

Early Access to Counsel in Police Precincts Best Practices and Recommendations

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Description about project

In 2017 and 2020, California passed Senate Bills 395 and 203 which provide youth under the age of 18 access to legal counsel upon arrest and prior to police interrogation. In 2021, Arnold Ventures funded Fair Trials and NORC at the University of Chicago to conduct an implementation study of California's Senate Bills 395 and 203, passed in 2017 and 2020, respectively, which require that all youth 17 years of age or younger consult with legal counsel prior to custodial interrogation. The study also facilitated the Network of Early Access to Counsel (NEAC), a learning community of subject matter experts on legal counsel and early access to counsel across the U.S to support the application and study of access to counsel at arrest and in police custody in sites beyond California, and to share experiences and best practices.

This brief describes recommendations and best practices providing early access to counsel for youth, based on the findings of our analysis from California stakeholders' responses to interview questions about the implementation and provision of early access to counsel, as well as from stakeholders across the U.S who have implemented early access to counsel programs in their respective jurisdictions via quarterly NEAC meetings.

Introduction

The United States (U.S.) Supreme Court has recognized that the inherent nature of custodial interrogation¹ can obscure the voluntariness of any statements made to police.² Youth are particularly susceptible to offering statements and false confessions during interrogation due to their age, maturity, and cognitive, social, and emotional development, which influences their ability to fully understand their constitutional rights, including *Miranda* warnings.³ In response to concerns about the vulnerability of youth, many states across the U.S. have begun to enact legislation to provide youth access to legal counsel prior to arrest. The following pages offer recommendations and considerations for the implementation of providing early access to counsel for youth prior to interrogation.⁴

Best Practices and Recommendations

ESTABLISH STANDARDIZED PROCEDURES

Developing and maintaining standardized procedures of practice for stakeholders who interact with youth is important to ensuring the provision of early access to legal counsel for youth. Law enforcement, for example, are more likely to ensure that a youth can consult with an attorney at the earliest point in time if they are aware of and trained on protocols that guide their interactions with youth prior to arrest and interrogation. Developing and maintaining standardized procedures of practice for stakeholders who interact with youth is important to ensuring the provision of

ADVANCING THE CASE FOR EARLY ACCESS TO COUNSEL IN POLICE PRECINCTS

With funding from Arnold Ventures, NORC at the University of Chicago and Fair Trials partnered on a three-year project to study the implementation of California Senate Bills 395 and 203 which went into effect in 2018 and 2021, respectively. Semi-structured interviews were conducted with publicly appointed defense attorney offices across thirteen counties in California to answer four primary research questions:

1. How has SB 395 and SB 203 been implemented across California?
 - a. How is access to legal counsel prior to arrest provided to youth in California?
 - b. How does the provision of legal counsel prior to arrest for youth vary across counties?
2. What barriers or challenges have impeded the implementation of SB 395 and SB 203?
3. What are the perceived benefits associated with the implementation of SB 395 and SB 203?
4. What best practices are emerging from the implementation of SB 395 and SB 203?

In addition to qualitative data collection, the project convened a national learning community to facilitate the application and study of arrest and stationhouse counsel in sites beyond California. The learning community included public defenders, academics, and community organizations to facilitate the sharing of information, data, policies, and best practices related to the provision of early access to legal counsel.

early access to legal counsel for youth. Similarly, attorneys should have procedures in place that outline how calls from youth and law enforcement will be addressed, who is responsible for responding to calls and consulting youth, the mode of legal consultation with youth (in-person or over the phone), and information that should be relayed to and collected during calls with youth.

PROVIDE SPECIALIZED TRAINING

Youth defense is a specialized practice that requires distinct knowledge and skills. Attorneys who provide legal support to youth pre-interrogation (and at any stage in the legal process) should receive specialized training to increase their knowledge on topics related to adolescent brain development, youth trauma, youth rights in relation to the 5th Amendment, and duress and coercion, among other things. Trainings should be mandatory, reoccurring, and regularly updated to incorporate the latest evidence-based practices.

ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP

Establishing good attorney-client relationships during any legal situation is beneficial both to the client and the attorney. In the case of providing early access to counsel for youth, the ability to establish an attorney-client relationship begins attorney-client privilege and provides the opportunity for attorneys to gather more information upfront about the situation and the facts of the case. Because the attorney can provide more extensive support and advice to the youth, the attorney is also able to build rapport with the youth and establish a more trusting relationship if the case moves forward.

It is not always the case, however, that publicly appointed defense offices are able to implement early access to counsel pre-interrogation practices that establish attorney-client relationships. Due to resource constraints, some offices may not be able to quickly facilitate conflict checks in cases when more than one youth was involved, for example. In these instances, legal counsel is typically limited to a *Miranda* consult and advising the youth to not speak with law enforcement or to request a lawyer be present if they choose to speak with law enforcement. During these initial contacts, attorneys may also speak with family members of the youth and collect intake information to provide information to later assigned attorneys should the case move forward.

ENSURE CONFIDENTIALITY IN COMMUNICATION

Like any other attorney-client interaction, it is important to ensure that attorney conversations with youth prior to interrogation are confidential. While conversations between attorneys and youth pre-interrogation may be short in nature, the youth should feel as if they are able to communicate with their lawyer in a safe environment and be provided the time and space to understand the information and advice that is being shared by the attorney.

