 2013	APRIL 2014	OCTOBER 2014	APRIL 2015	OCTOBER 2015	APRIL 2016	OCTOBER 2016
<p>Within 6 months: develop a training plan for all employees involved with delinquency docket & submit training plan to Monitor and US for approval</p> <p>Training plan shall insure appropriate staff are trained on topics relevant to their role & responsibilities in delinquency proceedings including:</p> <p>Constitutional due process requirements</p> <ul style="list-style-type: none"> i. Adolescent development ii. Dispositional planning iii. Best practices in social service & therapeutic options iv. Functional & practical purposes of juvenile court v. Appropriate professional role of different players within juvenile proceedings 	N/A	BC	PC	PC	PC	PC	SC	SC
<p>Juvenile Court shall implement 1st training plan within 12 months</p> <p>& shall create subsequent training plans on an annual basis thereafter</p>	N/A	N/A	BC	PC	PC	PC	SC	SC

Comments

During the last compliance period the court has maintained substantial compliance.

THE SHELBY COUNTY PUBLIC DEFENDER

SINCE 1917



BLUEPRINT TO ACHIEVE COMPLIANCE IN JUVENILE DEFENDER SERVICES

**STEPHEN BUSH
SHELBY COUNTY PUBLIC DEFENDER
AUGUST 15, 2016**



THE LAW OFFICES OF
THE SHELBY COUNTY PUBLIC DEFENDER

August 15, 2016

Sandra Simkins, Director
Children's Justice Clinic
Rutgers School of Law
217 N. 5th Street
Camden, NJ 08102-1203

Dear Ms. Simkins:

Please accept this *Blueprint to Achieve Compliance in Juvenile Defender Services* as a key step toward a comprehensive plan to realize a system of juvenile defender services as required under the Memorandum of Agreement.¹ The solutions set forth in this progress report propose a course of action to achieve and sustain all juvenile defender obligations by August 31, 2018.

This report is submitted in response to your request for advisory recommendations for achievable local solutions, including timelines for implementation.² At your direction the report is solution-oriented and recommends meaningful improvements that can be undertaken immediately. Each recommendation falls within the authority of the Mayor's Administration.

There are two critical elements: the Administration must take active steps to achieve a minimum level of independence for Public Defender services, and the Public Defender must increase service capacity to provide all non-conflict delinquency services.

Please note the focus on local solutions does not rule out options for either state solutions or a future opportunity to amend the Shelby County Charter, though local efforts to achieve compliance are not dependent on them.

If the recommendations can be realized under the proposed timelines, the Public Defender's juvenile defender unit will be able to provide all direct representation in delinquency petitions and detention hearings by January 15, 2017.

¹ The Memorandum of Agreement regarding the Juvenile Court of Memphis and Shelby County with the United States Department of Justice Civil Rights Division (hereafter "Agreement") was entered December 17, 2012, and provides agreed upon measures to remedy findings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. section 14141.

² Sandra Simkins, Compliance Report #7, June 16, 2016, page 5.

Background

The preferred structure for both direct and conflict defender services required in the Agreement is a single-agency defender model operating under a properly structured independent commission. David Carroll reported to you in September 2015 that efforts to establish a single-agency, independent commission approach to defender services in Shelby County were unsuccessful, concluding that Tennessee Supreme Court Rule 13 prohibits the necessary step of creating a single-agency model.³ Further, the County Charter precludes establishing an independent commission.

During the October 2015 site visit in a meeting with you, Winsome Gayle, and Richard Goemann, Ross Dyer affirmed these conclusions and reported that Shelby County had exhausted all local options to make further improvements in the area of defender independence. After a period of review Mayor Luttrell assigned to me a responsibility to coordinate local efforts to advance compliance in the area of defender services.

