REPORT OF
THE OFFICE OF THE EXECUTIVE SECRETARY
OF THE SUPREME COURT

Earlier Representation of Juveniles in Delinquency Cases

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Executive Summary

History and Requirements of the Legislation. Chapter 437 (House Bill 600) of the 2004 Acts of Assembly requires the earlier representation of juveniles who are charged with delinquent acts. An attorney must be appointed prior to any detention hearing. Also, juveniles who may be subject to commitment to the Department of Juvenile Justice ("DJJ") upon adjudication cannot waive representation except after consultation with an attorney and a determination that the waiver is voluntary.

An enactment clause of the Act directs the Office of the Executive Secretary of the Supreme Court of Virginia to develop procedures for implementing this legislation, in conjunction with the Commonwealth's Attorneys' Services Council, the Indigent Defense Commission and DJJ. That enactment clause also directs this office to submit a report to the Chairmen of the Senate Courts of Justice and House Courts of Justice Committees by December 1, 2004, regarding the work done by these entities to implement this legislation.

Members of the affected entities – judges, clerks, Court Services Unit staff, public defenders – met to formulate strategies for implementing the legislation. Just as courts across the Commonwealth face different sets of problems in implementing this legislation, there emerged a number of corresponding approaches to those problems. Common themes include the identification and timely appointment of attorneys for this representation, expanded use of video-conferencing equipment to conduct these hearings and streamlined procedures for juveniles who will not require pre-adjudication detention.

Fiscal Impact of the legislation. There will be increased use of court-appointed counsel for juveniles, both for detention hearings and for ascertaining whether waiver of counsel is voluntary. As regards detention hearings, there was a consensus that it will frequently be necessary to appoint a separate attorney simply for the detention hearing, to appoint a second attorney for the remaining stages of the proceeding and, thus, to compensate both attorneys for the representation. There are narrower and broader interpretations of who falls within the requirement for pre-waiver consultation with an attorney. Therefore, the total estimated annual fiscal impact of this legislation described in this report ranges from approximately $1.5 million to $2.3 million.

Legislative proposals. The report contains two legislative proposals relating to the increase in the use of court-appointed counsel. First, in addition to the fiscal impact of appointing two attorneys in a single matter, since there is no specific authorization for such sequential representation, the report contains a proposal for such authorization. Second, since it is not absolutely clear whether the class of offenses requiring appointment of counsel prior to waiver includes only offenses which would *immediately* result in commitment of the juvenile or those which may *eventually* result in commitment, the report contains a proposal to require pre-waiver appointment of counsel only when the charged offense could *immediately* result in commitment of the juvenile.

Introduction

During the 2004 Regular Session, the General Assembly enacted Chapter 437 (House Bill 600) (copy attached). Its overall mandate is to require earlier representation of juveniles who are charged with delinquent acts. The discussion surrounding the bill suggests that the intent of the legislation is to improve the frequency, quality and timeliness of the representation of juveniles charged with committing delinquent acts, to assure that this representation provides adequate protection of the juvenile's liberty interest at stake in the face of the prospect of detention, and to conserve appropriately the use of the relatively expensive resources of detention facilities.

The effective date of the legislation is July 1, 2005. However, due to concerns regarding its implementation, an enactment clause of the Act directs the Office of the Executive Secretary of the Supreme Court of Virginia to develop written guidelines and procedures for implementing this legislation, in conjunction with the Commonwealth's Attorneys' Services Council, the Indigent Defense Commission and the Department of Juvenile Justice ("DJJ"). That enactment clause also directs the Executive Secretary to submit a report to the Chairmen of the Senate Courts of Justice and House Courts of Justice Committees by December 1, 2004, regarding the work done by these entities to implement this legislation. This is the report required by that legislation.

A working group composed of representatives of the various affected constituencies was convened twice in the offices of the Executive Secretary of the Supreme Court in order to identify the problems posed by the implementation of this legislation and to formulate recommendations in response to those problems. The working group was comprised of juvenile and domestic relations district court judges and clerks, staff members from the Department of Juvenile Justice and from their intake offices throughout the Commonwealth, a Commonwealth's Attorney and the Administrator of the Commonwealth's Attorney's Services Council, the Executive Director of the Indigent Defense Commission, and staff members of the Office of the Executive Secretary. A list of the participants of the working group is attached.

This report reflects the issues raised by this legislation and the possible approaches courts, intake offices, defense attorneys, and Commonwealth's Attorneys could take in the implementation of House Bill 600. The report will first briefly summarize the current statutory requirements regarding the appointment of counsel in juvenile delinquency proceedings and then contrast the corresponding provisions of House Bill 600.

The report will then sketch out the problems which the working group foresaw in implementation of the legislation. As the group turned to identify solutions for these problems, it became readily apparent that there could be no "one size fits all" approach to these issues. Rather, the working group concluded, the best approach will vary from jurisdiction to jurisdiction and will depend upon factors such as the size of the respective pools from which court-appointed attorneys are drawn, the frequency with which the local court sits, the accessibility of detention facilities, the typical level of involvement of

the Commonwealth's Attorney in juvenile delinquency proceedings, and the challenges presented by geography. The report will set out the alternative models which may lend themselves to particular jurisdictions.

Next, this report discusses the fiscal impact to the court system of House Bill 600. A fiscal impact statement prepared by the Office of the Executive Secretary during the 2004 General Assembly Session concluded that there would be some fiscal impact on the Criminal Fund administered by this office, but was not able to quantify that impact. In the course of the deliberations of the working group, the scope of that potential impact became clearer and additional data emerged. The estimated annual fiscal impact described in this report ranges from approximately $1.5 million to $2.3 million. As described below, these estimates are based on a series of assumptions about the size of the group of juveniles affected by the provisions of this legislation. The scope of estimated impact is not certain, but there does appear to be the real possibility of an appreciable impact on the Criminal Fund.

Finally, the report includes a brief discussion of two possible legislative proposals which would address ambiguities growing out of the implementation of the legislation. One proposal would move the estimated annual fiscal impact toward the lower number cited above by defining more precisely when an attorney would have to be appointed for a juvenile who wishes to waive his right to an attorney. The other proposal would authorize the appointment of two attorneys as necessary to comply with the statute, one for the detention hearing only and a different attorney for the remainder of the proceeding. This option was seen by many in the working group as essential to providing the required earlier representation, but this practice carries a significant cost.

I. Current law regarding appointment of counsel in delinquency cases

Until the substantive provisions of House Bill 600 become effective on July 1, 2005, section 16.1-266 will continue to require that prior to the detention review hearing, adjudicatory hearing or transfer hearing for a juvenile charged with a delinquent act, the juvenile and his parent or guardian must be informed by the court, the court clerk or a juvenile probation officer of the juvenile's right to counsel and the parent or guardian's potential liability for a portion of the compensation of any counsel appointed by the court. In addition, the juvenile must be given the opportunity to retain counsel, to waive counsel or, if indigent, to have the court appoint counsel.

