divulge potentially incriminating statements about their charges; and (3) eliciting self-incriminating statements in the absence of Miranda warnings and informed waivers. This is contrary to Gault's holding that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." Id. at 55.

- JCMSC fails to hold timely probable cause hearings for children arrested without a warrant by failing to hold detention hearings on weekends and holidays. When a person has been arrested without a warrant, the Fourth Amendment requires that a judicial officer must determine that probable cause exists to believe the person has committed a crime in order for the state to continue the person's detention. Gerstein v. Pugh, 420 U.S. 103 (1974). In County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991), the Court held that probable cause determinations must be made within 48 hours of a warrantless arrest. Children at JCMSC experience extended detentions because the court has no procedure in place to hold detention hearings on weekends, extended holiday weekends, and holidays. For example, JCMSC detained 815 children over a five-year period for three days or more before their probable cause hearings.

- JCMSC fails to provide adequate due process protections for children before transferring them to the adult criminal court. We observed hearings and reviewed transcripts in which Magistrates made transfer decisions after making cursory inquiries (and in some cases no inquiries) into the child's background, after failing to hold a waiver hearing, or after asking the child to self-incriminate. This violates the minimal requirement that transfer proceedings "must measure up to the essentials of due process and fair treatment." Kent, 383 U.S. at 562.

We also have reason to believe that JCMSC engages in conduct that violates the constitutional guarantee of Equal Protection and federal laws prohibiting racial discrimination, including Title VI. We retained a leading, nationally recognized, expert on measuring disparities in the juvenile justice system through statistical analysis. Statisticians in the Department of Justice's ("DOJ") Office of Justice Program's Bureau of Justice Statistics and National Institute of Justice peer reviewed the expert's work. The expert used two methodologies to make this determination. First, he reviewed JCMSC's Relative Rate Index ("RRI"), the reporting mechanism required by DOJ's Office of Juvenile Justice and Delinquency Prevention ("OJJDP").[2] The RRI compares Disproportionate Minority Contact in Shelby County with other counties throughout the nation. Our consultant also examined JCMSC's case data – more than 66,000 files – over a five-year period to assess the outcomes throughout the different phases of a case, using odds ratio and logistic regression techniques. These techniques track the odds that a child's case

[2] Our consultant was one of the developers of the RRI mechanism.

JCMSC's failures interfere with the proper administration of juvenile justice, erode public confidence in the system, and fail to promote public safety. Due process and equal protection guarantees are critical elements of a functioning justice system, especially where the court's obligation is to provide for the "care, protection, and wholesome moral, mental and physical development of children" while ensuring the protection of the community. Tenn. Code Ann. § 37-1-101 (a)(1) (West 2011). Unfair and unequal treatment undermines the rehabilitation of young people who encounter the justice system.

Such failures often lead to a loss of liberty and may contribute to a child's continued contact with the juvenile justice system and subsequent contact with the adult criminal justice system. Studies show that children involved in the delinquency system are better served by treatment rather than confinement.[3] Studies also show that a child's initial interaction with the juvenile justice system may impact how the child progresses through the system at later junctures. For example, the initial pretrial detention proceeding has far-reaching implications for a child as demonstrated in a 2003 Florida study finding that children detained at pretrial proceedings were three times more likely to be confined at adjudication than children who were not detained.[4] Juvenile court proceedings that lack adequate due process protections and are applied disproportionately to one group of children based on their race cause real harm to the children appearing before the court.

Similarly, decisions to transfer children to adult court based on race, while obviously violative of equal protection, also have serious criminal justice consequences. Studies have found that children who are transferred have a higher likelihood of re-offending and continuing anti-social behaviors. For this reason, a review of studies commissioned by the Centers for Disease Control and Prevention ("CDC"), assessing the effects of transfer laws on juveniles, concluded 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."[5] The review also noted, "To the extent that transfer

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[3] See e.g. Chassin et al., Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders, 36 J. Substance Abuse Treatment, 36 (2009) (concluding that drug treatment led to reduction in re-offending).

[4] Office of State Courts Administrator, Florida's Juvenile Delinquency Court Assessment, 24 (April 2003).

[5] Department of Health and Human Services, Centers for Disease Control and Prevention, 56 Morbidity and Mortality Weekly Report, No. 9, Recommendations and Reports, Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult System: A Report on the Recommendations of the Task Force on Community Preventive Services 9 (2007).

detention and diversion programs, and excessive restraints used against children in the detention center.

On May 23, 2007, the Commission's Juvenile Court Ad Hoc Committee issued a preliminary report and recommendations to address a number of concerns they had with the court, including concerns about the disproportionate rate at which Black children were transferred to the criminal court, limitations placed on the children's right to confront witnesses against them, inadequacy of the notice of the charges against them, and limited opportunity to consult with an attorney.

In June 2007, a report by the National Center for State Courts ("NCSC") commissioned by the Shelby County Board of Commissioners also noted problems with JCMSC's approach to due process and equal protection issues. The NCSC study, however, did not focus on those issues and made only preliminary assessments. Among the observations cited in the NCSC study were delays in holding detention hearings, delays in appointment of counsel to children in delinquency proceedings, and concerns about disproportionate minority contacts.

On June 28, 2007, the Memphis Bar Association ("MBA") adopted a number of recommendations to improve the due process and other systems in JCMSC and requested that Judge Person implement the recommendations. While not entirely focused on due process and equal protection issues, the MBA recommended that juvenile defense attorneys be allowed more time to prepare for transfer and adjudication hearings, that probation officers refrain from interviewing children in delinquency matters before notifying their attorneys, that the court ensure proper preservation of its records for the purpose of appeals, and that the court increase awareness of disproportionate minority contact issues.

Our review commenced more than two years after these reports. Our findings here, in large measure, are consistent with the reports' conclusions about deficiencies and weaknesses in the administration of juvenile justice by JCMSC. Since our investigation commenced, JCMSC has made progress in addressing some of our concerns and the concerns expressed by local residents.

First, in a cooperative venture with the Memphis City Schools and Memphis Police Department, JCMSC supported a summons in lieu of transport program for certain offenses. Under the summons program, started in July 2010, the police will not necessarily arrest and transport children to the JCMSC's detention center for certain minor offenses such as disorderly conduct and trespassing.[7] Instead, the program encourages police to exercise their discretion to give the suspected child a summons to appear before the court at a later date. This change has significantly reduced the population of children held in the detention center. According to the

[7] The offenses include disorderly conduct, theft of property under $500, criminal trespass, vandalism under $500, assault, gambling, and simple possession of marijuana.

transferred annually to the adult criminal court. As Juvenile Court Judge, Curtis Person presides over the Juvenile Court, including its delinquency, administrative, dependency and neglect, and detention center components. A full-time staff of more than 250 and six appointed Magistrates, who preside over cases and recommend final orders, assist Judge Person. Our review focused on the Juvenile Court's delinquency and detention components.

A. History of Juvenile Courts

To understand the mission and challenges facing modern juvenile courts such as JCMSC, it is helpful to understand the ideological shifts that courts have gone through in their treatment of children. Before 1899, the law made no distinction between children over seven and adults. States prosecuted children in the same manner as adults and sentenced them to lengthy periods of incarceration in adult prisons.

After a reform movement in the late 19th century, states began establishing separate courts for juveniles. These new courts recognized that children were not as culpable as adults for their actions, and that children could be rehabilitated into productive citizens more easily than adults. The courts were based on a doctrine of "*parens patriae*" where the court stood in place of the parents and decided what was best for a child. With this mission to reform, not punish, children, the juvenile courts functioned in a manner that did not prioritize due process. In fact, bedrock due process protections afforded adults were considered restrictive for juvenile court judges, who sought to work informally to treat, guide, and rehabilitate young people.

In the 1950s and 1960s, juvenile courts shifted focus again amid claims that the relaxed nature of juvenile courts harmed children more than it helped. While juvenile courts offered less formal court proceedings, they still had the power to subject children to the significant consequences of a delinquency adjudication, which could include long-term confinement in an institution. The Supreme Court described the quandary facing most juveniles in its first opinion specifically addressing juvenile courts: "There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Kent v. U.S., 383 U.S. at 556. One year later, the Supreme Court decided *In re* Gault, its seminal opinion requiring due process protections for juveniles in delinquency proceedings. Gault expounded upon the deficiencies in juvenile courts, noting that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." Gault, 387 U.S. at 18.

Gault focused not on creating a system of rigid formality, but on ensuring that juveniles were afforded the protections of due process. In essence, the Court outlined important constitutional protections afforded to juveniles in the delinquency process — the right to counsel, the right to notice of the charges, the

right to confront witnesses, and the right to be free from compulsory self-incrimination.

B. Modern Challenges Facing Juvenile Courts

Given this historical context and constitutional mandate, juvenile courts, including JCMSC, must perform a balancing act. On the one hand, they have a mission (which benefits from flexibility and informality) to rehabilitate troubled young people. On the other hand, they must satisfy due process, which requires formal rules and procedures. To achieve this difficult balance, courts must be vigilant about eliminating lingering paternalistic attitudes that infringe upon the due process rights of juveniles. This means that for children accused of delinquent acts, juvenile courts must engage in the evidentiary testing required by due process to make a delinquency finding before engaging in the rehabilitative process. Gault, 387 U.S. at 27 (noting that the decision applies to "proceedings to determine delinquency," not to disposition).

In Gault, the Supreme Court envisioned a juvenile court capable of balancing these competing demands, where an adversarial testing of facts could coincide with a system attuned to the unique needs of young people:

> Of course, it is not suggested that juvenile court judges should fail appropriately to take account, in their demeanor and conduct, of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will, in some instances, introduce a degree of order and regularity to Juvenile Court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge will be replaced by its opposite.

Id. at 26-27.

The Tennessee Legislature has incorporated some of Gault's vision into the state statute. Under Tennessee law, juvenile courts and proceedings have the following public purposes, among others:

> (1) Provide for the care, protection, and wholesome moral, mental and physical development of children coming within its provisions;
>
> (2) Consistent with the protection of the public interest, remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and substitute therefore a program of treatment, training and rehabilitation;
>
> (3) Achieve the foregoing purposes in a family environment whenever possible, separating the child from such child's parents only when necessary for such child's welfare or in the interest of public safety; and

(4) Provide a simple judicial procedure through which this [statute] is executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

Tenn. Code Ann. § 37-1-101 (a)(1)–(a)(4) (West 2011).

During our investigation, we found pre-Gault era practices in JCMSC that violate the due process rights of children facing delinquency proceedings. These practices violate the children's civil rights.

II. DUE PROCESS VIOLATIONS

A. Constitutionally Inadequate Notice of Charges

1. Legal Standards

The Due Process Clause of the Fourteenth Amendment requires that notice "be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded." Gault, 387 U.S. at 33. Notice first provided to a child at a "hearing on the merits," which is equivalent to trial for adults, is not timely. Id. Further, notice must be in writing to comport with due process requirements, and it must contain "the specific charge or factual allegations to be considered at the hearing [on the merits]." Id.

In short, due process requires that children receive "notice which would be deemed constitutionally adequate in a civil or [adult] criminal proceeding." Id. In Tennessee, this means that courts must inform children of the charges facing them immediately upon their presentment before a Magistrate, because immediate notice is required for adult criminal defendants. Tenn. Code Ann. § 40-10-101 (West 2011) ("When the defendant is brought before a magistrate upon arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate shall immediately inform the defendant of the offense with which the defendant is charged.") See also Tenn. Const. art. 1, § 9 ("That in all criminal prosecutions, the accused hath the right …to demand the nature and cause of the accusation against him, and to have a copy thereof…"). Tennessee Rules of Criminal Procedure state that notice in the form of an affidavit of complaint "shall be filed promptly, when a person, arrested without a warrant, is brought before a Magistrate." Tenn. R. Crim. P. 5(a)(2). The affidavit of complaint must be in writing, made on oath before a Magistrate or neutral and detached clerk, and allege the essential facts constituting the offense charged. Tenn. R. Crim. P. 3.

Children tried at JCMSC typically have two court hearings that implicate the notice requirement.[10] The first hearing is the detention hearing, and the second is the adjudicatory hearing. At the detention hearing, court rules require Magistrates to address several issues before ordering that a child be detained. First, the court must arraign the child by informing the child of the "nature of the complaint" against him or her. Tenn. R. Juv. P. 15(a). Second, the court must inform the child of the legal rights afforded him or her during the delinquency proceeding. Id. Third, if a party seeks to detain the child, the court must determine that probable

[10] Children in JCMSC may have additional hearings, including disposition or rehearings. As those hearings do not implicate the notice requirement in Gault, we omit them from the discussion above.

cause that the child committed the alleged offense exists.[11] Tenn. R. Juv. P. 15(b). Prior to entering the detention order, the court must also find that detention is in the best interest of the child and the public, and determine that detention is warranted under Tenn. Code Ann. § 37-1-114 (West 2011). Id. Finally, if the Magistrate does not find probable cause to detain a child, she can release the child to appear for further court proceedings. Tenn. R. Juv. P. 15(b).

The second court hearing is the adjudicatory hearing, which is the equivalent of a trial in adult court. The adjudicatory hearing in JMCSC is the "hearing on the merits" discussed in Gault. The adjudicatory hearing must occur within 30 to 90 days of the detention hearing. Tenn. R. Juv. P. 17. JCMSC prepares a petition after the detention hearing but before the adjudicatory hearing. The petition is the formal charging document containing the specific charges the DA alleges the child committed. At the adjudicatory hearing, the Magistrate considers the DA's evidence in support of the petition and any evidence presented by the child, and decides whether the child is adjudicated delinquent of the charges.

2. Findings

We find that JCMSC engages in a pattern or practice of violating children's due process rights by not giving petitions to children at detention hearings. Further, JCMSC's policy of distributing petitions does not provide notice to children "sufficiently in advance of the [adjudicatory] hearing to permit preparation." Gault, U.S. 387 at 33.

