

Legislative Analysis



JUVENILES: REQUIRE ATTORNEY REPRESENTATION

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House Bill 4314 (Substitute H-3)

Sponsor: Rep. Mark Meadows

Committee: Judiciary

First Analysis (2-5-10)

BRIEF SUMMARY: In a delinquency proceeding, the bill would require the court to appoint an attorney to represent the child, unless the child was represented by counsel or, after consulting with an attorney, waived the appointment of counsel.

FISCAL IMPACT: House Bill 4314 would have an indeterminate fiscal impact on the judiciary and local court funding units. Any fiscal impact would be the result of an increase in court appointed attorneys for juveniles. Although it would make appointment of counsel for a juvenile under certain proceedings the default provision, it would also allow the juvenile to waive appointed counsel if the court found that it was done so voluntarily and understandingly and the juvenile consulted with an attorney. However, the juvenile would be unable to waive the right to counsel if the juvenile's parent or guardian ad litem objected.

THE APPARENT PROBLEM:

Under both state law and Michigan Court Rules, juvenile offenders must be advised that they have a right to be represented by an attorney at each and every stage of a proceeding. However, a court is only required to appoint an attorney to represent the child in certain circumstances, for instance, if a parent is either the victim or the person making the charge, the parents refuse to appear or participate in the proceedings, or the court determines that appointment of counsel is in the child's – or the public's – best interest. Moreover, a child can waive the right to counsel, if the waiver is done voluntarily and understandably.

According to juvenile justice advocates, the appointment of counsel by courts in juvenile proceedings is not uniform across the state. These are county-funded programs, and while some counties are generous in appointments, others rarely make them. Moreover, though juveniles cannot enter into contracts, they are deemed to be able to understand the ramifications of waiving counsel. Indeed, many do so out of pressure by parents who, though not indigent, are concerned about the costs if ordered by the court at a later date to reimburse the county for the cost of the attorney.

Some feel that the notice of the right to representation, along with the current limited requirements to appoint counsel, are not sufficient to ensure protection of the due process rights of children afforded by the Constitution. In fact, they feel that the current system is failing children. Many waivers to counsel are made by children who do not understand that without proper representation, they could face years of incarceration in a juvenile

facility and be affected far into adulthood. A child with a mental illness or who has a substance abuse problem may be particularly vulnerable to making poor decisions. Because children often want to please an adult in authority, they are especially susceptible to manipulation by law enforcement, court personnel, and family. As a result, children often face harsher sentences and longer incarceration periods than do adults tried and sentenced for similar offenses in adult court.

A better approach, advocates maintain, is to require, with some exceptions, that an attorney be appointed by the court in all juvenile proceedings, and that a waiver to counsel not be accepted unless the child first consults with an attorney.

THE CONTENT OF THE BILL:

House Bill 4314 would amend the juvenile code section of the Probate Code (MCL 712A.17c). The bill essentially requires attorney representation for juveniles except in specific circumstances instead of requiring such representation only in specific circumstances.

Currently, in certain juvenile proceedings [under Section 2(a) or (d), referred to as “delinquency proceedings”], a court must appoint an attorney to represent the child if one or more of the following apply:

- The child’s parent refuses or fails to appear and participate in the proceedings.
- The parent is the complainant or victim.
- The child and family are financially unable to pay the costs of an attorney and the child does not waive the right to an attorney.
- Those responsible for the child’s support refuse or neglect to employ an attorney for the child and the child does not waive the right to an attorney.
- The court determines that the best interests of the child or the public require appointment.

The bill would delete the listed circumstances and instead require a court to appoint an attorney to represent a child in a proceeding under Section 2(a) or (d). This would apply unless the child were represented by retained counsel or the child waived the appointment of an attorney as provided in subsection (3) of Section 17c.

Currently, subsection (3) allows a child to waive the right to an attorney in open court if the court finds on the record that the waiver is made voluntarily and understandably. However, the child is not allowed to waive counsel if a parent or guardian ad litem objects or if an attorney had been appointed because the court determined that the best interests of the child or the public required appointment.

The bill would revise the provision by deleting the highlighted portion. The bill would also require the child to consult with an attorney before waiving the right to appointed counsel.

[Delinquency proceedings. Section 2(a) lists the circumstances under which the family division of circuit court has jurisdiction over juveniles and includes juveniles under the age of 17 who have violated any local ordinances or state or federal laws (certain crimes require a juvenile who is 14 years of age or older to be tried as an adult unless the prosecutor petitions the court for the child to be tried as juvenile); and juveniles under 18 years of age who have suffered abuse or neglect. Section 2(d) places juveniles between the ages of 17 and 18 under the court's jurisdiction if they have substance abuse addictions; associate with criminal or disorderly persons; are found in a house of prostitution; associate with thieves, prostitutes, or pimps; or are willfully disobedient to the reasonable and lawful commands of a parent, guardian, or other custodian and in danger of becoming morally depraved.]

