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# POSITION ON PROPOSED LEGISLATION

**BILL: Senate Bill 744 – Juvenile Law - Reform "Non-Technical Violations of Probation**

**FROM: Maryland Office of the Public Defender**

**POSITION: Unfavorable**

**DATE: February 9, 2024**

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on Senate Bill 744.

The Juvenile Justice Reform Act (JJRA), which is current law, was the end result of diligent work by the Maryland General Assembly during the 2022 legislative session. The JJRA codified recommendations made by the Juvenile Justice Reform Council (JJRC), "a diverse, inter-branch, bipartisan group of juvenile justice stakeholders from across the state." The Maryland General Assembly established the JJRC **itself** to delegate the study of a complicated system and to ask the Council to make recommendations to the legislature on how to make it better for all Marylanders.

The JJRC engaged in intensive study and debate around best practices "regarding the treatment of juveniles who are subject to the criminal and juvenile justice systems and identifying recommendations to limit or otherwise mitigate risk factors that contribute to juvenile contact with the criminal and juvenile justice systems."[1] The Council met over a period of two years. The JJRA was structured on their recommendations.

[1] Juvenile Justice Reform Council Final Report 17 (January 2021), https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnJuvRefCncl/JJRC-Final-Report.pdf.

Less than 2 years after the JJRA went into effect, SB 744 seeks to dismantle it by drastically expanding which children are brought into the system and increasing prosecution, detention, and probation in a rushed and politicized context, divorced from what research **actually** supports as best for public safety and best for families.

Make no mistake, Senate Bill 744 is **not a bill that will address violent crime.** Under current law, any child age 10 and older can be fully prosecuted, detained, placed on probation until the age of 21, and committed for out of home placement for a crime of violence. Instead, SB 744 attacks very young children, and children involved in low-level offenses, almost exclusively Black children, and guts the steps the JJRA took to build out opportunities to divert children from formal legal system involvement.

There is little to no data being presented to support SB 744. Anecdotes are its only support. Anecdotes should not be used to overturn data-driven reforms designed and proposed by an interdisciplinary and bipartisan team that spent **years** examining the actual data and research for how to improve public safety.

Despite the rush to hear this bill, MOPD urges careful consideration of our testimony, experience, and careful analysis.

**Putting 10, 11, and 12 year old children in the System will not make communities safer.**

Senate Bill 744 seeks to extend jurisdiction of the juvenile court to children under the age of thirteen for certain offenses, page 3, lines 3-12 and page 7, lines 17-20.

In 2022, the JJRC recommended that Maryland join the majority of U.S. states and have a minimum age of jurisdiction, due to the growing body of evidence that found that pre-teens have diminished neurocognitive capacity to be held culpable for their actions; likewise they have little


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ability to understand delinquency charges against them, their rights and role in an adversarial system, and the role of adults in this system.[2] The Council recognized that behavior of younger children should be handled by the welfare and mental health systems, not the courts. As a result, the Juvenile Justice Reform Act was enacted which, among other things, raised the minimum age to 13 to charge children in juvenile court for the vast majority of offenses, excluding crimes of violence which can still be charged regardless of age. Those changes have been in effect only since June 1, 2022. Less than two years have passed since this change, and very little has changed for children under the age of thirteen.

The United States is an outlier throughout the world in the practice of trying young children in court. In 2019, the Committee on the Rights of the Child, which monitors the implementation of the United Nations Convention on the Rights of the Child (CRC), issued General Comment No. 24 stating that 14 is the most common minimum age of criminal responsibility internationally, and urging nations to set their minimum age of criminal responsibility to at least 14-years-old.[3] The United Nations Global Study on Children Deprived of Liberty in its 2019 report also called on countries to set the minimum age of prosecution in juvenile court at 14-years-old.[4]

Studies have also found notable developmental gaps between youth aged 16 to 18 years old and those 14-years-old and younger, which could impact their ability to understand trial matters.[5] For many young children, the support, learning, and accountability that their family

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[2] Juvenile Justice Reform Council Final Report 17 (January 2021), https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnJuvRefCncl/JJRC-Final-Report.pdf.
[3] United Nations Convention on the Rights of the Child (CRC), Committee on the Rights of the Child, General Comment No. 24 (2019) on Children's Rights in the Child Justice System (2019): 6, CRC/C/GC/24, http://tinyurl.com/w78myvky.
[4] United Nations, General Assembly, "Global Study on Children Deprived of Liberty: report of the Independent Expert," A/74/136 (11 July 2019): 20, available at https://undocs.org/en/A/74/136.
[5] Katner, 420, citing National Research Council, Reforming Juvenile Justice (Washington, DC: National Academies of Science, 2013), http://bit.ly/1zhoVmM.