Children appearing before JCMSC are entitled to receive the same notice accorded adult criminal defendants in Tennessee. Adult criminal defendants receive notice in the form of the affidavit of complaint the first time they are brought before a Magistrate. The affidavit of complaint is required to be in writing, to be made on oath, and to contain allegations of "the essential facts constituting the offense charged." Tenn. R. Crim. P. 3. However, according to our observations and review of case files, children in JCMSC do not receive equivalent notice at their initial hearing before Magistrates – they only get a verbal summary of charges. This disparity violates due process.

JCMSC has the capacity to prepare petitions that satisfy constitutional requirements. The content of petitions we reviewed was similar to the content required in affidavits of complaint for adults in criminal cases. Specifically, all of the JCMSC petitions we reviewed contained the specific charge against the child, including the date of the alleged offense and, when applicable, the name of

[11] For the purposes of this report, we refer to this third stage of the detention hearing as the probable cause hearing, or the probable cause determination.

complaining witnesses. The petitions also included a sworn statement[12] affirming that the allegations contained were true to the best of petitioner's knowledge, ability, and belief. However, where adults receive the affidavit of complaint at the initial hearing before a Magistrate, JCMSC provides petitions to children after the detention hearing. Of the 14 petitions we reviewed, all were time-stamped several days or weeks after the detention hearing.[13]

In order to comply with the due process requirements of Gault, JCMSC must provide petitions to children at the detention hearing. Under JCMSC's current procedure, the only notice provided to children at the detention hearing is a reading of the detention summary. This is not sufficient to meet due process requirements. The detention summary is a document that court staff adapt from the arresting officer's description of the incident leading to the child's arrest. The detention summary differs from the petition in several ways. It is not provided in writing to the child, nor is it made under oath. Moreover, Assistant District Attorneys ("ADAs") do not always review detention summaries prior to detention hearings. As a result, the offenses alleged in the detention summary do not necessarily reflect the final charges against the child. Stakeholders confirmed that, although it does not happen frequently, court staff or prosecutors have changed charges after the detention hearing and before the adjudicatory hearing. Because JCMSC does not provide petitions to children at the detention hearing, the notice children receive at detention hearings violates due process.

The Juvenile Court also violates due process because it does not provide notice sufficiently in advance of the adjudicatory hearing so that children have time to prepare. In 2010, several stakeholders informed us that JCMSC never provides a petition to the child or defense attorneys prior to the adjudicatory hearing. The fact that JCMSC generates petitions shortly after detention hearings, places them into a child's file, but fails to provide them to defense attorneys in advance of the adjudicatory hearing constitutes a clear violation of due process.

During our follow-up inspection in 2011, we learned that JCMSC responded to the feedback we gave in 2010 and began providing petitions to defense attorneys before adjudicatory hearings. However, JCMSC's official policy is to forward petitions "to parties no later than five days prior to the court hearing."[14] A child,

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[12] The petitions we reviewed appeared to be sworn by a probation officer. Tennessee statute allows the petition to be made by any person "who has knowledge of the facts alleged or is informed and believes that they are true." Tenn. Code Ann. § 37-1-119 (West 2011).

[13] JCMSC's docketing practices do not indicate whether the time-stamp reflects when a child actually receives the petition.

[14] JCMSC, Children's Bureau Desktop Manual, Policy III-1 (18), effective January 1, 2009. We interpret the phrase "court hearing" in this policy to refer to the adjudicatory hearing, not the detention hearing.

like an adult criminal defendant, needs time to meaningfully respond to the state's charges. Five days is an insufficient amount of time for a child and his or her defense attorney to prepare an adequate defense. Even if JCMSC followed its policy regarding the delivery of petitions to defense counsel, they would violate children's due process rights. The five-day policy, in short, fails to meet due process requirements.

JCMSC's failure to provide timely notice to children creates problematic instances in hearings where prosecutors, defense counsel, and even the Magistrates appear to be unclear about the charges facing the child, as in the following transcripts:

- In a detention hearing for juvenile C.C.,[15] the prosecutor and juvenile defender each made detention arguments to the judge that acknowledged the uncertainty of the exact charges facing the juvenile.

  > Prosecutor: This is a felony. I don't know what the underlying felony is…We would ask to [detain].
  >
  > Juvenile Defender: To detain him, I think, maybe is a little unreasonable, maybe an appearance bond. I agree with the state. I don't know what the underlying facilitation of the felony is, but he's in the 10th grade.

- In a detention hearing for juvenile D.D., the prosecutor and defense attorney based some of their arguments for detention and release, respectively, on an assault that was not charged.

  > Prosecutor: Also I would add here is that it's alleged the defendant pushed the victim against the wall.... I would ask that he be detained until a hearing is set, Your Honor.
  >
  > Juvenile Defender: Well, Your Honor, the state didn't allege this assault, so, I mean, they didn't plead assault.
  >
  > Prosecutor: In and of itself, what I'm saying is that it could be an allegation of pushing into the wall. What we're asking, Your Honor, is that he be detained.

Therefore, because JCMSC does not ensure that children receive "notice which would be deemed constitutionally adequate in a civil or [adult] criminal proceeding," it violates children's due process rights.

[15] We use fictional initials throughout to protect children's privacy.

B. Violation of Right to be Free from Self-Incrimination

1. Legal Standards

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person…shall be compelled in any criminal case to be a witness against himself." The Supreme Court concluded in Gault that "the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults." Id. at 55. The scope of the Fifth Amendment privilege is "comprehensive." Id. at 47. The Gault court also stated that "[i]t has long been recognized that the eliciting and use of confessions or admissions require careful scrutiny." Id. at 45. This scrutiny is even more important with "children from an early age through adolescence." Id. at 48.

2. Findings

JCMSC violates children's right to be free from self-incrimination during probation conferences by: (1) eliciting self-incriminating statements; (2) failing to advise children of their rights prior to questioning them about charges; and (3) not obtaining informed waivers from juveniles. At JCMSC, children come to probation conferences in one of two ways – by release or by detention. Released children are sent home directly from the detention center or by the court after a detention hearing. Released children receive a letter from a probation officer directing them to come in for a conference. Children who are detained have their probation conference in the detention center. Based on our observations, probation officers typically begin conferences by gathering basic information about the child and the child's family. The probation officer then asks for the child's version of the alleged delinquent act at issue. The probation officer notes whether the child admits or denies the allegations and summarizes the child's version of the incident on a "Visit and Contact" form. Magistrates and ADAs have access to the Visit and Contact form prior to adjudication. In fact, a copy of the form is placed on the Magistrate's bench prior to the adjudicatory hearing.

Though the Visit and Contact form is not formally used as evidence during the child's adjudicatory hearing, this practice of having probation officers question children raises serious Fifth Amendment concerns, especially for children who are detained during the probation conference. When children in detention are interviewed by the state, via an employee such as a probation officer, the children are not free to leave. Thus, this amounts to a custodial interrogation. See Miranda v. Arizona, 384 U.S. 436 (1966). Because the children are not free to leave, probation officers must provide them with an adequate advisement of Miranda rights. Id. To do anything less is a clear violation of the children's Fifth Amendment right to be free from self-incrimination.

In the probation conferences we observed, probation officers failed to advise children of their rights under Miranda. For example, in one interview of a detained

child, the probation officer stated to the child, "You can talk to me if you want or you can talk to your lawyer." The probation officer gave no information about the purpose of a lawyer, how one would be appointed, when one would be appointed, or that the lawyer could be appointed at no cost to the child. The probation officer also failed to indicate that any statements the child made would be included in the probation report, and did not describe how and if the Magistrate or the prosecutor could use the statement. Rather, the probation officer simply read the arrest ticket to the juvenile and asked "So what happened?" followed by a series of probing questions about the incident.

JCMSC's practice of asking children to admit, deny, or describe the alleged offense infringes on the child's rights in other ways. First, there is no way to monitor how the Magistrate uses the Visit and Contact form. For example, at least one person we interviewed reported seeing a Magistrate reading a Visit and Contact form before adjudication. Second, even if Magistrates refrain from reading the Visit and Contact forms before the adjudicatory hearing, this practice creates an appearance of impropriety because there is no assurance to the child or counsel that the Magistrate did not review the form. Third, even if the Magistrate waits until the disposition to read a child's statements in the Visit and Contact form, the Magistrate would be privy to any contradictions between the child's initial statements to the probation officer and the subsequent statements during trial or plea. There is a real risk that the Magistrate could draw a negative inference from any such contradictions. We did not see or receive any evidence that probation officers advise children that their admission or denial at the probation conference can be used by the Magistrate at disposition.

In 2010, probation officers held probation conferences without the child's defense attorney present. By our 2011 inspection, we learned that our 2010 feedback resulted in probation officers inviting attorneys to some conferences. We do not have confirmation that this practice is being consistently enforced. Moreover, we were told that some defense attorneys do not attend the conferences even when they are invited.

We have also witnessed violations of a child's right against self-incrimination in other contexts. In one particularly egregious example, a prosecutor called E.E. as a witness in his own adjudicatory hearing. Neither the juvenile defender nor the Magistrate opposed this move, and the prosecutor proceeded to cross-examine E.E. as part of the state's case-in-chief. The prosecutor asked E.E. direct questions about involvement in the alleged offense, such as "it's your testimony to this Judge, under oath that despite what has been said before, that you never went and stole a phone?" The juvenile's defense attorney followed the prosecutor, asking three questions in total.

C. Failure to Provide Timely Probable Cause Hearings

1. Legal Standards

Under the Fourth Amendment, in order for a state to detain a person arrested without a warrant, a judicial officer must determine that probable cause exists to believe the person has committed a crime. Gerstein v. Pugh, 420 U.S. 103 (1974). The judicial officer must make this determination "either before or promptly after arrest." Id. at 124. Seventeen years later, the Court further refined its Gerstein decision, holding that probable cause determinations must be made within 48 hours of a warrantless arrest. County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991) ("A jurisdiction that chooses to offer combined [probable cause and arraignment] proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.") Although the Supreme Court has not addressed whether Gerstein hearings are required for juveniles, the Sixth Circuit has answered this question affirmatively. Cox v. Turley, 506 F.2d 1347, 1353 (6th Cir. 1974) ("Both the Fourth Amendment and the Fifth Amendment were violated because there was no prompt determination of probable cause – a constitutional mandate that protects juveniles as well as adults.").

2. Findings

JCMSC violates children's right to a timely probable cause determination by failing to hold detention hearings on weekends and holidays. As discussed above, court rules require that JCMSC accomplish several things at the detention hearing, including: arraigning the child, informing the child of his or her rights, and – most crucial for the purposes of Gerstein and County of Riverside – making a determination of probable cause. Stakeholders emphasized to us that JCMSC makes a concerted effort to hold detention hearings within 24 hours of a child's arrest. Indeed, a child who is arrested during the work week will have a detention hearing the next weekday. In some cases of arrest early on a weekday, it is even possible for a child to have a detention hearing the same day as the arrest.

Despite its efforts to hold prompt detention hearings and probable cause determinations on weekdays, JCMSC violates children's due process rights by not having any provisions for holding these hearings on weekends or holidays. Children arrested on a Friday, for example, have a constitutional right to a probable cause determination by Sunday at the latest. Under JCMSC's current procedure, the earliest that a child arrested after 10:30 am on a Friday could be presented for a detention hearing (and have a probable cause determination) would be Monday afternoon. If Monday was a holiday, that child's probable cause determination would not be made until Tuesday afternoon, approximately 96 hours after arrest. Significantly, JCMSC has no policy in place to provide detained children held over extended holiday weekends with a timely probable cause hearing.

Our investigation revealed that it is not uncommon for children in Shelby County to experience extended unlawful detentions prior to any hearing before a Magistrate. The data JCMSC provided indicated that in the five year period from 2005 to 2009, the court detained approximately 815 children for three days or more before holding a detention hearing and making a probable cause determination.[16] Therefore, on average, JCMSC denies a timely probable cause determination to over 160 children each year. Three hundred and one, or 37%, of the 815 children were detained for seven days or longer before having their probable cause hearing.

We recognize that a Tennessee statute allows a child to be detained for three days, or even longer, before requiring a detention hearing and probable cause determination. Tenn. Code Ann. § 37-1-117 (b) (1) (West 2011) ("In the case of a child alleged to be delinquent, a detention hearing shall be held no later than three days after the child is placed in detention…"); see also State v. Carroll, 36 S.W.3d 854 (Tenn. Crim. App. 1999). The Tennessee statute excludes non-judicial days, which it defines as Saturdays, Sundays, or holidays, from the three-day computation but mandates that "a detention hearing shall be held no later than eighty-four hours after a child is placed in detention…" Tenn. Code Ann. § 37-1-117 (b) (1). However, to meet requirements of the Fourth Amendment, JCMSC must follow the 48-hour timeline under Riverside, not the state statute. We found no evidence that the constitutionality of this statute has been challenged. However, on its face, it appears to violate the Constitution.

We note that the court has expressed a willingness to make arrangements for Saturday detention hearings, which would enable children to have probable cause determinations that satisfy constitutional requirements. To be constitutionally adequate, at minimum, one defender, ADA, Magistrate, and probation officer should be present during each hearing.

D. Failure to Conduct Constitutionally Required Transfer Hearings

1. Legal Standards

Children must be given an opportunity for a hearing prior to the entry of an order transferring the youth to face charges in adult court. Kent, 382 U.S. 541. This hearing does not have to meet all of the formal requirements of an adult criminal trial, but at minimum it "must measure up to the essentials of due process and fair treatment." Id. at 562.

Tennessee law requires juvenile courts to hold a hearing prior to transferring jurisdiction to criminal court. Tenn. Code Ann. § 37-1-134 (West 2011). At the

[16] JCMSC provided information about the days, not the hours, that elapsed between the child's intake into the detention center and the detention or probable cause hearing. The basis for the delay was not provided.

behalf. By not allowing the defense witnesses to take the stand, the Magistrate failed to make a meaningful inquiry into whether reasonable grounds existed to believe that O.O. caused the death of the infant. Additionally, the Magistrate violated O.O.'s due process rights by not considering any of the social factors required under Tenn. Code Ann. § 37-1-134 (b) (West 2011) prior to transferring her case to criminal court.