ARGUMENTS:

For:

House Bill 4314 would strengthen the due process rights of children facing a delinquency proceeding. Currently, though all children must be advised of their right to an attorney, the court is only required to appoint one under limited circumstances. In addition, the child is permitted to waive the right to counsel – often on advice or under pressure from parents. This raises several concerns. For instance, a parent who is concerned about having to pay an appointed attorney's fees down the road may decide for the child that representation is not needed; a parent who is physically or sexually abusing the child may pressure the child to refuse representation out of fear of being discovered; and a parent or guardian suffering from mental illness or cognitive impairment may simply not understand the seriousness of the impending proceedings and so be ill-equipped to advise a child. According to testimony provided by the Legal Aid and Defender Association, “most of the children in the juvenile justice system have come from environments where there may be substance abuse, mental health issues, domestic violence as well as other forms of abuse and/or neglect.” This finding underscores the importance of protecting the due process rights of children by ensuring that they have the opportunity to be represented by, or advised by, legal counsel.

However, an attorney would not have to be appointed if the child or parents arranged their own legal representation, and counsel could still be waived if the child first consulted with an attorney. In addition, counties would still be free to collect reimbursement from non-indigent families as allowed under current law and court rules. Thus, the bill should not be overly burdensome to counties. Besides, proper representation may lead to more appropriate determinations that could reduce costs in the long run. For instance, children are often involved in the juvenile justice system for years for offenses for which an adult may only receive a fine or a short jail term. If more juveniles were represented by counsel, it could lead to more appropriate (and perhaps less costly) dispositions. Moreover, savings could occur if the appointed attorney recognized that the child had an underlying mental illness or substance abuse problem that was previously undiagnosed, or was a victim of sexual or physical abuse, that in turn led to the child being referred to appropriate services and rehabilitation instead of years of

incarceration in a juvenile facility. If early and appropriate treatment prevented future criminal activity as an adult, even greater savings to society could be achieved.

Response:

Though the bill would require a juvenile to consult with an attorney before waiving the right to counsel, there is no assurance that the attorney appointed to provide that counsel would be trained or have experience in the representation of children. Advocates note that many court appointed attorneys lack training and knowledge specific to juvenile issues and work under tremendous case loads that leave little time for fact-finding and investigations. Yet, working with children as clients takes a unique skill set, as well as an understanding of the juvenile justice system. The point of the legislation should not be just to provide “counsel” to the child, but to provide “competent counsel.” Only then will the child’s due process rights be protected.

Against:

The bill remains problematic for the following reasons:

****** Under current law and rules of court, if a judge determines that it is in the child’s (or the public’s) best interest to have court-appointed representation, the child cannot waive the right to counsel. As written, the bill would remove this important protection. The statute would then conflict with the provision in the Michigan court rules.

****** The costs to counties must be scrutinized. Counties are already facing severe cuts to revenue sharing in this and future fiscal years. Therefore, the legislation should be reviewed to see if it would result in Headlee implications. A recent report issued by the Legislative Commission on Statutory Mandates found that underfunding by the state regarding costs shifted to local governments over the past three decades exceeded \$2.2 billion in 2009 alone. Local governments simply cannot bear any more cost-shifting proposals.

****** There is a grass-roots movement to reform the indigent defense system, for which juvenile representation is a part. Even though House Bill 4314 includes appointment for non-indigent cases, many components of the indigent reform proposals would address shortcomings in the appointment for juvenile delinquency proceedings happening today, such as the lack of training and experience of appointees in juvenile justice law, fair and reasonable compensation, and how attorneys are appointed. Perhaps if the reform bill were to move first, it would pave the way for more effective implementation of House Bill 4314.

****** The bill would strip judges of discretion over whether the case at hand warranted appointment of counsel. Some proceedings in juvenile court are more informal and less adversarial than in more serious cases. Attorneys may not always be needed. Therefore, mandating attorney representation for every proceeding could result in additional costs not just for counties, but also for juveniles (and their parents) who are not indigent.

POSITIONS:

The Michigan Catholic Conference supports the bill. (1-20-10)

The Michigan Council on Crime and Delinquency supports the bill. (1-20-10)

The ACLU of Michigan supports the bill. (1-20-10)

The State Bar of Michigan supports the bill. (12-14-09)

The Legal Aid and Defender Association, Inc. supports the bill. (6-19-09)

The Campaign for Justice supports the bill. (6-19-09)

The Citizens Alliance on Prisons and Public Spending (CAPPS) supports the bill. (5-6-09)

The Prosecuting Attorneys Association of Michigan (PAAM) does not have a position on the bill. (5-6-09)

The Michigan Association of Counties opposes the bill. (5-6-09)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.