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provides them is the best resource for handling mistakes or misbehavior, and this should be the primary method used. For youth struggling with significant challenges, such as substance abuse, family fragmentation, academic failure, or abuse and neglect, other systems can address the root causes of a child's challenges without the negative impacts of justice system involvement. Alternate child-serving systems should be scaled up through funding investments, including via reallocation of funds from juvenile justice, so that young **children can be healthy and thrive—and can contribute throughout their lifetime to healthier, safer communities.**

Moreover, the Juvenile Services Education Program (JSEP), which operates the education programs in DJS facilities, cannot realistically meet the educational needs of youth under 13 years of age who might be detained under this bill. Middle school students currently in DJS facilities struggle to get appropriate education services. There is no consistent direct instruction and youth are generally grouped in classes by housing unit, rather than by age or grade level, making effective access to the grade appropriate curriculum difficult. It is particularly difficult to meet the needs of students with disabilities who we believe make up the majority of students involved in the juvenile justice system.[6]

Advances in neuroscience indicate childhood as a crucial time of brain development – a time at which children's brains are developing, have normal immaturity, and are unlikely to benefit from or understand processes in the legal system. Young children should be supported by their families, schools, and holistic resources, not handcuffed and sent to detention or court. They do not have the brain development necessary to understand what is happening in court or be able

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[6] *See* National Disability Rights Network, *Probation referral: A Model for Diversion of Children and Youth with Disabilities from the Juvenile Justice System* 7 (2019), ("Prevalence studies have found that 65-70 percent of youth in the justice system meet the criteria for a disability, a rate that is more than three times higher than that of the general population."), https://www.ndrn.org/wp-content/uploads/2019/10/Probation_Referral_Report_FINAL_w_Appendices.pdf


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to participate in their defense in any meaningful way. They are further unable to fully grasp the impact of breaking the law or to fully understand the legal and moral implications of their actions, and they face great risk of being physically harmed and emotionally traumatized by the experience.

Younger children are at the greatest risk of being victims of violence when in custody – more than one-quarter of youth under 13 years old were victims of some type of violence while confined, compared to nine percent of 20-year-olds.[7] Justice involved youth are also these victims and, when processed in the juvenile system, do not receive the trauma-informed services that they need. Furthermore, justice system processing is a treatment that is disproportionately used for children of color, enhancing the racial and ethnic disparities in the youth justice system.[8]

Part of the rationale for raising the age to thirteen was the fact that the vast majority of children under the age of thirteen are, at least initially, found incompetent to stand trial. A 2021 study found that 82.6% of children under the age of thirteen are likely to be found incompetent to stand trial.[9] Those same children rated as having a poorer or more guarded prognosis for restoration of competency within a lawful time frame than older adolescents.[10]

When children are found Incompetent to Stand Trial (IST) the <u>only</u> treatment available to them through prosecution is the very limited treatment necessary for them to attain competency. DJS only has jurisdiction to provide services if the child is found delinquent. There can be no delinquency finding unless and until a child is competent to stand trial. This means that if a child

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[7] Melissa Sickmund and Charles Puzzanchera (eds.), "Juvenile Offenders and Victims: 2014 National Report" (Pittsburgh, PA: National Center for Juvenile Justice, 2014): 216, https://bit.ly/37TiLON.
[8] M. Sickmund, A. Sladky, and W. Kang, Easy Access to Juvenile Court Statistics: 1985-2018; (National Center for Juvenile Justice, 2020), https://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp.
[9] Patricia C. McCormick , Benjamin Thomas , Stephanie VanHorn, Rose Manguso & Susan Oehler (2021). Five-Year Trends in Juvenile Adjudicative Competency Evaluations: One State's Consideration of Developmental Immaturity, Age, and Psychopathology, Journal of Forensic Psychology Research and Practice, 21:1, 18-39, DOI: 10.1080/24732850.2020.1804306, p. 33
[10] *Id.* at 34.

needs supervision, therapy, housing stability, or educational assistance, the Department of Juvenile Services *cannot* provide those services unless and until the child has been deemed competent to stand trial. If the child is never deemed competent to stand trial, then they may never receive those services. On the other hand, if a child is referred to DJS and they file a Child In Need of Services (CINS) petition, rather than forward the case to the State's Attorney for prosecution, they can receive all of the same services aimed at treating, guiding, and rehabilitating children. Children do not need to be competent to stand trial to receive services via a CINS petition. In short, prosecuting these young children delays and impedes the delivery of services.