- In a transfer hearing for P.P., the Magistrate found probable cause without hearing from witnesses after P.P.'s attorney waived live testimony. The Magistrate transferred P.P. to criminal court without making required findings about the interests of the community or whether P.P. was committable to an institution. The Magistrate also failed to consider the social factors required under Tenn. Code Ann. § 37-1-134 (b) before transferring P.P.

- In a hearing for juveniles A.A. and B.B. the Magistrate began by hearing the prosecutor's argument for transfer, and then elicited that both defense attorneys opposed transfer. After hearing attorney representations, but without conducting a hearing or taking any evidence, the Magistrate asked defense attorneys if their clients admitted guilt to the charges. The Magistrate announced his decision to keep their cases in juvenile court only after both children pled guilty. Even though A.A. and B.B. ultimately remained in juvenile court, the procedure followed here violated the children's due process rights and their rights under Tennessee law. Not only did the prosecutor fail to present evidence in support of waiver, but the Magistrate did not hold a hearing at all. Most problematically, the Magistrate solicited admissions of guilt from A.A. and B.B. before announcing his decision on their transfer. Procedurally, this violated A.A.'s and B.B.'s protection against self-incrimination.

Overall, JCMSC's approach to transfer hearings revealed that important stakeholders, including Magistrates, doubt the juvenile court's ability to handle matters involving allegations of serious violent crimes. It also belies the purpose of juvenile courts set out in Tenn. Code Ann. § 37-1-101 (a) (2), which is to replace "the taint of criminality and the consequences of criminal behavior" for children with "a program of treatment, training, and rehabilitation" when doing so will protect the interest of the public. Magistrates who make cursory decisions on transfers fail to fulfill the purpose of this section of the statute. In addition, Magistrates who respond to allegations of serious crimes by children with an automatic transfer to adult court ignore their obligation under Tenn. Code Ann. § 37-1-134 (b), which mandates that they consider specific social factors before transferring jurisdiction. We recognize that Magistrates have discretion in making the decision to transfer. However, it is mandatory for a Magistrate to consider the factors under § 37-1-134 (b). State v. Sexton No. E2000-01779-CCA-R3-CD, 2002 WL 1787946, at *7 (Tenn. Crim. App. Aug. 2, 2002). Moreover, the Magistrate is not required to list each

individual factor in the findings, but must include sufficient evidence in the record to support the court's transfer ruling. Id. at *8.

We observed numerous examples of this mindset in the cursory waiver proceedings described above. For example, the Magistrate made statements during O.O.'s waiver hearing indicating his belief that because the alleged crime was so serious, it had no place in juvenile court. Further, the Magistrate made comments evincing his belief that O.O. would not be held accountable in the juvenile system. This is an inaccurate view of the juvenile court's purpose and capability. Because the Magistrate declined to hear any evidence in O.O.'s case and did not make the findings required by Tennessee statute, he potentially missed an opportunity to craft a disposition that was more tailored to O.O.'s needs[17] and may have been more effective at rehabilitating O.O. without the taint of the adult system. While the Magistrate may have arrived at the same decision after considering the requisite evidence, his fundamental misunderstanding of the role of juvenile court contributed to the child's case being transferred to criminal court, which may not have been the most appropriate forum for her accountability and rehabilitation.

Additionally, the Magistrate in O.O.'s transfer hearing appeared to discount the substantial differences between disposition in juvenile court and sentencing in adult court. Specifically, he claimed that the treatment in adult court is the same as what O.O. could be offered in juvenile court. When O.O.'s defense attorney argued that O.O. "should be held accountable…in the rehabilitative manner in the Juvenile system," the Magistrate responded that O.O. "could receive the same kind of counseling services in the adult system." However, this assertion is not supported by Tennessee law, as there is no provision in Tennessee criminal statutes requiring treatment, training, or rehabilitation for adults charged with crimes. When O.O.'s defense attorney argued that children convicted in the adult system are not given help, but are just incarcerated, the Magistrate responded only by stating that O.O. was charged with "a serious crime." He did not provide a description of the treatment options that would be available to O.O. in adult court.

The failure to hold transfer hearings that protect the child's rights, or in some cases the failure to hold hearings at all does not measure up to the requirements of due process and fairness that Gault demands and that Tennessee law requires.

[17] O.O.'s defense attorney described the significant problems O.O. had experienced, including sexual abuse and domestic violence.

systems, to assist us in this determination. Our consultant analyzed JCMSC's case information on two levels. First, he examined JCMSC's Relative Rate Index ("RRI") to determine the existence and level of Disproportionate Minority Contact ("DMC") occurring at each phase of the juvenile court process. DMC is the term used to describe the overrepresentation of minority youth in the juvenile justice system. As discussed in greater detail below, the RRI is a federally mandated reporting mechanism that compares DMC in Shelby County with other counties throughout the nation. Our consultant examined the most recently available RRI data at the time of the analysis, 2007 through 2009.[18] Second, our consultant examined data submitted by JCMSC to Tennessee reflecting case data from 2005 through 2009, along with special data extracts developed by JCMSC and their data contractors, to assess the outcomes within JCMSC throughout the different phases of a case and DMC issues, using odds ratio and logistic regression techniques.[19] These methods track the odds that a child's case will be handled in a specific way at different decision points in the juvenile court process. Where the RRI captures a snapshot of the treatment of White and Black children at specific points in the juvenile court process, the odds ratio and logistic regression techniques follow a child's case through the system.

1. The Relative Rate Index

a. Using the Relative Rate Index to Measure Disproportionate Minority Contact

In determining whether there is a racial disparity in JCMSC's administration of juvenile justice, we evaluated the level of DMC at various phases of the juvenile justice process. This term is closely associated with the JJDP Act.[20] DOJ's Office of Juvenile Justice and Delinquency Prevention ("OJJDP") provides national leadership on tracking and reducing DMC levels. To accurately measure DMC levels, OJJDP utilizes the RRI. All jurisdictions receiving a JJDP grant, including Shelby County, must periodically report to OJJDP the numbers of children proceeding through their juvenile justice system and the level of disparity for each statistically significant minority group at different phases of the juvenile process.

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[18] As of the publication of this report, the RRI data for Tennessee and Shelby County has not been updated since the 2007-2009 submission in summer 2011.

[19] Our consultant used the Statistical Packages for the Social Sciences, Version 18.0, for our analysis.

[20] In 1988, Congress amended the JJDP Act to require states to address DMC in their State Plans. At that time, DMC referred only to disproportionate minority confinement, and focused only on the overrepresentation of minority youth in detention facilities. In 2002, Congress expanded the term to include all phases of the juvenile justice system, not just those phases that involve custodial confinement.

For our investigation of JCMSC, our consultant also utilized the RRI to measure DMC. As noted above, the RRI formula provides a snapshot of the children in the system during the time period reported and at major stages of the juvenile court process. The formula compares the rates of each measurable minority group to that of White youth. Our consultant used the RRI to measure the level of DMC at each phase for Black children as compared to White children in JCMSC.

b. Stages of Juvenile Justice Measured as Part of the Relative Rate Index

The RRI includes the rate of occurrence for different racial groups in each major stage of the juvenile justice process. The stages include the following:

(1) Juvenile Arrests	This stage consists of all juvenile arrests.
(2) Referrals to Juvenile Court	This category includes children who are brought before the juvenile court on delinquency matters either by a law enforcement officer, a complainant (including a parent), or by a school.
(3) Cases Diverted	This category includes children who are referred to juvenile court, but whose matters are resolved without the filing of formal charges. The charges against these children may be dismissed, resolved informally, or resolved formally through probation, an agreement, community service or various other options that do not include continuing through the formalized court process.
(4) Cases Involving Secure Detention Prior to Adjudication	This category includes children who are held in a secure detention facility before the final disposition of their cases. Some jurisdictions include children who are awaiting placement following the disposition of their cases in this category.
(5) Cases Petitioned	This category includes children who are formally charged with a delinquency matter and are required to appear on the court calendar. When a child is formally petitioned, the court is requested to adjudicate the matter or transfer the matter to the criminal court.
(6) Cases Resulting in Delinquent Findings	This stage encompasses a court finding that the child has been found delinquent, a formal finding of responsibility. The child would then proceed to a dispositional hearing where he or she may receive various sanctions including probation or commitment to a secure residential facility.
(7) Cases Transferred to Adult Criminal Justice System	This category consists of cases that have been transferred to the adult criminal court following a judicial finding that the matter should be handled outside of the juvenile system.
(8) Cases Resulting in Probation	This category includes cases where the child is placed on probation following a formal adjudication. This does not include the children whose cases were diverted earlier in the process.
(9) Cases Resulting in Confinement in Secure Juvenile Correctional Facility	This category includes cases where the child has been formally adjudicated and placed in a secure residential facility or a juvenile correctional facility.

Our investigation considered whether court actors were respecting the constitutional rights of children appearing before the court. As such, we did not conduct an analysis of the arrest data. Additionally, Tennessee does not submit arrest data in its OJJDP reports of RRI. We acknowledge and understand that arrest data may be available from other sources. We also acknowledge and understand that racial disparities exist in the rates of arrest by law enforcement. See e.g. OJJDP, Statistical Briefing Book (2008), available at http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05260 (stating that in 2008, the "black rate was more than double the white rate."); U.S. DOJ, Civil Rights Division, Investigation of the New Orleans Police Department at 39 (discussing the Department's troubling 16 to 1 ratio of arrest rates for African American males to White males). However, here we focus on decisions made after a child has been arrested and brought to the JCMSC. The information discussed here focuses on whether there a racial disparity exists in JCMSC's approach to the juveniles appearing on delinquency matters, not on the conduct of the different policing agencies in Shelby County.

There are multiple decision makers at each stage, including law enforcement officers; juvenile court personnel, such as intake/probation officers; prosecutors; and judges, who determine the extent of a child's involvement with the next stage of the system. For example, when a child is referred to juvenile court (usually through a law enforcement officer making a custodial arrest and deciding on the original charge), juvenile court personnel will make initial decisions regarding diversion, detention, and the filing of a petition. At later stages, prosecutors and judges review these decisions, and those decisions will determine how far the child proceeds through the system. A child's involvement with the court could end shortly after the arrest or proceed through adjudication. A delinquency charge could also result in a criminal proceeding if, following a hearing, the juvenile court determines that the matter should be transferred to the adult system.

c. Interpreting the Values in the Relative Rate Index for JCMSC

The RRI formula lists the numerical indicator of the level of disparity or difference in contact in each stage that a particular racial or ethnic group has in the reporting system. The formula compares the ratio of Black children to the ratio of White children for each stage of the process. A numerical value of 1.0 is neutral. A numerical value exceeding 1.0 means that Black children have a higher rate of representation at the particular stage being considered. A numerical value below 1.0 means that Black children have a lower, statistically significant, rate of contact in that stage as compared to the White children in that stage.

The first step in determining RRI is to determine the total number of events, categorized by race, in each phase of JCMSC's juvenile court system. Then, for each

racial or ethnic category, the RRI formula divides the number of events for each phase by the number of events in the preceding phase to determine rates for each phase. In JCMSC, this means that the RRI is calculated by comparing the rates for Black children to rates for White children by dividing the rate of Black children by the rate for the White children. For example, if a system incurred 20 juvenile arrests consisting of 10 White children and 10 Black children, and all 10 of the Black children were referred to juvenile court, but only 5 of the White children were referred, then the resulting rate of referral to juvenile court for Black children would be 1.0, and the rate for white children would be 0.5. The resulting RRI would equal 2.0, a value twice that of the neutral 1.0. RRI values that differ from the neutral 1.0 are marked as statistically significant, meaning that the difference in rates of contact is not likely to be the result of a chance or random process. The RRI does not control for the differences in the children's underlying charges. The case analysis, however, which will be explained below, controls for the underlying charges and other legal and social factors.

2. Case Analysis: Odds Ratio and Logistic Regression

In addition to utilizing the RRI formula, our consultant also conducted a case analysis of 2005 through 2009 data provided by the JCMSC. As discussed above, the RRI provides a means to compare the rates of contact experienced by Black children and White children in JCMSC. However, we wanted to track the probability that a child's case would be handled in a particular way at different decision points of the juvenile court process. Therefore, our consultant used the odds ratio to accomplish this. He calculated the probability (odds) of particular decisions or stages occurring and compared odds for White and Black children by creating a ratio of the two odds. Further analysis of the case processing data used the logistic regression technique to extend the odds ratio approach by measuring a child's odds of proceeding through the system once the child's non-racial characteristics are filtered out. Following the conclusion of this analysis, JCMSC submitted additional data for 2010 cases. Our consultant conducted a preliminary odds ratio analysis of this data to determine whether major changes occurred as compared to the five year review. He found no such changes. Accordingly, we did not commission a further logistic regression analysis on the 2010 data.[21]

In essence, the odds ratio is a comparison of the odds of one group of children receiving a particular result versus another group of children receiving that same result. For example, the odds ratio would consider the odds of Black child receiving a warning (one of many diversion options) as compared to the odds of a White child receiving a warning. Our consultant determined these odds by reviewing actual case files provided by JCMSC. While the odds ratio itself presents a picture of the different outcomes faced by Black children and White children in JCMSC, it does

[21] We will refer to the 2010 odds ratios, where relevant, throughout this report.

not account for other, non-race based, factors that may have played a role in the decisions leading to the outcomes.

To isolate the impact of race on the different decision points, the statistician conducted further analysis of the case data using a logistic regression technique. This method simultaneously considers the impact of other factors such as age, gender, education level, offense charged, whether the offense was aggravated,[22] a prior delinquency finding, drug involvement, and other measurable factors.[23] It assesses the impact of each of these factors, the significance of the factors, and the impact, if any, on the race effect. In short, this method introduces other control variables to determine whether the disproportionate impact on Black children could be explained by factors other than race.

As with the review of the RRI, the analysis of this data focused on cases involving Black or White youth. This analysis focused on delinquency matters and on cases involving children aged 10 to 18 years old. This analysis reviewed to a greater depth many of the points referenced in the RRI, including differences in the detention numbers, the diversion options available to each group, and the possibility of transfer to criminal court.