In January of 2016, the Mayor endorsed the following guiding principles:

1. Increase capacity of specialized Public Defender juvenile defender unit to provide representation for 100% of all juvenile delinquency cases where there is no ethical conflict of interest.
2. Identify achievable local solutions to enhance Public Defender independence.
3. Remain in regular dialogue with due process monitor and DOJ to invite input and test ideas under consideration toward achieving compliance.

Before, during, and after your April 2016 site visit, you were consulted regarding these priorities and endorsed them in your compliance report. I appreciate your input during this process, and also that of Ms. Gayle, Mr. Goemann, and Helam Gebremariam, Senior Counsel for the Office for Access to Justice.

In particular I wish to express gratitude to Judge Dan Michael and Chief Legal Advisor Garland Ergüden for their early endorsement of the need to increase Public Defender capacity to provide for all non-conflict representation. Interim County Attorney Marcy Ingram has provided useful guidance during this process, and Chief Administrative Officer Harvey Kennedy is continuing efforts to secure additional state funding to assure sustainability. I am grateful for the assistance of Director of Community Services Martha Lott and Cecil C. Humphreys School of Law Dean Peter Letsou in seeking approvals to extend the federal grants that support the new Children's Defense Clinic.⁴

Each of the recommendations that follow represents a deliberate, if imperfect, step toward one or more of the American Bar Association's (ABA) *Ten Principles of a Public Defense Delivery System*, which will continue to guide all efforts toward realizing a comprehensive plan for juvenile defender services in Shelby County. Establishing a

³ Letter from David Carroll to Sandra Simkins, September 24, 2015.

⁴ The Bureau of Justice Assistance approved our request and extended the terms of Justice Assistance Grants 2013-DJ-BX-0333 and 2014-DJ-BX-0559 for the purpose of funding the Children's Defense Clinic through June 30, 2018.

minimum level of independence is a necessary precondition to our ability to meet the *Ten Principles*, which form the fundamental elements of the Agreement’s defender requirements. The DOJ has made it clear that establishing independence of the defense function is “essential to achieving substantial compliance with the Agreement.”⁵

RECOMMENDATIONS

I. Establish Adequate Protections for Chief Public Defender

For local solutions to be effective, Shelby County must take steps to create job protections that ensure the Chief Public Defender is able to act ethically at all times *despite the prospect of removal* whenever public defense priorities are in tension with political or judicial objectives. The DOJ has made it clear that “more needs to be done to ensure that the appointment and removal of the Chief Public Defender is shielded from political influence.”⁶ Adequate safeguards are essential to balance the authority the County Charter grants to the Mayor to dismiss the Chief Public Defender at any time, for any reason.⁷

Independent commissions commonly use contractual arrangements to provide a designated term of service that permits termination only for just cause and that grants the Chief the right to hire and remove staff and the authority to set standards. These protections serve as important safeguards against undue political or judicial influence.

The County should take steps to implement comparable assurances. Ultimately the County should endeavor to set the term of service at eight years to align with those for district attorneys general, district public defenders, and state judges in Tennessee. To avoid undue political influence and to encourage merit-based selection of the Chief Public Defender a regular full term of service should begin two years following a mayoral election, on September 1st. Compensation should be based on an objective standard that is not subject to modification by the elected appointing authority.⁸

☒ **Solution:** Because the next full term Mayor will take office September 1, 2018, the Administration should establish job protections, which include an initial four-year term of service for the Chief Public Defender, through August 31, 2020.⁹

⁵ Email from Ms. Gayle to Ross Dyer, February 5, 2016, and letter from Ms. Gayle to Judge Michael, October 30, 2014.

⁶ Because the position remains under the control of the Mayor, the Civil Rights Division has highlighted the need to ensure the appointment and removal of the Chief Public Defender is shielded from political influence. Letter from Ms. Gayle to Mr. Dyer and Larry Scroggs, May 21, 2015.

⁷ According to Mr. Carroll, “the current public defender lacks any protection to ensure his ability to act with independence” and “the most pressing need in the reformation of the juvenile right to counsel is addressing the wholesale lack of independence in defender services.” When workload exceeds the capacity of defender services the Public Defender must have adequate independence to be able to refuse further appointments without being dismissed. See generally, ABA *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009).