If a juvenile is to be detained, notice of the detention hearing must be given to the juvenile (if 12 years or older), to his parent or guardian and to the Commonwealth's Attorney. Va. Code § 16.1-250. If the juvenile is detained following a detention hearing and was not represented by counsel, then the juvenile is entitled to appointment of counsel prior to any detention review hearing.

II. Provisions of House Bill 600

When House Bill 600 becomes effective on July 1, 2005, the juvenile and domestic relations district court must appoint and notify counsel for a juvenile prior to any detention hearing held pursuant to § 16.1-250, unless counsel has already been retained by the juvenile. Va. Code § 16.1-266 B. For the purpose of appointing counsel for this detention hearing, the juvenile is presumed to be indigent, obviating the need for the otherwise applicable inquiry regarding eligibility for court-appointed counsel. However, a judge may release a juvenile from detention prior to the appointment of counsel.

The provisions of House Bill 600 continue the current requirement that, prior to the detention review hearing, adjudicatory hearing or transfer hearing the court, the court clerk or a juvenile probation officer must still inform the juvenile and his parent or guardian of the juvenile's right to counsel and the parent or guardian's potential liability for a portion of the compensation of any counsel appointed by the court. In addition, the juvenile must be given the opportunity to retain counsel, to waive counsel or, if indigent, to have counsel appointed by the court.

House Bill 600 adds the significant requirement that, if a juvenile is charged with an offense where he would be in jeopardy of commitment to the Department of Juvenile Justice, the juvenile is permitted to waive counsel only after consultation by the juvenile with an attorney and a determination by the court that the waiver is free and voluntary. Va. Code § 16.1-266 C 3.

III. Assumptions About the Implementation of House Bill 600

The following three assumptions underlie the analysis of House Bill 600 by the Office of the Executive Secretary and formed a starting point for the discussions of the working group.

● House Bill 600 mandates attorney appointment before the initial detention hearing; however, judge has authority to release the juvenile from detention without prior appointment.

● The timing of the detention hearing is prescribed by statute and in any event must take place on short notice to all parties and the court. Va. Code § 16.1-277.1.

● One attorney will represent the juvenile through all stages of the proceeding, unless relieved as provided by law. Va. Code § 16.1-268; *see also* Va. Sup. Ct. R. 8:2 (defining "counsel of record"), Va. Rules of Prof'l Conduct R. 1.16 (c) (2000). Thus, there is no statutory authority for the appointment of more than one attorney as counsel in delinquency cases, absent withdrawal of counsel for legitimate reasons such as for

medical reasons or due to a conflict and, thus, no statutory basis for the routine appointment of more than one attorney. Since the routine appointment of two attorneys is not authorized, the Office of the Executive Secretary would not be able authorize payment out of the Criminal Fund for two attorneys in a single case on a routine basis. Va. Code § 2.2-810.

IV. Policy Predicates

The direct implications of House Bill 600, as well as the discussion of the bill in both the Senate and House Courts Committees, point to a legislative intent to assure earlier representation of juveniles in delinquency proceedings.

A. Earlier legal representation.

Earlier appointment would, in theory, afford the attorney more time to prepare and an opportunity to explore alternatives to detention in advance of the hearing. The legislation seems designed to address concerns that attorneys appointed subsequent to the initial detention hearing infrequently request a rehearing, to the detriment of their clients, as well as what is reported to be the high incidence of waiver of representation by the juvenile for the adjudication and disposition of the delinquency proceeding.

The value of earlier representation can lie not simply in whether the outcome of a specific hearing — or the entire proceeding — will likely be different, but also in the quality of the representation for the juvenile. Presumably, the representation at an earlier stage of the proceedings, as well as the requirement of conferring with an attorney before counsel can be waived after the detention hearing, result in somewhat better-informed juveniles who have more of an opportunity to participate in their own delinquency proceeding.

B. Efficient use of detention facilities.

The legislation could be read to embody an assumption that some of the unrepresented juveniles who are detained prior to adjudication and disposition would not have been detained had they been represented at the detention hearing or at any detention review hearing. Presumably, advocacy at the initial detention stage is thought to reduce the incidence of detention, which represents significant costs.

Prior to the commitment of a juvenile to the Department of Juvenile Justice, detention costs are paid by a combination of local and state funds. A formula for the latter contribution being based on the number of juveniles detained, the higher number of juveniles in detention, then the greater percentage of the cost will be borne by the state.

C. Improved outcomes for juveniles.

Juveniles who are detained have a higher incidence of recidivism and are more frequently committed to the Department of Juvenile Justice than those who remain in their homes and communities.

V. The Mechanics of House Bill 600

A. Sequence of the legal requirements.

House Bill 600, enacted to promote these policies and address these concerns, amends § 16.1-266 by requiring, absent an appearance by a retained attorney for the detention hearing, that the court "appoint a qualified and competent attorney-at-law to represent the child." Consistent revisions to § 16.1-250, related to procedures for holding a detention hearing or rehearing, require that notice be given to the juvenile's attorney, among others, and affords counsel an opportunity to be heard at the hearing. The juvenile is presumed to be indigent for purposes of appointment of counsel at this initial stage of the delinquency case. However, § 16.1-266 B explicitly provides that the judge has authority to "[release] a child from detention prior to appointment of counsel."

Before the adjudicatory or transfer hearing is held, the court must advise the juvenile of the right to counsel pursuant to § 16.1-266 C 2. If the juvenile was released from detention prior to appointment of counsel, she may, at this juncture, request that the court appoint counsel. If an attorney was previously appointed at the detention hearing stage, the court may continue such appointment. In either case, the court must now make a determination that the juvenile is indigent and therefore financially eligible for a court-appointed attorney. If the juvenile desires to waive the right to counsel at the adjudicatory stage and does not already have court-appointed counsel, an attorney must be appointed to advise the juvenile prior to any execution or acceptance by the court of the waiver, to ensure that such waiver is "free and voluntary." Va. Code § 16.1-266 C 3.

If the juvenile's parents are able and refuse to pay for the attorney appointed pursuant to subsections B or C of § 16.1-266, the court must "assess costs in whole or in part against the parent for such legal services" in an amount not to exceed $100 in circuit court, or as specified in § 19.2-163 (currently $112 maximum for each charge) in district court. The statutory scheme contemplates representation by one attorney beginning at an earlier stage of delinquency proceedings than under prior law, and payment for the services of that one attorney consistent with existing provisions.

Prior to a detention hearing, procedures are relatively uniform across the state and begin with apprehension of the juvenile by a law enforcement officer, who files a petition at the Court Services Unit at which time a detention order may be issued. A detention hearing must be held on the next day the court sits and no later than 72 hours after

detention. It is anticipated that House Bill 600, particularly requirements related to the appointment of counsel for the detention hearing and waiver decision, will not be implemented statewide in a "one size fits all" way, because the character of the jurisdiction will influence the availability and distribution of community resources.

B. Challenges to the implementation of House Bill 600.

(1) Timely Appointment of Counsel.