Both the RRI and the case analysis show that Black children are disproportionately represented in a number of stages in JCMSC. The RRI data shows that Black children in Shelby County are disproportionately represented in almost all phases of the process, including detention, petition, and transfer to criminal court. The case analysis shows that Black children are more likely to be detained pre-adjudication, less likely to receive warnings and lesser sanctions, and more likely to be transferred to criminal court. Moreover, the case analysis shows that these outcomes cannot be fully explained by factors other than race. These statistical evidentiary findings indicate a pattern or practice of constitutional and federal law violations.

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[22] In Tennessee, a delinquent act constitutes any act designated as a crime in the criminal code. As such, aggravated delinquency offenses are aggravated criminal offenses defined in the code. Most such offenses include the use of a weapon or offenses resulting in serious bodily injury to the victim. For example, aggravated robbery is defined as robbery involving the use of a deadly weapon or where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-402.

[23] We considered the factors made available by JCMSC, with the exception of gang affiliation because JCMSC noted that its gang affiliation data was unreliable.

C. Findings of DMC in JCMSC

1. Black Children Are Disproportionately Represented in Most Phases of the Shelby County Juvenile Justice System and in Certain Phases, the Disproportionate Representation Cannot Be Fully Explained By Factors Other Than Race

An analysis of Shelby County's RRI values shows that Black children are disproportionately represented in almost every phase of the juvenile justice system, including cases involving secure detention, cases petitioned, and cases transferred to the criminal court. These values suggest that race was an improper motivating factor in determining how a child proceeds through the system. Arlington Heights, 429 U.S. at 266. As described above, an RRI value of 1.0 is neutral, meaning there is no disparity between Black children and White children. However, an RRI above 1.0 indicates that Black children are disproportionately represented in the particular stage: The higher the number, the greater the disparity.

Rates of Juvenile Court Actions by Race, and Relative Rate Index, 2009											
	Shelby County				Tennessee (w/o Shelby)				National[24]		
Decision Stage (and base for rate calculation)	White	Black	RRI		White	Black	RRI		White	Black	RRI
1. Refer to Juvenile Court (per 1000 population)	48.4	166.9	3.4		119.1	223.8	1.9		40.9	103.7	2.5
2. Cases Diverted (per 100 referrals)	114.5	104.1	0.9		27.5	24.7	0.9		28.4	20.6	0.7
3. Cases Involving Secure Detention (per 100 referrals)	27.8	59.5	2.1		11.7	14.1	1.2		18.6	25.4	1.4
4. Cases Petitioned (Charge Filed per 100 referrals)	29.9	36.4	1.2		116.7	156.7	1.3		53.2	60.7	1.1
5. Cases Resulting in Delinquent Findings (per 100 cases petitioned)	54.3	72.2	1.3		23.1	27.1	1.2		63.2	57.0	0.9
6. Cases resulting in Probation Placement (per 100 found) delinquent)	22.8	22.5	1.0		82.0	51.9	0.6		59.6	52.9	0.9
7. Cases Resulting in Confinement in Secure Juvenile Correctional Facilities (per 100 found delinquent)	14.2	23.9	1.7		12.5	20.5	1.6		25.9	31.6	1.3
8. Cases Transferred to Adult Court (per 100 referrals)	2.3	5.3	2.3		0.2	0.4	2.7		0.9	1.1	1.2

As demonstrated above, Black children are overrepresented in almost every category. Most strikingly, the RRI for transfers of Black children to the adult criminal justice system is 2.3, and the RRI for detention prior to adjudication is 2.1. While some of these rates are similar to Tennessee's rates, Shelby's numbers are significantly higher than the national level at almost all stages.[25]

As mentioned above, the RRI determination provides a snapshot of the children in each stage, which allows us to see the level of representation of Black children as compared to White children in each stage. The case analysis, however, provides more concrete information about the impact of other factors on the chances

[24] Calculations based on data available from the National Disproportionate Minority Contact Databook, developed by National Center for Juvenile Justice for OJJDP (2011), available at http://www.ojjdp.gov/ojstatbb/dmcdb/index.html. The national data are current through 2008.

[25] The national level reflects estimates for the entire country developed by the National Center for Juvenile Justice.

of a Black child's case being resolved in a certain direction. Below, we present the results of the logistic regression technique used to determine the extent of race as a contributing factor to the decision-making processes involved in less frequently giving lesser sanctions to Black children, and more frequently detaining them pre-adjudication, and transferring their cases to criminal court.

2. Black Children Have a Lesser Chance of Receiving Diversion and Lenient Disposition Options than White Children in Shelby County

The case analysis data show that Black children are less likely to receive diversion and lenient dispositions than White children in Shelby County. In short, Black and White children are treated differently. Although the above RRI data on diversion shows that Black children have a slightly smaller chance of being diverted, the RRI data present merely a snapshot of the system. A deeper statistical analysis of the data, using the case analysis methodology explained above, reveals that the odds of Black children receiving diversion are far less than the RRI data suggest. After controlling for the impact of other factors, it becomes clear that race was a factor in the decision to offer a child more lenient options. This runs afoul of the Equal Protection Clause and Title VI. We explain the results of the case analysis below.

When a child is arrested or summoned to appear before the Juvenile Court, a probation officer makes the initial determination as to whether the child's case can be addressed in a non-judicial manner or whether the matter should proceed to the docket for adjudication. Non-judicial resolutions include referral of the child to another agency for counseling services or for supervision, warning the child in writing or verbally that his or her conduct was wrong and dismissing the case, simply dismissing the case, recommending pre-adjudicatory probation services for the child, requiring that the child perform community service, and other options that do not involve placing the matter on the docket and proceeding to adjudication. Such options may also be offered to a child once the matter has proceeded to the docket and at any point prior to adjudication. Children may also receive sanctions that do not include confinement if they are adjudicated delinquent. For example, a child may be placed on probation, be required to perform community service, receive counseling, receive a fine, or be required to provide restitution for the adjudicated offense. In other words, there are many non-confinement options tailored to suit the needs of a child referred to juvenile court before a matter is placed on the docket, after a matter is placed on the docket, and even following a finding of delinquency.

Many studies suggest that non-confinement options may be more beneficial to reducing a child's chances of re-offending than confinement. One such study is a long-term multidisciplinary study sponsored by OJJDP in partnership with other

organizations, The Pathways to Desistance Study ("Pathways Study").[26] See Edward P. Mulvey, Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders, OJJDP (2011), available at http://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf. The Pathways Study followed 1,354 juvenile offenders in two metropolitan areas (Philadelphia, PA and Maricopa County, AZ) for seven years after they were found delinquent or guilty of at least one serious violent crime, a property crime, or a drug offense. A number of reports have been issued assessing the results of the Pathways Study. One related report concluded that drug treatment reduced offending levels among juveniles who had prior offenses. See Chassin et al., Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders, 36 J. Substance Abuse Treatment, 36 (2009). Another report stemming from the Pathways Study concluded that longer confinement in juvenile facilities did not reduce the offending children's incidence of re-offending. See Thomas A. Loughran et al., Estimating a Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders, 47 (3) Criminology 699 (2009). Studies have also consistently concluded that a child's initial detention increases his or her likelihood to be processed through the system and to receive harsher sanctions upon adjudication, even after controlling for the types of offenses and prior offenses. See e.g. Office of State Courts Administrator, Florida's Juvenile Delinquency Court Assessment, 24 (April 2003) ("After accounting or controlling for demographic variables, the plea, and the severity and type of offense, findings show that securely detained cases have odds of commitment that are three times greater than the odds of a non-securely detained case."); Charles E. Frazier & Donna M. Bishop, The Pretrial Detention of Juveniles and Its Impact on Case Disposition, 76 J. Crim. L. & Criminology 1132, 1151 (1985)(finding that children detained pretrial are "disadvantaged by an increased likelihood of formal as opposed to informal case disposition."). Children referred to the juvenile courts benefit from non-confinement options. If diversion is offered disproportionately to White children, this will have a disproportionate impact on Black children.

Our consultant's analysis of JCMSC's case files shows that, when compared to White children, Black children in Shelby County are less likely to receive the benefits of more lenient judicial and non-judicial options. This is an impermissible discriminatory impact on the basis of race. See Farm Labor, 308 F.3d at 534 (reasoning that discriminatory effect can be established through use of statistical evidence showing one class is being treated differently from another class). Moreover, race was a major contributing factor to this disparity. We have reason to

[26] The Pathways to Desistance Study is sponsored by OJJDP, the National Institute of Justice, the Centers for Disease Control and Prevention, the John D. and Catherine T. MacArthur Foundation, the William T. Grant Foundation, the Robert Wood Johnson Foundation, and the William Penn Foundation, among others. Additional Pathway Study reports are expected in the forthcoming months.

believe that this racial impact, which is not explainable on grounds such as legal and social factors, is a violation of the children's right to equal protection. Notably, the sheer number of Black children before the court is higher than the number of White children. While we acknowledge that this substantial numerical difference is based on the number of children referred to the court by other agencies,[27] the case analysis considers how JCMSC personnel address these two groups once they are within the court's ambit. With respect to the court personnel's implementation of lenient options, two areas are particularly troubling – (1) disparities in the application of a pre-adjudicative warning or other informal adjustment such as counseling, and (2) disparities in the application of sanctions not resulting in confinement, such as a fine, restitution, and community service requirements.

First, our consultant considered the cases between 2005 and 2009 that did not result in dismissals. This included a total of 54,700 cases, involving 46,911 Black children and 7,789 White children. He analyzed the odds ratio of a Black child receiving a warning as compared to a White child. While a large number of children, both Black and White, received the benefit of a warning or other informal adjustment, Black children were less likely to receive these benefits than White children. In particular, he found that the ratio of the odds of a Black child receiving a warning compared to a White child was .45.[28] As with the RRI, 1.0 represents a race neutral ratio.[29] The base odds ratio of .45 suggests that Black children are less than fifty percent as likely to receive a warning as compared to White children. This number does not account for other variables such as age, gender, prior offenses, school attendance, and other issues that may have impacted the result. As such, we also considered the impact of these variables, using the logistic regression analysis method described above. The statistician found that the impact of these factors reduced the impact of race, but that race was still a statistically significant factor in determining whether a child will receive a warning as opposed to more serious sanctions. Specifically, the odds of Black children receiving a warning was

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[27] The disparity in the number of children referred to the court is itself cause for concern. However, we did not investigate this fact and, as such, do not make a finding concerning it.

[28] This number was determined by calculating the odds for each group. Accordingly, the odds of a White child receiving a warning are determined by dividing the percentage receiving a warning by the percentage not receiving a warning. For example, 88.2 percent of White children received a warning and 11.8 percent did not receive a warning. The overall odds of a White child receiving a warning is therefore 7.47. 77.3 percent of Black children received a warning and 23.0 percent did not receive a warning. The overall odds for a Black child receiving a warning is therefore 3.36. The effect of race is calculated as the ratio of the odds. In this case, 3.36 divided by 7.47 equals .45. (Note: The 2010 odds ratio data when added to the five year data, changes the odds ratio to 0.46).

[29] Note, the RRI and the odds ratios are different analyses, although neutrality is represented in both as 1.0.

one third less than the odds of White child receiving a warning even after accounting for other variables.

As previously discussed, this finding is based on a logistic regression analysis method that simultaneously considered the impact on the result of other variables such as age, gender, education level, offense charged, or prior delinquency finding. The following table shows the impact of the other variables on the odds of a child receiving a warning, including the impact of being Black.

Logistic Regression to Predict Warning, 2005-2009					
Variable	B	S.E.	Wald	Significance	Odds Ratio
Older	-.098	.027	13.628	.000	.907
Male	-.525	.030	312.168	.000	.592
Aggravated	-2.913	.055	2760.068	.000	.054
Special Ed	-.321	.054	35.446	.000	.725
Prior Delinquency	-1.442	.028	2581.971	.000	.236
Prior Alcohol & Drug ("A&D") Offenses	.003	.055	.002	.961	1.003
Prior Status Offenses	-.324	.080	16.566	.000	.724
Prior Dependency or Neglect	-.195	.036	29.771	.000	.823
Currently In School	.781	.037	446.352	.000	2.184
Two Parent home	.044	.036	1.499	.221	1.045
Other living arrangements	.079	.040	3.860	.049	1.082
Referral Person crime	.236	.039	36.672	.000	1.266
Referral Property crime	.165	.041	16.432	.000	1.179
Referral Conduct	.562	.037	228.098	.000	1.753
Referral status	2.597	.093	777.258	.000	13.421[30]
Number of charges	-.452	.022	423.150	.000	.636
Black	**-.408**	**.044**	**84.800**	**.000**	**.665**
Constant[31]	2.222	.066	1117.010	.000	9.229

The table includes a number of terms based in statistical analysis. For clarification, "B" represents the coefficient (i.e. the mathematical value of each variable in the formula to predict warning); "S.E." is the standard error rate associated with B (i.e. the range of confidence in estimating B); "Wald" represents the mathematical computation of chance connected to the significance testing; "Significance" represents the probability that the variable's impact is by chance (a significance of .000 means that the probability of the variable's impact being by chance is less than 1 in 1000); and the "odds ratio" represents the relationship between the particular variable and the outcome. Each variable was also given a value of 1 when it is present in the cases analyzed or zero if it is not present. Thus,

[30] This number is large because the County does offer a lot of diversion options. However, disparities in providing those options remain.

[31] This is a base value representing situations when the other variables are not present.

the odds of an older child receiving a warning are 90.7 percent of the odds of a younger child receiving a warning, an odds ratio that is statistically significant and that reflects the impact of age after taking into account all of the other variables listed in the chart.

As the highlighted text shows, even accounting for the other variables, being Black still reduces the chance of a child getting the lenient result of a warning as opposed to being considered for other, more formalized, options by court. When the other variables are included along with race, the odds ratio for a Black child receiving a warning was 0.67 (as opposed to 0.45 when race alone was considered). As a reminder, parity would be a valued as 1.00. This means that a Black child had odds of receiving a warning that was still substantially lower, by approximately one third, than the odds of a White child receiving a warning. In other words, the impact of race on the result is not a chance event.

