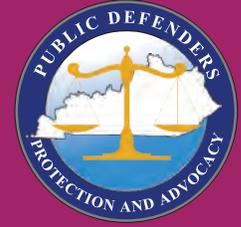


The Advocate



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Proposed Revisions to Kentucky Juvenile Code



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The Unified Juvenile Code Task Force created by House Concurrent Resolution 129 is an opportunity to change the course of the lives of Kentucky's children. Although all wish that every child's needs were met at home or through family and community care, the reality is that thousands of Kentucky kids will come into contact with the juvenile or family court system in some manner every year. As policymakers, advocates, and service providers, the members of the Task Force will be able to shape how the Commonwealth's courts and agencies will respond to children's needs in the days ahead.

In the pages that follow, the Department of Public Advocacy makes a number of specific recommendations to change Kentucky's Juvenile Code. Many of these recommendations seek to address the reality that Kentucky has the second highest rate of placing children who have not committed criminal acts (children referred to as status offenders) in detention. In general, the suggestions seek to take the following steps to improve juvenile court in the Commonwealth:

- Eliminate the concept of *Status Offenses* and replace with a new statutory framework recognizing *Children in Need of Services*.
- Prohibit formal prosecution of any child 10 years of age or younger.
- Ensure that secure detention of a child is a last resort to be used only when non-secure alternatives have been exhausted or public safety is at risk.
- Increase opportunities for diversion rather than formal adjudication in public offense cases.
- Recognize and provide limitations on the role of School Resource Officers in investigating and bringing charges against children.
- Enhance protections for children and the parents of children who are questioned about alleged criminal conduct.
- Expand judicial discretion to allow resolutions specific to a child and case instead of mandatory transfers, classifications, or commitments.

SECTION ONE: RECOMMENDED STATUTORY CHANGES

KRS CHAPTER 600: INTRODUCTORY MATTERS

KRS 600.010: The following legislative purpose should be added to Section (2):

Secure detention of a child should be used only when non-secure alternatives have been exhausted and should not be deemed in a child's best interest since it is often harmful to the child.

KRS 600.020: The following definitions should be amended:

- "Beyond the control of parents" should require that the danger to the child or others involves a significant risk of serious physical injury or death.
- "Habitual truant" should be amended to provide that three reports to the Director of Pupil Personnel must be made before a child can be found habitually truant, and that tardies of less than half a day may not be used as a basis for a truancy charge.
- "Informal adjustment" should be amended to eliminate the requirement of agreement between the parties.
- "Valid court order" should be amended to apply only to a person who is "found to be a status or public offender." The current language provides that a person who is "found or alleged to be a status offender" may be given a valid court order. This language is both too broad and too narrow. It is too broad because it permits valid court orders to be entered at arraignment, and that increases the use of detention for status offenders because courts enforce the valid court order without ever adjudicating the underlying status offense. It is too narrow because the basic requirements of the valid court order statute are responsible limitations which should be applicable to any dispositional order under KRS Chapters 630 or 635.

KRS CHAPTER 605: ADMINISTRATIVE MATTERS

KRS 605.100 should be amended to provide that both the Department of Juvenile Justice and the Cabinet for Families and Children shall place youth in the least restrictive alternative placement. It should also be amended to require those agencies to assess all youth for mental health conditions and substance abuse issues, and to provide appropriate mental health and substance abuse treatment in the least restrictive alternative.

New Section or Sections – Provide the duties, limitations, and prohibited activities of school resource officers.

KRS CHAPTER 610: PROCEDURAL MATTERS

KRS 610.010 should be amended to clearly state that jurisdiction to enforce and enter orders ends when juvenile turns 18.

KRS 610.030(4) should be amended to modify the circumstances where a county attorney or judge can insist that a case be referred for a formal hearing. Currently, referrals often happen before the Court Designated Worker procedure has concluded, resulting in a much higher likelihood of the child being detained. Consistent with the research cited in Section Two (beginning on page 3) of this article, we believe diversion should be mandatory for initial status offenses and misdemeanor offenses. Moreover, status offenders should go through diversion three times before a referral to court is permitted. In addition, any time a county attorney requests that a complaint be referred for formal hearing, the county attorney should be required to do so in writing, stating specifically the reasons why he or she is seeking a formal hearing. The statute should provide that a court may not direct a petition to be filed unless it states substantial and compelling reasons to believe that the diversion undertaken by the Court Designated Worker is not in the best interest of the child.