Among the constants statewide, all jurisdictions are served by law enforcement agencies, a juvenile and domestic relations court, a clerk's office, a Court Services Unit, a local or regional detention facility, and a Commonwealth's Attorney. All courts have existing procedures for accommodating emergency cases within tight time frames on frequently crowded dockets, though procedures related to scheduling and holding emergency hearings vary. Ensuring representation for a juvenile at a detention hearing by an attorney who will continue the representation "through all stages of the proceeding," as is required by statute, is at the heart of House Bill 600 and will present the greatest challenge to the court system in implementing the new legislation. This is especially true in light of the short time period within which to secure the services of a lawyer.

On one end of a continuum, urban judicial districts generally feature a large court with a heavy concentration of resources in one central location that is relatively easily accessible to all necessary players. To implement House Bill 600, urban courts will be required to redistribute time and human resources to accommodate the new legal requirements. On the other end of the continuum, rural districts tend to cover wide geographic expanses, with people and services dispersed and shared throughout the region. These courts will have the most difficult time implementing the requirement of House Bill 600 for early appointment of counsel to represent the juvenile at the detention hearing and throughout all stages of the delinquency case. Variables that will influence implementation of the statutory strictures include the existence of a public defender program and the number of attorneys available for appointments by a particular court.

(2) Are there enough lawyers?

Even in areas served by a public defender program, conflict situations will require courts to maintain a healthy number of lawyers on their list for court appointments and, in many of these courts, these lists of court-appointed attorneys is already small. Conflicts tend to arise frequently in delinquency cases, since juveniles many times will run in groups. The consequence of this phenomenon in the delinquency context is a high number of cases that feature co-defendants. For rural areas, locating more than one court-appointed attorney for co-defendant juveniles at individual detention hearings held on the same day presents a near impossible scenario for many courts.

In all areas, the current caps on payment of court-appointed counsel are perceived as an impediment to the effective administration of justice in the Commonwealth generally. In particular, the requirement to appear at an additional hearing in a delinquency case without an increase in the already meager fee is likely to further reduce attorney availability for this work. This is anticipated to be a likelier result in more rural areas, where a lawyer may be required to drive a relatively long distance on short notice for a quick hearing with little, if any, preparation time.

(3) The problem of dispersed participants.

The challenge of assembling all necessary players for a hearing with little notice is not new in the delinquency context. However, appointment of counsel for the detention hearing is central to implementation of House Bill 600 and presents the greatest difficulty. Moreover, the requirement for representation of the juvenile at the detention hearing is expected to impact the practice of some Commonwealth Attorney's offices across the state by producing an increased level of participation at the detention stage. In some districts, one Commonwealth Attorney may need to attend a hearing where the judge is sitting on a particular day, out of his home jurisdiction where the offense actually took place.

It should also be noted that transportation problems already plague some families. The problem is more pronounced in rural areas, where a parent may lack transportation to get to a hearing scheduled in a courthouse in the far end of a district because the judge is sitting in that location on the day a detention hearing must be held. Assuming release from detention, retrieving the juvenile from a distant facility presents a challenge for some rural parents. In urban areas, the ready availability of public transportation and taxi service tends to mitigate the problem for city dwellers, and detention facilities are generally located more closely to the courthouse.

Where the technology is available, video-conferencing also moderates the challenge of convening a detention hearing, where time is short and distances long. A juvenile may be held in detention in another district altogether or within the judicial district, but at a location distant from the courthouse. In these instances, the juvenile may remain at the detention facility with others at the courthouse. The possible expansion to three-way video conferencing could be considered to accommodate, for example, a Commonwealth's Attorney's office located at a distance from where the detention hearing is held. Video conferencing between attorney and juvenile will also be useful and preferable to telephone access, which should be the minimum level of contact for representation in the detention context. It was noted that video conferencing requires the use of staff resources at the detention facility.

VI. Alternative Approaches to Implementing House Bill 600

A. Common characteristics for successful implementation.

Representatives from jurisdictions expressing confidence in their ability to assimilate House Bill 600 requirements into existing procedures all work in systems with common components: duty judge, public defender or duty attorney, and readily available Commonwealth's Attorney and Court Services Unit representative. Detention hearings are scheduled at one particular time in the afternoon and video conferencing equipment links the court with the detention facility. Law enforcement may time the arrest of a juvenile to dovetail with existing docketing practices. There are sufficient numbers of attorneys available for appointment on short notice who routinely practice in the court and may be drafted readily in the event of a conflict situation. The Court Services Unit is local and involved early in the process, which tends to increase the amount of information available to the judge early in the delinquency process. This would generally include results from administration of a detention assessment instrument, which evaluates risk factors affecting the detention decision.

An open line and method of communication enhances procedural operation. For example, in one court, the clerk's office gives the public defender, Commonwealth's Attorney and Court Services Unit a copy of the daily docket as a routine practice. A particular Court Services Unit representative might be identified for others to call for information, which would enhance participants' ability to prepare and to gather for a detention hearing on short notice. In one area, the Intake Officer routinely notifies the public defender of detained juveniles, the evening before the detention hearing will take place, if possible, or the morning of, at the latest. In several jurisdictions in the state, public defender programs already staff detention hearings, while other courts routinely appoint counsel for these hearings.

B. Implementation in an urban context.

Urban courts generally benefit from systemic orchestration and availability of representatives from participating offices or agencies. A model procedure for an urban court would begin, following the arrest of a juvenile, with an Intake Officer's issuance of a petition and detention order. Assuming the juvenile is arrested during the night or by an 11:00 a.m. cut-off time, all necessary paperwork and an investigation would be initiated for an afternoon detention hearing at, say 2:00 p.m. Between 11:00 a.m. and 2:00 p.m., the public defender's office would receive referrals of the detention cases and the Commonwealth's Attorney would similarly be notified. If there are codefendants, court-appointed attorney(s) would be enlisted for the conflict case. This might be a duty attorney or another attorney available in the building or by telephone on short notice. A petition filed later than the cut-off time would be docketed for the next day, with the search for counsel being conducted in the afternoon by the clerk.

A duty attorney or other attorney would be in the courtroom during morning dockets for other cases, after which s/he or the assigned public defender would make contact with the juvenile at the detention facility, usually located near the courthouse. Absent a conflict situation, the public defender would be able to staff all of the scheduled detention hearings. In any event, the public defender or court-appointed attorney would be expected to represent the juvenile throughout the life of the case, including on appeal or transfer to the circuit court, consistent with current law and practice. Scheduling of the adjudicatory hearing would take place after the detention hearing, which may occur by video-conferencing at a specific time daily. In some jurisdictions with local detention facilities, the juveniles are transported from detention for the hearings that commence at a specified time.

The issues generally under consideration at the detention hearing would include the juvenile's home experience and school attendance, together with safety of self and of the community, including prior arrest record. Inquiry should be made into identifying an appropriate, willing and available caregiver before the hearing. An Intake Officer usually initiates this process, with follow up by counsel for the juvenile. In the absence of a face-to-face visit between juvenile and attorney, the court should accommodate a private video or at minimum, telephone interview before the hearing. The video equipment may be located in the courtroom or, in at least one jurisdiction, in the judge's chambers. In either case, counsel for the juvenile may request a private interview with the juvenile and she should be accommodated.