Counties that have implemented early access to counsel in California and across the U.S. vary in their requirements for in-person provision of counsel prior to interrogation. Providing legal counsel in-person is a best practice for ensuring confidentiality in communication, as well as providing oversight over the situation, offering direct support to the youth, and building trust. When publicly assigned counsel offices receive calls in these counties, attorneys

counsel the youth not to speak to law enforcement until they arrive on the scene.

However, in many larger counties, it may take several hours for an attorney to reach a youth to provide in-person counsel and is therefore not a realistic option. In these instances, confidentiality is established by directing the law enforcement to place the youth in a private location, such as the back of the police car with dash-cameras turned off, prior to handing the youth the phone, and then asking follow-up questions of the youth to ensure they are in a confidential space, including: where the youth is located; if there is anyone nearby that could potentially overhear the youths' conversation; and, whether or not the youth feels comfortable talking. If the youth is in the back of the patrol car, it is important to request that all recording devices in the car be shut off and make a note of the request in the attorney notes. Also, if the attorney does not feel comfortable that the youth is in a confidential space, the attorney should discourage the youth from providing any facts about the case over the phone and strictly limit the call to advisement of rights.

COLLECT DATA

Collecting data on the provision of early access to counsel is critical for ensuring that standardized procedures of practice are maintained and that information about the youth, case, and legal representation provided is consistently captured. Data collection is also important to support analysis of the impact of providing early access to counsel on youth outcomes, such as charging decisions, diversion, and case outcomes, among other things. In the best-case scenario, data collected on the provision of early access to legal counsel should be entered into a case management system or other electronic system to ensure that records are maintained in a consistent location where they can be accessed and easily extracted as needed.

Data collection in counties that have implemented early access to counsel practices often includes intake forms developed to capture standard information including: the date and time calls are received; the agency that initiates the call; the attorney who took the call; the youth's name, date of birth, immigration status, need for an interpreter, and dependency status, among other things; time and mode of consultation; and, location and result of consultation.⁵

EDUCATE COMMUNITIES ABOUT THEIR RIGHTS

Maintaining consistent communication about early access to counsel procedures and practices is important not only to justice stakeholders, but also to the youth, families, and communities affected by the reforms and practices. To have the greatest impact, the rights afforded by reforms like SB

395 and SB 203 should be clearly communicated to community members and institutions, such as schools and churches, via flyers, social media platforms, accessible websites, and town hall meetings. Campaigns that focus on educating parents, guardians, and youth of *Miranda* and their right to not speak with law enforcement and to have an attorney present is particularly important, as many caregivers encourage youth to speak with law enforcement during situations of custodial interrogation.

MAINTAIN THE YOUTH'S BEST INTEREST

The implementation of early access to counsel programs offers an important opportunity for youth to receive legal support during a critical interaction with the legal system. Notably, the ability to have an attorney advise youth on constitutional rights that they may not be aware of or understand is important. Yet, in some cases it may be in a youth's best interest to make a statement and speak with law enforcement with a defense attorney present. For example, a youth may have exculpatory information that could help eliminate future involvement in a case. Also, prosecutors note that their ability to offer diversion programs and supportive services is significantly diminished the longer youth wait to interact with law enforcement about the facts of the case. Therefore, it is important that the youth's best interest remain the focal point of early access to counsel interactions.

Conclusion

As the U.S. justice system is becoming more aware that procedural guidelines developed for adults are insufficient to protect the rights of youth, reforms are being passed to provide youth access to legal counsel prior to arrest. To date, eighteen states have introduced *Miranda* legislation for youth, and three states have enacted legislation, including California, Washington (House Bill 1140)⁶, and Maryland (Senate Bill 53).⁷

This study is the first to examine the implementation of early access to counsel reforms. Through the findings of this study, we outline seven best practices for jurisdictions who are considering implementing similar reforms in the future.

References

1. Custodial interrogation is questioning that occurs by law enforcement after a youth's freedom of movement is restrained. The U.S. Supreme Court has clarified that custody does not mean that a person need be in handcuffs or physically restrained but felt that "he or she was not at liberty to terminate the interrogation and leave." *Thompson v Keohane* 516 U.S. 99, 112 (1995).
2. See U.S. Supreme Court Cases: *Haley v. Ohio* 1948; *Gallegos v. Colorado* 1962; *In re Gault* 1967; *Fare v. Michael C.* 1979; *Yarborough v. Ivarado* 2004; *J.D.B. v. North Carolina* 2011.
3. Most states use the same *Miranda* framework for youth and adults.
4. For a report on the implementation of SB 395 and SB 203 see Ray and Hussemann (2023) *Early Access to Legal Counsel for Youth: An Implementation Study of California Senate Bills 395 and 203*. Chicago: NORC at the University of Chicago.
5. See Hussemann and Ray 2023, *Early Access to counsel in Police Precincts: Data Collection Practices & Recommendations*. Chicago: NORC at the University of Chicago.
6. H.B. 1140, 67th Leg. Reg. Sess., (Wash. 2021)
7. Child Interrogation Protection Act, S.B. 53, 444th Gen Assemb., Reg. Sess., (Md. 2022)

Acknowledgements

This project was funded by Arnold Ventures. We are grateful for their support and for the opportunity to conduct this study.

We would like to thank everyone who took time to share their insight and knowledge about the implementation of SB 395 and SB 203 in California. We would also like to thank Sue Burrell (former) of the Pacific Juvenile Defender Center, Elizabeth Calvin of the Humans Right Watch, and Galit Lipa of the Office of the State Public Defender, for their insight and guidance.

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