KRS 610.060 should be amended, or a new section created, which would specifically describe the child's right not to have family members testify against them, in a manner that is consistent with the rules of evidence. The current statute references the privilege, but is unclear on its application.

KRS 610.070 should be amended in the following ways:

- District court jury trials should be permitted upon request, subject to appropriate limitations. Juvenile courts are increasingly imposing consequences on kids which will impact them for the rest of their lives. That is not fair if those juveniles are innocent of the offense. "[M]ost evidence suggests that judges are more likely to convict" than jurors are.¹ In order to preserve this "sacred" right for juvenile defendants, section (1) should be amended to eliminate the prohibition on jury trials.
- In order to limit the court's exposure to unsworn information, section (3) should be amended to state that upon a motion of any party, the court shall exclude all persons from the courtroom during an evidentiary hearing or adjudication, except the judge, the clerk, the witness who is testifying, counsel for the parties, the client, and the client's family.

KRS 610.110 should be amended in the following ways:

- Specifically provide that the court shall make every effort to incorporate graduated sanctions and positive incentives into dispositional orders;
- Prohibit the court from using contempt powers to punish for violation of a probation order (thus overruling *A.W., A Child Under Eighteen, v. Commonwealth*, 163 S.W.3d 4 (Ky. 2005), which held that juveniles, unlike adults, could be found in contempt for a violation of probation);
- Provide that the secure detention sentence for contempt against a juvenile cannot be greater than the detention sentences permitted under KRS 635.060.

KRS 610.120 should be amended to permit the court to find that a placement selected by the Cabinet for Families and Children or Department of Juvenile Justice is not the "least restrictive alternative" and to order the child to be removed from that placement and placed elsewhere. The selection of the new placement should remain in the discretion of the agency. In addition, the statute should be amended

¹ Bernstein, Brian H., *Social Science Research for (and in) the Courts: Judges vs. Juries*, Court Review, Vol. 43, Issue 2, pg. 58 (January 2006). <http://aja.ncsc.dni.us/courtrv/cr43-2/CR43-2Bornstein.pdf>

to expressly provide that the court has the power to vacate or amend the results of an adjudication, or a disposition order, provided that it cannot make a disposition more restrictive unless the child has committed a new public offense.

KRS 610.200 should be amended to provide that the child has the right to have a parent, family member, or legal guardian be present during an interrogation and officers must reasonably comply with such a request. As described in the research cited in Section Two, youth as a class are especially vulnerable to false confessions, and often would benefit significantly with having a responsible adult present to help them understand their rights. As it stands, the fact that the current law does not provide this protection to children and parents is shocking to most parents and laypersons, and exposes vulnerable children to sophisticated interrogation techniques without adult protection. To remedy this, the statute should ensure the following:

- School resource officers and other police officers are not allowed to interrogate at school without the parents.
- The right to have a parent present may be invoked by a parent, family member, or legal guardian.
- Parental notification is more clearly described by the statute.
- Statements obtained in violation of this section will result in exclusion of the statement.

KRS 610.200(1) should be amended to include that the officer has to tell the parent where they are taking the child.

KRS 610.265 should be amended to provide that initial detention for a status offense contempt charge shall be non-secure. Alternatively, KRS 610.265(3)(c) could be amended to remove secure detention as an option for contempt of a status order. In addition, this provision should be amended to specifically authorize the Detention Alternative Coordinator to place a child in a detention alternative, if the child is in pretrial detention and has not been transferred for trial as a youthful offender.

KRS 610.280 should be amended to clearly create a presumption that the child shall not be detained unless the court finds the child is a flight risk, is unlikely to appear for future hearings, or is likely to present a danger to the public if released.

KRS 610.320 should be amended in the following ways to protect the confidential nature of juvenile delinquency proceedings:

- All of section (3) and the part of section (4) allowing disclosure of records to the school should be repealed. Currently, the erosion of confidentiality protections is permitting most players in the juvenile justice system to learn and act upon information arising out of confidential juvenile proceedings. These actions are often motivated by liability concerns rather than good public policy or the welfare of the child. For example, on many occasions, schools will attempt to exclude youth based on confidential juvenile court records. That process harms the child's education, without having a sound basis in policy.
- Section (5) should be amended to state explicitly that only felonies that have been adjudicated can be included in presentence investigations when a juvenile becomes an adult, or is transferred as a youthful offender. In some counties, adult presentence investigation reports routinely include either felony charges that were never adjudicated or the client's entire juvenile record, including misdemeanors and status offenses.

