

Kids Without Counsel

Colorado's Failure to Safeguard Due Process for Children in Juvenile Delinquency Court



A Report by the Colorado Juvenile Defender Coalition

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INTRODUCTION

“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.”

In re Gault, 387 U.S. 1, 36 (1967)

In the case of *In re Gault*, the United States Supreme Court ruled that children have a constitutional right to defense counsel in juvenile delinquency court under the Due Process Clause of the 14th Amendment. Defense counsel represents the child’s point of view, makes sure the child understands the court process and the consequences of decisions, and protects against unfairness or government overreach. Most people would assume that when a child is accused of a crime, the child would be provided a lawyer when they appear in court.

Yet, many Colorado children never receive counsel and plead guilty to crimes without a lawyer’s review of the case, the child’s family circumstances, the short- and long-term consequences of pleading guilty, and whether the proposed sentence is appropriate or even necessary.

For the last ten years, children in over 40% of all juvenile delinquency cases in Colorado had no defense attorney representation at any stage in their case.

Last year, children in three judicial districts had no defense attorney representation in over 60% of juvenile cases.

In its 2012 report: “*Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Proceedings*,” the National Juvenile Defender Center (NJDC) detailed their findings following an 18-month study of juvenile defense in Colorado. The Assessment noted wide disparities in access to counsel and the quality of defense representation for children. The Colorado Juvenile Defender Coalition (CJDC) took a second look at the data and found that **45% of all juvenile cases had no defense attorney** in 2012. CJDC then visited courtrooms across Colorado to observe the circumstances that drive so many children to waive their right to counsel.

Comparing the data to the delivery of legal services, we identified a combination of obstacles confronting children and families in juvenile court—stemming from court scheduling and public defender staffing practices, state law, and court procedures and policies—that must be remedied to safeguard due process, access to justice, and fundamental fairness for Colorado’s children.

STATISTICS

The Colorado judicial branch does not specifically collect data on the number of children waiving counsel or on the timing of the appointment of counsel. The best information we could obtain is the number of juvenile delinquency cases that had no defense attorney at any point in the case, which means the figures below do not address late appointment of counsel. Thus, these **statistics understate the number of kids without counsel** because they do not include cases where counsel was appointed late.

Percentage of Kids Without Counsel in 2012

Percentage	District	Counties	Cases
66.6	8	Larimer (Fort Collins), Jackson	1003
62.3	9	Garfield (Glenwood Springs), Pitkin, Rio Blanco	154
61.5	1	Jefferson (Golden), Gilpin	984
57.5	5	Clear Creek, Eagle, Lake, Summit	205
55.2	18	Arapahoe, Douglas, Elbert, Lincoln	1318
54.6	19	Weld (Greeley)	985
48.6	6	Archuleta, La Plata, San Juan	72
47.5	14	Grand, Moffat, Routt	82
45.9	10	Pueblo	287
42.8	11	Chaffee, Custer, Fremont, Park	161
36.7	21	Mesa (Grand Junction)	264
36.3	2	Denver	1096
34.6	22	Dolores, Montezuma	49
33.3	13	Kit Carson, Logan, Morgan, Phillips, Sedgwick, Washington, Yuma	156
32.4	17	Adams (Brighton), Broomfield	616
32.1	3	Huerfano, Las Animas	84
30.5	20	Boulder	566
30.4	7	Delta, Gunnison, Hinsdale, Montrose, Ouray, San Miguel	161
28.5	12	Alamosa, Conejos, Costilla, Mineral, Rio Grande, Saguache	126
27.7	16	Bent, Crowley, Otero	54
26.2	4	El Paso (Colorado Springs), Teller	1160
23.1	15	Baca, Cheyenne, Kiowa, Prowers	69

While juvenile crime is down and the number of delinquency cases has greatly declined, **high percentages of unrepresented youth persist** and data show a recent increase.