Competency to stand trial is not a mere legal technicality, it is a requirement of both the United States Constitution and the Maryland Declaration of Rights. For children under the age of 13, much of the issue of competency is simple developmental maturity, which may take far longer than the constitution allows. These cases can not be held open indefinitely while we wait for the child to grow and mature in the hope that they will attain competency. *Jackson v. Indiana*, 406 U.S. 715 (1972).

**Children need graduated sanctions and positive reinforcement, not jail.**

A new proposal in this bill, Cts & Jud Pro § 3-8A-19.6 (a) (5) on page 10 lines 26-27, would mandate that two or more unexcused failures by a child to appear at a treatment program ordered by the court would be a non-technical violation of probation. Meaning, if a child missed two or more visits to a treatment program (which remains undefined and could include daily programming) the child could face detention.

Tying an unexcused absence from a treatment program ordered by the court to a carefully and intentionally limited category of non-technical violations of probation, thereby opening the


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door to the detention and commitment of a child for placement through the Department of Juvenile Services, flies in the face of efforts to limit youth incarceration, ignores adolescent development and irrefutable brain science, and would further highlight significant racial and economic disparities among court involved youth.

First and foremost, the proposed statutory language is ambiguous and lacks necessary definition, which even the most reasonable of minds would struggle to collectively define. What constitutes an "unexcused failure"? Who is obligated to categorize the absence as "excused?"

The number of factors that are out of a child's control, but under this provision could contribute to a violation are too many to list. However, some key barriers that will increase violations include lack of internet access, transportation barriers, and competing demands for parents and children.

A fourteen year old may have no access to or ability to afford the internet for a virtual appointment. A thirteen year old may have no cell phone or laptop to log on to virtual therapy for the day. Under this language, it is not clear whether these may be excusable failures attributed to a parent or guardian, who may be unable or unwilling to assist with the technology or cost, or if the onus of familial gaps and lack of resources falls on the child.

Similarly, a child cannot drive a vehicle, if other transportation is lacking or if the parent or guardian does not have the ability to take off work to transport the child to an appointment at a program. It is unclear under this bill whether the child could face detention for failures to appear caused by transportation barriers or other issues that are beyond their control.

There are numerous programs that require attendance upwards of 2-3 times per week. The child likely lacks the contact information for the program, let alone a phone of their own or the maturity to contact a program themselves. If the parent, who is not the one on probation,


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forgets to contact the program, the child should not be punished. Further, failures to appear - whether excused, unexcused, or otherwise - may not be wanton. They may not be willful. Violating probation based on two unexcused absences is disproportionate  The proposition that a child, who needs assistance to get to a medical appointment,and cannot even excuse themself from school for the day, should be subjected to a non-technical violation of probation and potential detention and out of home placement for missing *two* appointments at a treatment program, is bad policy. Further, the practical impact of this proposed legislation would result in virtually every single violation of probation proceeding resulting in a contested hearing, likely necessitating the involvement of the treatment program to testify against the child, pitting them against  the child, rather than serving as the rehabilitative resource and service that it is intended to be. Children are more likely to be successful in their own treatment and rehabilitation if they feel part of the team and included in decision making instead of fearing punishment and detention.

Additionally, this proposed addition to the world of non-technical violations is completely unnecessary, as the current legislation permits a youth's probation to be extended *at least* two times - or more for certain underlying offenses - where there is good cause found and where the purpose of extending the probation is to ensure that the child completes a treatment or rehabilitative program or service. Surely all involved parties can agree that the goal in such a situation would be to reintegrate the child into the treatment program and to work to resolve any issues to ensure their attendance. It would be nonsensical to punish a youth for failing to attend an appointment as few as two times. This defeats the entire purpose of the treatment program and is in direct conflict with the rehabilitative nature of juvenile court.