C. Implementation in a suburban context.

Located outside, but within relatively close proximity to urban courts, suburban jurisdictions tend to share attorneys with their city neighbors. While these areas are less likely to be served by a public defender program, a particularly workable suburban model predominantly features a well-organized duty attorney/duty judge system. In a multi-judge court held daily, a duty judge might preside over emergencies and other short, routine business coming before the court on a daily basis. So, for example, family violence, motions and arraignments might take place in the morning, with detention hearings held in the afternoon at a time that is coordinated for video-conferencing with the detention facility.

Assuming an afternoon detention docket, the court is notified in the morning that a juvenile has been detained, leaving a 3 or 4 hour window to locate an available attorney. This will either be the duty attorney or a lawyer who is already in the building. When necessary, the court-appointed attorney list is usually populated enough to secure a lawyer by phone. Under one suburban court scheme, the clerk selects a day within 21 days after detention to hold the adjudicatory hearing and ensures appointment of an attorney who is available that afternoon for the detention hearing, and also on the future court date. In another similar-size jurisdiction, the date for adjudication is selected after the detention hearing while still in the courtroom, with all parties and calendars available.

One advantage of the duty attorney system is effective time management: one (or several) attorney(s) receive assignments to handle a cluster of cases. During the morning, for example, a duty lawyer may be appointed to cases during adult arraignments, to juvenile cases for the afternoon docket and perhaps to a smattering of other matters. Between the morning and afternoon dockets, adequate time is allowed for lunch and afternoon preparation. Subsequent hearings in different cases may similarly be scheduled conveniently for the lawyer, which encourages willingness to serve on the court-appointed list. Some courts "leverage" their court-appointed list by requiring attorneys to accept criminal appointments, which generate one flat fee regardless of time spent, in order to qualify for appointments as a guardian ad litem, with payment at hourly rates and no statutory cap.

Suburban communities usually feature a Commonwealth's Attorney office and Court Services Units in close proximity to the court with a less expansive and dispersed coverage responsibility than in rural areas, but likely with responsibility for handling a relatively higher volume of cases. If the Commonwealth's Attorney has not previously participated in detention hearings, staff resources may be redistributed to cover these additional hearings. In this context, the Intake Officer's risk assessment may influence the decision to make a court appearance on short notice. A public defender office may arrange with the Court Services Unit and Clerk's Office to be "on call" for appointments that day, as necessary. Following coverage of detention hearings by one representative from the public defender's and Commonwealth's Attorney's offices, the cases may be distributed among the legal staff for future hearings. Some of these offices assign an attorney to staff all cases coming before a particular judge in a multi-court jurisdiction, on a rotating basis.

D. Implementation in a rural context.

Some semi-rural county jurisdictions are located within an hour's drive of a city. In one particular community, there is only one lawyer on the court-appointed list. The regional detention facility serving this locality is located in the city, where a number of lawyers accept court-appointed cases and only occasionally work in the outlying areas. It is anticipated in this county court that appointment of one attorney to represent the juvenile for the detention hearing and all subsequent stages of the case will be difficult to impossible. Court is held every day, with a set time, coordinated with the detention facility for detention hearings held by video conference at 2:00 p.m. daily. It is unlikely that there will be enough cases to justify enlisting a daily duty attorney from the nearest city to take appointments. It was suggested that a "duty detention attorney" from the jurisdiction in which the facility is located could be appointed to appear on a daily basis with detained juveniles via video from the detention facility; however, continuing representation by the same lawyer would be unexpected given the distance to the home court where the charge originated.

In at least one area, a part-time public defender is located at the detention facility and provides staff for video detention hearings at the court. In that jurisdiction, a juvenile

and domestic relations district court judge sits two days per week, while a general district court judge holds court the other three weekdays. The regular docket is interrupted to accommodate detention hearings; judges, not intake, make the decision to detain or release. General district court and juvenile court judges are routinely cross-designated, facilitating coverage of detention hearings on a daily basis. The Commonwealth's Attorney appears at all detention hearings.

In another part-rural county district served by a regional detention facility covering 17 jurisdictions, the court sits daily with arraignments held once a week. For that day, a duty attorney is scheduled and representation for detention hearings would be immediately available, in the absence of a conflict situation. On the other four days of the week and for codefendant juveniles, the clerk's office would scramble in the morning to secure representation for a hearing in the afternoon. Emergency cases are taken up at 1:00 p.m., including detention hearings if all parties can be assembled. The Commonwealth's Attorney routinely staffs all such hearings. A set time is not scheduled for video conferencing, but instead is arranged on an as-need basis, first-come, first served. The locale is experiencing a decline in lawyers willing to take criminal cases attributable to the already low compensation rates together with the requirement of an additional appearance on behalf of a juvenile, attendant to the new legislation. Recruitment efforts by the clerk are underway.

In rural jurisdictions there may be only a handful of attorneys, or even simply one attorney, on the court-appointed list. Typically, there may be only one judge in the district holding court in any one jurisdiction one day per week and only one detention facility serving an expansive geographic area. All rural areas do not have video equipment due to the expense in relation to frequency of use. In one particular rural area, a detention hearing is held by transporting the juvenile to the court where the judge is sitting and coordinating with the neighboring jurisdiction clerk's office to appoint an attorney in that locality. In another, predominantly rural, district, the judge travels back to the largest court after finishing the more rural court's docket in order to handle any detention hearings in the afternoon, as necessary. The larger locality not only has a higher incidence of delinquency proceedings, but also a greater number of attorneys available on short notice for court appointments. This region is not served by a public defender's office.

If the judge is sitting in the court where the charge happened to originate, chances are improved that an attorney may be appointed that will stay on the case to conclusion. Otherwise, the distance between courts within the judicial district may make such representation prohibitive. Cross-designation of judges in rural areas is already common, but dockets on any given court day for that one sitting judge are extremely heavy and accommodating emergency cases, especially those that require the level of coordination as in detention hearings, is difficult. A concern was raised that rural Commonwealth's Attorneys, many of whom do not currently cover detention hearings, still may not be able to do so under the new rubric. Those offices are unlikely to take on criminal cases outside their given jurisdictions.

These scenarios would necessitate the appointment of two attorneys, and payment therefore, contrary to current provisions and policies. Putting aside for the moment the obvious negative effect on the Criminal Fund of such extra appointments, an inequity would be created among lawyers practicing in the state. While some court-appointed lawyers would be expected to prepare for and appear at an additional hearing for no additional pay, the detention-hearing lawyer, after being relieved, would presumably be eligible for the full flat rate fee under currently established guidelines.

A legitimate concern was expressed about the situations where the juvenile judge will next be sitting in a jurisdiction different from the one where the alleged delinquent act occurred. This phenomenon, mentioned above, is encountered in rural districts where the judge travels to different courts on different scheduled days of the week in order handle the business of the court across a geographically expansive district. This practice generally enhances access to justice by reducing the inconvenience of travel to citizens. In effect, the judge comes to the people rather than vice versa. However, one obvious reality is that it leaves some courts with no judge on some days. Some courts may have a judge scheduled to sit only two days a month. In order to accommodate emergency cases, that is, those that require hearing in short time frame, the court where the judge will be that day may add cases that "belong" in another jurisdiction to the docket, then returns the case to the home court for further proceedings. Detention hearings fall into this category. So, in the detention context, the juvenile and other participants will sometimes follow the judge to the jurisdiction where she next sits.