KRS 610.330 should be amended to permit expungement of felonies, and to make expungement of misdemeanors automatic upon attaining age 18, in order to ensure that offenses committed during adolescence truly are "bur[ie]d . . . in the graveyard of the forgotten past."²

KRS 610.342 should be amended to provide that an attorney representing a child under KRS 31.110 is entitled to a copy of the child's records without the necessity of an order.

KRS 610.345 should be repealed for the same reasons that DPA is seeking modification of KRS 610.320(3) and (4).

New Section – Provide that a juvenile before the court may be examined and found incompetent to stand trial and that a child who has been found incompetent to stand trial shall have their public or status offense dismissed.

New Section – Prohibit a court from ordering the arrest of a child for any reason except upon affidavit and a showing of probable cause that the child has committed a public offense.

New Section – Give a court the authority to amend felony adjudications to misdemeanors for good cause shown even after disposition.

New Section – Require juvenile confessions to be recorded and prohibit admission of unrecorded confessions. With common cell phones able to record high-definition video, a recording requirement would not be the burden on law enforcement it would

² *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 107 (1979)(Rehnquist, C.J., concurring).

have been in the past. Recording of any statement protects all persons involved and demonstrates that force or coercion is not used.

New Section – Authorize the court to provide expert and other necessary resource funding under KRS 31.185 to indigent youth at all stages of the proceeding including pre-detention and post-disposition.

New Section – Create a presumption that juveniles will not be physically restrained in the courtroom. This presumption may be overcome at a hearing at which evidence of likely danger if the child is unrestrained may be presented.

KRS CHAPTER 630: STATUS OFFENDERS

Eliminate Status Offenses - Many jurisdictions no longer identify truancy, beyond control of parent, and similar charges as "status offenses." Rather, a child found to have committed such conduct is declared a "child in need of services" (or a similar phrase) and treated as a non-offender.³ Status offense provisions identify the child as a wrongdoer and invite the court to enter orders directing the future behavior of the child. That approach is what has led to the current challenges with over-incarceration of status offenders. A more effective approach would be to view the child as a non-offender whose behavior reflects underlying problems which require positive intervention. This will help eliminate the resource disparity between status offenders and non-offenders, and will eliminate the secure detention of status offenders. The system as a whole would work toward addressing the needs as a whole rather than using the power of a court over an offender for the purpose of regulating the child's future conduct.

While DPA has supported recent efforts to modify statutes relating to status offenses, the change which will provide that population and our communities the most benefit is to eliminate the status offense designation altogether.

The cleanest way to accomplish this would be to repeal Chapter 630 in its entirety and replace it with a new Chapter entitled: Children in Need of Services.

KRS CHAPTER 635: PUBLIC OFFENDERS

KRS 635.020 should be amended in the following ways:

- A section should be added to clarify that for the purposes of determining the sentence classification of the current or prior offense, sentence enhancements which would apply to adults are not to be applied. In other words, a person charged with trafficking in under 8 ounces of marijuana while within 1000 yards of a school would be treated as being charged with a misdemeanor, rather than a felony. This is consistent with the Supreme Court's decision in *Phelps v. Commonwealth*, 125 S.W.3d 237 (Ky. 2004), but ensures consistency in application of the law, since it ensures that no other enhancement will be construed as applying to children.
- Section (3) should be amended to provide that a child may not be transferred if the maximum sentence available to the court upon conviction, if transferred, was five years or less. This will eliminate adult prosecutions for youth charged with a single class D offense, whose sentence is not going to be significantly longer than what would be available to the court under KRS 635.090.

Section (4), relating to automatic transfers, should be eliminated. This provision has resulted in the transfers of many youth who would otherwise not have been appropriate for trial as an adult. Transfers of youth who would currently be eligible for automatic transfer should be discretionary after a preliminary hearing under KRS 640.010.

KRS 635.060 should be amended to require that the disposition for a juvenile offense can never be more severe than the penalty for the offense if committed by an adult. For the purposes of this rule, commitment to the Department of Juvenile Justice should be treated as the equivalent of a 12 month jail sentence. This would ensure that violations can only result in a fine, and Class B misdemeanors cannot result in commitment.

KRS 635.080(2) and **KRS 635.083** should be repealed as they are not commonly utilized. Streamlining the code by excising those portions not utilized will strengthen legislative intent in the remaining portions.

KRS 635.510 should be amended in the following ways.