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Last, this proposed legislation widens the door to commitment for court-involved youth, particularly low income youth of color. Prior to the implementation of the JJRA, and before the distinction between technical and non-technical violations, there were times in Maryland when nearly 50% of probation violations resulted in placement, with what later became defined as technical violations accounting for 1 in 3 commitments statewide.[11] Youth were more than twice as likely to be committed for a VOP than for a violent felony. Missing two appointments with a court ordered treatment program does not increase one's level of risk to an extent that warrants removing that child from their home, detaining them, and committing them for placement.

The indeterminate harm that could result from this proposal lacks justification, clear definition, or any rational reasoning.

**Children should not face detention prior to the adjudication of their case.**

Senate Bill 744 seeks to alter Cts & Jud Pro § 3-8a-15(b)(3)(iii), page 10 lines 1-16, to repeal protections for children **accused** of minor crimes. The proposal authorizes children to be detained pre-adjudication, if they were under the supervision of the Department of Juvenile Services at the time of the alleged new offense, when the new alleged offense is only a misdemeanor. Meaning, if a child is placed on probation and is then arrested on a new, minor charge—such as a school fight or petty theft—the Court can detain the child pending trial simply because they were already under supervision when a new alleged offense arises. This change exposes children who are merely accused of a new, minor offense to up to 30 days in detention. *See* Cts & Jud Pro § 3-8A-19.6; Cts & Jud Pro § 3-8A-15(d)(6)(i).

[11] The Annie E. Casey Foundation, Doors to DJS Commitment: What Drives Juvenile Confinement in Maryland? January, 2015, https://djs.maryland.gov/Documents/publications/AECF%20Assessment%20of%20MD%20Dispositions%20-%20Updated%20March%2016%20-%20Final%20PDF.pdf..



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If enacted, this provision is harmful and overly punitive. The children captured by this provision are not youth accused of violent offenses; they are children who have already made a mistake that brought them to court, who then are accused of a new, misdemeanor offense. This proposal would result in children being detained pretrial for an offense that they could not be detained for if they are found involved (or found guilty). It is illogical that a child who is presumed innocent may be detained for something that they will not be detained for if they are adjudicated delinquent.

The harms of this provision far outweigh any conceivable benefits. To highlight, an extremely common misdemeanor offense for youth to incur are simple assaults, which often appear as school-based incidents. School-based incidents typically lead to disciplinary actions, suspensions, and consequences that are age appropriate. Other examples include small thefts, minor destruction of property charges, and driving without a license. The reforms implemented by the JJRA in 2022 recognized that children and teenagers are prone to making mistakes, and were created with evidence-based principles in mind to address the underlying causes of delinquent behavior. However, this proposed provision removes protections for youth who are learning and growing, and whose delinquent behavior is currently being addressed.

When a youth is placed on probation, the Department of Juvenile Services rolls out services, including counseling, family therapy, victim awareness classes and other programming, as their probation progresses. Like much of life, it takes time for youth and their families to adjust to being under supervision and to acclimate to the services being received. Rehabilitation is fluid; predictably, many youth continue to make minor mistakes before their habits and behaviors improve. The Juvenile Probation system also allows case managers to ramp up sanctions and services depending on the youth's needs, and probation can be extended for good


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cause and to complete a rehabilitative program or service. *See* Cts & Jud Pro § 3-8A-19.6. If a youth incurs a new charge, while the child awaits their trial, DJS Case Managers (who operate like probation officers) can impose sanctions while also addressing the child's identified needs—by putting in place additional counseling, mentorship, or GPS monitoring, among other services. Rather than continuing to address a child's needs in the community when they receive a new charge, the proposed amendment would disrupt any progress that is being made in the most traumatic of ways.

Being detained and losing one's liberty, especially as a juvenile, is a life-changing event with unquantifiable collateral consequences. When children are detained, they are removed from their homes, from their parents, from their schools, and from their communities. Detention impacts a youth's self-esteem, and their social and moral development.