Such a practice is in tension with § 16.1-250, which requires that the juvenile "appear before a judge on the next day on which the court sits within the county or city wherein the charge against the child is pending." In addition, conducting the detention hearing in another jurisdiction is likely to make it more difficult for the parents and other support systems for the juvenile to have access to the court at the time of the detention hearing. Moreover, it may be difficult or impossible for a Commonwealth's Attorney to appear at an emergency hearing in another jurisdiction on short notice. The Commonwealth's Attorney's office may consist of just that one individual, or a small number of assistants, who may have a previously scheduled matters in the home jurisdiction. She would then be put in the position to miss the detention hearing, while under House Bill 600, representation of the juvenile at that stage is mandated. As noted above, this scenario would make it less likely, however, that the same defense attorney would continue with the case through subsequent proceedings back in the home jurisdiction and therefore more likely to necessitate the appointment of two attorneys in the case.

While having the potential to create a dilemma for case participants, the practice of seeking out the judge at the earliest possible point, even if he is sitting in an adjoining jurisdiction, is arguably quite consistent with one of the goals of House Bill 600, which is to curb any excessive or unnecessary use of detention facilities. Earlier detention hearings will result in an earlier release for some of the detained juveniles.

In addition, it is plausible to interpret the provision of § 16.1-250 cited above as focused not solely on the question of venue, but also on a concern with timeliness. Typically, cases do not migrate to follow judges; rather, the assumption is that the detention hearing will be held where the charges arise. If that is the background assumption, then the main thrust of that provision may be not so much "Don't follow the judge" as "Have a detention hearing ASAP." Conducting the detention hearing in an adjacent jurisdiction in order to have it at the easiest possible point can be construed as consistent with at least a part of the legislative intent embodied in § 16.1-250. Therefore, it is possible to characterize this practice as a balancing of important, but potentially competing, policies.

Nonetheless, it is appropriate to raise a concern about developing a procedure where it would be expected or routine to conduct detention hearings in adjacent jurisdictions. However, it may be prudent to retain this possibility as an option for holding even more timely detention hearings in certain situations. Finally, as noted above, the strategy of cross-designation of general district court judges as juvenile and domestic relations district court judges is a statutorily-authorized, appropriate response which could permit earlier detention hearings to be held within the jurisdiction where the charges are pending.

VII. Possible Legislative or Programmatic Responses to the Implementation of House Bill 600

A. Expanding the use of public defenders.

The working group concluded that, because of the challenges posed to courts in more far-flung judicial districts by the mandates of House Bill 600, statutory amendments would be required to assure representation of juveniles at the detention stage. Expansion of public defender program coverage was suggested as a possible approach. As discussed above, implementation of House Bill 600 is anticipated to be less difficult in areas that have a public defender program, compared to those that do not. Therefore, consideration could be given to expanding the public defender system or its resources to permit district-wide coverage of all detention hearings by public defenders, even outside of that public defender's "home jurisdiction."

Additional consideration could be given to establish public defender "detention specialists" with offices in detention facilities and special expertise, education and training in this area of the law and familiarity with local resources and services for juveniles. He would conduct an initial investigation and represent the juvenile at the detention hearing, followed by appointment of counsel by the court. Thus, this detention specialist would not take work away from the private bar, who would be appointed for proceedings subsequent to the detention hearing.

Since these possible responses represent an appreciable extension of the role of public defenders and since these responses emerged in the midst of the deliberations of the working group as general possibilities to be explored, but not as detailed, endorsed proposals, the group concluded that these possible responses required further reflection. Therefore, no legislative proposals were developed for these possible responses. Furthermore, either response would presumably have a fiscal impact for the public defender system and would require additional resources, but no estimated fiscal impact has been prepared for these possible responses.

B. A contract model for court-appointed attorneys.

A new program could be developed for legal services provided to detained juveniles under a contract model. A contract attorney would provide representation in all detention hearings for a fixed fee. The expectations of performance including availability and standards of practice would be specified in the contract. Of course, this option would require a statutory change, as well as an increase to the Criminal Fund, and specialized training in the relevant law and familiarity with community resources.

C. Issues regarding the release of the juvenile.

In the absence of an adequate pool of court-appointed attorneys to appear on short notice for a detention hearing and represent the juvenile through all stages of the proceeding, release prior to appointment of counsel is contemplated by the new statute. House Bill 600 provides that "Nothing in this subsection shall prohibit a judge from releasing a child from detention prior to appointment of counsel." § 16.1-266 B. It is not immediately apparent by what mechanism a judge could release a juvenile prior to appointment of counsel since such appointment is required prior to the detention hearing and a hearing is the usual context for a judge to receive the information on which to base the detention decision. However, the legislation apparently contemplates the possibility of release without the appointment of counsel.

Generally, an Intake Officer has authority to issue a detention order and to release the juvenile, with or without conditions, prior to a detention hearing. This might occur once a family member is located to take the juvenile. For any violations of conditions of release, the preferred procedure would be reissuance of the detention order on the original charge.

It was agreed that once the court assumes jurisdiction over the detention issue, in other words, in the absence of release by Court Services Unit staff in advance, the right to counsel attaches and the judge is decision-maker. If the court has been unable to appoint counsel for the juvenile and neither the Intake Officer nor Commonwealth's Attorney seek continued detention, the working group was generally supportive of the idea of releasing the child without benefit of counsel, as apparently contemplated by House Bill 600. A "quasi" detention hearing was envisioned, in the context of which two scenarios

might play-out. It was first suggested that the Commonwealth's Attorney could withdraw the detention order request and present evidence of a viable alternative to continued detention. Then, alternatively or in combination with this next procedure, such a hearing might be held without counsel for the child upon execution of a waiver for representation at that hearing with assurance of release. There was a consensus that if such a hearing is held, the juvenile and parent must be present. It was further anticipated that either one or both of Commonwealth's Attorney or Intake Officer would appear to provide the judge with necessary information on which to base the decision to release. An advisement would take place in the context of this hearing, and an attorney appointed to represent the child for further proceedings.

However, the working group was concerned whether the court, in the context of a quasi-hearing without appointment of counsel for the juvenile, could release the juvenile with court-ordered conditions, and this was generally rejected as an option. Unlike a straight forward release, a release with conditions leaves the prospect of detention sufficiently imminent that counsel for the juvenile ought to be present to assent to or contest such proposed conditions of release.

It should be noted that the Court Services Unit representative is independent of the Commonwealth and the judge may disagree with any decision to release the juvenile, after hearing evidence. In those circumstances, an attorney would be appointed and a detention rehearing liberally granted. It was suggested that the consequence of a court's inability to locate an attorney to represent the juvenile for the detention hearing might mandate release from detention; clarification of the effect of such "failure" may be warranted to avoid that result.

