

Report of the Task Force to Study the Restraint, Searches, and Needs of Youth in the Juvenile Justice System

Submitted to the Governor and the Maryland General
Assembly

December 30, 2016

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Task Force Members

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Appointed by the President of the Senate

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Appointed by the President of the Senate

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Delegate Keith Haynes
Democrat, District 44A, Baltimore City
Appointed by the Speaker of the House

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Background

The task force to study the restraint, searches, and needs of youth in the juvenile justice system was established through House Bill 1634 during the 2016 session of the Maryland General Assembly. The task force was charged with reviewing the current policies and practices of the Department of Juvenile Services (DJS/the Department) regarding shackling and strip searches; examining when, by whom, and for what purposes a youth in the custody of the Department of Juvenile Services is strip searched or shackled; determining the capital expenditures that are necessary to address issues regarding the restraint and searches of youth within the juvenile justice system; and making recommendations regarding changes in policies, practices, or capital expenditures that are necessary to address issues involving the restraint and searches of youth within the juvenile justice system. House Bill 1634 also required the task force to submit a report of its findings and recommendations to the Governor and the General Assembly on or before December 31, 2016.

The task force met seven times between September and December, 2016.¹ During the first five meetings, task force members heard testimony from DJS, presenters from national organizations specializing in juvenile justice issues, a developmental psychologist, an administrator of a Residential Treatment Center (RTC) in Maryland, and members of the public. During the final two meetings, task force members voted on recommendations submitted by DJS, the Maryland Office of the Public Defender and the Maryland Juvenile Justice Monitoring Unit, legislators, and advocacy organizations.

The findings and recommendations of the task force are contained in the following sections of this report. Minority comments are included at the end of each recommendation where applicable. A minority report (with included appendices) submitted by the Department of Juvenile Services on behalf of certain task force members is included in its entirety on page 45.

¹ All task force meetings were recorded and are available online.

Meeting one: <http://mgahouse.maryland.gov/mga/play/bc6da5ca-597b-4189-a142-f5b26a0210d7/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting two: <http://mgahouse.maryland.gov/mga/play/d4e06cca-848c-4211-a83e-751272bcf173/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting three: <http://mgahouse.maryland.gov/mga/play/0f4cb696-76cb-438b-bfab-0bb0d5285719/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting four: <http://mgahouse.maryland.gov/mga/play/c4d2f4dd-2396-4812-b7a8-19052c530aae/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting five: <http://mgahouse.maryland.gov/mga/play/6719480c-f937-4fe2-9aa9-9aaff3849604/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting six: <http://mgahouse.maryland.gov/mga/play/8cf967e7-bb5f-4569-99dd-3ab25e454891/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Meeting seven: <http://mgahouse.maryland.gov/mga/play/67fd3824-703c-4929-a186-0e02b8d6003f/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>

Findings

The Department provided the task force with its written policies governing admission to DJS facilities, transportation, restraints, and searches. The Department's policies on strip searches and mechanical restraints are applicable to all youth in DJS facilities. Youth held can range in age from 7 to 21 years old. Discussion of DJS policies among task force members led to the conclusion that youth are automatically strip searched at admission to a DJS facility and following visits inside facilities with their attorneys and family members. The content of the discussion also indicated that all youth who are transported by the Department's secure transportation unit are automatically mechanically restrained in shackles and handcuffs fastened to a belly chain by a black metal box. Youth in staff secure facilities and youth who are traveling for an earned home pass may be transported by the secure transportation unit, and thus mechanically restrained. The Department does not currently collect data on the number of strip searches conducted; what, if any, contraband is recovered specifically from strip searches; or on the utilization of secure transportation.

In subsequent meetings, DJS presented national standards on shackling and strip searches, as well as data and policies concerning transportation and strip searches from juvenile justice agencies in other states across the country. Presentations were delivered on national standards and the psychological effects and legal implications of strip searches and shackling, and a local practitioner discussed alternatives to automatic shackling of youth during transportation.

Documentation submitted to the task force by DJS and expert panelists is available at: <http://www.opd.state.md.us/JuvenileJusticeTaskForce.aspx>

Recommendations: Strip Searches

RECOMMENDATION 1:

A youth in a detention center or hardware secure program operated by the Maryland Department of Juvenile Services shall not be strip searched, except at admission, unless:

- (i) there is an articulated reasonable belief that the youth is concealing drugs, keys, or anything that can be used as a weapon, and**
- (ii) the search has been authorized by the facility superintendent, administrator, or their designee**

The task force heard from presenters who discussed research on the psychological harms that can be caused by strip searching youth. The task force also heard from a nationally recognized expert on standards for juvenile facilities who testified that a reasonable belief standard is consistent with several national juvenile correctional standards regarding strip searches.

The task force recognizes that there are two competing interests that must be accounted for when considering the use of strip searches within hardware secure² juvenile detention facilities and hardware secure juvenile placements. One interest is the need to avoid potential traumatization and the embarrassment caused by requiring youth to submit to a search without clothes by facility staff. The other interest is the need to keep youth and staff within the facility safe from dangerous contraband such as weapons and drugs.

Current DJS policy requires that all youth be strip searched upon admission to a DJS facility. The task force recommends curtailing the use of strip searches at admission for certain youth (see also Recommendation 3) and after youth have been admitted to a facility.

For situations other than when a youth is first admitted, the task force has adopted an “articulated reasonable belief” standard that is similar to those contained in national standards.

Recommendation 1 requires that the ultimate decision to conduct a strip search, other than at admission, rests with the head of the facility or that person’s designee.

Vote: Pass 10-9

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. O’Neal (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

² Hardware secure is the equivalent to maximum security. Hardware secure facilities are locked and fenced.

Against: Sen. Ready, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. McLeod (SOA), Ms. McWilliams (DJS)

Minority Comments: (excerpted from a minority report submitted by DJS on behalf of certain task force members, available in its entirety on 45).

Recommendation #1 would prohibit a visual body search unless there is a reasonable belief that the child is concealing drugs, keys or anything that could be used as a weapon. This recommendation is extremely dangerous as it fails to address the many other types of contraband that can destabilize a facility and put youth and staff at significant risk. Moreover, #1 and #2 are substantially similar to the department's recommendations and only differ by limiting the type of contraband that would be subject to a search.

Limiting the ability to do a visual body search when there is a belief that a youth has drugs, keys or a weapon is extremely difficult to implement. It would require that staff have a reasonable belief as to actually what item the youth is concealing – as opposed to a belief that the youth is concealing something. For example, it would be impossible for staff to know an item they saw exchanged between a family member and a youth at a visitation is one of the prohibited items unless the youth is actually searched.

Furthermore, there are many other types of contraband that can be concealed that would put the youth's safety and safety of others at substantial risk. Pursuant to recommendation #1 and #2, a search would NOT be able to be done if there was a reasonable belief a youth was concealing 1) matches (prior to a consistent application of DJS policies there were incidents of youth setting fires with matches); 2) lighters; 3) cigarettes; 4) rope/string; 5) electronic devices such as cell phones or SIM cards; 6) food items or candy that is concealing a weapon such as a razor blade; and 7) anything that could be used for self-injurious behavior.

The department's recommendations seek to employ searches based on reasonable belief, just as the majority's. However, the significant difference is the department's reform is to permit a visual body search when there is a reasonable belief the youth is concealing any type of contraband rather than limiting the ability to search to situations when there is a belief drugs, keys or weapons are being concealed. The department is committed implementing reforms aimed at limiting visual body searches, except admission searches, to circumstances when there is reasonable belief the youth is concealing contraband.

This recommendation was adopted by a 10 -9 vote, which clearly indicates a lack of meaningful consensus. Additionally, with this particular recommendation, many Task Force members (including some who were in the majority), did not understand the voting process and were not clear as to which recommendation the vote ratified.

The Maryland Sheriff Association (MSA) has additional concerns. They oppose any recommendations that would require some level of individualized suspicion of potential harm before either full body searches or mechanical restraints are employed. It is

important that security measures be applied consistently and not be subject to the discretion of individual security officers or deputy sheriffs. Individualized decision requirements assume that the officer present has enough training and background information to make an informed assessment; a failure to provide adequate security could prove to be disastrous and result in injuries to other juvenile offenders and to public safety officers.

The Juvenile Services employee representatives share in these concerns, as well as the potential for claims of disparate impact and abuse of discretion that are invited by individualized treatment. Further, this process undermines the standard routine practices needed to insure order and puts unnecessary liability risk on individual officers and employees.

RECOMMENDATION 2:

A youth in a staff secure program shall not be strip searched at any time unless:

- (i) there is an articulable reasonable belief that the individual is concealing drugs, keys, or anything that can be used as a weapon and**
- (ii) the search has been authorized by the facility superintendent, administrator, or their designee**

The calculus used at a staff secure³ facility when weighing whether or not to strip search a youth should be different from that used to make such a determination at a hardware secure detention center. When a youth is placed by the juvenile court in a staff secure facility, the court has already made a determination that the youth's risk level does not warrant placement in a hardware secure facility. Recommendation 2 takes into account the court's determination about the level of security to which a youth should be subjected.

At the same time, the task force took in account that circumstances can arise under which a youth in a staff secure facility may need to be strip searched. The task force recommends including the same "articulable reasonable belief" standard in Recommendation 2 that is in Recommendation 1 and the same requirement that a high ranking official at the staff secure facility must approve any decision to perform a strip search.

[Note: Recommendations 1 and 2 were combined and voted on together. For the vote count see Recommendation 1 above.]

Minority Comments: See Minority Comments, Recommendation 1, above.

³ Staff secure facilities are classified at a lower security level and are less restrictive than hardware secure (maximum security) facilities.

RECOMMENDATION 3:

A youth in a detention center operated by the Maryland Department of Juvenile Services shall not be strip searched at admission if the sole basis for detention is:

- (i) a failure to appear**
- (ii) a CINS complaint**
- (iii) a status offense**
- (iv) a traffic violation**
- (v) the youth's parent is unable or unwilling to take the youth home**

The task force is aware of the potential for trauma created by strip searching youth. Whereas strip searches without an articulated reasonable belief are allowed at admission as discussed above, the task force listed several exceptions where a youth may not be searched during the admission process, unless there is an articulated reasonable belief.

Such exceptions concern youth who are in detention for reasons or under circumstances that do not indicate that they pose a danger to staff or other youth in the detention center or that they are likely to possess weapons or drugs. For these youth, the task force recommends that they should not be strip searched at admission, unless there is an articulated reasonable belief.

Vote: 10-9

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. O'Neal (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Against: Sen. Ready, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. McLeod (SOA), Ms. McWilliams (DJS)

Minority Comments: (excerpted from a minority report submitted by DJS on behalf of certain task force members, available in its entirety on page 45).

While the majority of the members of the Task Force were seeking to limit searches, some of the recommendations may have been guided by inaccurate information.

For example, the department is not permitted to detain youth for a CINS (child in need of supervision) complaint, non-incarcerable traffic violation, or a status offense⁴. Generally, a CINS complaint and status offense include youth who have runaway, are truant from school, or have committed an offense that would not be a crime if committed by an adult.

⁴ See, Md. Code, Courts and Judicial Proceedings, §3-8A-01 and §3-8A-15.

Some other of the recommendations, such as prohibiting visual body searches after a failure to appear or a incarcerable traffic violation, put youth and staff at risk and create significant gaps in safety and security protocols.

The department has no information as to what the youth may be concealing when brought to a detention center by law enforcement, and as a result, there is a significant risk of contraband entering the facility if youth are not searched. In fact, introducing a youth that has not been searched into a secure facility would not only endanger that youth, but all others in the facility who have undergone the search.

If this recommendation holds, the department would be required, if unable to search the youth, to hold them in a separate area from the general population. This would require a significant capital expenditure to create space in each of the seven DJS detention facilities.

RECOMMENDATION 4:

The Maryland Department of Juvenile Services shall provide youth with a disposable paper gown when conducting all strip searches.

Task force recommendations do not encompass a system-wide ban on strip searches. To attempt to mitigate the potential traumatic impact of strip searches, the task force unanimously recommends that youth be provided with a paper gown to minimize the amount of time their private parts are in view of staff.

Vote: Pass 19-0

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Sec. Abed (DJS), Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. O'Neal (CPAC), Mr. McLeod (SOA), Ms. McWilliams (DJS), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

RECOMMENDATION 5:

The Maryland Department of Juvenile Services shall develop procedures to direct staff to utilize a graduated approach when conducting an articulated reasonable belief search (utilizing other search procedures such as processing with youth, a pat down search or wand search) before employing a strip search.

Currently, in addition to youth being strip searched upon entry, strip searches are sometimes performed within facilities when staff determine that youth may be harboring contraband. In line with current Department of Juvenile Services' practices within DJS facilities, the task force recommends that verbal counseling and less invasive search

alternatives be exhausted before DJS management and staff proceed to employ a strip search.

Vote: Pass 12-7

For: Sen. Ramirez, Sen. Ready, Del. Haynes, Sec. Abed (DJS), Mr. Akbar (ACY), , Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. McLeod (SOA), Ms. McWilliams (DJS)

Against: Sen. Muse Del. Jalisi, Del. Proctor, Mr. DeWolfe (OPD) Mr. O'Neal (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Minority Comments: The minority supported an alternative proposal to Recommendation 5 which further restricted the use of strip searches. The alternative recommendation limited the circumstances under which a strip search could be performed and allowed youth to remain in their underwear or under a smock throughout the duration of strip search.