Second, our consultant considered the remaining cases that did not result in dismissal or warning, between 2005 and 2009. This amounted to 16,361 cases, involving 14,817 Black children and 1,449 White children. These cases involve sanctions that did not result in ultimate confinement. Reviewing these case files demonstrated that 27.4 percent of the remaining cases involving Black children resulted in a non-incarceration sanction, while 41.1 percent of cases involving White children resulted in a non-incarceration sanction. Black children were less likely to receive the more lenient result.

Impact of race on sanction without a loss of liberty, among cases not resolved by dismissal or warning.			Race		
			White	Black	Total
Sanction without loss of liberty	No	Count	854	10752	11606
		% within Race	58.9%	72.6%	71.4%
	Yes	Count	595	4065	4660
		% within Race	41.1%	27.4%	28.6%
Total		Count	1449	14817	16266
		% within Race	100.0%	100.0%	100.0%

The yearly breakdown of children receiving less than incarceration shows a reduction in the number of White children receiving the more lenient sanctions, but not any corresponding increases in the Black children receiving more lenient results. The disparity is consistent over the entire time period analyzed as demonstrated in the following table.

Percentage receiving fine, restitution or community service sanction, of cases not resolved by dismissal or warning		
Year	White	Black
2005	42.6	28.6
2006	44.2	31.0
2007	47.6	26.5
2008	28.0	25.7
2009	39.8	24.3

The disparate results demonstrated in the above tables remain evident even after other variables are included in the analysis. Specifically, the odds of a Black child receiving a more limited sanction is approximately half of the odds of a White child receiving that sanction, with an odds ratio of 0.54.[32] Again, parity is represented by 1.00. The disparity is reduced to 0.689, but not eliminated, following the introduction of other variables, such as the types of offenses, the child's age, and the child's prior offenses, among other variables listed in the following table. Race still impacts the chances of a child being given a lesser sanction even after controlling for the impact of an aggravated offense and priors.

[32] This disparity increased in 2010 where the odds ratio for these lesser sanctions was 0.38. Black children were less likely to receive these lesser sanctions.

Logistic regression to predict fine, restitution or public service sanction among cases that were not dismissed or released with warning, 2005-2009					
Variable	B	S.E.	Wald	Significance	Odds Ratio
Older	.069	.039	3.124	.077	1.071
Male	-.068	.047	2.089	.148	.935
Aggravated	-.541	.053	104.872	.000	.582
Special Ed	-.271	.081	11.291	.001	.763
Prior Delinquency	-1.151	.043	710.969	.000	.316
Prior A&D Offenses	-.160	.095	2.848	.091	.852
Prior Status Offenses	-.468	.129	13.132	.000	.627
Prior Dependency or Neglect	-.129	.054	5.788	.016	.879
Currently In School	.569	.065	76.948	.000	1.767
Two Parent home	.250	.051	24.385	.000	1.285
Other living arrangements	-.186	.062	8.948	.003	.830
Referral for Person crime	-.041	.060	.477	.490	.960
Referral for Property crime	.781	.059	174.509	.000	2.184
Referral for Conduct	-.330	.057	33.079	.000	.719
Referral for Status Charge	-.080	.094	.727	.394	.923
Number of charges	-.062	.025	6.127	.013	.940
Black	**-.372**	**.065**	**33.081**	**.000**	**.689**
Constant	-.465	.109	18.335	.000	.628

JCMSC's own records show that Black children are treated significantly worse than White children even after accounting for the other social and legal factors. This is a violation of their Equal Protection rights. U.S. v. Jones, 159 F.3d 969, 977 (6th Cir. 1998)(noting that an equal protection violation in selective prosecution case may be established, in part, by showing different treatment of similarly situated individuals); Farm Labor, 308 F.3d at 533 (reasoning that an equal protection violation occurs where claimant is "subjected to unequal treatment based upon their race or ethnicity."). This also violates Title VI and its implementing regulations. See Elston, 997 F.2d at 1406 (recognizing that Title VI provides similar protection to the Equal Protection clause but that the Title VI regulation requires only a showing of a "disparate impact on groups protected by the Statute").

3. Black Children have a Greater Chance of Being Detained Prior to a Detention Hearing than White Children in Shelby County

The case analysis of files from 2005 through 2009 shows that the initial detention rate for Black children referred to JCMSC is higher than the detention rate for White children. Additionally, the introduction of other variables such as aggravated offenses, priors, age, and gender, do not eliminate the impact of race. When a police officer, school, or other agency refers a child to the JCMSC, Juvenile Court personnel must still decide whether that child should be released or detained. According to its Detention Policy and Procedure Manual, the detention decision in JCMSC is made by an intake officer and, on some occasions, administrative personnel in the detention center. The intake officers have the authority to require the "secure detention for any child who poses a serious risk to the community or is a risk not to appear at a future court hearing as identified through the use of the Detention Risk Assessment Tool" ("DAT").[33] The DAT uses a point system form intended to aid the intake officer in determining whether a child should be detained based on factors such as the child's suspected offense, prior adjudications, probationary status, and history of failure to appear and to ensure consistency in the intake decision-making process. JCMSC implemented the DAT in early 2006.[34]

If the child receives a high score on the DAT (16 or above), the intake officer is authorized, but not required, to detain the child until a detention hearing before the Magistrate.[35] If the child's score is lower than 16, the child may still be detained, although the court's procedures recommend that, if detained, the child should be held in a less restrictive "non-secure detention alternative."[36] While application of the DAT is important to the intake officer's determination, the officer still has discretion in evaluating whether the child should be detained prior to a hearing. For example, a child may be detained if the intake officer determines that detention is "required to protect the person or property of others or the child," the "child may abscond," or that there is "no parent, guardian, custodian, or other person able to provide supervision and care and return the child to the court when

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[33] Detention Policy and Procedure Manual, Policy # VIII-I at 241.

[34] Our case analysis time-frame extends from 2005 through 2009, so the DAT applied throughout most of that time.

[35] Id. at 242.

[36] Id.

required."[37] The child's DAT score may also be overridden upon the approval of a supervisor or higher ranking detention center administrator.

The statistical analysis found a disparity in the initial detention of Black children as compared to White children throughout the relevant five-year period. The initial decision to detain has a significant impact on the affected child. Pretrial detention has been shown to increase the likelihood that a child will be formally charged and receive more serious sanctions.[38] The Black-to-White odds ratio for being detained once referred to JCMSC is 2.74.[39] Even after the introduction of other variables, the odds ratio remains statistically significant with nearly the same magnitude. As noted above, parity is 1.00. A number below 1.00 represents a lower odd of receiving the particular result being examined. A number above 1.00 represents a higher odd of receiving the result being examined. As such, a Black child brought to the JCMSC has a substantially higher chance of being detained prior to the detention or probable cause hearing – despite his or her offense level, prior delinquent offenses, or other social conditions – than a White child.

Impact of Race on Initial Detention

			Race		
			White	**Black**	**Total**
Initially Held in Detention	**No**	Count	5823	21402	27225
		Percent	63.1%	38.4%	41.9%
	Yes	Count	3412	34397	37809
		Percent	36.9%	61.6%	58.1%
	Total	Count	9235	55799	65034
		Percent	100.0%	100.0%	100.0%
Odds of being held			0.59	1.61	
Odds Ratio				2.74	

Over the five-year period, 61.6 percent of the Black children brought to the court were initially held in the detention facility, a total of 34,397 children. In the same period, 36.9 percent of the White children brought to the court were held in the detention facility, a total of 3,412 children. The numbers trended down for White

[37] Id.

[38] Office of State Courts Administrator, Florida's Juvenile Delinquency Court Assessment, 24 (April 2003); Charles E. Frazier & Donna M. Bishop, The Pretrial Detention of Juveniles and Its Impact on Case Disposition, 76(4) J. Crim. L. & Criminology 1132 (1985).

[39] While the 2010 data shows some progress in the use of detention for all children, substantial racial disparities remain. Including the raw 2010 odds ratio (2.43) in the five-year analysis changes the overall odds ratio to 2.78.

children after the introduction of the DAT in 2006 and remained constant for the Black children during the five-year period, causing the odds ratio to expand over the time period. For example, 2005's odd ratio was 1.94, while 2009's odds ratio was 3.30 indicating that an already unconstitutional situation has been getting worse. The following table shows the odds ratio for each year reviewed.

Percentage Initially Held in Detention			
Year	White	Black	Odds Ratio
2005	44.3%	60.7%	1.94
2006	40.5%	62.5%	2.45
2007	35.3%	62.5%	3.05
2008	31.9%	62.2%	3.51
2009	31.6%	60.4%	3.30

The race impact in the initial detention decision was significant even after the introduction of other variables (i.e., age, gender, offense type, prior delinquency, living arrangement, or school attendance), with Black children having a greater chance of being held once brought to the court than a White child.

Logistic Regression: Initially Held in Detention

Variables in the Equation	Significance	Odds Ratio
Older	0.00	0.87
Male	0.53	1.01
Aggravated	0.00	8.47
Special Ed	0.00	1.46
Prior Delinquency	0.00	1.42
Prior A&D Offenses	0.08	0.92
Prior Status Offenses	0.08	1.12
Prior Dependency or Neglect	0.00	1.30
Currently In School	0.00	0.91
Two Parent home	0.00	1.28
Other living arrangements	0.00	1.25
Referral Person crime	0.00	0.59
Referral Property crime	0.00	0.68
Referral Conduct	0.00	1.21
Referral status	0.00	0.41
Number of charges	0.00	1.89
Black	0.00	2.74
Constant	0.00	0.28

In essence, we found that the effect of race on the detention decision cannot be explained by other measurable factors and, therefore, the initial detention decision has a discriminatory impact on Black children.

4. Black Children are More Likely to be Recommended for Transfer Hearings to Adult Criminal Court than White Children in Shelby County

The case analysis shows that, of the children whose matters were not resolved by dismissal or through a warning or counseling, Black children were more likely to be recommended for a transfer hearing than White children. Moreover, the higher odds of a Black child being subject to a recommendation for transfer were not explained by the introduction of other variables. As described more fully in the due process section, a juvenile transfer proceeding is a proceeding in which the juvenile court determines whether to waive its jurisdiction and transfer the matter to criminal court for the child to be tried as an adult. In Kent, 383 U.S. 541, the Supreme Court mandated the basic due process requirements applicable to transfer hearings: (1) the right to a hearing; (2) the right to be represented by counsel at the hearing; (3) the right of counsel to have access to the evidence to be considered by

the juvenile court in determining transfer; and (4) the right to have the juvenile court's determination on the record accompanied by a statement of reasons for transfer. The Tennessee statute, Tenn. Code Ann. § 37-1-134, and the JCMSC court rules, Rule 24, also outline standards for transfer.

In Shelby County, several stakeholders have a role in deciding which cases are suitable for transfer. Before a matter is formally petitioned, however, a JCMSC probation counselor decides whether a child's matter should be addressed in a non-judicial manner (such as dismissal, referral for social services, or a warning), or should proceed formally. The probation counselor assesses the child's eligibility for diversionary options and services. In many instances, the probation counselor decides what formal charges should be included in the petition, although the DA ultimately certifies those charges. Once the matter is formally placed on the docket, the DA may seek a transfer hearing. The Magistrate makes the ultimate decision on whether a child's case should be transferred to the adult court following a hearing on the legal grounds and the social factors supporting or militating against transfer. In doing so, the Magistrate determines not only whether reasonable grounds exist to believe that a child has committed the delinquent act, but also whether the child may be appropriately treated in the juvenile system. As discussed in our due process section, we found that Magistrates often failed to adequately protect the children's due process rights during the transfer hearings. Our case analysis shows that Black children are more likely to be considered for transfer proceedings, regardless of having many of the same case attributes and social circumstances as White children. Black children with similar legal and social factors as their White counterparts received different, more harmful, outcomes based on their race. This is impermissible. Farm Labor, 308 F.3d at 533-34.

We found that Black children in JCMSC have a greater chance of being considered for transfer to the criminal court than white children and, following the inadequate transfer hearings discussed in the due process section, they have a substantially higher chance of having their case actually transferred to the criminal court. During the period reviewed, 2005 through 2009, 1051 children (1002 Black children and 49 White children) in the analysis parameters were recommended for a transfer proceeding and 1041 (99 percent) children were actually transferred to the adult court following a hearing.[40] Black children accounted for 994, 95.5 percent, of the 1041 children transferred to adult court. There has been some decrease in the odds ratio over the five-year period, because there was an increase in the number of

[40] At the outset of the analysis, there were 66,300 children referred to the court during the five-year review period. This number includes 56,881 Black children and 9,419 White children.

White children considered in 2009, not because there was a decrease in the rate of Black children being considered for transfer.[41]

Percentage considered for adult transfer, of cases not resolved by dismissal or warning			
Year	White	Black	Odds Ratio
2005	2.7%	5.9%	2.26
2006	1.4%	5.1%	3.78
2007	1.8%	6.1%	3.54
2008	7.0%	8.8%	1.28
2009	5.7%	8.6%	1.56

The large disparity in transfer between Black and White children was not removed by the introduction of other variables. While the analysis showed that aggravated offenses, multiple charges, and prior adjudications influenced the decision to seek transfers, those variables did not remove the impact of race. Before introducing the legal and social variables, the odds ratio associated with race was 2.07, that is, a Black child was more than twice as likely as a White child to be recommended for transfer proceedings. After introducing the variables, the odds ratio associated with race was only slightly reduced to 2.02.

[41] This trend appeared to be reversing in 2010, with fewer White children being referred for transfer. As such, Black children had almost double the odds ratio (1.76) of being recommended for transfer in 2010.

