

Due Process Rights and Children: Fifty Years of *In re Gault* – Part Two, the Right to Counsel

This post is the second in a series focused on *In re Gault*, the U.S. Supreme Court case which mandated that the core due process rights applicable to adults in criminal proceedings must also be afforded to juveniles who are alleged to be delinquent. Perhaps the most significant of these rights is the right to counsel.

The Supreme Court strongly condemned the denial of counsel to children in a proceeding which carries “the awesome prospect of incarceration” until the age of majority. 387 U.S. 1, 36. In such proceedings, a juvenile needs legal representation “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.” *Id.* Thus, in delinquency hearings “which may result in commitment to an institution in which the juvenile’s freedom is curtailed,” the child and his or her parents must be notified of the child’s right to counsel, or if they cannot afford counsel, that counsel will be appointed. *Id.* The NC Juvenile Code codified and expanded the right to counsel in [G.S. 7B-2000](#) by requiring the appointment of counsel for all juveniles who are alleged to be delinquent without the need to show indigency. Despite this progress, advocates still question whether the right to counsel for juveniles extends far enough.

Evolution of a Juvenile’s Right to Counsel in NC

Immediately following the *Gault* decision, the General Assembly enacted former G.S. 110-29.1 (1967 Cum. Supplement), which essentially followed the language of *Gault* and guaranteed a right to counsel to juveniles facing the possibility of commitment to a training school (what we now call a youth development center) and a right to appointed counsel to those who were indigent. Appellate decisions interpreting *Gault* also required affirmative evidence in the record that the trial court gave prior notice of the juvenile’s right to counsel to the juvenile and the juvenile’s parents and “confronted [them] with the need for specific consideration” of whether they chose to waive it. *In re Stanley*, 17 N.C. App. 370, 371 (1973) (reversed based on trial court’s failure to properly advise juvenile and his parents of right to counsel); *In re Garcia*, 9 N.C. App. 691, 694 (1970) (same).

In 1979, the [Juvenile Code Revision Committee](#), part of the former Department of Crime Control and Public Safety, recommended amending the law to provide that juveniles have the right to counsel “in all [juvenile] proceedings” and that the court may appoint counsel at any stage of the proceedings but *must* appoint counsel for juveniles alleged to be delinquent unless counsel has been retained or waived by the juvenile. The General Assembly considered these recommendations but determined that counsel must be provided for delinquent juveniles at all stages without the possibility of waiver and regardless of indigency. See former G.S. 7A-584 (1980). Thus, juveniles in North Carolina have been afforded automatic appointment of counsel in delinquency cases since 1980.

Juvenile Defense Services in NC

North Carolina indigent defense providers have consistently recognized the importance of juvenile defense. The first two state funded public defender offices founded in 1970, located in Guilford and Cumberland counties, immediately provided representation to juveniles. Currently, all but two of the state district offices represent juveniles. One of these districts, Mecklenburg County, is home to the non-profit law firm Council for Children's Rights (CFCR). Formerly known as the Children's Law Center, CFRC has maintained a contract to represent juveniles in Mecklenburg County since 1987, making it one of the oldest indigent defense contracts in NC. CFRC promotes best practices in juvenile defense including the use of in-house investigators and social workers. Although *Gault* did not extend the right to counsel in appeals, juveniles receive appellate representation through the Office of the Appellate Defender.

In the late 1990's, renewed national interest in the quality of juvenile defense prompted the American Bar Association and the National Juvenile Defender Center to perform state assessments of quality of counsel. From 2001 to 2002, North Carolina participated in an assessment and the results were detailed in the 2003 report, "[An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings](#)." The report revealed a lack of standards, guidance, training, and technical support for juvenile defense counsel. As a result, in 2005, the NC Office of Indigent Defense Services created the statewide Office of the Juvenile Defender (OJD). OJD's mission is to improve the quality of defense counsel by creating standards and guidelines, improving education and training opportunities for juvenile defenders, and building a community of specialized representation among public defenders, contractors, and privately assigned counsel.

Extending the Right to Counsel Beyond *Gault*?

In *Gault*, the Supreme Court emphasized that children, even more than adults, need "the guiding hand of counsel at *every step in the proceedings* against [them]." 387 U.S. 1, 36 (emphasis added). However, the Court's holding was limited to the adjudicatory phase of a delinquency proceeding and did not address how the right to counsel impacts "the totality of the relationship of the juvenile and the state." 387 U.S. 1, 13. The Court specifically declined to consider the applicability of due process rights to the "pre-judicial . . . post-adjudicative or dispositional process." *Id.* This means that juveniles do not have a constitutional right to counsel at other critical stages of the proceeding that influence the outcome of the juvenile's case.

For example, while attorneys are appointed early in the process, counsel typically is not present during the intake investigation, which determines whether a court counselor will approve the case for court (unless the offense is non-divertible and *must* be approved). Although court counselors consider [numerous factors](#) in deciding whether to file a complaint against a juvenile as a juvenile petition, the counselor's face-to-face meeting with the juvenile and the juvenile's parent or guardian is an important part of this determination. See [G.S. 7B-1701](#) (requiring *reasonable efforts*

by court counselors to personally meet with the juvenile's family for divertible offenses). Some defenders have advocated for the right to be present at intake to protect their client's interests.

Defenders also question the need for "on call" counsel for juveniles who are placed in detention awaiting an initial secure custody hearing. Although juveniles must be represented by counsel at the hearing on the need for continued custody, held within five days, the initial order placing the juvenile in secure custody is usually entered by the judge *ex parte*; therefore juveniles may be subject to law enforcement interrogation without access to counsel. Other gaps in representation may occur post-disposition, such as during periods of probation or when juveniles are placed in locked facilities. Undisciplined juveniles, youth who are accused of being disobedient or truant, also must face the court without counsel.

Meaningful access to counsel might also include a more holistic representation that goes beyond the delinquency charges to allow defenders to represent a juvenile who is suspended from school or needs special education services; or to obtain an expunction for a juvenile who faces barriers to employment or housing from an adjudication of delinquency. However, with no constitutional or statutory right to counsel in such proceedings, juveniles lack this type of representation. While some organizations such as [Advocates for Children's Services](#) or [Council for Children's Rights](#) can provide some additional services beyond the normal scope of the juvenile defender's representation, ultimately, a reevaluation of the scope of the juvenile's right to counsel may be necessary to truly allow for holistic representation.

**In collaboration with the NC Office of the Juvenile Defender, this post is the second in a series of posts related to *In re Gault* and its impact on due process rights for juveniles. The blog posts in this series will be posted to both the *On the Civil Side Blog* and the *Juvenile Defender Blog*.*