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
56%	56.7%	56.9%	54.2%	50%	49.3%	44.8%	43.2%	41.4%	43.3%	45.7%

COLORADO COURT WATCHING

CJDC sent trained volunteers to observe juvenile court proceedings in urban, suburban, and rural counties during a four month period in the summer of 2013. Court watchers collected data on the cases they saw and the parties and practices in the courtroom, recording their observations of the circumstances faced by children and families.

Court watchers made 20 visits to 16 courtrooms across 15 judicial districts, and collected observational information from over 250 cases in Colorado.

Most of the courtrooms we visited were located in the same city as the public defender's office serving that county. We planned court visits for the earliest stages of a juvenile delinquency case, such as detention hearings and first appearances, where we knew from the NJDC Assessment children had difficulty accessing a juvenile defense attorney.

Counties Observed	Judicial District	Courthouse Location	Public Defender's Office
Adams	17	Brighton	Brighton
Alamosa	12	Alamosa	Alamosa
Arapahoe	18	Centennial	Centennial
Boulder	20	Boulder	Boulder
Denver	2	Denver	Denver
Douglas	18	Castle Rock	Castle Rock
El Paso	4	Colorado Springs	Colorado Springs
Jefferson	1	Golden	Golden
Fremont	11	Canyon City	Salida
Garfield	9	Glenwood Springs	Glenwood Springs
Larimer	8	Fort Collins	Fort Collins
Kit Carson	13	Burlington	Sterling
Pueblo	10	Pueblo	Pueblo
Weld	19	Greeley	Greeley

Upon review of the court observation information and data collected, CJDC concluded the most significant **factors contributing to kids without counsel** are as follows:

1. The absence of a juvenile defense attorney in the courtroom
2. Cumbersome procedures to apply for a public defender
3. Waiver of counsel occurs while a child pleads guilty
4. Judges appoint GALs as a substitute for defense counsel

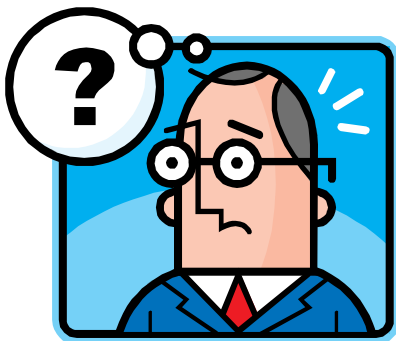
1. THE ABSENCE OF A JUVENILE DEFENDER IN THE COURTROOM

The number one factor that appears to affect whether a child gets a lawyer is presence or absence of a juvenile defense attorney in the courtroom. In some places, like Denver, Boulder, and Colorado Springs there are public defenders in juvenile court nearly every day and the majority of kids are spoken to or represented by counsel. However, in other counties, like Arapahoe, Larimer, Jefferson, and Weld, public defenders only appear on days when their clients are scheduled, which leaves space on the court calendar for kids without counsel. Typically, in these counties, first appearances were scheduled when public defenders or other court-appointed counsel were not routinely present.

On one day in Larimer County we observed *20 out of 22 children with no counsel*; on another day in Arapahoe County *15 out of 23 children had no counsel*; while in Weld County *21 out of 21 children had no counsel* for their first day in juvenile court. The absence of a defense lawyer is permitted and persists through court scheduling, public defender staffing practices, and the laws and procedures for determining indigence.

First Appearances

When a child receives a summons, the child's first court date is called a first appearance or advisement hearing. A first appearance may only take a few minutes in front of the judge, but families can wait for hours before their case is called. In Arapahoe, Douglas, Jefferson, and Weld Counties, **prosecutors called out names of children** and spoke with children and families first, **advising them about the court process**, the right to an attorney, **and the plea bargain** the prosecutor was offering the child. These conversations rarely lasted more than a few minutes and often took place in the middle of a busy noisy public courtroom where children and families had no privacy.



The absence of a juvenile defender in the courtroom means families are informed about the court process and what might happen by a prosecuting attorney, followed by a judicial advisement given to everyone in the room. In most courtrooms children and parents are given three “options”: (1) hire a private attorney and come back another day, (2) apply for the public defender and come back another day, or (3) talk to the prosecutor and work out a deal that day.