D. Waiver of counsel by the juvenile.

House Bill 600 provides that a juvenile who is alleged to have committed an offense that may result in commitment may waive the right to counsel only after he consults with an attorney and the court determines that his waiver, which must be in writing and signed, is free and voluntary. The apparent intent of this provision is to avoid a juvenile being committed to the Department of Juvenile Justice without any legal representation.

The statutory language is open to interpretation insofar as it could apply to felonies and class one misdemeanors. A suggestion was made to clarify the scope of applicability to felony level charges. It was further suggested that the provision should apply explicitly to felonies, and then that the right to counsel should not be waivable (a parallel provision to representation in a case involving an offense against a family member).

The waiver provision would most frequently apply where the juvenile has not been detained, but appears in court for advisement of the right to counsel for adjudicatory or transfer proceedings. The court may have a lawyer present for the advisement, resolve

the waiver question, and set the case for trial with the attorney (and her calendar) present. This could be a duty attorney who would have the potential for multiple appointments on one day. In the alternative, a court could appoint counsel in every case, provide contact information to the defendant and set the case for trial. As appropriate under the latter scenario, the court would hear a motion to waive counsel on the trial date.

VIII. Fiscal Impact of House Bill 600.

There will be some fiscal impact from this legislation and, while its impact cannot be precisely determined with available data, there are reasonable grounds for suspecting that the impact on the Criminal Fund could be very significant. Currently, court-appointed counsel in delinquency proceedings are paid $112 per case for the entire representation in juvenile and domestic relations district court through disposition. Va. Code §§ 16.1-267, 19.2-163. This legislation does not change that rate of compensation. Rather, it only provides that the representation ought to start earlier, prior to an initial detention hearing, as opposed to before a detention review hearing, which will lead to additional appointments of counsel. Additional appointments of counsel will also be required prior to any waiver of counsel by juveniles charged with offenses which could lead to commitment to DJJ.

There are three scenarios through which the patterns of representation of juveniles in delinquency proceedings can change. One represents little or no fiscal impact, while the other two will involve some fiscal impact.

A. One attorney, additional proceedings.

An attorney is appointed prior to an initial detention hearing and represents the juvenile through disposition. That attorney will continue to be eligible for compensation up to $112, though he will obviously have had to invest an increased amount of time for admittedly small compensation. The cost of this class of counsel should not represent an appreciable fiscal impact.

B. Two attorneys routinely appointed in sequence.

There will be attorneys appointed for an initial detention hearing who are unable to continue representation of the juvenile for the entire matter, necessitating appointment of a second attorney. Both attorneys would seek compensation. This sequence can occur now with an attorney appointed to represent the juvenile prior to a detention hearing or detention review hearing who is unable to continue representation and is relieved for good cause.

However, as noted earlier, the specter of this routine sequential representation presents both a fiscal problem and a legal problem if juvenile and domestic relations district courts routinely appoint one attorney to represent a juvenile at the detention hearing and a second attorney prior either to any detention review hearing, to a decision by the juvenile to waive counsel or to the actual adjudication. Although it is not possible to assign a precise fiscal impact, it is possible to suggest an estimated impact for the routine appointment of two attorneys. This estimate begins with the statistic that, for fiscal year 2003, there were 13,500 admissions into detention prior to disposition. DATA RESOURCE GUIDE: FISCAL YEAR 2003,Virginia Department of Juvenile Justice, p.18. This number includes both admissions into detention following a detention hearing, as well as admission into detention following adjudication but prior to disposition. All of these detentions involve delinquency cases. The estimated fiscal impact analyzes this statistic with three very conservative assumptions.

● First, the number of pre-disposition admissions to detention does not represent all detention hearings, but only hearings which resulted in the juvenile being detained. Counsel might still be appointed where a hearing is held and the juvenile is released, despite the court's authority to release a juvenile without appointment of counsel. Nevertheless, we shall utilize the number 13,500 as a reasonable, conservative estimate of the number of detention hearings.

● Second, we assume that two-thirds of those pre-disposition detention admissions involve the appointment of an attorney who will only represent the juvenile at the detention hearing and will not represent the juvenile throughout the proceeding, necessitating the appointment of a second attorney, either to simply advise the juvenile regarding a waiver of counsel or to actually represent the juvenile through adjudication and disposition. If this assumption is correct, then there would be an additional 9,045 appointments of counsel in delinquency proceedings as a result of this portion of the legislation.

This assumption is conservative because the appointment of counsel for the detention hearing is not premised on the indigency of the juvenile. The legislation provides that, for the purpose of appointing counsel for the detention hearing, the juvenile is presumed to be indigent. Va. Code § 16.1-266 B. There would be an appointment of counsel for every detention hearing, except arguably in the rare instances when counsel is already retained by the parents. In addition, this estimate is conservative because anecdotal evidence suggests that the bulk of predisposition detentions occur prior to adjudication and will require the separate appointment of counsel.

● Third, we assume that both attorneys will be paid the cap of $112.

If these assumptions are correct, the annual fiscal impact on the Criminal Fund from the routine appointment of two attorneys in delinquency matters would be $1,013,040 ((13,500 x .67) x $112).

C. Appointment of counsel in order for the juvenile to waive counsel.

The legislation provides that the juvenile cannot waive representation by an attorney until and unless an attorney has advised him regarding the waiver. An attorney appointed for this purpose in a situation where the juvenile ends up waiving representation will nonetheless be eligible for compensation. Thus, there will be a fiscal impact resulting from the juveniles who either (i) wish to waive their right to counsel and otherwise would have done so without appointment of counsel, but who are then afforded counsel for this limited purpose, or (ii) would have waived but now do not do so, with the court-appointed attorney representing the juvenile throughout the remaining stages of the proceeding. For the purposes of this calculation, we have assumed that counsel will be paid $112, whether she represents the juvenile for waiver only or for the entire remaining proceeding. Again, while there are no precise numbers available, it is possible to conservatively estimate a potential significant fiscal impact.

For the fiscal year spanning 2003-2004, the Criminal Fund paid for 28,000 court-appointments of attorneys as counsel − as opposed to appointments as a guardian ad litem − in juvenile cases. Since these counsel could have been appointed in so-called CHINS ("child in need of services" or "supervision") cases, only a portion of those appointments were in delinquency cases. There were 79,000 delinquency cases and 15,000 status offense and CHINS cases concluded in juvenile and domestic relations district courts during calendar year 2003. VIRGINIA STATE OF THE JUDICIARY REPORT 2003, p. F-146. If ratio between the numbers of appointments of counsel in delinquency cases and CHINS/status cases is similar to the ratio between the number of delinquency cases (79,000) and CHINS/status cases (15,000), then 85% of the appointments of counsel would have been for delinquency cases. However, the possible consequences for delinquency cases are more serious than for CHINS and status offense cases, so it is reasonable to suspect that the percentage of counsel appointments which are for delinquency cases may be even higher. Therefore, we shall assume that 26,000, or approximately 93%, of the 28,000 appointments of counsel in juvenile cases occurred in delinquency cases.