RECOMMENDATION 6:

The Maryland Department of Juvenile Services shall collect data to capture when and under what circumstances there is an articulated reasonable belief to conduct a strip search and what, if any, contraband or prohibited items are recovered.

The Department of Juvenile Services does not currently collect data related to strip searches. In order to provide information regarding frequency, circumstances and results of strip searches, the task force recommends that DJS begin collecting data on their utilization.

Vote: Pass 10-9

For: Sen. Ready, Del. Haynes, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. McLeod (SOA), Ms. McWilliams (DJS)

Against: Sen. Muse, Sen. Ramirez, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. O'Neal (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Minority Comments: The majority recommendation requires only that DJS collect data on when and under what circumstances there is an articulated reasonable belief to strip search and what, if any, contraband is recovered. This recommendation does not require DJS to collect detailed information necessary to evaluate whether the Department's use of strip searches is appropriate, effective and narrowly tailored to be used only when absolutely necessary.

The Department should be required to collect and place in the juvenile's file the following information: (1) the name, gender, race and age of the child subject to the strip search, (2) the date, time and location of the strip search, (3) the name and gender of any persons conducting or assisting in the search, (4) the name of the person authorizing the search, (5) a detailed statement of the articulated reasonable belief for the strip search, and (6) a detailed description of each item recovered from the youth and from where each item was recovered. These data collection requirements were contained in recommendations proposed by OPD and JJMU (see Addendum A, page 28).

Additionally, this recommendation does not include any requirement that DJS report the data it collects regarding the use of strip searches. This data should be aggregated and reported annually (without any identifying information) to the governor and the legislature.

RECOMMENDATION 7:

On or before December 31, 2017, the Maryland Department of Juvenile Services shall submit a report to the General Assembly providing an update on the implementation of the task force recommendations.

In order to assess the Department of Juvenile Services' progress in operationalizing taskforce recommendations and to update the General Assembly, the task force recommends that DJS submit a report to the legislature on the agency's implementation of task force recommendations.

[Note: Recommendations 6 and 7 were combined and voted on together. For the vote count see Recommendation 6 above.]

Minority Comments: To increase accountability, the Department should report annually—rather than on a one-time basis—on its efforts to implement task force recommendations to provide for ongoing evaluation.

Recommendations: Mechanical Restraints

RECOMMENDATION 1:

The Maryland Department of Juvenile Services (the Department/DJS) will evaluate reorganizing the secure transportation unit. Currently, the Department operates one statewide unit that is responsible for most of the youth transportation needs across the state. It is DJS policy that all transportation unit transports are secure, meaning mechanical restraints are used. The Department shall evaluate the ability to create a separate non-secure transportation unit for staff secure programs. It is anticipated that a budget appropriation for equipment and staff will be required to implement this recommendation.

Youth in staff secure facilities have not been committed by the courts to the maximum security equivalent level of placement (hardware secure) and therefore should not be subject to the secure transportation practices routinely utilized when transporting youth to and from hardware secure facilities. Youth in staff secure placements can currently be transported without mechanical restraints when that transport is done by a case manager or staff from the facility. However, this option is not always available and, in these cases, youth are securely transported in mechanical restraints by the DJS transportation unit.

In an effort to ensure that youth ordered by the courts to be held in staff secure facilities (a lower security level than the locked and fenced hardware secure facilities) are not mechanically restrained during transportation, the task force recommends that the Department evaluate the creation of a separate non-secure transportation unit.

Vote: Pass 11-8

For: Sen. Ramirez, Sen. Ready, Del. Haynes, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

Against: Sen. Muse, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Minority Comments: Recommendations 1-3 were voted on together. Recommendation 1 does not guarantee any curtailment or limitations on the use of secure transportation. Under this recommendation, youth in staff secure facilities would not necessarily be transported without mechanical restraints. Youth in staff secure facilities have not been committed by the courts to the maximum security equivalent level of placement (hardware secure). Therefore, they should not be automatically subject to the secure transportation practices routinely utilized at hardware secure facilities without an articulated reasonable belief that an individual youth will flee or pose an imminent danger to self or others. Alternative recommendations proposed by OPD/JJMU sought to prohibit the default

utilization of mechanical restraints during transportation of youth to and from staff secure facilities (see Addendum A, starting on page 28).

RECOMMENDATION 2:

The Department will work with private providers to transition non-secure transportation services to the provider.

DJS contracts with private providers that operate staff secure facilities (a lower security level than locked and fenced hardware secure facilities) in the state. In order to ensure that youth are transported without mechanical restraints in accordance with the lesser level of security of the private facility in which they have been placed, the task force recommends that DJS work with private providers to transfer responsibility for transportation services to and from staff secure private facilities to the providers.

[Note: Recommendations 1, 2, and 3 were combined and voted on together. For the vote count, see Recommendation 1 above.]

Minority Comments: Recommendations 1-3 were voted on together. Task force members who voted against Recommendation 2 support the transition of non-secure transportation services from DJS to the private providers who operate facilities where DJS youth are held. However, Recommendations 1-3 were voted on as a single package and the limitations of Recommendations 1 and 3 outweigh the strengths of Recommendation 2.

RECOMMENDATION 3:

The Department shall develop procedures for out-of-state transports. Specifically, the procedures shall include factors to consider when requiring transport for out-of-state placements, such as a youth's verbal indications of AWOL, behavioral health, suicide ideations, prior AWOLs, and aggressive behavior.

Out-of-state secure ground transportation can require that youth remain in mechanical restraints for extended periods of time. The task force heard testimony from the mother of a girl in the custody of the Department of Juvenile Services who was continuously mechanically restrained for 20 hours as she was transported overland from Maryland to Florida. The task force recommends that DJS develop procedures for out-of-state secure transportation which take into consideration certain factors.

[Note: Recommendations 1, 2, and 3 were combined and voted on together. For the vote count, see Recommendation 1 above.]

Minority Comments: Recommendations 1-3 were voted on together. Recommendation 3 does not delineate concrete limitations on the use of out-of-state secure ground transportation, or specify how the factors listed will be considered in the procedures that will be developed for out-of-state transports.

RECOMMENDATION 4:

The Department shall eliminate the use of secure transports when transporting a youth on an earned home pass or for release to the community.

Currently, if a parent, guardian, or case manager is unable to travel to a facility to pick up a youth who has earned a home pass, the youth is transported in mechanical restraints by the Department of Juvenile Services. The task force unanimously determined that youth should not be mechanically restrained during transportation to and from earned home passes, or during transportation for release to the community.

Vote: Pass 19-0

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Sec. Abed (DJS), Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Lee (CPAC), Mr. Stevenson (DJS), Ms. McWilliams (DJS), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

RECOMMENDATION 5:

Use of mechanical restraints shall be prohibited for a time period of more than eight hours. A time period of five minutes without mechanical restraints must be provided for every four hours a youth is in mechanical restraints.

The use of mechanical restraints on youth should be minimized. The task force heard testimony from the mother of a girl in the custody of the Department of Juvenile Services who was continuously mechanically restrained for 20 hours as she was transported overland from Maryland to Florida. The task force recommends that the use of mechanical restraints during transportation be limited to a maximum of eight hours. Additionally, after four hours of continuous mechanical restraint, the youth should be given a five minute period without mechanical restraints.

Vote: Pass 10-8 (1 abstention)

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Against: Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

Abstain: Sen. Ready

Minority Comments: (excerpted from a minority report submitted by DJS on behalf of certain task force members, available in its entirety on page 45).

The Minority group is not opposed in principle to permitting a period of five minutes without mechanical restraints for every four hours a child is in mechanical restraints. In most circumstances a youth is not transported for a period of time that exceeds four hours. However, the Minority group believes there should be some exception for exigent circumstances. For example, a youth's repeated verbal indication of absconding or a youth's extreme aggressive behavior may make it very unsafe for the youth, staff and community to remove restraints during transport. In addition, there could be unanticipated problems with traffic which prevent the vehicle from being able to access a secure location, such as a police station, to meet this requirement.

The Minority group is very concerned about limiting the use of mechanical restraints for a time period of more than eight hours without any allowance for individualized concerns. It is unclear what steps the department should employ if a transport must exceed eight hours. Further, the department has committed to providing specific guidance on circumstances which may require exceptions to the is recommendation.

RECOMMENDATION 6:

A youth in mechanical restraints must always have a hand free when using the bathroom.

Youth are mechanically restrained in shackles and handcuffs fastened to a belly chain with a black metal box during secure transport. Under current practice, a youth using the bathroom during secure transportation has the black box removed, disconnecting the handcuffs from the belly chain. Youth remain in handcuffs and leg irons when using the bathroom. The task force unanimously agreed that staff must ensure that youth in mechanical restraints always have one hand free from handcuffs when using the bathroom.

Vote: Pass 19-0

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Sec. Abed (DJS), Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Lee (CPAC), Mr. Stevenson (DJS), Ms. McWilliams (DJS), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

RECOMMENDATION 7:

The Department shall not use mechanical restraints for convenience or discipline. This recommendation is consistent with current Maryland state law and the Department's existing practices.

The use of mechanical restraints should only be used when necessary for the safety and security of the youth or the community. This recommendation reinforces what state law and the Department's policies currently stipulate.

Vote: Pass 11-7 (1 abstention)

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Mr. Lee (CPAC), Mr. Moroney (JJMU)

Against: Sec. Abed (DJS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

Abstain: Mr. Stansbury (NAACP)

RECOMMENDATION 8:

To mitigate the need for secure transportation, the court may permit the youth to appear by video conference for court hearings. It is anticipated that the Department will work with stakeholders, including the State's Attorney's Association, the Office of the Public Defender, and the Courts to evaluate the use of video conferencing technology.

Currently, youth transported by the DJS secure transportation unit traveling to and from court hearings are mechanically restrained during transportation. In an effort to reduce the utilization of secure transportation, the task force recommends that the court permit youth to appear via video conferencing for court hearings.

Vote: Pass 11-7 (1 Abstention)

For: Sen. Ready, Del. Haynes, Del. Proctor, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

Against: Sen. Muse, Del. Jalisi, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Abstain: Sen. Ramirez

Minority Comments: For reasons stated below the minority strongly opposes this recommendation.

The recommendation allows youth to avoid being unnecessarily shackled, only so long as they give up their constitutional rights to:

- (1) effective assistance of counsel (Sixth Amendment to the United States Constitution);
- (2) confront their accusers (Sixth Amendment); and
- (3) due process of law (Fifth Amendment).

The minority believes this recommendation will face constitutional challenges in every instance.

The National Juvenile Defender Center (NJDC) published a 2016 memorandum summarizing relevant case law and research related to the use of videoconferencing. The NJDC memo (1) highlights problems with the solemnity and effectiveness of video proceedings, (2) demonstrates how videoconferencing harms the attorney-client relationship and inhibits advocacy, (3) raises serious constitutional concerns regarding the Sixth Amendment right to confrontation, and (4) shows how videoconferencing leads to disparate outcomes for those subjected to them. (See the NJDC memo, Addendum B, on page 33.)

According to the NJDC publication, “judges acknowledge that juveniles whose hearings are held via video are less likely to have fair and dignified hearings than their in-person counterparts.”⁵ The report also notes that states across the country are moving away from the utilization of videoconferencing in juvenile court proceedings. For example, the Kansas Supreme Court’s Blue Ribbon Commission excluded juvenile proceedings from its recommendation to adopt the use of video technology in state court.⁶ The Florida Supreme Court determined that the use of videoconferencing amounted to “robotic justice” that “limits judicial decision making and imposes unreasonable barriers to client representation.”⁷ Finally, the Illinois Court of Appeals noted that videoconferencing can impede “the ability for immediate and unmediated contact with counsel.”⁸

Recommendation 6 could create serious barriers to ensuring that youth and their lawyers have direct contact during court proceedings. Lawyers representing youth held in facilities across the state would have to travel between various locations within a short window of time. Under such circumstances, it may be logistically impossible for lawyers to appear alongside each of their clients during proceedings held via videoconferencing. These challenges would be particularly pronounced in jurisdictions, like Wicomico County, where there is just one juvenile public defender and juvenile court is held one day a week.

⁵ National Juvenile Defender Center, “Videoconferencing Research Summary.” October, 2016. Page 1.

⁶ Id., page 4.

⁷ Id., page 2.

⁸ Id., page 3.

RECOMMENDATION 9:

When a youth is placed in mechanical restraints during transport, written documentation of the following information shall be placed in the youth's case file:

- (i) Name, gender, race, and age of the youth being placed in mechanical restraints,**
- (ii) Travel date, start and end times, and address of origin and destination,**
- (iii) Name and job title of the person who articulated the reasonable belief,**
[The immediate applicability of this provision is likely nullified by the task force's decision not to adopt an alternate recommendation concerning the need for articulable reasonable belief prior to mechanically restraining a youth.]
- (iv) Name of the superintendent or administrator or their designee that approved the use of mechanical restraints** *[The immediate applicability of this provision is likely nullified by the task force's decision not to adopt an alternate recommendation concerning the need for articulable reasonable belief prior to mechanically restraining a youth.]*
- (v) Detailed statement of the articulated reasonable belief for the use of mechanical restraints** *[The immediate applicability of this provision is likely nullified by the task force's decision not to adopt an alternate recommendation concerning the need for articulable reasonable belief prior to mechanically restraining a youth.]*

The Department of Juvenile Services does not currently collect data related to the routine use of mechanical restraints during transportation. The task force agreed that the Department should begin collecting data on the use of mechanical restraints during transportation.

Vote: Pass 10-9

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Against: Sen. Ready, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

RECOMMENDATION 10:

Annually on or before December 31, the Department shall submit a report to the General Assembly providing an update on the implementation of the task force recommendations. No confidential information should be contained in the report.