Logistic regression to predict adult transfer consideration among cases that were not dismissed or released with warning, 2005-2009		
Variable	Significance	Odds Ratio
Older	.000	9.118
Male	.000	4.186
Aggravated	.000	6.384
Special Ed	.000	.483
Prior Delinquency	.000	1.870
Prior A&D Offenses	.507	1.077
Prior Status Offenses	.072	1.399
Prior Dependency or Neglect	.498	1.072
Currently In School	.000	.309
Two Parent home	.679	1.046
Other living arrangements	.746	1.039
Referral Person crime	.000	1.900
Referral Property crime	.000	.470
Referral Conduct	.104	.843
Referral status	.004	.465
Number of charges	.000	1.489
Black	.000	2.020
Constant	.000	.001

The disparity in transfer rates for Black children is especially problematic because the consequences of transferring a juvenile to the adult court are significant. Transfer removes the child from the rehabilitative juvenile system and subjects the child to the adult criminal system. Children who are adjudicated in the adult system have been shown to reoffend and continue antisocial behavior more frequently. See Carol A. Schubert et al., Predicting Outcomes for Youth Transferred to Adult Court, 34 Law & Hum. Behav. 460, 471 (2010)(finding that the majority (77 percent) of study group, adolescents whose matters had been transferred to the adult court, were either rearrested or resumed antisocial behaviors). Moreover, children considered for transfer may be more inclined to plead guilty in order to avoid the potentially serious consequences of trial in the

adult system. See e.g. Robert E. Shepherd, Jr., Plea Bargaining in Juvenile Court, 23 Crim. Jus. 61 (2008) (discussing the importance of plea bargaining to avoid more serious consequences such as transfer to adult court).

The higher odds ratio of transferring Black children in JCMSC cannot be explained by factors other than race. Even after accounting for the types of offenses, prior offenses, age, gender, and a number of other factors that could have arguably reduced the impact of race, race still shows up as a statistically significant factor in the decision to recommend a child's case for transfer and to transfer the child's matter to criminal court. Children are being treated differently in JCMSC based on race. This violates the Equal Protection rights of the children appearing before the court. U.S. v. Jones, 159 F.3d at 977; Farm Labor, 308 F.3d at 534. For the same reasons, it also violates Title VI and its implementing regulation prohibiting "methods of administration which have the effect of subjecting individuals to discrimination because of their race." 28 C.F.R. § 42.104 (b)(2).

IV. PRACTICES THAT CONTRIBUTE TO DUE PROCESS AND EQUAL PROTECTION VIOLATIONS

Many factors contribute to the due process and equal protection violations discussed in this report. Unless reformed, these factors will further contribute to a pattern or practice of unconstitutional conduct.

A. Fundamental Misunderstandings About JCMSC's Purpose and Players

A number of stakeholders have a fundamental misunderstanding about the purpose of juvenile court and the roles and responsibilities of its participants. Misunderstandings about the role of defense counsel seem particularly acute. Several JCMSC staff also expressed resistance to the idea that JCMSC would be stronger overall with a more adversarial system. This misunderstanding and resistance, if allowed to continue, could frustrate JCMSC's efforts to fully comply with Gault. We discuss each one of these problems in turn below.

1. Adversarial Testing of Facts in Juvenile Court

During our 2010 inspection, we suggested that JCMSC could benefit from a more vigorous adversarial testing of the facts in juvenile delinquency cases. During our 2011 tour, however, court officials expressed concern that adversarial testing would result in less civil interactions in the court. Our suggestion was meant to convey the importance of due process and is fully consistent with JCMSC's mandate to "[p]rovide a simple judicial procedure…in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." Tenn. Code Ann. § 37-1-101 (a)(4). In short, it means that JCMSC should embrace more of the due process protections the Supreme Court set out in Gault, not that JCMSC should operate exactly as an adult criminal court.

Adversarial testing occurs when there is a sufficiently rigorous challenging of the state's evidence to ensure due process at the probable cause hearing and trial. Adversarial testing of the evidence should not erode cordiality and collegiality in the courtroom. If it does, then JCMSC should address this problem by training court staff on the different roles and responsibilities of all players in the juvenile court process.

2. The Role of Defense Counsel

Defense attorneys play a central role in the proceedings. A Juvenile Defender ("JD" or "defender") is the sole participant responsible for advancing the interest or position the child articulates. [42] Unlike probation officers, psychiatrists and others, the defense counsel must protect the youth's expressed interest and cannot supplant it with his or her judgment about what is in the youth's best interest. Vigorous advocacy by defense counsel ensures that the youth's voice is heard in the process and a fair, just and appropriate result is achieved.

Notably, there appears to be some confusion on this point expressed by several employees of JCMSC, including Magistrates, as evidenced by an exchange during a detention hearing for R.R., a child arrested for allegedly assaulting her mother. Because R.R.'s mother did not attend the hearing, the Magistrate made a referral to the Department of Children's Services and appointed a guardian for R.R in addition to a JD. The Magistrate advised R.R. that "if you have any issues you can talk to your attorney, or you can talk to [guardian] about this matter and they'll work together on your best interest, okay?" However, this misstates the JD's role. While the attorney appointed as guardian is charged with working in R.R.'s best interests, the JD's responsibility is to advocate for R.R.'s express interest, which could differ from her best interest. Indeed, the defender is the only professional in a juvenile's case whose principal duty is to serve as the child's voice in the proceedings.[43]

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[42] National Council of Juvenile and Family Court Judges, "Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases" (2005), http://www.ncjfcj.org/content/blogcategory/346/411/. The Guidelines recommend that an attorney for the child in a juvenile proceeding should "[b]e an advocate, zealously asserting the client's position under the rules of the adversary system." See also, Tennessee Rules of Professional Conduct R. 1.3: Diligence (2011), www.tba.org/ethics/2011_TRPC.pdf (stating that a "lawyer must … act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.")

[43] See generally, Kris Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245 (2005).

B. Juvenile Defenders

Against the backdrop of a court culture that frequently discourages an adversarial testing of facts for children and misinterprets the proper role of defense counsel, the Juvenile Defenders in JCMSC are challenged to meet ethical and professional obligations to their clients. Although we observed several defenders who are experienced and engaged advocates,[44] we also found some instances where defense attorneys failed in their duties to be competent and zealous advocates.

The following examples from hearings demonstrate problematic practices by defense counsel: [45]

- As noted above, in an adjudicatory hearing, the ADA called juvenile E.E. to testify at his own adjudicatory hearing. E.E.'s defense attorney did not object to this highly unusual step and was therefore complicit in allowing E.E.'s privilege against self-incrimination to be violated.

- At a transfer hearing for A.A., discussed previously, the Magistrate had not yet announced a decision about whether to transfer A.A. to adult criminal court. But during the defense attorney's argument against waiver, the Magistrate asked the attorney whether A.A. admitted guilt. The defense attorney readily acknowledged that A.A. "admitted full responsibility on these charges." In this case, A.A. should have had a full hearing on the transfer issue, where the Magistrate would have been required to find "reasonable grounds to believe that A.A. committed the delinquent act as alleged" in order to transfer A.A. See Tenn. Code Ann. § 37-1-134 (a)(4)(A). By admitting A.A.'s guilt on this crucial issue, the JD helped the ADA make the case against his client.

- In a transfer hearing for P.P., the defense attorney began the hearing by stipulating that P.P. "was found with the property, was legally detained [and] that he gave a statement freely and voluntarily." Instead of insisting that the court follow mandatory transfer procedures, the JD suggested that the court skip live testimony, which would have been crucial for discovery purposes.

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[44] We were pleased to learn that JCMSC arranged for the Chief Juvenile Defender to attend a national training for juvenile defense attorneys in 2010.

[45] We recognize that defense attorneys have discretion to make strategic decisions about their cases, and that defense attorneys may have chosen a course of action based on a privileged communication with their client. However, the decisions included here were detrimental to the client's position and are so far out of the norm for defense practice that we have presumed that the client did not consent to or request these strategies.

- In Q.Q.'s transfer hearing, the defense attorney stipulated to the government's evidence against Q.Q. The defense attorney did not insist that the prosecutor present evidence in support of transfer, thereby giving up the opportunity to cross-examine the government's witnesses.

The defense provided to juveniles in JCMSC could be enhanced if JDs were more proactive in asserting their client's rights throughout the proceedings. During our observations of detention hearings, we rarely, if ever, saw JDs assert their client's rights under the Fifth or Sixth amendments at the detention hearing. The Fifth Amendment assertion must be explicit and specific. Defenders should specifically invoke the Fifth Amendment right to counsel "in this and all future proceedings" at presentment or arraignment in an effort to protect the child against police contact about any case for which the defendant is in custody. See McNeil v. Wisconsin, 501 US 171, 184 (1991). Although there is some debate whether this invocation by counsel at the arraignment will constitute a valid assertion of the Fifth Amendment right to be free from custodial interrogation with regard to offenses that are not yet charged, it is still a good practice for JDs to adopt. The Sixth Amendment right is offense specific. Id. at 175. JDs should, at minimum, invoke the Sixth Amendment right to counsel for the offenses presently before the court.

During stakeholder interviews, we learned that JDs do not consistently request discovery from ADAs. Tennessee's court rules regarding discovery require JDs to have access to the same type of discovery that a defense attorney would receive in adult criminal court. Tenn. R. Juv. P. 25 (providing that "each juvenile court shall ensure that the parties in delinquent and unruly proceedings in juvenile court have access to information which would be available in criminal court…"). As a standard practice, JDs should request discovery in every case, not just in those cases that they feel have trial potential. Discovery is a crucial part of a case's investigative stage as it can inform and/or direct the defense strategy.[46]

From court observations and in transcripts, it was clear that the majority of JDs did not challenge probable cause when the government moved to detain their clients, even when seemingly viable arguments were available, such as self-defense or mis-identification. In fact, many JDs made statements indicating that they felt that the facts of the case — which are crucial to probable cause determinations — were off limits to them at the probable cause portion of the detention hearing. We observed an example of a failure to zealously challenge probable cause in a case of a child charged with gun possession and burglary. Before the arrest, the child was

[46] National Council of Juvenile and Family Court Judges, supra note 15, at 31 (stating that defense attorneys should "[a]ctively pursue discovery from the prosecutor under informal procedures, court rule, and motions practice as appropriate. Effective representation of the client's interests is frustrated when counsel for the youth is ignorant of information contained in discovery materials.").

riding in a car with three or four adult men. The police discovered the gun in the child's purse. There was video of the adult males committing the crime but not of the child. Available arguments against probable cause included whether the child knew a gun was in her purse, whether she was actively involved in the alleged crime, or whether she was under duress from the adult males in the car. The JD did not assert any potential arguments against probable cause.

We were encouraged to hear during our second visit that probation officers have begun inviting JDs to probation conferences. It is difficult to determine how frequently this occurs. JDs can ensure that their clients have representation at probation conferences by requesting that the probation officers invite them to meetings. Once informed of the meeting, the JD should make it a priority to attend in order to advise the child about options presented by the probation officer, including ensuring that the child understands all the conditions of any diversion program offered.

It was clear from our inspection and interviews that appeals and written motions by defense counsel are rare in JCMSC. In our review of court files, we observed one written motion to suppress evidence. One defender informed us that oral motions, as a strategic choice, are more common than written ones. During interviews, stakeholders acknowledged that appeals are practically non-existent at JCMSC. In a promising sign, it appears that JDs do request rehearings of detention decisions approximately one to four times per week. Overall, JDs should be more proactive in pursuing appeals and filing motions to suppress evidence when there is a basis to do so.

Finally, we are concerned about the structure of Juvenile Defender's Office ("JDO"). The JDO is not an independent agency, nor is it affiliated with the county public defender's office. Instead, JCMSC operates it entirely, and the Chief Juvenile Defender is appointed by, and reports directly to, the Juvenile Court Judge. This organizational structure, while not unconstitutional *per se*, creates an apparent conflict of interest, as a juvenile defender must balance the duty of representing the child client with the inherent duty of loyalty to his or her employer. National standards for public defender systems strongly encourage independence from the judiciary to avoid conflicts of interest and judicial interference.[47]

[47] American Bar Association, "Criminal Justice Section Standards, Providing Defense Services", Standard 5-1.3 (1992) http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html ("The [legal representation] plan and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."); See also James R. Neuhard & Scott Wallace, "The Ten Commandments of Public Defense Delivery Systems," National Legal Aid and

C. Other Recommendations

In addition to our concerns about misunderstandings about the function and professional roles within the juvenile court, we had other concerns about practices within the Juvenile Court. These practices do not directly violate the Constitution, but if left unaddressed, they could undermine JCMSC's efforts to provide due process protections for juveniles in a consistent manner.

1. Increase Time Assistant District Attorneys and Juvenile Defenders Have to Prepare for Detention and Probable Cause Hearings

We were encouraged to see, after our 2010 visit, that JCMSC made changes to the case assignment process. Previously, the JDO appointed one to two attorneys to cover all of the detention hearings for a particular day. The appointments occurred just moments before the detention hearings began. JCMSC restructured the appointment process so that each defender is appointed to represent only one or two children each day. Defenders also receive the arrest tickets approximately 45 minutes before the detention hearings begin, rather than minutes before the hearing. These changes show considerable improvement in the JDs' access to information and time to prepare for detention hearings. Because defenders have fewer clients each day, they can follow-up with prosecutors about discovery and with probation officers about conferences more quickly.

But JCMSC has the opportunity to provide JDs even more time to prepare for hearings. Under the current court schedule, detention hearings occur each weekday at 1:00 pm, and JDs receive arrest tickets at approximately 12:15 pm. However, the intake staff completes paperwork for most of the detention hearings scheduled for a particular afternoon before 12:15 pm. Children arrested anytime between 10:30 am on Day 1 and 10:30 am on Day 2 will have their detention hearing the afternoon of Day 2. This means there is a 24-hour window prior to the detention hearing in which arrest tickets are being delivered to the detention center. Arrest tickets generated after 10:30 am on Day 1 should be distributed to the JDO and the DA early in the morning on Day 2. This would allow defenders and ADAs to get paperwork the morning of the detention hearing, giving them more time to prepare for the hearing.

2. Bond for Juveniles

The Eighth Amendment states in relevant part, "Excessive bail shall not be required, nor excessive fines imposed…" U.S. Const. amend. XIII. The amount of bail should not be arbitrary or punitive, but rather an amount that will reasonably ensure the child's appearance, as is required in Tennessee's criminal statute. See

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Defender Association (2001),
http://www.nlada.org/Defender/Defender_Standards/Standards_Attach6.