Subtracting the number of counsel appointments in delinquency cases from the total number of delinquency cases produces the conclusion that, in 53,000 delinquency cases, there was no appointment of counsel. In these cases, either the juvenile had retained counsel or else the juvenile waived counsel. Based in part simply on anecdotal evidence, it appears that the larger percentage of those juveniles who did not have counsel appointed waived their right to representation. Therefore, to once again make a very conservative assumption, we shall assume that two-thirds of those unrepresented by court-appointed counsel, 35,300, waived counsel.

House Bill 600 does not require appointment of counsel in every one of the estimated 35,300 delinquency cases in which a waiver occurred. Counsel would now need to be appointed prior to any waiver only if the juvenile were charged with either a felony or what would be a Class 1 misdemeanor "that may result in commitment [to DJJ] pursuant to subsection 14 of § 16.1-278.8." The misdemeanor prong of the commitment statute encompasses only those juveniles charged with either a Class 1 misdemeanor after having been found to be delinquent based on a felony or else a Class 1 misdemeanor after having previously been adjudicated delinquent of three or more Class 1 misdemeanors "and each such offense was not a part of a common act, transaction or scheme."

As noted earlier, there are two differing interpretations as to when the waiver requirement comes into play. The narrower interpretation would read this requirement as applicable only when the instant charge is for an offense that could *immediately* trigger a commitment, i.e., either the fourth Class 1 misdemeanor or else a Class 1 misdemeanor after adjudication for a felony. During the course of the working group's deliberations, a broader interpretation emerged. The broader interpretation would apply the waiver to every Class 1 misdemeanor charge, since any Class 1 misdemeanor could *eventually* serve as a predicate for a subsequent commitment. The broader interpretation would require significantly more waivers and, thus, have a significantly greater fiscal impact.

For fiscal year 2003, 89% (51,558 out of 57,809) of the delinquency complaints processed by intake units of the Court Services Units involved acts which would be either a felony or a Class 1 misdemeanor. DATA RESOURCE GUIDE: FISCAL YEAR 2003,Virginia Department of Juvenile Justice, p.18. Applying the ratio of felonies and Class 1 misdemeanor charges to the estimated 35,300 waivers produces an estimate of 31,417 waivers in delinquency cases involving felony or Class 1 misdemeanor charges. Of the 51,558 felony and Class 1 misdemeanor level delinquency charges, 34,594 were Class 1 misdemeanors.

It seems reasonable to suppose that juveniles tend to waive counsel more frequently for less serious delinquency charges than for more serious delinquency charges. Therefore, in order to have a conservative estimate of the number of additional appointments of counsel which may be required in waiver situations, we have reduced the estimated number of potential waivers subject to this counsel requirement by one-third to 21,049 (31,417 x .67).

At this point, it becomes apparent that the ambiguity in the statute could produce two very different estimates. If one adopts the broader interpretation, then appointment of counsel is required in every one of these estimated 21,049 waivers, for an annual fiscal impact of **$**2,357,488 (21,049 x $112).

The narrower interpretation of the applicability of the waiver requirement would encompass all 16,964 felony complaints, but only a portion of the 34,594 Class 1 misdemeanor complaints. It is not known how many of those Class 1 misdemeanor complaints are either for a fourth Class 1 misdemeanor or else follow adjudication for a felony. For the purposes of this estimate, assume that 20% of the Class 1 misdemeanors

would invoke the waiver requirement. This assumption would mean that 46% of the felony and Class 1 misdemeanor level delinquency petitions processed ((34,594 ÷ 5) + 16,964) out of 51,558) involved charges which could lead to commitment as a result of that pending case. Applying that ratio to the estimated 21,049 waivers in delinquency cases involving the "committable"- level delinquency charges, produces 9,683 waivers where counsel would have to be appointed, for an estimated fiscal impact of $1,084,496 (9,683 x $112).

D. Estimated combined annual fiscal impact to the Criminal Fund.

(1) Initial estimated annual fiscal impact with the broader interpretation of the waiver requirement: $3,370,528. Initial estimated annual fiscal impact with the narrower interpretation of the waiver requirement: $2,097,530.

(2) Adjustment for public defender assistance.

(a) To the extent to which both (i) the instances of additional representation will occur in areas served by public defenders, and (ii) the local public defenders will handle this additional representation, these fiscal impacts will be lessened. In Fiscal Year 2003, there were public defenders offices in 48 jurisdictions, which in turn contain 30% of the population of Virginia. (The number of public defenders offices has since increased by four.) Historically, the fiscal effect of the establishment of a public defender's office has utilized the assumption that it will replace three-quarters of the case load of the court-appointed attorneys, but that court-appointed attorneys would still need to be utilized in one-quarter of the cases, due to conflicts. Assuming those jurisdictions represent easily 30% of the juvenile delinquency case load, as well as assuming that public defenders will be "conflicted out" of representation approximately 25% of the time due to multiple juvenile respondents or other conflicts, it is quite possible that these fiscal impact could be decreased by 23%.

(b) If this set of assumptions all prove to be true, then the revised fiscal impacts would be: Total annual fiscal impact with the broader interpretation of the waiver requirement and assuming public defender participation: $2,595,307. Total annual fiscal impact with the narrower interpretation of the waiver requirement and assuming public defender participation: $1,615,103.

(3) Adjustment for current compliance.

(a) Anecdotal evidence was presented to the working group that some courts already process delinquency cases so as to move toward the requirements of House Bill 600, even if they do not actually comply with those requirements in all particulars. The courts in question would routinely (i) appoint counsel prior to detention hearings, if requested and not waived by the juvenile; or (ii) not accept a

waiver to what the court considers a serious charge unless the juvenile has consulted with an attorney; or (iii) both.

(b) Clearly some courts will have less distance to go, i.e., fewer new appointments of counsel to make, in order to comply with House Bill 600 than will others. It is not known how many courts fall into this category, nor how many additional appointments will still need to be made in those courts following the effective date of House Bill 600. However, to account for whatever current compliance with the House Bill 600 mandate already exists in the courts, the estimate for the annual fiscal impact is further reduced by 10%.

(c) Therefore, if these sets of assumptions regarding the public defenders and current compliance all prove to be true, then the revised fiscal impacts would be: Total annual fiscal impact with the broader interpretation of the waiver requirement, assuming public defender participation and discounting for current compliance: $2,335,776. Total annual fiscal impact with the narrower interpretation of the waiver, assuming public defender participation and discounting for current compliance: $1,453,592.

E. Other Fiscal Impact.

(1) Impact on the Indigent Defense Commission. As noted previously, if it were decided to pursue an expansion of the role of the public defender system for the implementation of House Bill 600, either through adding additional offices, hiring additional public defenders, or developing a unit of "detention specialists," the Indigent Defense Commission would presumably require additional resources. Since those possible responses have not been endorsed by any constituency and have not been developed into detailed proposals, no estimated fiscal impact has been prepared.

(2) Impact on parents. The implementation of House Bill 600 will have a fiscal impact on another group involved in delinquency proceedings – the parents of the juveniles who are the subjects of these proceedings. When counsel is appointed for a juvenile in a delinquency proceeding, parents who are financially able are to be assessed for the cost of that representation. Va. Code § 16.1-267. In the juvenile and domestic relations district court, that assessment would be a maximum of $112 for each instance of representation.