⁸ Tenn. Code Ann. § 8-7-201 sets compensation of district public defenders in Tennessee and is an example of an objective standard that would remove the issue of compensation from local political influence.

⁹ An initial four year term of service permits the next full term Mayor to select the first Chief Public Defender to serve a full eight year term, while also minimizing risk that efforts to reach full compliance will be subject to further delays due to changes in leadership.

II. Establish Operational Independence for Public Defender

As a general policy the Administration should assure the professional independence of the public defense function whenever doing so is not restricted by the County Charter or local legislation. The following solutions enhance independence in key areas and will improve the integrity of public defense governance. Importantly, because the Public Defender must operate under the ethical obligations that govern all lawyers and law firms, the following solutions will ensure the public defense function can meet all ethical requirements when depending on essential supports from other County agencies.¹⁰ Because the Public Defender functions as a government law firm it should be exempt from non-essential administrative requirements.

- ☑ **Solution:** Ensure the Public Defender can advocate for funding and participate fully in state and local budget proceedings independently of political or judicial controls.
- ☑ **Solution:** Reorganize the Division of Defender Services to create structures for service delivery and supervision consistent with the *ABA Ten Principles*.
- ☑ **Solution:** Establish business rules that govern the administration of revenue sources that support public defense.
- ☑ **Solution:** Ensure the Public Defender can manage all operations and business functions in a manner that meets ethical obligations at all times.

III. Increasing Public Defender Capacity: Making the Panel Problem Smaller

By January 2016 there was a clear consensus that Rule 13 is not adequate to support a system of independent defender services. During your April 2016 site visit you endorsed our strategy to increase Public Defender capacity to provide representation in all delinquency proceedings except where there is a conflict of interest, noting that doing so would significantly increase the number of youth represented by lawyers with adequate resources, training, and supervision.

At the time the Administration had requested increased state funding to cover the juvenile defender capacity gap in the amount of \$1.1 million. Unfortunately there was no increase in state funding for juvenile defender services for the fiscal year that began July 1, 2016. The Public Defender did receive a local funding increase for FY2017 in the amount of \$500,000 that has been allocated to support efforts to increase capacity.¹¹

¹⁰ By implementing these solutions the Administration Shelby County can affirmatively meet the constitutional obligation to ensure that the “public defender is not amenable to administrative direction in the same sense as other state employees.” See *Polk County v. Dodson*, 454 U.S. 312 (1981).

¹¹ Tennessee state law requires local government to balance any increase in new local funding to the District Attorney General by requiring the public defender funding baseline be increased by 75% of the increase to the prosecution.

To address the remaining gap the Administration has affirmed a plan to add supplemental capacity by appointing attorneys from the private bar to serve as part-time Assistant Public Defenders. Efforts underway to recruit and train additional staff will enable the Public Defender to provide representation for all children in delinquency petitions and detention hearings where there is not a conflict of interest by January 15, 2017.¹²

Panel Structure

You have raised specific concerns about the fundamental lack of independence in the present panel coordinator structure. At this time the panel is not “overseen by an independent body” as required by the Agreement, and it is clear that the Court cannot be responsible for fixing the problems without exerting undue judicial influence. Efforts underway to increase Public Defender capacity will make the scope of the panel problem as small as possible. As this milestone is reached it may become possible, subject to Court approval, to modify the Panel Coordinator function in a manner that continues to meet the needs of the Court, does not conflict with Rule 13, and is more closely aligned with national standards.

Sustainability

Sustainability of the defender reforms underway and those proposed in this report have been considered throughout the planning process. The DOJ has said clearly “sustainability requires us to create a structure that ensures independence over time.”¹³ In some areas sustainability cannot be achieved until compliance is reached. This is true in matters that affect independence or require recurring funds. Efforts to achieve compliance in service quality, capacity, and structure must continue even if the sources of sustainability are uncertain at this time.