The task force unanimously agreed that the Department should be held accountable to report on its efforts to implement task force recommendations.

Vote: Pass 19-0

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Sec. Abed (DJS), Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Lee (CPAC), Mr. Stevenson (DJS), Ms. McWilliams (DJS), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Recommendations: Related Provisions

RECOMMENDATION 1:

Admission to a secure detention facility should not be permitted for youth under the age of 13.

Currently, youth between the ages of 7 and 21 can be held in DJS facilities. In FY 2015, there were 94 youth under the age of 13 admitted to DJS maximum security detention centers, 87% of whom were African-American.⁹ Youth under the age of 13 should not be subjected to the potentially traumatizing practices of strip searches and mechanical restraints. The task force recommendation is that youth under the age of 13 should not be held in a maximum security detention facility.

Vote: Pass 11-8

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Ms. Henderson (AFSCME Maryland), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Against: Sen. Ready, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

RECOMMENDATION 2:

Any changes in the Maryland Department of Juvenile Services' policies and procedures should be reviewed to determine appropriate staffing levels. Compensation levels for all DJS employees should be reviewed for a possible upgrade in order to improve recruitment and retention.

The task force voted unanimously to recommend that DJS staffing and compensation levels be evaluated to ensure DJS is properly resourced to carry out the recommendations of the task force.

During the task force hearings, attention was drawn to a number of factors which may have adverse effects on recruitment and retention of staff at the Department of Juvenile Services including an assertion that DJS workers must work for 30 years to earn full retirement benefits while state corrections workers earn full retirement benefits after 20 years of service. Several task force members expressed concern at this evident disparity.

Vote: Pass 19-0

⁹ DJS Data Resource Guide, FY 2015, available at: http://djs.maryland.gov/Documents/2015_Full_DRG.pdf (p. 102)

For: Sen. Muse, Sen. Ramirez, Sen. Ready, Del. Haynes, Del. Jalisi, Del. Proctor, Sec. Abed (DJS), Mr. Akbar (ACY), Mr. DeWolfe (OPD), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Lee (CPAC), Mr. Stevenson (DJS), Ms. McWilliams (DJS), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

RECOMMENDATION 3:

Maryland Department of Juvenile Services policies should be made public.

The task force recommends that DJS policies (including those governing shackling and strip searches) be made public to promote transparency and accountability.

Vote: Pass 10-9

For: Sen. Muse, Sen. Ramirez, Del. Haynes, Del. Jalisi, Del. Proctor, Mr. Akbar (ACY), Mr. DeWolfe (OPD), Mr. Lee (CPAC), Mr. Moroney (JJMU), Mr. Stansbury (NAACP)

Against: Sen. Ready, Sec. Abed (DJS), Capt. Hemmeain (DPSCS), Ms. Henderson (AFSCME Maryland), Dr. Ito (DJS), Ms. Kruger (MSA), Ms. Lee (GOC), Mr. Stevenson (DJS), Ms. McWilliams (DJS)

Presenter Biographical Notes

Presenters on Strip Searches

Mr. John Irvine, Director of the Office of Research and Evaluation at the Maryland Department of Juvenile Services

John Irvine is the Director of the Office of Research and Evaluation at the Maryland Department of Juvenile Services. The office manages all agency data reporting, research, and program evaluation projects, and insures that policy and programming are evidence based, and reflect best practice. He has served in Maryland government for 15 years at DJS and DHR, with a focus on strategic planning, performance measurement, program and policy evaluation, and has coordinated practical research initiatives with academic and other research partners, including the University of Maryland Institute for Innovations and Implementation, and the Annie E. Casey Foundation. Mr. Irvine has led agency implementation of StateStat, Managing for Results, and other key performance and accountability initiatives.

Ms. Dana Shoenberg, Esq., Visiting Professor, Bronfein Family Law Clinic, University of Baltimore School of Law

Dana Shoenberg teaches in the Bronfein Family Law Clinic, where students represent low-income clients in family law matters such as youth custody, divorce, youth support and domestic violence protective orders. Students also engage in law reform and education, including projects related to juvenile justice.

Before joining the faculty in 2015, Ms. Shoenberg served as Deputy Director of the Center for Youth's Law and Policy (CCLP), where she worked with state and local juvenile justice systems across the country to reduce racial and ethnic disparities, reduce unnecessary incarceration, and improve conditions of confinement. During her time at CCLP, she helped manage national juvenile justice reform initiatives, co-authored standards for conditions of confinement in juvenile detention, and conducted professional trainings on topics such as sexual misconduct prevention, addressing the school to prison pipeline, rights of confined youth, LGBTQI youth in the juvenile justice system, reducing detention of probation violators, and court systems' responsibilities to limited English proficient youth and families. From 2012-2014, she also taught a Juvenile Justice seminar as an adjunct professor at American University's Washington College of Law. Ms. Shoenberg was an instructor in the Certificate Program in Reducing Racial and Ethnic Disparities with Georgetown University's Center on Juvenile Justice Reform from 2013-2015.

Mr. Mark Soler, Esq., Executive Director, Center for Children's Law and Policy

Mark Soler is the Executive Director of the Center for Children's Law and Policy. From 1978 until February, 2006, Mark was Senior Staff Attorney, Executive Director, then

President of the Youth Law Center, a national public interest law firm. At the Youth Law Center, he and his colleagues worked in more than 40 states on juvenile justice, child welfare, health, mental health, and education issues, and litigated successfully in 16 states on behalf of children whose rights have been violated in juvenile justice and child welfare systems. He has written more than 20 articles and book chapters on civil rights issues and the rights of children, and has taught at Boston College Law School, the Washington College of Law at American University, Boston University School of Law, the University of Nebraska Law School, and San Francisco State University. He has received awards for his work from the American Psychological Association, American Bar Association, Alliance for Juvenile Justice, and Office of Juvenile Justice and Delinquency Prevention. Mr. Soler graduated from Yale University and Yale Law School.

Ms. Jessica Feierman, Esq., Associate Director, Juvenile Law Center

Jessica Feierman joined Juvenile Law Center in 2006. Jessica engages in litigation and amicus efforts on a wide variety of subjects, including juvenile life without parole, institutional conditions, and adult sentencing. With Juvenile Law Center Deputy Director and Chief Counsel Marsha Levick, Ms. Feierman co-authored the lead child advocates amicus briefs in *Graham v. Florida*, where the U.S. Supreme Court struck life without parole sentences for juveniles convicted of non-homicide offenses under the Eighth Amendment; *Safford v. Redding*, in which the U.S. Supreme Court held a school strip search unconstitutional; and *J.D.B. v. North Carolina*, where the U.S. Supreme Court ruled that a juvenile's age is relevant to the Miranda custody analysis under the Fifth Amendment.

Ms. Feierman also engages in policy advocacy and public education on the juvenile justice and child welfare systems, with a particular focus on the impact of trauma and adolescent development on juvenile and child welfare policies, and on the educational obstacles and opportunities facing court-involved youth. Prior to joining Juvenile Law Center, she was a litigation fellow at the ACLU National Prison Project, where she litigated prison conditions cases in federal court. From 2001-2003, Jessica was a teaching fellow in the Georgetown University Law Center's Street Law in the Community Program. From 2000-2001, she served as a law clerk to the Honorable Warren J. Ferguson on the Ninth Circuit Court of Appeals. Ms. Feierman is a graduate of Wesleyan University and the University of Pennsylvania Law School, and was awarded an LLM in advocacy from Georgetown University Law Center.

Presenters on Mechanical Restraints

Mr. John Irvine, Director of the Office of Research and Evaluation at the Maryland Department of Juvenile Services

(See description on page 24.)

Ms. Maureen McGuire, LCSW-C, Director, The Jefferson School (Jefferson, MD)

Maureen McGuire has been working with youth since graduating with a master's degree in social work from the University of Maryland in 1995. She has focused on working in clinical mental health in a variety of settings such as inpatient, outpatient, group home and Residential Treatment Centers (RTC). The last 15 years she has been with the Sheppard Pratt Health system at both the Eleanor and Berkeley Mann RTC and now as the Director of The Jefferson School located in Frederick, Maryland. The Jefferson School has 53 residential beds and 20 day students. The youth are placed in the RTC by families, DSS, DJS and local Core Service Agencies from across the state. All RTC youth meet medical necessity for RTC based on their psychiatric illness. Most youth have histories of trauma including but not limited to neglect, emotional abuse, sexual abuse and physical abuse. The youth in the program typically struggle with problematic behaviors such as aggression, sexual acting out, self-injury, impulsivity and substance abuse. The Jefferson School employs CPI (Crisis Prevention Institute) nonviolent crisis intervention techniques and DBT (Dialectical Behavioral Therapy) to treat these behaviors and prepare youth for successful transition back to their communities and families. Ms. McGuire is dedicated to rehabilitating youth and helping them achieve their lives worth living.

Ms. Mary Ann Scali, Esq., Deputy Director, National Juvenile Defender Center (NJDC)

Mary Ann Scali has been at NJDC since 2000 and has worked on juvenile indigent defense issues for over 15 years. As acting executive director, she oversees the delivery of juvenile defense training, facilitates and writes state assessments of juvenile indigent defense services, coordinates and participates in numerous cross-disciplinary reform efforts, and manages a variety of projects with NJDC staff. Prior to working at NJDC, Ms. Scali was a social worker and an attorney in the juvenile division of the Office of the Public Defender in Baltimore, Maryland. After completing her undergraduate degree at the College of the Holy Cross, she spent two years teaching at a boys' high school in Pohnpei, Micronesia. Mary Ann also worked for a year at the Jesuit Refugee Service in Rome, Italy, and spent a year teaching Baltimore City boys at the Baraka School in Nanyuki, Kenya. Ms. Scali earned her J.D. and M.S.W. from Loyola University Chicago where she was a Civitas YouthLaw Scholar and co-founder of the Public Interest Law Reporter.

Dr. Jennifer Woolard, Co-Director of Graduate Program in Developmental Science, Georgetown University

Jennifer Woolard began her career at the National Victims Resource Center. While obtaining her doctoral degree in developmental and community psychology at the University of Virginia she also served as a victim-witness volunteer in the county police department, a staff member to the Virginia Commission on Family Violence Prevention and a consultant with Virginians Against Domestic Violence (now Virginia Sexual and Domestic Violence Action Alliance). She then joined the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice and became an assistant professor at the

University of Florida's Center for Studies in Criminology and Law. In 2002 she joined the psychology faculty at Georgetown University where she serves as co-director of their graduate program, supervising the Human Development and Public Policy track. Her research and action laboratory, the Georgetown Community Research Group, examines how individuals and families interact with systems in communities, including how first responders and veterans receive mental health treatment. Her Center for Research on Adolescence, Women, and the Law concentrates on care and control systems, including the juvenile and criminal justice systems and schools. Projects examine how youth and parents understand the right to remain silent, the right to an attorney, and the right to a trial. Dr. Woolard has testified as an expert before federal and state legislatures as well as in criminal cases. She has presented her research findings to a wide variety of academic, legal, and policy audiences, and won several awards for teaching excellence.

ADDENDUM A

Recommendations submitted by OPD and JJMU

OPD/JJMU RECOMMENDATIONS REGARDING STRIP SEARCHES

Definitions

- a) Admission – accepting and processing of a child who is placed in the care and custody of the Department by the court or a department intake officer for detention, shelter care or placement in a hardware secure or staff secure program.
- b) Detention center - a place for the temporary care of children who, pending court disposition, require secure custody for the protection of themselves or the community in physically restricting facilities.
- c) Hardware secure program - a program that provides a physically restrictive environment for behavior management and treatment; the facility must be locked to prevent escape and have either a perimeter fence surrounding the facility or an outside-fenced recreation area.
- d) Psychiatric facility – a facility operated by the Maryland Department of Health and Mental Hygiene, or a Residential Treatment Center or other program operated primarily to treat children with severe psychological or psychiatric disorders.
- e) Staff secure program - a residential program that provides for behavior management and treatment that is secured by staff.
- f) Strip search – a visual search only, during which a child is required to remove all of their clothing and staff does not touch the child being searched. Youth shall wear a disposable paper gown from when they take off their clothes until the visual search is conducted, and afterwards until they are provided clothing.

Strip Searches of Children in the Juvenile Justice System

- a) Except as provided in subsection (b) and (c), a child in a detention center or hardware secure program operated by the Maryland Department of Juvenile Services shall not be strip searched, except at admission, unless:
 - i) there is an articulated reasonable belief that the child is concealing drugs, keys or anything that can be used as a weapon, and
 - ii) the search has been authorized by the facility superintendent, administrator or their designee.

- b) a child transferred from a detention center or hardware secure program shall not be strip searched upon admission to another detention center or hardware secure program if the child has remained under the direct and continuous supervision of department staff during the transfer.
- c) A child in a detention center operated by the Maryland Department of Juvenile Services shall not be strip searched at admission if the sole basis for detention is:
 - i) failure to appear,
 - ii) a CINS complaint,
 - iii) a status offense,
 - iv) a traffic violation,
 - v) the child's parent is unable or unwilling to take the child home.
- d) A child in a staff secure program shall not be strip searched at any time unless:
 - i) there is an articulated reasonable belief that the individual is concealing drugs, keys or anything that can be used as a weapon and
 - ii) the search has been authorized by the facility superintendent, administrator or their designee.
- e) When a child is strip searched, written documentation of the following information shall be placed in the child's case file:
 - i) name, gender, race and age of the child subject to the strip search,
 - ii) date, time and location of the strip search,
 - iii) name and gender of any persons conducting or assisting in the search,
 - iv) name of the person authorizing the search,
 - v) detailed statement of the articulated reasonable belief for the strip search, and
 - vi) a detailed description of each item recovered from the youth and from where each item was recovered.
- f) On or before September 30 of each year, the Department shall submit a report based on the information in subsection (e) to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly.