Those options led many of the children we watched to plead guilty and waive their right to counsel, often with parents who understandably wanted to resolve the case that day, but without fully understanding the long term consequences for the child and/or family.

Across the state, children were pleading guilty to crimes without counsel, entering into sentencing agreements requiring a year or more of supervision, evaluations, classes, electronic home monitoring, and/or drug and alcohol testing. Parents too can be bound by sentencing agreements and may not be fully aware of the burdens on their schedules or wallets. **One mother in Arapahoe County told the court she lost three jobs trying to keep up with her sons' appointments** and his case was not yet resolved.

Detention Hearings

When a child is arrested, handcuffed, and taken to a detention center, the child's first court date is called a detention hearing. At the detention hearing the child comes to court in a jumpsuit, handcuffed (and sometimes the handcuffs are attached to a chain around their waist), and in many places the child is also shackled at the ankles. Nearly all children from juvenile detention facilities are shackled in court, regardless of the seriousness of the accusation. ***In Weld County we observed five children shackled and chained together at the ankles walking into court.*** The chain and handcuffs were removed by deputies after the children were seated in court.

At the detention hearing the judge decides whether to let the child go home or keep the child locked up until the case is resolved. *Unlike adults, children can be held without bond or bail.* Even when a child is released, restrictions may be placed on the child that can lead to re-incarceration for technical violations. We observed many children put on electronic home monitoring, which places a transmission device on the child's ankle, can cost families money, and may be highly unnecessary.

In many courtrooms **there was no defense attorney present for detention hearing.**

In Glenwood Springs, we observed one child who spent over six weeks in juvenile lock up without a lawyer. While he waited in detention for mental health evaluations, it was reported his depression and anxiety worsened. The child was finally released at his third hearing when a defense attorney was appointed and advocated for his removal from the detention facility.



Sometimes a parent wanted their child to stay in detention, and when that child had no lawyer there was no one to advocate for the child. In the case of an unrepresented child appearing in El Paso County, the mother had previously waived counsel and was now telling the court that her child didn't accept the opportunity the court gave him. The court kept the child in detention, did not appoint counsel, and set the case for a hearing.

In contrast, **in Denver and Boulder public defenders regularly appear at detention hearings.** Likewise, in Boulder, Denver, and Fremont County public defenders called the cases on the calendar and were the first parties to talk to kids and families. In these counties, children and families were able to confidentially ask questions about their options and the juvenile delinquency court process.

2. THE PUBLIC DEFENDER APPLICATION PROCESS

The second greatest barrier we observed affecting children's access to counsel was the public defender application process. Under Colorado law, if children and families want an attorney and cannot afford a private lawyer, they must first request an attorney and then apply for a public defender. The parents or legal guardian of the child then have to go through the process of determining whether they qualify for a public defender.

This process varied in every courtroom we visited. In Boulder and Fremont counties, a public defender was present in the courtroom to help answer questions and provide applications. In Adams County, the judge directed every juvenile to apply for a public defender. In Larimer County, the magistrate simply asked if the child would like to speak to the District Attorney or apply for a Public Defender, as if it was an either/or decision where each path was equally well-chosen, or all the same to the court.



Indigence Determinations

Under state law, the public defender can only represent the child if the child's *parent* or legal guardian is indigent. **In Colorado, a family of four will qualify for a public defender only if their total family income is below \$32,000.** Yet a private attorney can cost as much as \$150 to \$300 dollars or more per hour, and require several thousand dollars up front as a retainer. *There is a significant gap between being indigent and having the resources to hire a private attorney.* This scheme creates significant tension between a parent and child for families already under stress.