If the goal is deterrence, ample data shows that the end does not justify the means.[12] The proposed amendment is also plainly unnecessary. As the law currently stands, if a child commits a new, misdemeanor offense while under the supervision of the Department of Juvenile Services, once found involved (or found guilty), the Court has the discretion to impose sanctions higher than the listed terms of probation, and/or the State's Attorney's Office or Department of Juvenile Services can file a Violation of Probation Petition to hold a separate hearing to impose additional consequences <u>after the youth is found involved in the new offense</u>. *See* Cts & Jud Pro § 3-8A-19.6. The law also already allows a youth with multiple findings of involvement from the same year to be detained pretrial on an alleged misdemeanor, and already addresses concerns

[12] *See* Simon I. Singer & David McDowall, Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law, 22 L. & Soc'y Rev. 521, 529-532 (1988) (measuring New York arrest rates before and after change to require prosecution of some adolescents in criminal court); Eric L. Jensen & Linda K. Metsger, A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime, 40 Crime & Delinq. 96, 100-102 (1994) (evaluating deterrent effect of Idaho statute mandating criminal processing as adults of adolescents charged with serious offenses).


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about gun offenses. *See* Cts & Jud Pro § 3-8A-15(b)(3)(i) and (b)(3)(ii).

The 2022 General Assembly understood that pretrial detention for children should be used only for the most serious crimes and cases, where the community and public safety are seriously at-risk. We urge the committee not to adopt the proposed amendment to protect children who are still learning and growing from the loss of liberty this amendment sanctions**.**

**Children need swift and certain services, not long periods of probation.**

Senate Bill 744 expands juvenile probation from an initial period of six months to one year for misdemeanors and from one year to two years for felonies, extends the probationary expansion period from three months to four months, and adds an entire year to the total period of probation, including expansions.

The Office of the Public Defender opposes these changes to the probationary periods for two primary reasons: the current law is reflective of data driven recommendations from the JJRC and appropriately allows for probation to be extended when necessary in each individual case, and these changes punish children for the shortcomings of the Department.

The current probationary time limits were put in place in response to the recommendations by the JJRC. After studying data pertaining to juvenile probation in the state of Maryland, as well as a national overview of juvenile probation systems, the JJRC recommended that the initial probation period be 6 months for misdemeanors and 1 year for felonies, with the possibility to extend given the individual child's needs.

The JJRC report stated, "Youth have better safety outcomes when the juvenile justice system helps them set rehabilitation goals and accomplish them, as opposed to merely surveilling them through long periods of probation supervision. In line with these findings, several states


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have recently passed legislation to make probation shorter and more goal-oriented."[13] The time periods recommended by the JJRC were not arbitrary; they were supported by data and were in line with what other states, like Utah, South Dakota and Kentucky, had successfully implemented. The proposed legislation seeks to not only increase these evidence-driven time limits, but to double them, *without* the support of data to support the change.

In addition, the current law allows for probation to be extended for good cause and if the child needs to complete a treatment or rehabilitative program. This provision, in alignment with the individualized juvenile court system, allows for the court to look at individual children and their specific situation to determine if they need more time to complete treatment. This practice is commonly utilized by the courts. However, many youth successfully complete their probation within the initial period of probation. For that significant group of children, the proposed legislation would place them in a probationary period twice as long as necessary. This does not yield a neutral impact on the child, but rather vastly increases their time in the juvenile court system, which research supports can have diminishing returns.[14]

If there are concerns with the Department's ability to provide all the necessary services within the required time-limits, efforts should be focused on ensuring that the Department works towards seeking more treatment providers, reducing waiting lists, and expediting connecting children to treatment and rehabilitative services. In contrast, placing the burden and onus on children by increasing probation to time-periods unsupported by data is not beneficial to children

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[13] Juvenile Justice Reform Council Final Report 20 (January 2021), https://dls.maryland.gov/pubs/prod/NoPblTabMtg/CmsnJuvRefCncl/JJRC-Final-Report.pdf.

[14] Dir, A. L., Magee, L. A., Clifton, R. L., Ouyang, F., Tu, W., Wiehe, S. E., & Aalsma, M. C. (2021). The point of diminishing returns in juvenile probation: Probation requirements and risk of technical probation violations among first-time probation-involved youth. *Psychology, public policy, and law : an official law review of the University of Arizona College of Law and the University of Miami School of Law*, *72*(2), 283–291. https://doi.org/10.1037/law0000282



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and their progress, and is particularly harmful to black and marginalized youth who are disproportionately represented on probation.

**For the above reasons, and those explained in our oral testimony, the Maryland Office of the Public Defender urge the committee to issue an unfavorable report on Senate Bill 744.**


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