OPD/JJMU RECOMMENDATIONS REGARDING MECHANICAL RESTRAINTS

- a) **Mechanical Restraints** – devices such as handcuffs or wristlets, leg irons, legcuffs or anklets, waist chains, security black boxes and key locks or any other approved device, or combination of devices, used to limit the movement of the child's hands, legs and body.
- b) Except as provided in subsections (c)-(e), the Department of Juvenile Services may transport a child to or from a detention center or hardware secured program operated by the Maryland Department of Juvenile Services in mechanical restraints.
- c) A child in a hardware secured program that is being transported to or from an earned home pass or for release to the community shall not be placed in mechanical restraints.
- d) The Department of Juvenile Services shall not use mechanical restraints for convenience, for discipline or when a child is in the third trimester of pregnancy, labor, delivery, and postpartum recovery.
- e) The Department of Juvenile Services shall not use mechanical restraints for transport of children to or from staff secured placements unless:
 - i) there is an articulated reasonable belief that the child, during transport, will flee or pose an imminent danger to their self or others, and
 - ii) the use of mechanical restraints has been authorized by the superintendent or administrator of the facility from which the child is being transported, or their designee.
- f) Factors to be considered in the determination of reasonable articulable belief for the use of mechanical restraints include the child's recent behavior or voiced intent to:
 - i) Harm or attempt to harm others or themselves,
 - ii) Leave or attempt to leave a moving vehicle
 - iii) Flee or attempt to flee,
 - iv) Act agitated or lack self-control.
- g) When a child is placed in mechanical restraints, written documentation of the following information shall be placed in the child's case file:
 - i) Name, gender, race and age of the child being placed in mechanical restraints,
 - ii) Travel date, start and end times, and address of origin and destination,
 - iii) Name and job title of the person who articulated the reasonable belief,
 - iv) Name of the superintendent or administrator or their designee that approved the use of mechanical restraints,

v) Detailed statement of the articulated reasonable belief for the use of mechanical restraints.

h) On or before September 30 of each year, the Department shall submit a report based on the information in subsection (g) to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly.

ADDENDUM B

National Juvenile Defender Center Memorandum: Videoconferencing Research Summary



MEMORANDUM

FROM: National Juvenile Defender Center

DATE: October 19, 2016

RE: Videoconferencing Research Summary

The National Juvenile Defender Center (NJDC) strongly opposes the use of videoconferencing in juvenile delinquency proceedings, informed by our mission to promote justice for all children by ensuring excellence in juvenile defense. Juveniles are entitled to due process protections under the Fourteenth Amendment, as guaranteed by the United States Supreme Court in *In Re Gault*.¹ Videoconferencing generally decreases the quality of juvenile court hearings, presents insurmountable barriers to effective assistance of counsel, harms attorney-client relationships and confidentiality, and leads to worse outcomes for youth. This document summarizes the relevant case law and research concerning the use of videoconferencing.

I. PROBLEMS WITH THE SOLEMNITY AND EFFECTIVENESS OF VIDEO PROCEEDINGS

Remote videoconferences present issues for all court actors—including judges, prosecutors, defense lawyers, courtroom personnel, and the juveniles themselves. Individuals appearing from remote locations on camera are physically separated, and thus are less likely to feel as though they are participants in the proceeding.² This physical barrier creates a psychological and emotional barrier that can prevent youth from engaging in the proceedings, even if they can view them.

Even judges acknowledge that juveniles whose hearings are held via video are less likely to have fair and dignified hearings than their in-person counterparts. As one federal judge

¹ 387 U.S. 1 (1967).

² WILLIAM RETERT ET AL., PROTECTING QUALITY REPRESENTATION IN VIDEO COURT: A PRACTICAL HANDBOOK FOR WISCONSIN JUVENILE DEFENSE ATTORNEYS 13 (Sept. 2005), <http://wispd.org/images/AppellateFolder/templates/forms/Q1.pdf> (“Peering at a small screen that may only show the head and shoulder shots of the main participants in the courtroom diminishes the real sense of the significance of appearing in court. This effect is not beneficial to litigants, especially juveniles or witnesses, whom society intends to impress with the gravity of the situation that brings them to the formal court setting.”).

remarked, video presence connotes “second-classness.”³ Another judge noted that “the hearings totally lacked the dignity, decorum, and respect one would anticipate in a personal appearance before the court.”⁴ The consequences of this paradigm shift are very real. “If those in court . . . do not consider the person important enough to be there in court, then this may impact their opinion of the person and the case.”⁵ The Florida Supreme Court reviewed the issue of video detention hearings and determined, based on the personal experiences of lower court judges running courtrooms with videoconferencing, that this “robotic justice” limits judicial decision making and imposes unreasonable barriers to client representation.⁶

Videoconferencing alienates children who are already limited in the control they have over their own cases and in their understanding of court proceedings.⁷ One trial court judge has noted that “most juveniles at video first appearance hearings appear almost like zombies . . . Conversation via a video screen with a juvenile who is in detention is extremely difficult and problematic.”⁸ Similar remarks and conclusions have been made by various juvenile defenders and by children themselves.⁹ Separating youth from the court can ultimately lead to the youth feeling like they are not an important party in the matter, the proceedings are not serious, or the system is stacked up against them because they are the only party not in the courtroom; which in turn can lead to higher recidivism rates.¹⁰

Videoconferences are generally ineffective at capturing important aspects of testimony and courtroom behavior. The Illinois Court of Appeals has noted that “[i]n a televised appearance, crucial aspects of a defendant’s physical presence may be lost or misinterpreted, such as the participants’ demeanor, facial expressions and vocal inflections, the ability for

³ DANIEL DEVOE AND SARITA FRATTAROLI, VIDEOCONFERENCING IN THE COURTROOM: BENEFITS, CONCERNS, AND HOW TO MOVE FORWARD 29 (2009) [hereinafter VIDEOCONFERENCING IN THE COURTROOM], <http://perma.cc/2SUJ-6MHP>.

⁴ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d 470, 473 (Fla. 2001).

⁵ VIDEOCONFERENCING IN THE COURTROOM, *supra* note 3, at 29.

⁶ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d at 474 (internal citation omitted) (While the concerns raised by those in favor of the use of videoconferencing—elimination of transportation costs, increased security, decreased disruptions due to the spectacle of handcuffed children—were acknowledged by the court, the majority reasoned that these concerns could not be dealt with by implementing a form of “robotic justice.” The majority was further concerned that the “multiple and complex problems” facing children before the court could only be dealt with through personalized attention. The use of an audio-visual device would lead, the court worried, to a detached form of justice where children are not treated as “society’s most precious resource.”).

⁷ See, e.g., TEAMCHILD & JUVENILE INDIGENT DEFENSE ACTION NETWORK, WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION & UNDERSTANDING IN JUVENILE COURT 5 (2012) [hereinafter WASHINGTON JUDICIAL COLLOQUIES PROJECT],

http://www.teamchild.org/docs/uploads/JIDAN_Judicial_Colloquies_FINAL.pdf; Pamela Snow & Martine Powell, *The Language Processing and Production Skills of Young Offenders: Implications for Enhancing Prevention and Intervention Strategies*, Criminology Research Council grant 23/00-01 (2002); Michele LaVigne & Gregory Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 71 (2011).

⁸ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d at 474.

⁹ See *id.* at 473.

¹⁰ No matter the outcome of the proceedings, studies have shown that when a youth feels like the proceedings were fair, his or her voice was heard, and he or she was treated with respect by all parties, that procedural fairness generally results in lower recidivism rates among juvenile defendants. Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1476-83 (2009).

immediate and unmediated contact with counsel, and the solemnity of a court proceeding.”¹¹ Both research and practice confirm this.¹² Indeed, studies find that videoconferencing actually alters actions—including nonverbal cues, eye contact, and even viewer expectations.¹³ Videoconferencing also impairs a judge’s ability to assess a defendant’s credibility¹⁴ and the substance of an attorney’s argument.¹⁵ Thus, “[t]o the extent that technology changes behavior or masks or distorts information, it may undermine the accuracy of perceptions and corrupt the result of the proceeding.”¹⁶ These decisions are not only important in the adjudicatory context. As the Federal Rules of Criminal Procedure note, the decision to use videoconferencing in detention hearings has potential negative ramifications for defendants.¹⁷ “Much can be lost when video teleconferencing occurs the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant—a factor that may weigh on

¹¹ *People v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000).

¹² See, e.g., Lothar Muhlbach et al., *Telepresence in Videocommunications: A Study on Stereoscopy and Individual Eye Contact*, 37 HUM. FACTORS 290, 296-97 (1995) (discussing the challenges of videoconferencing technology).

¹³ See Bert Pryor and Raymond W. Buchanan, *The Effects of a Defendant's Demeanor on Juror Perceptions of Credibility and Guilt*, J. COMM. 92, 93 (Summer 1984); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1106-1114 (2004) [hereinafter *The Remote Defendant*]; G. Daniel Lassiter & Audrey A. Irvine, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 16 J. APPLIED SOCIAL PSYCHOLOGY at 268-76 (1986) (noting that subtle changes in camera angle can affect the judgments of jurors).

¹⁴ Fern L. Kletter, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R. 5th 509 (2004) [hereinafter *Validity of Judicial Videoconferencing*] (“As personal impression is often a crucial factor in persuasion, videoconferencing may render it difficult for the fact finder to make credibility determinations and gauge demeanor.”).

¹⁵ Carlos Ferran & Stephanie Watts, *Videoconferencing in the Field: A Heuristic Model*, 54 MANAGEMENT SCIENCE 1565 (2005) (finding that participants in a videoconference evaluated speakers by how likable they perceived them to be, rather than the quality of their arguments, while in-person participants did the opposite, because due to the lesser cognitive load of in-person communication, listeners were able to allocate cognitive resources more efficiently and more accurately evaluate the quality of information).

¹⁶ *The Remote Defendant*, *supra* note 13, at 1114. See also Martin S. Remland, *The Importance of Nonverbal Communication in the Courtroom*, 2 N.J. COMM. 124, 124 (1994); John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 HUM. COMM. RES. 197, 199 (1995); Brid O’Conaill et al., *Conversations Over Video Conferences: An Evaluation of the Spoken Aspects of Video-Mediated Communication*, 8 HUM. COMPUTER INTERACTION 389, 418 (1993); Nancy Gertner, *Videoconferencing: Learning through Screens*, 12 WM. & MARY BILL OF RTS. J. 769, 784 (2004) (discussing verbal and non-verbal cues, and the capacity to understand and perceive these cues via video); Gene D. Fowler & Marilyn E. Wackerbarth, *Audio Teleconferencing Versus Face-to-Face Conferencing: A Synthesis of the Literature*, 44 W. J. SPEECH COMM. 236, 245 (1980) [hereinafter *Synthesis of Literature*] (finding that alliances formed among those on the same side of a video conference); Ederyn Williams, *Social and Psychological Factors*, 28 J. COMM. 125, 126 (1978) [hereinafter *Social and Psychological Factors*] (finding that those in the same room during a videoconference viewed each other as “more intelligent, competent, sensible, trustworthy, and constructive and less unreasonable, boring, and impersonal than the people at the far end of the link”); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 900 (2010) (finding that after controlling for other factors, bail increased after hearings started being conducted by videoconference, and decreased after videoconferencing ceased, leading to the conclusion that conducting bail hearings by videoconference significantly disadvantaged defendants); CHICAGO APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT (2005) [hereinafter VIDEOCONFERENCING IN REMOVAL HEARINGS] (finding in an evaluation of 110 videoconference hearings in Chicago’s immigration court, that videoconferencing resulted in an alarming number of adverse rulings, problems in communication, interpretation and an increased difficulty in judges making credibility determinations).

¹⁷ FED. R. CRIM. P. 10(c), advisory committee’s notes to the 2002 Amendments.

pretrial decisions, such as release from detention.”¹⁸ In the asylum hearing context, a study examining the use of videoconferencing found that,

The expressions, gaze, posture, and gestures that provide important insight into ... credibility or level of understanding are skewed when viewed via [video teleconferencing]. Video transmission may exaggerate or flatten an applicant’s affect and audio transmission may cut off the low and high frequencies of the applicant’s voice; both of these anomalies impair the fact finder’s ability to assess the veracity of the applicant’s story.¹⁹

For these reasons, the American Bar Association’s Criminal Justice Standards recommend that “the trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present.”²⁰

The issues encountered in videoconferencing for adult criminal and civil hearings are amplified in the juvenile context. While the Kansas Supreme Court’s Blue Ribbon Commission strongly recommended expanding the use of video technology in Kansas state courts, it explicitly excluded juvenile proceedings from that recommendation, noting that “in conducting juvenile proceedings there is a salutary effect in having a young offender appear in court and experience the seriousness and formality of proceedings conducted by a robed judge sitting behind an elevated bench.”²¹

Videoconferencing also has developmental side effects. Developmental research confirms that youth are less likely than adults to understand and anticipate the future consequences of their decisions and actions.²² Recent progress in brain imaging provides physical evidence to show that regions of the brain controlling decision making and impulse regulation are the last to mature.²³ These developmental factors can contribute to a youth retreating, both cognitively and emotionally, from a hearing that is happening on a television screen. Additionally, young people on average are more prone to distraction than adults.²⁴ Videoconferencing increases opportunities for distraction, as juveniles in these settings feel more removed from the solemnity of the courtroom. This will have harsh consequences for young people forced to videoconference into hearings, placing them at a disadvantage compared to

¹⁸ *Id.*

¹⁹ Frank Walsh & Edward Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Proceedings*, 22 GEO. IMMIGR. L. J. 259, 268 (2008) [hereinafter *Effective Processing or Assembly-Line Justice*].