Tenn. Code. Ann. § 40-11-118(a) ("Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.")

In JCMSC, we observed Magistrates frequently setting bond for children at detention hearings. In a number of these hearings, the bond amounts appeared to be excessive, especially for indigent children who qualified for a court-appointed attorney. The Tennessee Code does not specifically address guidelines or limits for Magistrates for the setting of bond at juvenile detention hearings. However, § 37-1-117(e), allows Magistrates the discretion to "release the child on an appearance bond." From our observations and conversations with stakeholders, we understand that, in practice, Magistrates issue three types of bonds for children: (a) an appearance bond, as mentioned above, where the child is essentially released on his or her own recognizance; (b) a secured bond, where the child (or parent) may post 10% and collateral with a bond company; or (c) an unsecured bond, where the child (or parent) is required to pay the bond if the child fails to appear. Of course, the Magistrate can also detain the child with no bond.

During out 2010 inspection, we were informed that Magistrates typically set bonds between $250 – $500. However, in our review of hearings and transcripts, we did not find this to be the case. While some of the bonds did fit into the $250 – $500 range, we noted a significant number of times when the Magistrate set unnecessarily high and sometimes unconstitutionally excessive bonds. In one transfer hearing, a child was charged with stealing the rims and tires off of a car. After finding probable cause and transferring the child to adult court, the Magistrate set bond at $1,000,000. We also observed Magistrates setting bonds ranging from $1,000 to $10,000.

We do not suggest here that Magistrates in JCMSC should not be setting bonds; nor do we attempt to suggest what the bond amounts should be. However, a starting point for determining bail amounts should be the Eighth Amendment, which prohibits excessive bail. JCMSC should consider adopting a policy that prevents excessive bonds for children and reasonably assures the child's appearance for court.

3. Plea Colloquy

The court hearings and transcripts we reviewed demonstrate that Magistrates inconsistently administer plea colloquies for children. Tennessee court rules require Magistrates to make a thorough inquiry of a child before accepting a plea of guilty. Tenn. R. Juv. P. 21. The Magistrate must "address the child personally in open court and inform the child of, and determine that the child understands" several issues, including the nature of the charges, possible dispositional consequences of the admission, the right to plead not guilty, and the right to confront and cross-examine witnesses. Id. The court must also take steps under the rule to ensure that the plea is voluntary. Id. While some Magistrates gave a clear explanation of the rights the child was giving up by pleading guilty,

others did it cursorily without asking questions to confirm that the child understood the process. At minimum, the Juvenile Court Judge should ensure that all Magistrates comply with the requirements of Rule 21.

4. Confidentiality in Detention Hearings

During our court observations, we saw that JCMSC closes off hearings for each individual child to the general public. When it is time for a child's case to be heard, the bailiff retrieves any family from the hallway. However, during all of the hearings we observed, court staff allowed children to sit in on one another's hearings. Nothing in the Tennessee statute or Tennessee rules explicitly prohibits this practice. Tennessee Code requires that court records and files, not court proceedings, remain confidential. In particular, Tenn. Code Ann. § 37-1-153 (c) provides, in relevant part, "if a court file or record contains any documents other than petitions and orders, including, but not limited to, a medical report, psychological evaluation or any other document, such document or record shall remain confidential." Court rules allow for open hearings, but give the court discretion to exclude the general public and admit only "those persons having a direct interest in the case." Tenn. R. Juv. P. 27.

Our concern with JCMSC's practice is that allowing non-interested parties to sit in on the hearings essentially makes § 37-1-153 (c) meaningless. The Magistrates, attorneys, probation officers, parents, and clinicians involved in a child's delinquency hearing frequently discuss sensitive and private information in open court. For example, in a hearing for siblings V.V. and W.W., both children pled guilty to sexual battery. The Magistrate held the disposition hearing immediately after the pleas, where the professionals, including a clinician, discussed both children's treatment needs in open court, in the presence of non-interested parties. In the waiver hearing for O.O., the Magistrate and attorneys discussed O.O.'s traumatic history in open court, including that O.O. had witnessed domestic violence and had been a victim of sexual assault. Allowing one child to be present during another child's hearing is certainly not the same as providing full access to the entire file. But given that Tennessee's statute protects sensitive information like medical records and psychological evaluations, it does not make sense to allow other children to hear the sort of information the confidentiality statute was designed to protect. The best way to prevent the inadvertent release of confidential information is to bar non-interested parties, including other children.

We also observed hearings in 2011 during which a Magistrate made the parents confirm, in open court and under oath, their monthly income and number of dependents. We recognize that this is a necessary step in confirming the child's indigency for purposes of determining eligibility for court-appointed counsel. However, there is no judicially defensible reason to force a parent to share his or her income with his or her child. Moreover, it is not necessary because the Magistrate merely read the information from a form the parents had previously completed. Although this practice does not raise an issue of due process, there is no reason to

continue it. A viable alternative could be for the Magistrate to ask the parent to swear to the information without repeating it out loud. For example, after swearing the parent, the Magistrate could state the following, "I am holding an eligibility form for court-appointed counsel. You have completed this form. This is your signature? Do you agree that everything you say in this form is true and accurate to the best of your knowledge?"

5. Language Access

During our 2011 inspection, we observed Spanish-speaking children and their parents participating in JCMSC proceedings. Appropriately, JCMSC had a Spanish interpreter available to interpret for parents during two detention hearings. Several stakeholders reported that the interpreter is usually available for afternoon hearings if she is notified in the morning.

However, we also learned that JCMSC issues summons in English only, not Spanish or any other language. With this practice, JCMSC is potentially in violation of Title VI. Recipients of federal financial assistance from DOJ are required by Title VI to provide meaningful access to persons who are limited English proficient. Lau v. Nichols, 414 U.S. 563, 569 (1974). Under Executive Order 13166, each federal agency that extends financial assistance is required to issue guidance explaining the obligations of their recipients to ensure meaningful access by LEP persons to their federally assisted programs and activities. See 65 Fed. Reg. 50,121 (Aug. 16, 2000). The DOJ guidance issued pursuant to this requirement states that recipients of financial assistance from DOJ should undertake "every effort . . . to ensure competent interpretation for [Limited English Proficient ("LEP")] individuals during all hearings, trials, and motions[.]" Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,471 (June 18, 2002)("DOJ Guidance"). The Assistant Attorney General for the Civil Rights Division issued a guidance letter on August 16, 2010, to all Chief Justices and State Court Administrators ("Courts Letter") describing the obligation of state courts under Title VI to provide LEP individuals with meaningful access to court proceedings, notwithstanding any conflicting state or local laws or court rules. The letter also described several practices "that significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability," including denying LEP parties access to court interpreters in civil proceedings and charging LEP parties for the cost of interpreter services. Letter from Thomas Perez, Assistant Attorney General, to Chief Justices and State Court Administrators at 2 (August 16, 2010).

JCMSC's failure to provide the summons in Spanish may violate Title VI if its failure to do so discriminates against Spanish-speaking children and their parents on the basis of their national origin or if the this failing has a

discriminatory effect on them. 28 C.F.R. § 42.104(b)(2); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995).[48]

6. Restitution

As with plea colloquies, we observed inconsistencies in Magistrates' handling of restitution amounts. The Tennessee statute is vague on the standard of proof necessary for requiring a child to pay restitution. The statute merely provides that after a finding of delinquency, "the court shall determine if any monetary damages actually resulted from the child's delinquent conduct." Tenn. Code Ann. § 37-1-131. If the court finds in the affirmative, it "shall order the child to make restitution for such damages unless the court further determines that the specific circumstances of the individual case render such restitution . . . inappropriate." Id.

In some cases, Magistrates ordered children to pay restitution based on a victim's oral representations and without documentation, as in the following examples:

- U.U. pled guilty to burglary. At the disposition, the victim initially stated that he did not know the value of the items still missing. The Magistrate, ADA, and JD then walked through all the items the victim claimed were still missing, including DVDs, a computer, and a hard drive. At one point in the hearing, the ADA suggested the value of the DVDs. Later in the hearing, the Magistrate asked the victim, "from what is still missing, what have you lost?" The victim replied, "I think one thousand . . . three hundred dollars." After additional discussion and without documentation, the Magistrate arrived at a total restitution amount of $1,590, and ordered U.U. to pay half, or $795, to the victim.

Other Magistrates clearly required a higher standard of proof before ordering children to pay restitution as part of disposition. In these cases, Magistrates made sure that the state and the victim provided written documentation to justify the amounts sought in restitution. These Magistrates also provided the JDs an opportunity to meaningfully challenge the restitution amount.

The variety in Magistrates' approaches to restitution demonstrates that they could benefit from clear guidance for restitution at disposition. And the inconsistent approach to restitution for children within JCMSC is even more problematic when compared to the proof required in adult criminal cases. Tennessee law requires that a jury determine the value of the property before

[48] The court summons may be deemed a "vital document"; that is, a paper or electronic written document containing information that is critical for accessing a JCMSC program or activity, or a document that is required by law. See Dep't of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41, 463 (June 18, 2002).

restitution is ordered for adults convicted of certain property offenses. Tenn. Code Ann. § 40-20-116.

Even though the statutory provision covering restitution does not include a specific provision about the proof required, JCMSC should ensure that the procedure requires documentation and allows children and their defense attorneys time to review the requested amounts before ordering the child to pay restitution.

7. Recordings of Hearings are of Poor Quality

As part of our investigation, we requested, and JCMSC provided, recordings of a variety of juvenile hearings. Unfortunately, many of these recordings were of poor sound quality. This made it difficult to produce transcripts that accurately captured the events that transpired at the hearings. The ability to obtain a recording of a hearing implicates a child's due process rights. A transcript is crucial to the appeals process because accurate records of proceedings enable attorneys to shape their appellate arguments. Section 37-1-134(f)(2) of the Tennessee Code requires juvenile courts to make audio recordings of all transfer hearings. A child who wants to appeal a transfer decision must arrange to make a transcript from that recording. And even though other juvenile appeals are first heard *de novo* by a criminal court, transcripts are still necessary because the next level of appeal after criminal court is to the Court of Appeals. See § 37-1-159(a).

V. DETENTION FINDINGS

JCMSC's decision to detain children for the period prior to their adjudicatory hearing rather than divert them or release them to a parent or guardian can have serious consequences. Our investigation revealed that JCMSC subjects children in its detention facility to dangerous and excessive restraint chair techniques and fails to protect them from self-harm. These practices violate the Constitution.

A. Legal Standards

Children detained at JCMSC's detention facility are protected by the Fourteenth Amendment and have a substantive due process right to reasonably safe conditions of confinement and freedom from undue bodily restraints. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982). Officials violate children's constitutional rights if they substantially depart from generally accepted professional standards. See id. at 314.

B. Findings of Protection from Harm Violations

1. Use of Dangerous and Excessive Restraint Techniques

Detention staff has a duty to protect children in their care from harm. Youngberg, 457 U.S. at 307. This duty includes efforts to ensure that, when staff must intervene physically, they do so using means that do not unnecessarily subject

children to pain or injury. Youngberg, 457 U.S. at 324. Achieving this objective requires a facility to have detailed policies and procedures guiding use of force that are in line with contemporary standards. Conditions of confinement at JCMSC violate children's constitutional rights because the use of severe interventions, such as the restraint chair and pressure point control tactics are often not needed, used when no threatening behavior is apparent, and used before staff make reasonable efforts to temper the precipitating behavior.

a. Restraint Chair

Generally accepted professional standards regarding restraint chair use in juvenile detention facilities require that the chair either be eliminated entirely or, in the rare cases where a restraint chair is used, that it only be used under the direct supervision of a medical or mental health care provider. JCMSC has failed to adopt either practice. Rather, JCMSC's detention facility has *three* restraint chairs which, according to JCMSC's policies and procedures, are used inside of an isolation room,[49] outside of the direct supervision of medical and mental health staff. Indeed, restraint chairs are used outside of the direct supervision of any facility staff. Moreover, the facility uses the isolation room and restraint chair in instances when there is no evidence the child is a danger to themselves or others. This is unconstitutional. Morgan v. Sproat, 432 F. Supp 1130, 1132 (S.D. Miss. 1977).

Between July 2009 and January 2011, JCMSC used the restraint chair 13 times. This number is especially high given that the Performance-based Standards[50] ("PbS") national field average for restraint chair usage is zero. While using the restraint chair, JCMSC failed to follow its own policies and procedures. JCMSC's policy stipulates that children shall remain in the isolation room and restraint chair for no longer than 20 minutes. This is not occurring. Rather, as detailed below, JCMSC restrains and confines children for excessive periods of time.

- X.X. was handcuffed and placed in a restraint chair in the isolation room after an argument ensued with a detention officer due to X.X.'s refusal to return a book from her room. X.X. remained in the chair for 40 minutes, twice the time permitted by facility policy. There is no evidence that X.X. was a danger to herself or others.

[49] JCMSC's isolation room has no sink or toilet, and children housed there are only visible through a small window that opens into the hallway.

[50] Performance-based Standards for Children Correction and Detention Facilities is a self-improvement and accountability system used in 31 states and the District of Columbia to improve the quality of life for children in custody. PbS gives agencies the tools to collect data, analyze the results to design improvements, implement change, and measure effectiveness with subsequent data collections from within the facility and against other participating facilities. The PbS formula calculates an incident rate based on its occurrence per 100-bed days.

- Y.Y. was placed in a restraint chair in the isolation room after repeatedly attempting suicide in his cell. The incident report notes that Y.Y. was held in the restraint chair for 110 minutes; more than five times the facility's permissible time.

b. Pressure Point Control Tactics

JCMSC also subjects children to dangerous and unconventional pressure point control tactics that are neither designed, nor developmentally appropriate, for use with children and adolescents. Though use of force reports provided to us do not reflect this tactic, staff members informed us that they used pressure points. Pressure point control tactics use pain compliance and joint manipulation to force acquiescence. For example, detention staff will bend a child's wrist backwards to induce pain, forcing them to the ground in submission. The duty to protect children from harm includes efforts to ensure that, when staff must intervene physically, they do so using means that do not unnecessarily subject children to pain or injury. Youngberg, 457 U.S. at 324. JCMSC must provide appropriate training to ensure that when physical restraints are necessary, they are not applied punitively. Ingraham v. Wright, 430 U.S. 651, 669 n. 37 (1977); C.C. v. State, No. 3:09-0246, 2010 U.S. Dist. LEXIS 100327, at *10 (D. Tenn. 2010). Pain compliance is not necessary to achieve restraint. Accordingly, JCMSC's use of pressure point control tactics violates children's constitutional rights.

