

Juvenile Justice Fact Sheet Series: Right to Counsel

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Right to
Counsel

Girls

Crossover
Youth

African-
American
Youth

Latino Youth

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Youth

Mental
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Overview:

The right to counsel—or the right to be represented by an attorney—is established by the Fifth and Sixth Amendments to the United States Constitution. In 1967, the United States Supreme Court held in *In re Gault* that the right to an attorney also applies to children in delinquency proceedings under the Due Process clause of the Fourteenth Amendment. The Court held: “There is no material difference, with respect to right to counsel, between adult and juvenile proceedings in which adjudication of delinquency is sought.” In the nearly 50 years since *Gault*, research has helped us better understand children and adolescent development, highlighting that the dangers the Court sought to protect children from in *Gault* still exist.

Right to Counsel for Ohio Youth:

Under Ohio law, every child has the right to be represented by an attorney. In addition, children are presumed to be indigent, or unable to pay for an attorney, meaning that children are entitled to counsel at state expense, regardless of their parents’ financial situation.

However, barriers to children’s access to quality legal representation remain. In 2003, an American Bar Association examination of children’s access to counsel in Ohio found that “it has become a tolerated if not accepted practice that large numbers of poor youth waive their right to an attorney in Ohio, even during the most critical stages of proceedings.” The report found that children’s access to counsel in Ohio is hampered by insufficient funding and courts that devalue the role of defense attorneys.

In recent years, several statewide developments have improved access to counsel for Ohio youth:

- *In re C.S.*: In 2007, the Supreme Court of Ohio held that children may not waive their right to counsel unless they are advised by their parent, guardian, or custodian about their right to counsel. Before allowing a child to waive his or her right to counsel, a judge/magistrate must consider several factors, including the child’s age, intelligence, and education level; the child’s background and experience; the child’s conduct and emotional stability; and the complexity of the proceedings.
- *Juvenile Rule 3*: In 2010, the Supreme Court of Ohio amended Juvenile Rule 3, requiring children to have an attorney when: 1) the child faces transfer to adult court (bindover) or serious youthful offender charge that may result in an adult sentence; 2) there is a conflict or disagreement between the child and their parent, guardian, or custodian; and 3) the custodian requests that the child be removed from the home. Juvenile Rule 3 also requires that every child charged with a felony offense meet and consult with an attorney before waiving their right to counsel. Finally, in any case in which a child faces a loss of liberty (such as detention) as a potential disposition, the court must explain to the child the child’s right to counsel and the disadvantages of proceeding without an attorney.

Kids are Different:

In recent years, advances in brain research have shown how different children are from adults. Children’s and adolescents’ brains are hardwired to seek risk and reward, and not to anticipate future consequences of actions. The human brain does not finish developing the synapses that control problem solving and decision making until a person is in his or her mid-20s.

These fundamental differences between children and adults—including less resilience to peer pressure and perception of consequences, and limited understanding of the criminal and juvenile justice systems—affect criminal culpability and children’s abilities to make informed decisions during their cases, such as how to assist their attorney and whether to accept a plea agreement. Based in part on information from neuroscience, the U.S. Supreme Court has recognized the importance of elevated protections for even the most serious offending children in the justice system, issuing decisions requiring that age be considered as a factor in some legal analyses, outlawing mandatory life without parole for children, and prohibiting courts from sentencing children to death or to life without parole in non-homicide cases.

It is critical that attorneys who work with children are aware of the differences between adults and children, in order to provide meaningful representation to their clients. A child’s physical, mental, and social immaturity makes juvenile delinquency representation a specialized practice, requiring attorneys to know more about their clients and factors influencing their lives. Juvenile defenders represent their clients’ expressed interests—not what the attorney thinks is the child’s best interest—and counsel has the difficult task of explaining complex legal issues to their clients, who could fall anywhere on the adolescent development spectrum. And since, by nature, children seek to please authority, training in adolescent interviewing is vital for juvenile attorneys.

While adolescent development studies have recently brought the juvenile justice system a long way, children in Ohio’s juvenile justice system continue to face barriers to access to counsel, high waiver rates, underfunded indigent defense programs, and insufficiently trained counsel. Even well-trained advocates struggle to educate courts and legislators on how childhood and adolescence factor into the court system.

Conclusion:

In *Gault*, the U.S. Supreme Court declared: “The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”

Recent case law suggests that courts are acknowledging the unique challenges children face in the juvenile and criminal justice systems. The constitutional right to counsel is critical, with heightened importance for adolescents with developmental issues. Ohio has taken steps in the right direction with *In re C.S.* and amendments to Juvenile Rule 3, providing increased protection for children facing the most serious charges. But many Ohio children continue to face delinquency charges without being represented by counsel, or while being represented by counsel who are not adequately trained. Access to quality counsel promotes fundamental fairness and procedural justice, which leads to success for children, the justice system, and community safety.

Resources:

U.S. Supreme Court decisions: *In re Gault*, 387 US 1 (1967); *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *J.D.B. v. North Carolina.*, 131 S. Ct. 2394 (2011); *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

Supreme Court of Ohio: *In re C.S.*, 115 Ohio St.3d 267, 874 N.E.2d 1177 (2007); Ohio Rule of Juvenile Procedure 3.

American Bar Association, et al.: *Justice Cut Short: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings in Ohio* (2003).

National Juvenile Defender Center: *National Juvenile Defense Standards* (2012); Juvenile Training Immersion Program: Adolescent Development.

Ohio Revised Code §2151.352

This fact sheet is one of a fact sheet series about Ohio’s juvenile justice system by the Ohio Juvenile Justice Association.

If you have any questions, please visit OJJA’s website or contact Erin Davies with the Juvenile Justice Coalition at edavies@jjohio.org or 614-400-5548.