The requirements of House Bill 600 create the possibility that parents who did not seek representation for their juvenile (or when the juvenile himself did not seek representation) could be assessed for the cost of counsel appointed to represent the juvenile at a detention hearing or to advise the juvenile regarding a waiver of counsel, or for both purposes. For the detention hearing, counsel will be appointed, even though juvenile (or his parents) may intend to retain counsel or may have already retained counsel, but where the retained counsel is unable to be present at the detention hearing. As described above in the discussion of the

appointment of two attorneys in sequence to represent the child, it is even possible that an attorney would have been appointed prior to the detention hearing who cannot continue representation any further and a second attorney will be appointed for the purpose of ascertaining that any waiver of counsel is free and voluntary. In this latter instance, which one presumes will be relatively rare but which is nevertheless possible under the provisions of House Bill 600, the parents could be charged $112 twice for unsought representation, once for the detention hearing and once for an advisement regarding waiver of counsel.

Thus, parents will be assessed for the cost of representation which was not requested, but which was required by the provisions of House Bill 600. This assessment requires a prior expenditure of funds from the Criminal Fund. The assessment clearly has a fiscal impact on any parent assessed. There is also an impact regarding the Commonwealth. Approximately 17% of the cost of court-appointed counsel in all levels of trial court is recouped as a result of assessments against parents and against adult defendants who are convicted. VIRGINIA STATE OF THE JUDICIARY REPORT 2003, p. A-150. However, the funds collected as a result of these assessments are deposited in the General Fund. Therefore, under the current statutory scheme, these collections do not at all mitigate the fiscal impact on the Criminal Fund itself.

IX. Specific Legislative Proposals

Section VII of this report discussed a more expansive view of possible legislative refinements to the requirements created by House Bill 600. Many of these were considered promising ideas, but probably require further reflection. However, there was a consensus among the working group that two legislative proposals should be pursued at the 2005 Session of the General Assembly, so that these changes could be made to be effective at the same time as House Bill 600 becomes effective, July 1, 2005. In addition, over and apart from any specific legislative changes, the Office of the Executive Secretary notes with some urgency the significant fiscal impact which House Bill 600 is likely to have on the Criminal Fund, an impact which was not as quantifiable during the 2004 legislative session.

A. Applicability of counsel requirement for waiver of counsel.

It was noted that there is an ambiguity in the amendments to subdivision B 3 of § 16.1-266 about the circumstances requiring appointment of counsel to advise a juvenile regarding the waiver of representation by counsel. Clearly, it applies when the juvenile is charged with a felony or when he is charged with a Class 1 misdemeanor after having been previously adjudicated delinquent for a felony. However, does it apply to a Class 1 misdemeanor charge only if it is a charge which could *immediately* result in commitment to DJJ, i.e. the juvenile's fourth Class 1 misdemeanor, or does it apply to any Class 1 misdemeanor, since any Class 1 misdemeanor could *eventually* result in a commitment to

DJJ? It was generally supposed that the former, narrower interpretation was intended, but the actual language could support the broader interpretation. The following legislative proposal would clarify this issue in favor of the narrower interpretation:

> **§ 16.1-266. Appointment of counsel and guardian ad litem. —**
>
> C. Subsequent to the detention hearing, if any, and prior to the adjudicatory or transfer hearing by the court of any case involving a child who is alleged to be in need of services, in need of supervision or delinquent, such child and his parent, guardian, legal custodian or other person standing in loco parentis shall be informed by a judge, clerk or probation officer of the child's right to counsel and of the liability of the parent, guardian, legal custodian or other person standing in loco parentis for the costs of such legal services pursuant to § 16.1-267 and be given an opportunity to:
>
> . . .
>
> 3. Waive the right to representation by an attorney, if the court finds the child and the parent, guardian, legal custodian or other person standing in loco parentis of the child consent, in writing, and such waiver is consistent with the interests of the child. . . . A child who is alleged to have committed ~~an offense that may result in commitment pursuant to subsection 14 of § 16.1-278.8~~ *either (i) an offense that would be a felony if committed by an adult, (ii) an offense that would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been found to be delinquent based on an offense that would be a felony if committed by an adult, or (iii) an offense that would be a Class 1 misdemeanor if committed by an adult and the juvenile has previously been adjudicated delinquent of three or more offenses that would be a Class 1 misdemeanor if committed by an adult, and each such offense was not a part of a common act, transaction or scheme*, may waive such right only after he consults with an attorney and the court determines that his waiver is free and voluntary. The waiver shall be in writing, signed by both the child and the child's attorney and shall be filed with the court records of the case.

Of course, this shift to the narrower interpretation would reduce the estimated fiscal impact of House Bill 600 by nearly $1 million, from $2,335,776 to $1,453,592, assuming public defender participation and discounting for current compliance.

B. Routine appointment of two attorneys.

As previously noted, the Office of the Executive Secretary has interpreted subdivision C 3 of § 16.1-266 and § 16.1-268 as establishing the rule that only one attorney may be appointed in a delinquency proceeding unless the first attorney appointed

must be removed for good cause. Routinely appointing two attorneys in delinquency matters either for the convenience of the attorneys, for their financial benefit, or as an inducement to remain on the court-appointed list, have not been interpreted by the Office of the Executive Secretary as falling within the ambit of good cause. Therefore, in addition to the fiscal problems occasioned by the "two attorney" model, the Office of the Executive Secretary believes it is constrained from compensating two attorneys per delinquency case on a routine basis.

The working group concluded that, given the timeliness with which counsel must be appointed for the detention hearing, the time frame within which the adjudication must occur and the limited number of attorneys available to be appointed in some jurisdictions, smaller jurisdictions will not be able to comply with House Bill 600 without the flexibility to appoint different attorneys for the detention hearing and the remainder of the delinquency proceeding.

> **§ 16.1-266. Appointment of counsel and guardian ad litem. —**
>
> . . .
>
> B. Prior to the detention hearing held pursuant to § 16.1-250, the court shall appoint a qualified and competent attorney-at-law to represent the child unless an attorney has been retained and appears on behalf of the child. For the purposes of appointment of counsel for the detention hearing held pursuant to § 16.1-250 only, a child's indigence shall be presumed. Nothing in this subsection shall prohibit a judge from releasing a child from detention prior to appointment of counsel. *Notwithstanding any other provisions of law, the appointment of an attorney to represent the child under this subdivision shall not preclude the court relieving and replacing this attorney by another attorney to represent the child during the remaining stages of the proceeding.*

The prior section of this report details the calculation of the fiscal impact of this practice of appointing two attorneys in these delinquency cases to sequentially share the representation. This practice would have a fiscal impact of $1 million on the Criminal Fund.

C. Increase to the Criminal Fund.

Regardless of whether any legislative proposals are advanced in response, it is still necessary to increase the amount of money available through the Criminal Fund. Relying on the estimated fiscal impacts which vary between $1.5 million and $2.3 million, an increase in the Criminal Fund is essential.

Attachments