²⁰ AM. BAR ASS’N STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.8(a): PROCEEDINGS IN AND OUTSIDE OF THE COURTROOM (3d ed. 2000).

²¹ KAN. SUPREME COURT’S BLUE RIBBON COMM’N, RECOMMENDATIONS FOR IMPROVING THE KANSAS JUDICIAL SYSTEM at 81 (2012).

²² REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 89-118 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., The National Academies Press 2013), <https://www.nap.edu/catalog/14685/reforming-juvenile-justice-a-developmental-approach>.

²³ *Id.* at 96-99.

²⁴ Tracy Rightmer, *Arrested Development: Juveniles’ Immature Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC HEALTH L. 1, 14-15 (2005).

peers that have in-person hearings. Judges are likely to interpret distracted behaviors as a sign of disinterest in and/or disrespect for the proceedings and treat youth who appear remotely more harshly because of this perception.

Judicial proceedings are confusing enough for youth, even without their physical exclusion from potentially life-changing arguments and decisions that concern them. Detention, adjudicatory, disposition, and other hearings held via video further mystify and perplex youth who may already feel alienated from their own proceedings.²⁵ This process may potentially restrict judges and other court personnel from aggressively pursuing viable alternatives to detention. Children require specialized attention that may be muted through this attenuated process. Additionally, videoconferencing severely reduces the ability of judges to form impressions of respondents.²⁶ This is particularly worrisome in juvenile delinquency cases where many youth may also have abuse, neglect, and trauma issues that may leave visible traces, difficult to see over video monitor.

The Supreme Court reasoned in *In re Gault* that children need access to counsel in order to engage in their own defense; to help them become direct participants in their cases instead of spectators.²⁷ Remote access videoconferencing directly undermines this and creates due process implications.

II. VIDEOCONFERENCING HARMS THE ATTORNEY-CLIENT RELATIONSHIP AND INHIBITS ADVOCACY

Effective communication with a client is the lynchpin of meaningful advocacy for any attorney. The use of videoconferencing to engage in court hearings requires either that the defense attorney be in court, away from his or her client, or be with the client, away from the

²⁵ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So. 2d 470, 473 (Fla. 2001) (“[T]he mechanical process produced a proceeding where, on many occasions, multiple parties would speak at once, adding to the confusion. At the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.”)

²⁶ See, e.g., *Thornton v. Snyder*, 428 F.3d 690 (7th Cir. 2005) (noting the myriad difficulties and challenges with using videoconferencing, and remarking that videoconferencing is “no substitute for actual presence”); *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D. Va. 1999) (“Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.”). See also *Effective Processing or Assembly-Line Justice*, *supra* note 19, at 268 (examining the use of videoconferencing in asylum removal proceedings and finding that “[t]he expressions, gaze, posture, and gestures that provide important insight into an asylum applicant’s credibility or level of understanding are skewed when viewed via [video teleconferencing]”); *The Remote Defendant*, *supra* note 13, at 1114 (noting that videoconferencing “may undermine the accuracy of perceptions and corrupt the result of the proceeding”); *Developments in the Law – Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1185 (2009) (finding that “testifying through a video monitor is less persuasive because it is a less direct form of communication”).

²⁷ 387 U.S. 1, 34-42 (1967).

courtroom and other key personnel in the case. Neither is effective for maintaining successful communication with the client or for effective representation in the courtroom.

A. Harms of Videoconferencing When the Lawyer and Client are in Different Locations

Where the defender is in a separate location from the client, the child is isolated, becomes disengaged, and is rarely if ever afforded the representation to which he or she is entitled under the U.S. Constitution. Essential private conversations and collaboration between attorney and client are rendered impossible.²⁸ In court, an attorney can turn and whisper quietly to a client; if the client and attorney are in different locations, private conversation would require a recess and access to separate, secured communications systems outside of the courtroom that would allow the child and the attorney to communicate confidentially.²⁹ It is likely that this obstacle will entice some defense attorneys to “make do” and not properly consult with their clients at key points, make assumptions as to their client’s desires, or fail to ensure that their client understands the proceedings. Any of these concessions would be in violation of the defender’s ethical responsibilities.³⁰ For example, national standards require counsel to maintain regular contact with their clients, and to provide them with complete information concerning all aspects of their cases.³¹ Additionally, even if some communications system is set up that enables reliably secure communication between the youth and his or her attorney, it can never be confidential if staff members at the detention facility are with the youth. This would likely create obstacles to the security protocol at the detention facility, as youth would need to be left unattended in order to ensure confidential communication with the attorney. Anything less would violate the attorney-client privilege.

The distance between attorney and client is especially challenging for hearings in the early stages of a case. An attorney cannot work effectively without developing a relationship of trust with a client. This holds particularly true for the juvenile defender.³² Trust is built up over time. It cannot exist if defense attorneys and their clients are “meeting” for the first time in separate rooms, separated by a video monitor.³³ National standards point out that the failure to

²⁸ See, e.g., William M. Binder, *Videoconferencing: A Juvenile Defense Attorney’s Perspective*, WIS. LAW 18 (1997) (describing activities that necessitate direct attorney-client interaction during court appearances, such as the need to examine exhibits or fill out paperwork).

²⁹ *The Remote Defendant*, *supra* note 13, at 1129-31. See, e.g., *People v. Lindsey*, 772 N.E.2d 1268, 1271-71 (Ill. 2002) (describing the system used, where the defender had to leave court and call the client on the telephone to avoid having conversations openly in court; many of the communications thus took place without confidentiality).

³⁰ MODEL RULE OF PROF’L CONDUCT, R. 1.2, R. 1.3, R. 1.4, R. 1.6, R. 2.1. See also NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 1.1: ETHICAL OBLIGATIONS OF JUVENILE DEFENSE COUNSEL 18-19; § 1.2: ELICIT AND REPRESENT CLIENT’S STATED INTERESTS 19-21; § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 40-41.

³¹ MODEL RULE OF PROF’L CONDUCT, R. 1.4. See also NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41.

³² See Christine S. Pierce & Stanley Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 BEHAV. SCI. & L. 89 (2002).

³³ See David A. Davis, *Talking Heads—Virtual Reality and the Presence of Defendants in Court*, FLA. BAR J. at 30 (2001) (suggesting that a client appearing in court by video will not connect well with counsel and “may believe his lawyer is merely processing his case without any real connection with him”).

maintain regular and sufficient contact with a juvenile client undermines confidence in his or her representation.³⁴

The challenges of remote access to the client do not diminish as the case continues, however. National standards require attorneys to consult with their clients,³⁵ but communication challenges for youth, already commonplace in face-to-face settings, are exacerbated by the physical barrier of distance.³⁶ Counsel must already navigate obstacles inherent in juvenile defense, including communication with clients who have developmental and cognitive disabilities,³⁷ cultural differences,³⁸ and varying levels of maturity and understanding.³⁹ One study in Washington State found that youth who appeared in court understood fewer than one-third of the court-ordered release conditions.⁴⁰ That lack of comprehension led to low rates of recall and compliance, and often resulted in additional sanctions, including detention.⁴¹ Removing juveniles from the court setting and from their attorneys and placing them in a withdrawn, isolated environment will likely lead to lower rates of comprehension, poorer quality of communication, and bad outcomes—including higher rates of recidivism.

B. Harms of Videoconferencing When the Lawyer and Client are Together in a Remote Location

If juvenile defense attorneys are on-site with their clients and appearing remotely via videoconference, they cannot be meaningful advocates in the courtroom. An attorney who is not in the courtroom cannot engage in sidebar conversations with the prosecutor or the judge, may

³⁴ MODEL RULE OF PROF'L CONDUCT, R. 1.4 cmt. See also NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41 (2012).

³⁵ MODEL RULE OF PROF'L CONDUCT, R. 1.4. See also NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.6: OVERCOMING BARRIERS TO EFFECTIVE COMMUNICATION WITH CLIENT 43-46 (2012).

³⁶ See generally Joel V. Oberstar et al., *Cognitive and Moral Development, Brain Development, and Mental Illness: Important Considerations for the Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1051 (2006) [hereinafter *Cognitive and Moral Development*].

³⁷ See Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GEN. PSYCHIATRY 1133 (2002); Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN 143 (2008); Solomon Moore, *Mentally Ill Offenders Strain Juvenile System*, N.Y. TIMES, Aug. 10, 2009, at A1; Karen M. Abram et al., *Post-Traumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES OF GEN. PSYCHIATRY 403 (2004) (finding in a scale study in Cook County, Illinois that 92.5% of detained juveniles had experienced at least one traumatic experience in their lifetimes and that 11.2% suffered from PTSD, levels higher than those of the general juvenile population); Charles Huffine, *Bad Conduct, Defiance, and Mental Health*, 20 FOCAL POINT 13 (2006) (claiming that many youth in the juvenile justice system are misdiagnosed and that conduct disorder and oppositional defiant disorder diagnoses often have co-occurring mental health conditions, like bipolar disorder or post-traumatic stress disorder, requiring individualized evaluations and treatment); *Cognitive and Moral Development*, supra note 36.

³⁸ Cassandra McKeown & Michael Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S. D. L. REV. 33 (2009).

³⁹ See Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173 (2009) (noting the findings of several studies on developmental issues, such as the influence of time perspective, impulsivity, and peers on decision-making).

⁴⁰ WASHINGTON JUDICIAL COLLOQUIES PROJECT, supra note 7, at 9.

⁴¹ *Id.*

miss opportunities for informal negotiation with probation officers or prosecutors, and may not have ready access to reports, evidence, or other documents that are in the courtroom. Moreover, any conversations between the judge and the prosecutor about the case can easily become inappropriately *ex parte* without the defense attorney present.

Regardless of the stage of the case, appearing remotely can impair effective questioning of hearing participants or challenging of reports.⁴² In more formal hearings, such as fact-finding or probation revocation hearings, remote lawyering severely impedes advocacy as it is impossible to effectively present evidence or conduct cross-examination, both of which are vital components in adequate—let alone quality—representation. At hearings with less strict rules of evidence, documents, reports, and other evidence can still be regularly discussed. A host of technological systems beyond video equipment—such as computers, document-sharing programs, and the like—would be necessary to provide some access to materials in the courtroom, and these would still not solve the problem of an attorney needing to handle a particular piece of evidence or an unscanned document in the moment. This barrier to accessing evidence violates national standards. The National Juvenile Defense Standards reify that defenders have a responsibility to review and investigate all evidence presented.⁴³ The Supreme Court itself requires juvenile defense attorneys to “insist upon regularity of the proceedings,” but videoconferenced proceedings are anything but regular. In addition, the physical distance between attorney and other court actors will limit the effectiveness of last-minute negotiations with the state, which are much more productive when done face-to-face and in private. In our experience consulting with attorneys across the country, when juvenile defenders cannot communicate with other courtroom participants effectively, client representation suffers.

During hearings or immediately before, juvenile defense attorneys must also regularly work closely with clients’ families to put together documentation and social information for the client. Videoconferencing renders this vital task overly burdensome when the family is in court and the attorney is in a remote location with the client. Family engagement and cooperation with defense-proposed release or disposition plans requires effective attorney, client, and family collaboration, which videoconferencing all but prevents. Gathering and understanding information for pre-trial hearings and motions, pre-sentencing reports, disposition terms, and post-disposition advocacy is a task that cannot be effectively performed in isolation from the parties most able to help collect it or understand it in context.

Because problems arise regardless of the attorney’s location during videoconferencing, at least one federal court has called this issue a “Catch-22.”⁴⁴ In other words, regardless of where

⁴² See, e.g., Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J. L. REFORM 695, 702 (2002); Petition for Writ of Certiorari at 5-9, *Junkin v. Florida*, 133 S. Ct. 670 (2012) (No. 12-475).

⁴³ NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41 (2012). See also A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION STANDARD 4-4.1: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS (4th ed.).

⁴⁴ *Rusu v. I.N.S.*, 296 F.3d 316, 323 (4th Cir. 2002) (“A . . . problem inherent in the video conferencing of asylum hearings is its effect on a petitioner’s lawyer. Because video conferencing permits the petitioner to be in one location and an [immigration judge] in another, its use results in a “Catch 22” situation for the petitioner’s lawyer. While he

the juvenile's attorney is situated during this process, videoconferencing is a hindrance to effective assistance of counsel.

III. CONFRONTATION CLAUSE CONCERNS

In re Gault guaranteed juveniles a Sixth Amendment right to confrontation.⁴⁵ Videoconferencing is not identical to face-to-face confrontation,⁴⁶ and has been found to satisfy confrontation requirements only in limited circumstances where, as set forth in *Maryland v. Craig*, the "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."⁴⁷ *Craig* found constitutional a statute permitting juvenile victims of sexual abuse to testify via one-way videoconferencing, where the defendant could see the witness, but the witness could not see the defendant, if found that the witness would suffer severe emotional distress as a result of being in the defendant's presence. Following the articulation of the *Craig* standard, a number of courts have found two-way videoconferencing to be insufficient to meet the constitutional standard.⁴⁸ Particularly where videoconferencing is used for the sake of convenience or to save money, instead of to accommodate a witness' emotional or physical needs, courts have found that videoconferencing does not meet the public policy prong of *Craig*.⁴⁹ Furthermore, the Supreme Court clarified in

can be present with his client – thereby able to confer privately and personally assist in the presentation of the client's testimony – he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternatively, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.").