- Section (1) should be amended to eliminate mandatory declaration that the child is a juvenile sexual offender for felony offenses committed by a child who is 13 years of age or older. The decision of whether a particular child requires sex offender treatment should be discretionary with the court.
- Section (3) should be amended to require that the juvenile sexual offender assessment may not include a description of the risk level posed by the child,

³ A 2003 Report indicates that at that time approximately 20 jurisdictions referred to youth in this category as "children in need of services" or by a similar designation. *Alone Without a Home: A State-by-State Review of Laws Affecting Unaccompanied Youth*, National Law Center on Homelessness and Poverty (2003), pg. 40-43, currently available at http://www.maine.gov/education/homeless_ed/documents/alonewithouthome.pdf

unless that statement is based on the use of a validated evidence-based risk assessment instrument. The statute should require that the assessment be conducted by a person who is qualified to perform mental health assessments.

KRS 635.515⁴ should be amended to eliminate mandatory commitment for a child declared to be a juvenile sexual offender. The statute should also clearly provide that a child should not be committed as a juvenile sexual offender unless the court finds that treatment in the community has failed, that there is the presence of a validated risk factor which indicates that the child cannot remain safely in the community, or that the family is not capable of providing supervision for the youth. This would be consistent with the recommendations of the National Center for Sexual Behaviors in Youth and other national organizations, and it would reduce institutionalization of sex offenders.

KRS 635.527 should be amended to apply to any statement made by a child in any treatment program, including non-sex offender treatment programs. The statute may need to be relocated to KRS Chapter 605 in order to clarify its intent.

New Section - A "Romeo and Juliet" rule, either in KRS Chapter 635 or in the penal code, would prohibit prosecution for age-based sexual offenses if both individuals are juveniles, and within four years of age of one another. In addition, a provision is needed to prohibit prosecution of any minor for an "unlawful transaction with a minor" offense. Current provisions of KRS Chapter 510 have resulted in prosecutions of youth for serious felony offenses (many Class A or B felonies) for consensual sexual relations with same-aged or similarly-aged peers.

New Sections - Reestablish and modify the common law "infancy" defense. The provision should provide that a child under the age of 11, either chronologically or intellectually, may not be proceeded against as a public offender; that a child age 11-13 is presumed to be incapable of forming the capacity to commit a public offense, but that presumption can be rebutted by evidence; and that a child age 14-18 may prove in exculpation that he lacked the criminal capacity to commit a public offense. Studies show that children under the age of 14 are considerably less competent to assist defense counsel than those 16 or older. The MacArthur Foundation's 2003 *Study of Juvenile Adjudicative Competency* found that 85% of children under 12 were unable to correctly describe a single consequence of pleading guilty.

KRS CHAPTER 640: YOUTHFUL OFFENDERS

KRS 640.010 should be amended to require that the factors must be found to exist by clear and convincing evidence, and that the 5 of the 8 factors must favor transfer. The statute should require that the burden of going forward belongs to the Commonwealth and the burden of proof is on the Commonwealth. Failure of the Commonwealth to present evidence on a factor would mean the Court cannot consider that factor.

KRS 640.040 should be amended in the following ways:

- Section (4) should say that the case shall be returned to district court to be disposed of in accordance with KRS 635.060, if the child was no longer eligible to be tried as a youthful offender on the offense.
- A new section should be added which clearly states that Youthful Offenders are not Violent offenders under KRS 439.3401.

SECTION TWO: WHAT RESEARCH SAYS ABOUT GOOD JUVENILE JUSTICE POLICY

Kentucky's juvenile justice system should identify policies which are consistent with what social science tells us about effective treatment for youth. To that end, here are some of the conclusions which have been consistently supported by the data.

Securely Detaining Juveniles Does Not Improve Public Safety: Placing a child in detention generally does not promote the welfare of the child, and in fact *increases* recidivism.⁵ According to one study, having been previously placed in detention was a significantly greater predictor of recidivism than a poor parental relationship, membership in a gang, or carrying a weapon.