Delayed Proceedings

The Public Defender's office is required to review every application to determine who is indigent before the court can appoint a public defender. Although applications may be filled out and reviewed in the courtroom, most courts do not make an indigence determination on the same day and instead direct families who request counsel to go to the public defender's office. Court hearings are often rescheduled for the purpose of applying for a public defender and determining eligibility. This causes unnecessary delay in the case for parents and children who must miss additional days at work or school, and/or remain in detention or on pre-trial supervision requirements, ultimately inducing the waiver of counsel and un-counseled guilty pleas to resolve the case faster.

3. WAIVING COUNSEL WHILE PLEADING GUILTY

In courtrooms across the state, little time was spent explaining the charges and the rights of children. The primary explanation was often a set of written documents handed to the child and parent by a prosecutor. **In Larimer County children were handed a 7-page advisement document that the magistrate spent 2 minutes reviewing** from the bench before calling the first case. Most families appeared preoccupied with what was happening in the courtroom and likely did not fully read the document. Yet when the judge asked the child if he or she understood the advisement, the child always answered yes (one time we saw a mom nudge her child to say "yes").

Advisement

Juvenile court is complicated and confusing, with lots of legal language and acronyms. One parent had no idea who the parties in the courtroom were, even after talking to them. Another parent didn't realize it was a prosecutor they were speaking to about their case. Some parents openly express frustration and confusion. A dad in El Paso County lamented "all the faces keep changing." One mom commented that beside her, no one was there to advocate for the removal of the electronic ankle device from her son.

Children are not waiving counsel and then continuing through the case "pro se."

They are simply waiving their right to counsel as one of the many rights they give up by pleading guilty.

In other courtrooms, like in Adams County and some in Jefferson County, judges spent more time advising children individually, explaining the court process, and encouraging applications to the public defender; in those courtrooms more children and their families requested counsel.

Many judges recommended children and parents to meet directly with the prosecutor and when one parent agrees, other parents waiting in the courtroom tend to follow suit. In Fort Collins, when the judge asked the child and parent if they would like to speak to the district attorney *or* apply for a public defender, only 3 out of 20 families wanted to apply for a public defender. *Larimer County was the only location we observed where cases were continued so kids and parents could meet with the prosecutor at their office before pleading guilty at the next court date.* Court watchers also witnessed prosecutors in Alamosa, Arapahoe, Douglas, Jefferson, and Weld Counties offer a plea deal to juveniles at their first appearance, *before* the child had been advised of their right to counsel by the judge or had an opportunity to request counsel.

In Arapahoe County we heard the prosecutor tell a family “I know this is a lot to throw at you” as the prosecutor walked between the benches in the courtroom, talking to kids and parents as they sat waiting for court to start. *In Douglas County the prosecutor handed every child and parent paperwork and then came back and asked families if they wanted a lawyer.* Children and families, hoping to quickly resolve the case, often take the offer and plead guilty at that first appearance, waiving their constitutional right to counsel.

The Complicated Role for Parents

Parents are put in a difficult position in juvenile delinquency court. On the one hand they are placed in the position of a defense attorney, to assist their child through big decisions like pleading guilty and waiving rights, and on the other hand they may be contemplating a parent perspective or obligation to teach their child a lesson about misconduct and consequences.



These expectations can put even a parent’s best intentions in conflict with their child’s legal and liberty interests. We observed judges ask parents how their child is behaving at home when deciding how to handle the case. While this seems appropriate it poses problems for kids without counsel. Parents can both waive their child’s right to an attorney and make statements against a child, leaving **no one to represent the child.** Colorado law does not require the court to consider whether the interests of the parent are in conflict with the wishes or rights of the child when a child is waiving counsel.

Parents can find themselves facing conflicting expectations of teaching their child a lesson and protecting their child’s constitutional rights. None of the parents we observed were attorneys themselves and were likely unaware of all of the effects of a guilty plea and sentence. Without consultation with defense counsel, children and parents are making critical decisions with life-long consequences on their own.

4. APPOINTMENT OF A GUARDIAN AD LITEM (GAL) AS A SUBSTITUTE FOR DEFENSE COUNSEL

In delinquency cases, the juvenile delinquency court judge or magistrate may appoint a Guardian ad Litem (GAL) for reasons including when a parent does not accompany the child or when there is conflict between parent and child. Although in Colorado a GAL is a licensed attorney, he or she does not have the same obligations as defense counsel.