⁴⁵ 387 U.S. 1, 42-43 (1967); *Coy v. Iowa*, 487 U.S. 1016 (1987) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . . due process clearly requires that . . . a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome.").

⁴⁶ *Validity of Judicial Videoconferencing*, *supra* note 14 ("Even with advancing technology, presence via video-audio link-up remains less than the complete equivalent of actual presence."). Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (citing *U.S. v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999)) (Scalia) (noting that a witness testifying via two-way videoconference is different than confronting the defendant face-to-face).

⁴⁷ *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (establishing a test to determine when videoconferencing is permissible, and emphasizing that face-to-face confrontation is not easily dismissed).

⁴⁸ *U.S. v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) (finding that a two-way closed circuit television did not meet constitutional requirements, and noting that "virtual confrontation" is not constitutionally equivalent to face-to-face confrontation); *People v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000) (holding that a televised guilty plea is not constitutionally permissible, and noting that "[i]n a televised appearance, crucial aspects of a defendant's physical presence may be lost or misinterpreted, such as the participants' demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding"). *But see Aslam v. Mulasky*, 537 F.3d 110 (2d Cir. 2008) (finding in an appeal of a final order of removal from the B.I.A. that testimony of the defendant's ex-wife by videoconference was constitutionally permissible because there was no indication that the testimony was unfair, she lived in another state, and the defendant was given an opportunity to file a motion to transfer venue to the ex-wife's state).

⁴⁹ *See Commonwealth v. Atkinson*, 987 A.2d 743, 750-51 (Pa. Super. Ct. 2009) (finding that allowing a witness to testify remotely via videoconference at a suppression hearing violated the defendant's constitutional right to

Crawford v. Washington and subsequent cases that specifically where a witness is offering testimonial statements, the constitutional requirement of face-to-face confrontation may not be relaxed simply “to accommodate the necessities of trial and the adversary process.”⁵⁰ Juveniles have a constitutional right to face-to-face confrontation.

IV. VIDEOCONFERENCING LEADS TO DISPARATE OUTCOMES

Numerous courts have held that videoconferencing simply does not measure up to in-person attendance in hearings.⁵¹ The asylum study discussed earlier,⁵² which has some of the most concrete outcome data to date, found that there were significant disparities in outcomes of immigration hearings dependent on whether they were carried out via videoconference or in person. The asylum seekers with in-person hearings were twice as likely to have their requests for asylum granted as those who had hearings via videoconference.⁵³ In the context of bail hearings, a study found that conducting these hearings by videoconference resulted in judges setting higher bail.⁵⁴ This is because, as additional studies show, people evaluate those with whom they interact face-to-face more favorably than those with whom they interact via video.⁵⁵ Worse yet, for youth who need an interpreter, negative outcomes increase with videoconferences, due to the greater chance for misinterpretations and miscommunication, and these results draw from a civil scenario in which access to counsel is not constitutionally mandated.⁵⁶ For juvenile hearings, where there is a right to counsel, videoconferencing provides substantial due process concerns.

confrontation, noting that “[w]hile efficiency and security are important concerns, they are not sufficient reasons to circumvent [defendant’s] constitutional right to confrontation”); *Commonwealth v. Musser*, 82 Va. Cir. 265, at *4-5 (Ca. Cir. Ct. 2011) (finding that state’s interest in saving money by having a medical examiner testify remotely did not satisfy the public policy prong of the *Craig* test).

⁵⁰ See *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

⁵¹ See, e.g., *United States v. Thompson*, 599 F.3d 595, 597 (7th Cir. 2010); *Terrell v. United States*, 564 F.3d 442, 445 (6th Cir. 2009); *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005); *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *Valenzuela-Gonzalez v. U.S. Dist. Ct. for D. Ariz.*, 915 F.2d 1276 (9th Cir. 2000); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999); *Edwards v. Logan*, 38 F.Supp.2d 463 (W.D. Va. 1999).

⁵² *Effective Processing or Assembly-Line Justice*, *supra* note 19.

⁵³ *Id.* at 271.

⁵⁴ Fed. R. Crim. Pro. 10(c), Committee Notes (“Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public’s confidence in the integrity and solemnity of a federal criminal proceeding...Second, using video teleconferencing can interfere with counsel’s ability to meet personally with his or her client...Third, the defendant may miss the opportunity to meet with family or friends, and others who might be able to assist the defendant...Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotion, and mental condition of the defendant—a factor that may weigh on pretrial decisions, such as release from detention.”).

⁵⁵ *Synthesis of Literature*, *supra* note 16, at 245; *Social and Psychological Factors*, *supra* note 16, at 126.

⁵⁶ See VIDEOCONFERENCING IN REMOVAL HEARINGS, *supra* note 16, at 7 (noting that in hearings via videoconference that required an interpreter, 30% appeared to misunderstand what happened at the hearing, 70% of non-English speaking respondents experienced a problem related to videoconferencing during the hearing, and 50% of non-English speakers received removal orders compared to only 21% for English speakers).

V. CONCLUSION

Implementing technological devices simply because they are available, while swift and expeditious, causes a misdirection of our objectives; our children must never be short-changed in the name of technological advancement. We strongly believe that the measure of a society can be found not in the words spoken about its youth, but in the action and methods utilized in its relationship with its youth...[O]ur youth must never take a second position to institutional convenience and economy.⁵⁷

Videoconferencing chips away at the due process rights guaranteed to youth in delinquency cases by decreasing the quality of juvenile court hearings and preventing effective assistance of counsel and the formation of attorney-client relationships. Research and case law support the conclusion that by disrupting verbal and non-verbal communication, videoconferencing presents issues for all court actors, threatens the integrity of proceedings, and eventually leads to worse outcomes for youth. As such, the practice can never be justified by concerns over judicial economy, transportation time and costs, or administrative ease.

Please know that NJDC stands ready to answer any questions you may have or provide any further assistance regarding this issue. Please feel free to contact NJDC's Director of Training and Technical Assistance, Tim Curry, at 202-452-0010 x 106 or at tcurry@njdc.info.

⁵⁷ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d 470, 474 (Fla. 2001).

**Minority Report
Submitted by the Department of
Juvenile Services**

(With included appendices)

Task Force to Study the Restraint, Searches and Needs of Children in the Juvenile Justice System

Minority Report

Introduction

The Task Force to Study the Restraint, Searches, and Needs of Children in the Juvenile Justice System was established pursuant to Chapter 665 of the Laws of Maryland 2016. The Task Force, effective June 1, 2016, met seven times between September 8, 2016 and December 15, 2016.

The Department of Juvenile Services (DJS or department) is submitting this Minority Report to address the Task Force recommendations that raise significant safety and security concerns, threaten to destabilize department facilities, and put youth, staff and the community at risk.

The following Task Force members join in this Minority Report.

Senator Justin Ready
Republican, District 5, Carroll County

Secretary Sam Abed
Maryland Department of Juvenile Services (DJS)

Ms. Arlene Lee
*Executive Director, Maryland Governor's Office for
Children (GOC)*

Ms. Denise Henderson
*American Federation of State, County, and Municipal
Employees (AFSCME) Maryland*

Ms. Karen Kruger
*Executive Director, Maryland Sheriff's Association
(MSA)*

Dr. Michael Ito
*Director, Office of Behavioral Health, Substance
Abuse & Mental Health Services
Maryland Department of Juvenile Services (DJS)*

Ms. Linda McWilliams
*Deputy Secretary of Operations
Maryland Department of Juvenile Services (DJS)*

Mr. Kevin McLeod
Director, Silver Oak Academy (SOA)

Capt. Elwood Hemmeain
*Transportation Officer
Maryland Department of Public Safety and
Correctional Services (DPSCS)*

Task Force Requirements

The Task Force was charged with:

- reviewing the current policies and practices of the Department of Juvenile Services shackling and strip searches of children within the juvenile justice system;
- examining when, by whom, and for what purposes a child in the custody of the Department of Juvenile Services is strip-searched or shackled;
- determining the capital expenditures that are necessary to address issues regarding the restraint and searches of children within the juvenile justice system; and
- making recommendations regarding changes in policies, practices, or capital expenditures that are necessary to address issues involving the restraint and searches of children within the juvenile justice system.

Overview of the Department of Juvenile Services Reform Initiatives

The number of youth in the juvenile justice system has declined significantly over the past ten years due to fewer juvenile referrals and collaborative reform efforts led by the department. Complaints referred to the department have declined 56.1% over ten years and a greater proportion of cases are resolved at intake.

Collaborative reforms led by the department have reduced the average daily population in juvenile detention by 55% over ten years. Additionally, youth awaiting placement in juvenile detention has declined 67.3% over ten years. At the same time, the percentage of juveniles associated with serious crimes has increased. Almost one third of the total populations are youth charged as adults.

Since Fiscal Year 2014, 36% fewer juvenile offenders were placed in out-of-home treatment programs. These reductions were accomplished safely and enhanced through the implementation of DJS's Accountability and Incentive Management (AIM) initiative. This initiative created a standardized and graduated system of responses to youth violating the technical terms of their probation. As a result, AIM has contributed to significant reductions in the number of youth being committed for technical probation violations, which were accounting for one-in-three commitments in the years prior to Fiscal Year 2016.

AIM has been effective in promoting a more equitable juvenile justice system. Recently, the AIM initiative was recognized by the Center for Children's Law and Policy as a model for other states to emulate. See <http://www.cclp.org/wp-content/uploads/2016/06/Graduated-Responses-Toolkit.pdf>

Substantive Issues Concerning the Recommendations

Recommendations: Strip (Visual Body) Searches

The Department of Juvenile Services seeks to employ policies and procedures that are designed to keep youth, staff and the community safe while balancing the dignity of the youth we serve. The department's policies and procedures related to visual body searches¹⁰ have been reviewed by the Department of Justice and found to be 100% compliant with the Prison Rape Elimination Act.

The department fully participated and contributed to the Task Force review of departmental policies and procedures related to the use of visual body searches of youth in juvenile detention and department committed facilities. The department also provided a comprehensive overview of national juvenile standards¹¹ and the use of visual body searches in juvenile facilities across the country¹².

The department presented the Task Force with a set of recommendations¹³ to reform department practices while considering strategies to mitigate security risks. These reforms are in-line with the majority of the states reviewed and either meet or exceed national juvenile justice standards.

¹⁰ The department uses the term "visual body search" when referencing a search that requires removal of clothing and a visual inspection of the body for weapons or contraband.

¹¹ See Appendix A, "Search Policy Overview", Presented by the Department of Juvenile Services.

¹² See Appendix A, "Search Policy Overview", Presented by the Department of Juvenile Services.

¹³ See Appendix B, Department of Juvenile Services Task Force Recommendations.

The department reforms include:

- ✓ Requiring that a youth is provided with a disposable paper gown while conducting all visual body (strip) searches.
Adopted by the Task Force.
- ✓ Develop procedures to direct staff to utilize a graduated approach when conducting a reasonable suspicion search (utilizing other search procedures such as, processing with the youth, a pat down search or wand search) before employing a visual body search.
Adopted by the Task Force.
- ✓ Prohibit a visual body search of a youth after attorney visitation, unless there is reasonable belief that the youth is in possession of contraband.
- ✓ Prohibit a visual body search of a youth after family visitation, unless there is reasonable belief the youth is in possession of contraband. A budget appropriation would be required for equipment and staff in each of the 13 DJS operated facilities to implement this recommendation.
- ✓ Prohibit visual body searches when youth have remained under the direct and continuous supervision of department staff during an off-campus outing, unless there is reasonable articulable suspicion to believe the youth is in possession of contraband.

The department and the Task Force members joining this Minority Report believe the recommendations of the Task Force identified below will put youth, staff and the community at significant risk.

Task Force Recommendation 1 and 2

A child in a program operated by the Maryland Department of Juvenile Services shall not be strip searched, except at admission, unless:

- (i) there is an articulated reasonable belief that the child is concealing drugs, keys, or anything that can be used as a weapon, and**
- (ii) the search has been authorized by the facility superintendent, administrator, or their designee**

Minority Concerns:

Recommendation #1 would prohibit a visual body search unless there is a reasonable belief that the child is concealing drugs, keys or anything that could be used as a weapon. This recommendation is extremely dangerous as it fails to address the many other types of contraband that can destabilize a facility and put youth and staff at significant risk. Moreover, #1 and #2 are substantially similar to the department's recommendations and only differ by limiting the type of contraband that would be subject to a search.

Limiting the ability to do a visual body search when there is a belief that a youth has drugs, keys or a weapon is extremely difficult to implement. It would require that staff have a reasonable belief as to actually what item the youth is concealing – as opposed to a belief that the youth is concealing something. For example, it would be impossible for staff to know an item they saw exchanged between a family member and a youth at a visitation is one of the prohibited items unless the youth is actually searched.

Furthermore, there are many other types of contraband that can be concealed that would put the youth's safety and safety of others at substantial risk. Pursuant to recommendation #1 and #2, a search would NOT be able to be done if there was a reasonable belief a youth was concealing 1) matches (prior to a consistent application of DJS policies there were incidents of youth setting fires with matches); 2)

lighters; 3) cigarettes; 4) rope/string; 5) electronic devices such as cell phones or SIM cards; 6) food items or candy that is concealing a weapon such as a razor blade; and 7) anything that could be used for self-injurious behavior.