2. JCMSC Does Not Adequately Protect Children from Self-Harm

JCMSC fails to adequately protect children from self-harm, and therefore violates their constitutional rights. Youngberg, 457 U.S. at 307; Silva v. Donley County Texas, 32 F.3d 566, 1994 WL 442404, *5-7 (5th Cir. 1994) (unpublished). As a general matter, the Supreme Court has held that corrections officials must take reasonable steps to guarantee detainees' safety and provide "humane conditions" of confinement. Farmer v. Brennan, 511 U.S. 825, 832 (1994); Hare v. City of Corinth, 74 F.3d 633, 639 (5th Cir. 1996) (recognizing a duty to provide detainees with basic human needs including protection from harm). In addition, an official's failure to maintain adequate policies, procedures, and practices for the prevention of suicides may violate a detainee's due process rights. Silva, 32 F.3d 566 (holding sheriff's failure to establish suicide detection and prevention training for jail personnel, condoning *de facto* policy of sporadic cell checks, and absence of a policy for observing "at-risk" detainees may rise to deliberate indifference to known risk of suicide in detention settings).

Children confined at JCMSC are three times more likely to engage in self-injurious behavior than other children in detention facilities. Although the PbS national field average is 0.119, JCMSC's rate is 0.366. Despite this, the Division of Clinical Services ("Clinical Services"), a division of JCMSC that employs in-house qualified mental health professionals, has no meaningful input into the policies,

procedures, or practices surrounding mental health protocols for suicide prevention or attempts. Although Clinical Services is largely responsible for conducting psychological testing and evaluation, there is no evidence that children determined to have suicidal ideation receive a follow-up clinical visit from Clinical Services, or any other mental health care provider. In fact, JCMSC's policies and procedures expressly prohibit any intervention by Clinical Services regarding suicide interventions:

> We take all threats of suicide behavior or verbalization seriously. Mobile Crisis should be asked to intervene to determine and document which children are in need of acute care services and which are malingering. Mobile Crisis is trained in this area and it is the State Contractor to deal with these situations.
>
> *Under no circumstances are we to accept any recommendations from the Crisis Counselor that requires us to provide any level of supervision above what we classify as our routine supervision.*[51]

JCMSC also fails to protect children from self-harm by not appropriately assessing the physical plant for suicide risks. JCMSC has no policy or procedure requiring staff to identify these risks and provides no training to staff regarding the elimination of these dangers. There is no systematic suicide-proofing of the building, no education to detention staff regarding necessary precautions, and no plans to correct these risks. Facility staff should be made aware of how the physical plant's design creates an increased opportunity for suicidal behavior. For example, the enclosed location of shower sprinkler heads outside of the line of sight of detention staff present a specific suicide risk. Many of the rooms have fixtures, hardware, and construction elements, such as overhead air vent grates, that would support a suicide attempt.

The high rate of suicidal behavior, the lack of involvement of Clinical Services, and JCMSC's failure to appropriately engage in necessary suicide prevention in the physical plant, violate the constitutional rights of children housed there and substantially depart from generally accepted professional standards. See Youngberg, 457 U.S. at 324.

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[51] JCMSC Detention Policy IX-1: Mobile Crisis Notification (emphasis added). JCMSC contracts with the Mobile Crisis Unit for its detention center's emergency mental health services. The policy language apparently prohibits the Clinical Services personnel from providing crisis intervention, including for children on suicide watch.

VI. REMEDIAL MEASURES[52]

A. Due Process

JCMSC should immediately implement the following remedial measures to correct the due process deficiencies in its delinquency matters. These remedial measures address JCMSC's failure to provide timely and adequate notice of the charges, failure to protect children from engaging in self-incrimination without advising them of their Miranda rights and obtaining a waiver, failure to hold timely probable cause hearings following warrantless arrests and failure to provide adequate due process protections before transferring children to the adult criminal court.

1. Timely and Adequate Notice of Charges

a. JCMSC must provide children and their counsel with copies of the petition at the initial detention hearing. The notice should also include a sworn statement affirming that the allegations are true to the best of the petitioner's knowledge, ability, and belief.

b. When it is necessary to make changes to the charges before the adjudicatory hearing, JCMSC must provide notice of the final charges well in advance of the adjudicatory hearing, providing JDs with sufficient time to prepare for the hearing.

c. JCMSC must establish procedures to ensure that all Magistrates conduct detention hearings that are in compliance with due process. At minimum, this requires making a determination of probable cause prior to detaining a child.

2. Safeguards Against Self-Incrimination

a. JCMSC should ensure that probation officers appropriately advise children of their rights under Miranda prior to eliciting self-incriminating statements. At minimum, the court should explain the following to children:

   i. The role of a lawyer;
   ii. That defense attorneys can be appointed to eligible indigent children at no cost;

[52] This list of remedial measures provides broad guidelines for the type of changes required to begin addressing the problems identified in this letter. Reform will require a sustained commitment to institutional change, including a commitment to implement performance measures to ensure progress.

iii. Any statements made by the child regarding the alleged offense can be included in the probation report; and
iv. That the prosecutor or the Magistrate could use the child's statements in further proceedings, including disposition.

b. JCMSC must ensure that any waiver of children's rights is an informed waiver. JCMSC should ensure that children are notified of the rights they are waiving by speaking with the probation officer. Children must acknowledge their waiver in writing in order for the probation conference to proceed.

c. When a child has retained or appointed counsel, JCMSC should invite JDs to attend the probation conferences.

d. JCMSC should cease the practice of providing Visit and Contact forms to Magistrates prior to adjudicatory hearings.

e. JCMSC should ensure that children are not called by the government as witnesses in their own adjudicatory or transfer hearings.

3. Timely Probable Cause Determinations

a. To comply with the Fourth Amendment, JSMSC must ensure that Magistrates make a probable cause determination – that there is sufficient probable to believe that any child arrested without a warrant has committed the alleged delinquent act – within 48 hours of any warrantless arrests.

b. JCMSC must implement a formal system in which at least one Magistrate, one JD, one ADA, and one probation officer is available for several hours each weekend, three-day weekend, and holiday to hold probable cause and detention hearings.

4. Adequate Transfer Hearings

a. JCMSC must require adequate hearings before waiving jurisdiction and ordering transfer of a child's case to adult court. In accordance with due process. JCMSC Magistrates must ensure the following occurs at transfer hearings:

i. The ADA presents evidence in support of the petition for transfer;
ii. Children have a right to an attorney;
iii. Children are provided the opportunity to introduce evidence on their own behalf;
iv. Children are protected from self-incrimination;

v. The Magistrate considers and makes findings about the child's involvement with the delinquent act alleged, the child's eligibility for an institution, the interests of the community, and the child's social factors.

b. Waiver should not depend solely upon the perception that the adult court is the most appropriate place for handling serious allegations of delinquency.

5. Other Due Process Safeguards

JCMSC should address the pre-Gault elements of its practices and procedures by ensuring that all stakeholders respect the due process rights of the children appearing on delinquency matters. JCMSC should also eliminate those factors that could further contribute to a pattern or practice of unconstitutional conduct. In particular, JCMSC should:

a. Encourage zealous advocacy by JDs. This may be accomplished by supporting further training of JDs;

b. Consider reorganizing the court structure so that the Chief Judge does not directly oversee the Juvenile Defender's Office;

c. Ensure that participants in the courtrooms show respect for the rights of the children appearing before the court, including swearing in all victims and witnesses before they testify and appropriately sequestering witnesses prior to testimony;

d. Establish a procedure for plea colloquies that is age-appropriate and clear to the child;

e. Arrange to have hearings properly recorded for rehearing motions or appeals;

f. Distribute available arrest tickets to JDs (and ADAs) earlier on the morning of the detention hearing;

g. Consider adopting a policy that prevents excessive bonds for children and reasonably assures the child's appearance for court;

h. Make summonses and other crucial court documents available in other languages for limited English proficient individuals; and,

i. Consider adopting a restitution policy that requires documentation and allows children time to review the requested amounts before ordering the child to pay restitution.

B. Equal Protection

Addressing issues of DMC in any jurisdiction is a challenging task that requires the focused commitment of stakeholders at all levels. It involves questioning the appropriateness and feasibility of long-standing practices, and raises uncomfortable questions as a jurisdiction tries to figure out how its practices have led to severely disproportionate results on minority children. JCMSC has started this process by engaging with the Anne E. Casey Foundation's JDAI initiative. JCMSC should continue this work by employing the following strategies to address its DMC issues.

1. Assess the extent and causes of DMC within JCMSC to inform and direct JCMSC's DMC reduction-efforts

a. Continue to collect data and information to determine where DMC occurs.

b. Assess the impact of JCMSC's policies, procedures, and programs on DMC levels at different decision-points. Involve community and other non-traditional partners in this process.

c. Engage in strategic planning to develop a strategy to address DMC, form a committee to execute the plan, and decide up-front how success will be determined.

2. Consider efforts that focus on direct services for children

a. Develop prevention/early intervention programs that proactively target youth who are at risk for delinquency but have not yet been adjudicated delinquent.

   i. Examples include family therapy, parent training, cognitive-behavioral treatment, mentoring, academic skills enhancement, afterschool recreation, vocational/job training, and wraparound services.

b. Further develop diversion programs that hold children accountable for their actions, but are used as an alternative to formal court processing. Refine race-neutral criteria for eligibility.

   i. Examples include community service, informal hearings, family group conferences, victim impact panels, victim-offender mediation, mentoring, teen courts, restitution, and other restorative justice strategies.

c. Continue developing pre-and post-adjudication alternatives to secure detention that allow children to access services in their community

    i. Examples include house arrest, day/evening treatment centers, intensive probation, shelter care, specialized foster care, and attendant or holdover care.

d. Encourage advocacy that will enable children to understand their legal rights and the juvenile court process. Provide materials explaining the process to children appearing before the court.

3. Consider efforts that provide training and technical assistance for JCMSC staff

a. Provide cultural competency/sensitivity training to raise staff's awareness about the subtle ways racial bias, conscious or unconscious, affect policy and practice.

b. Make culturally appropriate services and programming available.

c. Institute culturally competent staffing practices.

    i. Examples include having a diverse staff and employing appropriate interpreters and translators.

d. Train JCMSC staff about DMC.

e. Train staff on proper use of neutral decision-making tools.

4. Consider policy and procedural solutions to address DMC

a. Employ empirically-based, race-neutral, objective assessment tools at different decision points.

    i. Improve use of the Detention Risk Assessment Tool, by providing more credit for positive conduct and ensuring that staff uses the tool in a neutral manner.
    ii. Use a risk assessment instrument to evaluate a child's background and current situation in order to estimate the likelihood that the child will continue to be involved in delinquent behavior.

5. Evaluate efforts toward reducing DMC at regular intervals

C. Protection from Harm

1. Restraint Chair

a. Discontinue use of the restraint chair.

b. Discontinue use of administrative segregation for rules violation. Administrative segregation should only be used sparingly, as an emergency measure to control a child whose behavior poses an immediate risk of harm to himself or others, either at the child's request or the facility's assessment. Children who are placed in administrative segregation for behavioral reasons should be removed from segregation as soon as their behavior no longer poses an immediate risk of harm to themselves or others.

2. Pressure Point Control Tactics

a. Develop and implement written use of force policies and procedures that establish a graduated set of interventions that avoid the use of pressure point control tactics. Completely discontinue use of pressure point control tactics.

b. The use of force policies and procedures must emphasize that physical force should be used by staff only in exceptional circumstances when all other pro-active, non-physical behavior management techniques have been unsuccessful and the child presents a danger to himself or others. In the limited circumstances when physical force is appropriate, staff should employ only the minimum amount necessary to stabilize the situation and protect the safety of the involved juvenile or others.

c. Detention staff should be trained in non-physical, verbal interventions to de-escalate potential aggression from children.

d. Children who have been subjected to force or restraint should be assessed by a medical professional following the incident regardless of whether there is a visible injury or the child denies any injury.

e. Following all instances of force, supervisors should conduct a formal review of the incident to determine whether staff acted appropriately. The post-incident review should also be utilized to identify any training needs and debrief staff on how to avoid similar incidents through de-escalation.

3. Protection from self-harm

a. Develop a comprehensive suicide prevention program that incorporates meaningful input from the Division of Clinical Services.

b. Assess the physical plant to determine and address any potential suicide risks.

c. Place potentially suicidal children in rooms that are free of suicide hazards and not isolated. Maintain sufficient staffing levels to supervise children who require constant observation.

d. Provide regular follow-up assessments for children who are removed from suicide precautions. Mental health staff should conduct these assessments and establish individualized treatment plans for suicidal children that address relapse prevention and initiate a risk management plan.

e. Establish and maintain an adequate quality assurance program to measure compliance with the facility's suicide prevention program.

* * *

The constitutional deficiencies identified above can be remedied with the long-term commitment and engagement of JCMSC, key community stakeholders, and outside sources including, for example, DOJ's Office of Juvenile Justice and Delinquency Prevention and the Annie E. Casey Foundation. We look forward to exploring the assistance that sources, such as DOJ's Access to Justice Initiative, can offer to develop core competencies to address the problems revealed in our investigation. Immediately following the release of this Report, we will reach out to community stakeholders, national experts on juvenile justice reforms, and the organizations currently working with the Court to forge these solutions. Our aim is to build on the reforms that JCMSC has already started to put in place. We look forward to working with Judge Person and the wider Shelby County community, to reach our mutual goal of ensuring that the youth who appear before JCMSC receive their constitutionally guaranteed rights to due process, equal protection, and protection from harm.