Odds of Recidivism in Arkansas Youth⁶

This is especially true with regard to status offenders. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) has noted that:

A significant body of research indicates that detention

⁴ See "NCSBY Fact Sheet: What Research Shows About Adolescent Sex Offenders", National Center on Sexual Behavior of Youth (July 2003), available at <http://www.ncsby.org/What%20Research%20Shows%20About%20Adolescent%20Sex%20Offenders%20060404.pdf> (accessed July 27, 2012)

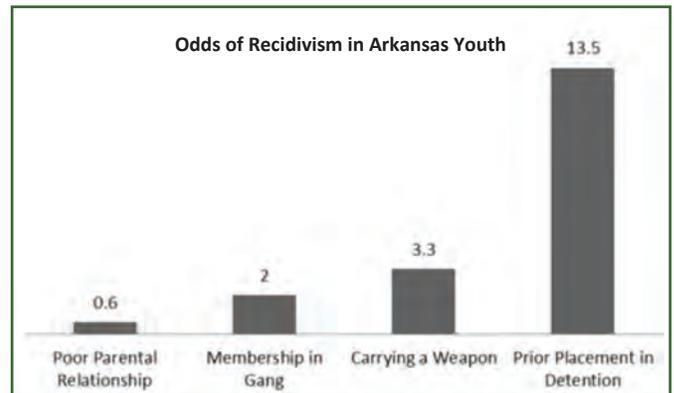
⁵ Holman, B., and Ziedenberg, J, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, (Justice Policy Institute, 2006). Available at http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf. (Last accessed July 27, 2012).

⁶ Benda, B.B. and Tollet, C.L., *A Study of Recidivism of Serious and Persistent Offenders Among Adolescents*, *Journal of Criminal Justice*, Vol. 27, No. 2, 111-126 (1999).

- Is not necessary for status offenders and other low-risk offenders (Austin, Johnson, and Weitzer, 2005);
- Is less effective than community-based detention alternatives and can cause lasting harm (Munson et al., 2008; Holman and Ziedenberg, 2007; National Juvenile Defender Center, 2006);
- Is associated with higher rates of recidivism than community-based alternatives and costs far more (Austin, Johnson, and Weitzer, 2005; Holman and Ziedenberg, 2007; Munson et al., 2008; Howell, 1995); and
- Does not improve, and may worsen, public safety (Holman and Ziedenberg, 2007).

Accordingly, the National Council of Juvenile and Family Court Judges ("NCJFCJ") recommends diversion for status offenders and most first time public offenders.⁷ As the NCJFCJ explains, there are several reasons for ensuring that a robust diversion system exists for both public and status offenders:

- First, most youth who are referred to juvenile delinquency court for a delinquent or status offense never return on a subsequent offense. Using expensive formal resources for this population is not necessary when less expensive informal diversion resources are equally effective.
- Second, properly designed informal response systems are faster than the formal adversarial juvenile delinquency court process. Since responses that occur closer to the time of the offense have more impact than delayed responses, an informal response can be more effective for the youth.
- Finally, in order for juvenile delinquency courts to have sufficient resources to deal effectively with the more serious offenders, the juvenile delinquency court should not use unnecessary resources on less serious offenders.⁸



Many Children Are Not Able to Protect Their Interests in the Face of the Juvenile Justice System: Studies have shown that more than one third of youth under the age of 14, and nearly one fourth of 15-16 year olds, are "significantly impaired" in their ability to assist their counsel and make judgments about their case.⁹ In both groups the number nearly doubles when one looks only at youth in that population with an IQ below 75.¹⁰

This impairment impacts not only their ability to defend themselves against charges of wrongdoing, but also their ability to avoid falsely confessing to police during interrogation. For example, in one experiment, nearly three-quarters of youth under the age of 17 could be persuaded to confess to having caused a data crash by hitting a computer key, a figure which was significantly lower than college aged students.¹¹ A different study found that only twenty percent of juveniles adequately understand *Miranda* warnings, a figure which is also much lower than it is for adults.¹² Recognition of these limitations is critical as reforms are considered.

⁷ National Council of Juvenile and Family Court Judges, *Technical Assistance Brief: Key Principles for Improving Juvenile Court Practice in Juvenile Delinquency Cases*, pg. 1. <http://www.ncjfcj.org/sites/default/files/idg%20technical%20assistance%20brief%20final.pdf>

⁸ National Council of Juvenile and Family Court Judges, *Improving Court Practice in Juvenile Delinquency Cases*, Spring 2005, pg. 67. http://www.ncjfcj.org/sites/default/files/03chapter_0.pdf

⁹ Larson, Kimberly and Grisso, Thomas, *Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers*, National Youth Screening and Assessment Project (2011), pg. 17.

¹⁰ *Id.*

¹¹ Scott-Hayward, Christine, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 L.Psych.Rev. 53, 60 (2007)

¹² *Id.*, at 65.



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