The department's recommendations seek to employ searches based on reasonable belief, just as the majority's. However, the significant difference is the department's reform is to permit a visual body search when there is a reasonable belief the youth is concealing any type of contraband rather than limiting the ability to search to situations when there is a belief drugs, keys or weapons are being concealed. The department is committed implementing reforms aimed at limiting visual body searches, except admission searches, to circumstances when there is reasonable belief the youth is concealing contraband.

This recommendation was adopted by a 10-9 vote, which clearly indicates a lack of meaningful consensus. Additionally, with this particular recommendation, many Task Force members (including some who were in the majority), did not understand the voting process and were not clear as to which recommendation the vote ratified.

The Maryland Sheriff Association (MSA) has additional concerns. They oppose any recommendations that would require some level of individualized suspicion of potential harm before either full body searches or mechanical restraints are employed. It is important that security measures be applied consistently and not be subject to the discretion of individual security officers or deputy sheriffs. Individualized decision requirements assume that the officer present has enough training and background information to make an informed assessment; a failure to provide adequate security could prove to be disastrous and result in injuries to other juvenile offenders and to public safety officers.

The Juvenile Services employee representatives share in these concerns, as well as the potential for claims of disparate impact and abuse of discretion that are invited by individualized treatment. Further, this process undermines the standard routine practices needed to insure order and puts unnecessary liability risk on individual officers and employees.

Recommendation 3:

A child in a detention center operated by the Maryland Department of Juvenile Services shall not be strip searched at admission if the sole basis for detention is:

- (i) a failure to appear**
- (ii) a CINS complaint**
- (iii) a status offense**
- (iv) a traffic violation**
- (v) the child's parent is unable or unwilling to take the child home**

Minority Concerns:

While the majority of the members of the Task Force were seeking to limit searches, some of the recommendations may have been guided by inaccurate information.

For example, the department is not permitted to detain youth for a CINS (child in need of supervision) complaint, non-incarcerable traffic violation, or a status offense¹⁴. Generally, a CINS complaint and

¹⁴ See, Md. Code, Courts and Judicial Proceedings, §3-8A-01 and §3-8A-15.

status offense include youth who have runaway, are truant from school, or have committed an offense that would not be a crime if committed by an adult.

Some other of the recommendations, such as prohibiting visual body searches after a failure to appear or a incarcerable traffic violation, put youth and staff at risk and create significant gaps in safety and security protocols.

The department has no information as to what the youth may be concealing when brought to a detention center by law enforcement, and as a result, there is a significant risk of contraband entering the facility if youth are not searched. In fact, introducing a youth that has not been searched into a secure facility would not only endanger that youth, but all others in the facility who have undergone the search.

If this recommendation holds, the department would be required, if unable to search the youth, to hold them in a separate area from the general population. This would require a significant capital expenditure to create space in each of the seven DJS detention facilities.

Recommendations: Mechanical Restraints

The Department of Juvenile Services seeks to employ policy and procedures that aim to keep youth, staff and the community safe while balancing the dignity of the youth we serve. The department fully participated and contributed to the Task Force review of departmental policies and procedures related to the use of mechanical restraints in juvenile detention and department committed facilities. The department also provided a comprehensive overview of national juvenile standards¹⁵ and the use of mechanical restraints in juvenile facilities across the country¹⁶.

The Task Force focused on the use of mechanical restraints during transportation to or from a detention or DJS committed facility. Transporting youth in the community, generally to Court or for admission to a facility, can be a stressful event. It is well known that youth, due to their adolescent development, can act impulsively, unpredictably and may act without understanding the consequences of their behavior. This can put youth in danger of hurting themselves or others while in the community. It is paramount that reasonable safety measures are employed to not only protect the community, youth and staff, but to also protect a youth from hurting themselves. This is particularly important because the youth are in a moving vehicle, which, in itself, can cause serious harm to the public if and when a driver is distracted by disturbances in the van.

The department presented the Task Force with a set of recommendations¹⁷ to reform department practices while considering strategies to mitigate security risks. These reforms are in-line with the majority of the states reviewed and either meet or exceed national juvenile justice standards. All the department reforms were adopted by the Task Force.

The department reforms adopted by the Task Force include:

¹⁵ See Appendix C, "Restraint Policy Overview", Presented by the Department of Juvenile Services.

¹⁶ See Appendix C, "Restraint Policy Overview", Presented by the Department of Juvenile Services.

¹⁷ See Appendix B, Department of Juvenile Services Task Force Recommendations.

- ✓ Evaluate reorganizing the secure transportation unit. Currently, the department operates one statewide unit that is responsible for most of the youth transportation needs across the state. It is DJS policy that all transportation unit transports are secure, meaning mechanical restraints are used. The department shall evaluate the ability to create a separate non-secure transportation unit for our staff secure programs. It is anticipated a budget appropriation for equipment and staff would be required to implement this recommendation.
Adopted by the Task Force.
- ✓ Evaluate the use of video conferencing to eliminate the need for transportation to certain court hearings.
Adopted by the Task Force.
- ✓ Eliminate the use of secure transports when transporting a youth on an earned home pass or when a youth is released.
Adopted by the Task Force.
- ✓ Work with private providers to transition non-secure transportation responsibilities to the provider.
Adopted by the Task Force.
- ✓ The department shall develop procedures for out-of-state transports. Specifically, the procedures shall include factors to consider when requiring a secure transport for out-of-state placements, such as a youth's verbal indications of AWOL, behavioral health, suicide ideations, prior AWOLs, and aggressive behavior.
Adopted by the Task Force.

The Minority group has concerns with Task Force recommendation #5 due to safety implications for the youth, staff and community.

Recommendation 5:

Use of mechanical restraints shall be prohibited for a time period of more than eight hours. A time period of five minutes without mechanical restraints must be provided for every four hours a child is in mechanical restraints.

Minority Concerns:

The Minority group is not opposed in principle to permitting a period of five minutes without mechanical restraints for every four hours a child is in mechanical restraints. In most circumstances a youth is not transported for a period of time that exceeds four hours. However, the Minority group believes there should be some exception for exigent circumstances. For example, a youth's repeated verbal indication of absconding or a youth's extreme aggressive behavior may make it very unsafe for the youth, staff and community to remove restraints during transport. In addition, there could be unanticipated problems with traffic which prevent the vehicle from being able to access a secure location, such as a police station, to meet this requirement.

The Minority group is very concerned about limiting the use of mechanical restraints for a time period of more than eight hours without any allowance for individualized concerns. It is unclear what steps the department should employ if a transport must exceed eight hours. Further, the department has committed to providing specific guidance on circumstances which may require exceptions to the recommendation.

General and Procedural Concerns

The Task Force members joining this Minority Report have general concerns regarding the structure and procedural aspects of the Task Force.

- ✓ Very few votes were unanimous, and frequently voting margins differed by one vote. The lack of consensus on the recommendations was notable.
- ✓ The Minority strongly believes that some of the recommendations set out in the majority report are not appropriate for legislation; but should be recommendations for policy changes in order to allow for nimble adjustment if needed.
- ✓ The Minority is concerned that not all of the affected stakeholders were part of the Task Force; for instance, the State's Attorneys were not invited to participate, while the Office of the Public Defender played a major role in making recommendations. More significantly, the process completely excluded and by-passed the State Advisory Board, established by the MD Code Ann., Human Services Art., § 9-215 whose role is specifically to "recommend to the Secretary [of the Department of Juvenile Services] policies and programs to improve Juvenile Services in the State." The Task Force recommendations should be presented to the State Advisory Board for further review and recommendations for implementation; and not for legislative consideration which would bypass the statutory construct.

Reporting Requirements and Conclusion

The Task Force members joining in this Minority Report realize that several of the reforms identified by the department will require a budget appropriation and should be examined thoroughly to ensure necessary staff are available to continue to maintain a safe and secure environment.

The department is committed to implementing reforms to agency policy and procedure. The department agreed to update the Governor, Maryland General Assembly and Task Force members on the progress of implementing reforms through a yearly report.

Appendix A

SEARCH POLICY OVERVIEW

Presented by the Maryland Department of Juvenile Services

STATE REVIEW - SEARCHES

The following State policies were reviewed:

Alaska	Kansas	Nebraska	South Carolina
Arizona	Kentucky	New Hampshire	Texas
Colorado	Louisiana	New Jersey	Utah
Delaware	Maine	New Mexico	Vermont
Florida	Massachusetts	North Carolina	Washington
Georgia	Michigan	Ohio	West Virginia
Hawaii	Minnesota	Oklahoma	Wisconsin
Idaho	Mississippi	Oregon	Maryland
Indiana	Missouri	Pennsylvania	Virginia

USE OF STRIP SEARCH AT INTAKE/ADMISSION

36 States were reviewed:

- ✓ **31 States (86% of those reviewed) require routine strip searches at intake / admission**

Arizona; Colorado; Delaware; Florida; Georgia; Hawaii; Idaho; Indiana; Kansas; Louisiana; Maine; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; New Jersey; New Mexico; North Carolina; Ohio; Oklahoma; Oregon; Pennsylvania; South Carolina; Texas; Utah; Washington; West Virginia; Wisconsin; Maryland; Virginia

- ✓ **Other (2)**

- ✓ **Alaska** – Requires routine strip searches. A traffic offender or minor admitted for a bail-able minor offense have one hour to post bail without being strip searched – unless there is reasonable suspicion
- ✓ **Vermont** – Requires routine strip Searches when the youth is charged with a crime of violence, use of a weapon, or drug offense; when the youth has a history of an arrest, charge or conviction of the above; and/or there is evidence of self-harming and suicide ideation.

- ✓ **Unclear From the Policy Provided** – New Hampshire; Nebraska; Kentucky

USE OF STRIP SEARCH AFTER VISITATION

36 States were reviewed:

- ✓ 22 States (61% of those reviewed) require routine strip searches after visitation

Arizona; Colorado*; Delaware*; Florida; Georgia; Hawaii*; Idaho; Indiana; Kansas; Louisiana**; Maine; Massachusetts*; New Hampshire***; New Jersey; New Mexico; Ohio; South Carolina; Texas; West Virginia; Wisconsin*; Maryland; Virginia

- ✓ 12 States - Provide for a Reasonable Suspicion search

Alaska; Kentucky (PC); Michigan; Minnesota; Nebraska; North Carolina; Oklahoma; Oregon (PC); Pennsylvania; Utah; Vermont; Washington

- ✓ 2 States are unknown

Mississippi; Missouri

* Required for family visitation or non-professional

** Required after family, relatives, friends and attorneys

*** Required after family, relatives, friends and attorneys + reasonable suspicion

PC – Requires Probable Cause

USE OF STRIP SEARCH WHEN REASONABLE SUSPICION

36 States were reviewed:

✓ 32 States (89% of those reviewed) provides for routine strip searches when reasonable suspicion exists

Alaska; Arizona; Colorado; Delaware; Florida; Georgia; Hawaii; Idaho; Kansas; Kentucky*; Louisiana; Maine; Massachusetts; Michigan; Minnesota; Nebraska; New Hampshire; New Jersey; New Mexico; North Carolina; Ohio; Oklahoma; Oregon*; Pennsylvania; South Carolina; Texas; Utah; Vermont; Washington; West Virginia; Wisconsin; Maryland; Virginia

✓ Unclear from policy provided (3) – Indiana; Mississippi; Missouri

*Requires Probable Cause

JDAI DETENTION FACILITY ASSESSMENT STANDARDS – ANNIE E. CASEY 2014 UPDATE

Standard (p.167)

- 1. The facility has written policies, procedures, and actual practices governing searches of youth, the facility, and visitors in accordance with applicable law. The facility posts search policies at the entrance to the facility, in the intake/admissions area, all living units, and in visiting areas. [See also standard VIII(C)(1).]
- 2. Written procedures address each of the following:
 - a. Intake searches include pat-downs, metal detector, or clothing searches. If the facility permits strip searches upon intake or visual body cavity searches, staff conduct them in accordance with applicable law.
 - b. When staff search youth who are returning from court, school, another facility, visits on the premises, or who have otherwise been continuously supervised, they do so by a pat-down, metal detector, or clothing search. Staff conduct strip or visual body cavity searches in such circumstances only with prior supervisory approval, upon reasonable suspicion that a youth is in possession of a weapon or contraband, and in accordance with applicable law. [See also standard III(C)(12).]

AMERICAN CORRECTIONAL ASSOCIATION (ACA) PERFORMANCE-BASED STANDARDS FOR JUVENILE CORRECTIONAL FACILITIES 4TH EDITION, 2014 SUPPLEMENT

Security: Contraband Control - 4-JCF-2A-20

The staff conducts searches of facilities and juveniles to control contraband and provide for its disposition. The procedures are made available to staff and juveniles. The procedures are reviewed annually.

Comment: The facilities search plans and procedures may include but are not limited to the following:

6. Staff training in effective search and other techniques instead of body searches whenever feasible

Care: Contraband Control 4-JCF-4C-63

When there is reason to conduct a manual or instrument inspection of a body cavity based on a risk to the security of the facility, the juvenile is referred to a health-care practitioner. Any inspection is completed in private.

Comment: It is recommended that observations and/or x-ray be obtained in lieu of a manual or instrument inspection.

Security: Strip Searches - 4-JCF-2A-22

- Strip searches are conducted in private and based on the reasonable belief that the juvenile is carrying contraband or other prohibited material. In all cases, the inspection is conducted by trained personnel of the same sex.