The GAL's role is to stand in the place of the parent and provide the court information about the child's circumstances and represent what they think is in the *best interests* of the child. Unlike defense attorneys who represent the *expressed interests* of the child, **GALs do not have a confidential attorney-client relationship with children.**

Yet, in some delinquency courtrooms GALs have a stronger presence than defense counsel. In one courtroom in Fort Collins there was a desk (and sign) for the GAL but there was no public defender present for the entire court docket. In multiple counties, **judges appointed a GAL outright, or to advise the child of their right to counsel, instead of simply appointing defense counsel for the child.**

For instance, in Adams County a child's uncle was the victim in the case and expressed concern about the expense of hiring a private attorney, so the judge appointed a GAL for the purpose of advising the child about the right to counsel. A similar practice was observed in Weld County.



In at least 30 instances we observed the court appoint a GAL but not defense counsel. One factor contributing to the appointment of a GAL instead of defense counsel could be that there is no indigence requirement or application for a GAL appointment. Judges and magistrates may be appointing a GAL if there are concerns the parents may not qualify for a public defender or because of the absence of a public defender in the courtroom.

Because of the lack of attorney-client confidentiality, GALs are generally trained not to discuss the facts of the case with the child, and do not investigate the case or act as a check on the state's version of events. Only appointing a GAL in a delinquency proceeding still leaves the child without counsel against the charges in the case.

CONCLUSION

Whether or not a child gets a lawyer in juvenile delinquency court varies widely across Colorado. CJDC's recent observations confirmed that even within the same courthouse, whether a child gets a lawyer can depend on which courtroom and to which judge the child's case is assigned. When the professionals in the courtroom are committed to ensuring representation for all children and the public defender is regularly present, kids are far more likely to get counsel. Where there is an accepted absence of counsel, children are more likely to take a quick deal and families are left to fend for themselves.

Laws are meant to ensure equal access to justice and due process. Colorado systemically fails to safeguard children's right to counsel in law and practice. Children need the guiding hand of counsel not only to protect their rights but to ensure the resolution is appropriate for the individual child after an investigation into the case and the child's circumstances. Yet, court and public defender scheduling, indigence determinations, and other judicial practices collectively undermine the importance of defense counsel and the constitutional mandate to provide children due process. It's time for Colorado to develop laws, rules, and practices that ensure access to justice for all of our children.

RECOMMENDATIONS

The Colorado Juvenile Defender Coalition recommends **four fundamental reforms** to break down barriers and provide meaningful access to defense counsel for children:

1. Ensure all children are represented by defense counsel at their first court date, whether that is a detention hearing, first appearance, or advisement hearing. The appointment and presence of defense counsel should be standard in all juvenile courtrooms. A GAL should never be appointed as a substitute for defense counsel.
2. Consider all children indigent for the purpose of appointing a public defender. At a minimum, indigence determinations should be based upon the income and assets of the child, not the parent or legal guardian.
3. Create safeguards to reduce the waiver of counsel. The waiver of defense counsel should be an exceptional circumstance that follows consultation with counsel to make sure children and parents understand the possible consequences in the case.
4. Create a juvenile defense division to ensure that attorneys who represent children are well-trained specialists in adolescent development, juvenile law, and juvenile defense. A chief juvenile defender is necessary to provide statewide leadership, and ensure children benefit from the implementation of new laws and policies.

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About CJDC: The *Colorado Juvenile Defender Coalition* is a nonprofit organization dedicated to excellence in juvenile defense and advocacy and justice for all children and youth in Colorado. We believe all children and youth should experience adolescence free from over-criminalization in a just society that promotes their well-being and provides second chances. The principal author of "*Kids Without Counsel*" is CJDC's Executive Director Kim Dvorchak.

See also, "*Colorado: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Court*", National Juvenile Defender Center and CJDC (2012).



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