Comprehensive Plan for Defender Services

In each of your last three compliance reviews you have addressed the foundational issue of independence as essential to a comprehensive plan for defender services capable of delivering and sustaining the juvenile defender services required under the Agreement.¹⁴ Likewise, the Civil Rights Division has affirmed the need for a comprehensive plan that outlines how the requirements of public defender independence, reasonable workload controls, and adherence to juvenile defender

¹² It is an ambitious undertaking for the Public Defender to add capacity in this manner and volume, and to implement systems for supervision and oversight required to meet NJDC/NLADA *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*, October 2012, and the *Tennessee Juvenile Defense Standards*. You and Mr. Carroll have each expressed reservations concerning the adequacy of the proposed rate of compensation. Your continued evaluation will help determine the degree to which this strategy is successful, and how to best modify the service plan as we learn from it.

¹³ Letter of Ms. Gayle to Judge Michael, October 30, 2014.

¹⁴ June 2016, November 2015, and June 2015.

practice standards can be achieved, noting they are essential to reaching and sustaining compliance with the Agreement.¹⁵

The solutions proposed in this *Blueprint* address your concerns directly in the threshold area of independence. It is my belief that once implemented the cumulative effect of the improvements will achieve a level of independence that is satisfactory to both you and to the Civil Rights Division. Having this foundational element in place is essential for Shelby County to achieve and sustain full compliance in the area of juvenile defender services before the end of Mayor Luttrell's term on August 31, 2018.

As requested timelines proposed for these solution are:

CHIEF DEFENDER INDEPENDENCE	Area	Date
Job Protections	Legal	September 15

OPERATIONAL INDEPENDENCE	Area	Date
State and Local Budget Assurances	CAO	September 15
Reorganize PD Structure	HR	October 1
Establish Business Rules	CAO	October 15
Business Systems Protocols	IT	November 1
Minimize Mandatory Requirements	CAO	November 1

SUPPLEMENTAL CAPACITY	Area	Date
Job Description and Compensation	HR	September 1
Assigned Counsel Unit – Review	Legal	September 15
Structure for Assigned Counsel Unit	PD	September 15
Recruit Attorneys from Private Bar	PD	October 1
Revised Delinquency Volume Projections	PD	November 1
Assigned Counsel Unit – Limited Services Start	PD	October 15
Assigned Counsel Unit – Staggered Recruitment Complete	PD	December 1
Assigned Counsel Unit – Orientation Trainings Complete	PD	January 1
Panel Coordinator Recommendations	PD	January 15

¹⁵ "Independence in this context means that the defense function is *independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.*" Letter from Ms. Gayle to Judge Michael, October 30, 2014.

The solutions proposed in this *Blueprint* identify critical areas in which Shelby County must act to secure an adequate level of operational independence to meet obligations that are foundational to the Agreement. However, unless a minimum acceptable level of public defender independence can be established, it will not be possible for Shelby County to either achieve or sustain the juvenile defender services required in the Agreement.

I look forward to your feedback on the *Blueprint to Achieve Compliance in Juvenile Defender Services* and ask that you correct any misunderstandings or misinterpretations reflected in this report likely to impede our ability to achieve compliance, or cause further unnecessary delay. It is imperative that the Administration has your assurance that the solutions proposed in this report are a necessary and proper course of action toward full compliance by August 31, 2018.

Sincerely,



Stephen Bush
Shelby County Public Defender

cc: Mark H. Luttrell, Jr., Mayor, Shelby County
Marcy Ingram, Interim Shelby County Attorney
The Honorable Dan Michael, Judge, Juvenile Court of Memphis & Shelby County
Bill Powell, Settlement Coordinator
Winsome Gayle, Juvenile Counsel, Special Litigation Section, USDOJ

**THE LAW OFFICES OF
THE SHELBY COUNTY PUBLIC DEFENDER**

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