Comment: A strip search is inclusive of the oral cavity

**AMERICAN CORRECTIONAL ASSOCIATION
(ACA) PERFORMANCE-BASED STANDARDS
FOR JUVENILE CORRECTIONAL FACILITIES
4TH EDITION, 2014 SUPPLEMENT**

Justice and Order: Approved Visitors - 4-JCF-3A-19

Juveniles may receive approved visitors except where there is substantiated, documented evidence that the visitor poses a threat to the safety of the juvenile or the security of the facility. Procedures specify:

2. The circumstances under which the visitors are searched

Programs and Services, Reception and Orientation: Admissions Process - 4-JCF-5A-01

- Upon entry into the system, the admission process includes, but is not limited to, the following:
 2. A thorough and complete search of the juvenile and of possessions.

DJS SECURITY CONTRABAND DEFINITION

Contraband is reported in the DJS Incident Database, either as a stand-alone incident, or as part of another incident type, where contraband was found. DJS policy distinguishes "Security Contraband" (level 2 or 3) from non-security contraband (level 1) as:

Security Contraband - an unauthorized item found in, on, or around DJS grounds or confiscated from a staff, youth, or visitor that has the potential to threaten the security of the facility.

- Level 2 includes, but is not limited to cigarettes, lighters, matches, gang material, batteries, money - less than \$10 (currency and coins), screws, wire, glass, etc.
- Level 3 includes, but is not limited to any weapon, homemade or manufactured; cell phones; illegal, controlled, or unknown substances; explosives or explosive substances; money greater than \$10 (currency or coins); escape plans, maps, and/or provisions; etc.

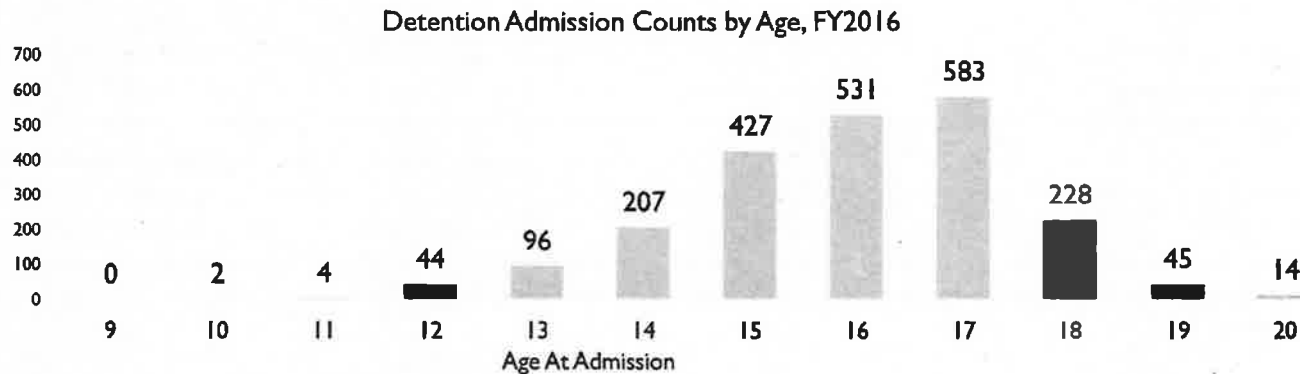
DJS FACILITY CONTRABAND INCIDENTS FY2011 – FY2016

- There were 104 incidents logged in FY2016 where security contraband were found. This is down 57% from FY2011.
- Almost all contraband found is a result of a search. Of the 104 incidents of contraband found, just nine were discovered during a restraint, assault, or medical exam.

	Total Incidents	Level 2	Level 3
FY 2016	104	78	26
FY 2015	89	70	19
FY 2014	147	101	46
FY 2013	197	NA	NA
FY 2012	195	NA	NA
FY 2011	244	NA	NA

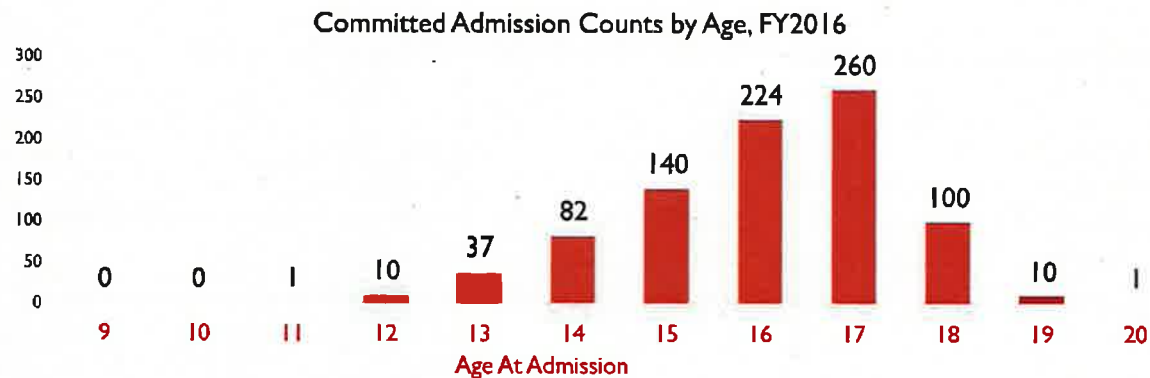
DJS DETAINED YOUTH BY AGE, FY2016

- During FY2016 there were six youth under the age of twelve admitted to detention
There were 44 youth admitted at age 12.
- 2.3% of detained youth were under 13.



DJS COMMITTED YOUTH BY AGE, FY2016

- During FY2016 there was one youth admitted under the age of twelve. There were ten youth admitted at age twelve.
- 1.3% of committed youth were under 13.



Task Force Requirements

The Task Force was charged with:

- reviewing the current policies and practices of the Department of Juvenile Services regarding shackling and strip searches of children within the juvenile justice system;
- examining when, by whom, and for what purposes a child in the custody of the Department of Juvenile Services is strip-searched or shackled;
- determining the capital expenditures that are necessary to address issues regarding the restraint and searches of children within the juvenile justice system; and
- making recommendations regarding changes in policies, practices, or capital expenditures that are necessary to address issues involving the restraint and searches of children within the juvenile justice system.

DJS Recommendations

Visual Body Searches

1. The department shall provide youth with a disposable paper gown when conducting all visual body searches.
2. The department shall not conduct a visual body search of a youth after attorney visitation, unless there is reasonable articulable suspicion that the youth is in possession of contraband.
3. The department shall not conduct a visual body search of a youth after family visitation, unless there is reasonable articulable suspicion to believe the youth is in possession of contraband. **A budget appropriation would be required for equipment and staff in each of the 13 DJS operated facilities to implement this recommendation.**
4. The department shall prohibit the use of visual body searches when youth have remained under the direct and continuous supervision of department staff during an off-campus outing, unless there is reasonable articulable suspicion to believe the youth is in possession of contraband.
5. The department shall develop procedures to direct staff to utilize a graduated approach when conducting a reasonable suspicion search (utilizing other search procedures such as, processing with the youth, a pat down search or wand search) before employing a visual body search.

Other State Information

- ✓ 61% of States Reviewed Require Routine Strip Search After Visitation
- ✓ 12 of the 36 States Reviewed Provide for a Reasonable Suspicion or Probable Cause Search at Visitation
- ✓ Recommendations are consistent with or exceed the Annie E. Casey Detention Standards
- ✓ Recommendation #4 is consistent with the approach in Oregon; Colorado; Florida; Massachusetts; and Pennsylvania

Mechanical Restraints

6. The department will evaluate reorganizing the secure transportation unit. Currently, the department operates one statewide unit that is responsible for most of the youth transportation needs across the state. It is DJS policy that all transportation unit transports are secure, meaning mechanical restraints are used. The department shall evaluate the ability to create a separate non-secure transportation unit for our staff secure programs. **It is anticipated a budget appropriation for equipment and staff would be required to implement this recommendation.**
 7. The department will evaluate the use of video conferencing to eliminate the need for transportation to certain court hearings. The department currently has video conferencing capabilities in all 13 facilities and in all 24 county offices. The department will work with stakeholders, including the State's Attorney's Association, Office of the Public Defender, and the Courts to evaluate the potential use of this technology.
 8. The department shall eliminate the use of secure transports when transporting a youth on an earned home pass.
 9. The department will work with private providers to transition non-secure transportation responsibilities to the provider.
 10. The department shall develop procedures for out-of-state transports. Specifically, the procedures shall include factors to consider when requiring a secure transport for out-of-state placements, such as a youth's verbal indications of AWOL, behavioral health, suicide ideations, prior AWOLs, and aggressive behavior.
- Other State Information

 - ✓ 66% of States Reviewed Require the Use of Restraints During Transports

 - ✓ The Annie E. Casey Detention Standards permit the use of handcuffs during transport – if additional restraints are required, staff must have particularized reasons for their use.

General Recommendations / Reporting

11. The department shall collect data to capture when and under what circumstances there is reasonable articulable suspicion to conduct a visual body search, and what if any contraband or prohibited items are recovered.
12. The department shall collect data to monitor the use of secure transports.
13. On or before December 31, 2017, the department shall submit a report to the General providing an update on the implementation of the task force recommendations.

Legislative Changes

14. The Task Force should consider legislation to set a minimum age a youth could be detained.

RESTRAINT POLICY OVERVIEW

Presented by the Maryland Department of Juvenile Services

STATE REVIEW - RESTRAINTS

The following State policies were reviewed:

Alaska	Idaho	Mississippi	North Carolina	Vermont
California	Kansas	Missouri	Ohio	Washington
Colorado	Kentucky	Nebraska	Oregon	West Virginia
Connecticut	Louisiana	New Hampshire	Pennsylvania	Maryland
Florida	Maine	New Jersey	South Carolina	
Georgia	Massachusetts	New Mexico	Texas	
Hawaii	Michigan	New York	Utah	

USE OF RESTRAINTS DURING TRANSPORTATION

32 States were reviewed:

✓ 21 States (66% of those reviewed) require use of restraints during transports

Alaska (court transports); Colorado; Florida (high risk/ maximum risk program); Georgia; Hawaii; Kansas; Maine; Massachusetts (hardware secure and staff secure); Michigan; Mississippi; New Mexico; New York; North Carolina; Ohio (transfer; medical; legal; funeral); Oregon (between facilities; from higher security facility; from community to detention/higher security; to or from DOC; medical; funeral); Pennsylvania (secure care); South Carolina (secure confinement); Texas; Utah (secure facility); West Virginia (secure facility); Maryland

✓ 11 (34% of those reviewed) States permit the use restrains during transport

California; Connecticut; Idaho; Kentucky; Louisiana; Missouri; Nebraska; New Hampshire; New Jersey; Vermont; Washington;

TYPE OF RESTRAINTS IN TRANSPORTATION

32 States were reviewed:

- ✓ 12 State policies (38%) specify the type of restraints: handcuffs; belly/waist chain; and leg irons

California; Colorado; Michigan; Mississippi; New Mexico (and flight suit); North Carolina; Ohio; Oregon; South Carolina; Texas; West Virginia; Maryland

- ✓ 4 State policies (13%) specify the type of restraints: handcuffs and belly/waist chain

Alaska; Massachusetts; Pennsylvania; Utah

- ✓ 16 (50%) State policies do not specify type of restraint

Connecticut; Florida; Georgia; Hawaii; Idaho; Kansas; Kentucky; Louisiana; Maine; Missouri; Nebraska; New Hampshire; New Jersey; New York; Vermont; Washington

JDAI DETENTION FACILITY ASSESSMENT STANDARDS – ANNIE E. CASEY 2014 UPDATE

USE OF PHYSICAL FORCE OR RESTRAINT INCIDENT: Any situation involving the use of physical force, the use of chemical agents, the use of chemical or medical restraints, or the use of mechanical restraints beyond routine restraints that occur during transportation. (page 172)

d. During transportation (inside or outside of the facility), staff may use handcuffs to prevent injury or escape. In the rare instances that staff need additional restraints during transportation, such as belly belts/chains or leg shackles, staff must provide particularized reasons for their use and obtain approval by the facility administrator. Staff do not use belly belts/chains or leg shackles on pregnant girls. Staff do not handcuff youth together during transportation, or restrain youth to the vehicle. (page 173)

**JDAI DETENTION FACILITY ASSESSMENT
STANDARDS – ANNIE E. CASEY
2014 UPDATE**

3. The facility develops and implements written policies, procedures, and actual practices to prohibit:
- a. The use of any kind of mechanical restraint device other than handcuffs while youth are in the facility.
 - b. The use of any kind of restraint device other than handcuffs or belly belts/chains and leg shackles during transportation.
 - c. Use of chemical agents, including pepper spray, tear gas, and mace (page 174)

**AMERICAN CORRECTIONAL ASSOCIATION
(ACA) PERFORMANCE-BASED STANDARDS
FOR JUVENILE CORRECTIONAL FACILITIES
4TH EDITION, 2014 SUPPLEMENT**

Security: Transportation of Juveniles: 4-JCF-2A-16

There are guidelines to govern the transportation of juveniles outside the facility and from one jurisdiction to another. These guidelines emphasize safety and the proper use of restraints, and are made available to all personnel.

Security: Restraints Not Used for Punishment: 4-JCF-2A-17

Instruments of restraint, such as handcuffs, leg irons, and straightjackets are never applied as punishment and are applied only with the approval of the facility administrator of designee.

Comment: Instruments of restraint are only used as a precaution against escape during transfer; for medical reasons by the direction of the medical officer; to prevent juvenile injury to self or others; or to prevent property damage. They are not applied for more time than is absolutely necessary.