Chair Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. I am Niki Clum, legislative liaison for the Office of the Ohio Public Defender. Thank you for the opportunity to provide written opposition testimony regarding proposed amendments to Ohio Rule of Juvenile Procedure 4 and a related issue regarding Ohio Rule of Juvenile Procedure 3.

Ohio Rule of Juvenile Procedure 4

The proposed amendments to Juv.R. 4 remove the language that details the appropriate procedures when a licensed attorney is appointed as both counsel and a guardian ad litem (GAL) for a child in juvenile court proceedings. The proposed language of subsection (C) of Juv.R. 4 provides that an attorney also acting as GAL for a child, who discovers a conflict between the child’s expressed interest and his best interest, may remain on the case as GAL while a new attorney is appointed to represent the child as counsel. This presents a problem.

The OPD agrees that, where a conflict exists, a child’s expressed interest and best interest be maintained by separate professionals. As such, the current rule – that allows the attorney-GAL to withdraw as GAL and remain on as counsel is problematic; and, the proposed rule, which permits the professional to remain on as GAL is problematic as well.

Allowing the professional who discovers this conflict to withdraw as counsel and continue as the GAL presents a due process problem for the child. The information that an attorney-GAL learns may be subject to attorney-client privilege and therefore protected in court proceedings. By allowing a professional in that role to remain on a child’s case as GAL destroys that confidentiality, given the GAL’s role and responsibility to report to the court.
In 2012, the National Juvenile Defender Center promulgated standards for defense attorneys who represent children in delinquency and criminal court. Notably, to avoid conflicts of interest, an attorney should not accept a dual appointment as defense attorney and guardian ad litem.¹

While the law or practice may permit it, such representation creates an unavoidable conflict of interest. Due process requires that juveniles in delinquency proceedings have ‘defense counsel, that is, counsel which can only be provided by an attorney whose singular loyalty is to the defense of the juvenile.’ Guardians ad litem are required to act in the best interests of their clients, whereas juvenile defenders are to act in the expressed interests of their clients. [W]hen counsel attempts to perform [both roles], the risk that counsel will render ineffective assistance or that an actual conflict of interest will arise is substantial. It is impossible to foresee when such a divergence will occur, so counsel should avoid entering into such dual representation from the outset.²

To ensure that the child’s due process rights are protected, the OPD proposes the following three alternatives:

1. Appointment as both attorney and GAL in delinquency cases be prohibited; or

2. In cases where an attorney is dually appointed as GAL for a child and discovers a conflict between the GAL’s role and the child’s expressed interest, the court be required to appoint new counsel and a new GAL, protecting both the attorney-client and GAL ward relationships; or

3. The rule should remain as currently written, such that in the case of a conflict, the attorney would remain as counsel, to protect attorney-client privileged information, and the court must appoint a new GAL—someone who is previously unfamiliar with the case.

**Related Issue – Ohio Rule of Juvenile Procedure 3**

The Supreme Court of Ohio previously sought comment on proposed amendments to Ohio Rule of Juvenile Procedure 3. The amendments would have guaranteed all children in delinquency and status offense cases an appointed counsel at the earliest date. The proposed amendments would have

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¹ National Juvenile Defender Center. § 1.6: Avoid Conflicts of Interest. *National Juvenile Defense Standards*, 2012, 26-29

² Id. citing *People v. Austin M.*, 975 N.E.2d 22 (2012). (finding that having one lawyer functioning as both the juvenile defense attorney and the guardian ad litem is a per se conflict and a violation of the juvenile’s due process rights in a delinquency proceeding).
ensured a juvenile cannot waive counsel until they have spoken to an attorney and can never waive counsel if the juvenile is detained pending adjudication. The OPD supported the proposed amendments to Juv.R. 3. Unfortunately, the Supreme Court did not submit these amendments to the Ohio General Assembly.

In 1967, the United States Supreme Court released its landmark decision in *In re Gault*³, in which the Court found that children in delinquency proceedings should be afforded certain due process rights, the chief of which was the right to counsel. Ohio’s Juv.R. 3, which was enacted to ensure that children facing delinquency adjudication are afforded stringent protections before waiving their right to counsel, does not apply to all cases in Ohio’s juvenile Courts. The protections in Juv.R. 3 are triggered only by the filing of a felony complaint in juvenile court. But, more than 50 years ago, the United States Supreme Court’s recognition that children need the guiding hand of counsel at every stage of the legal proceeding was a result of a misdemeanor case—the very cases to which Ohio’s right does not apply. In other words, if Gerald Gault’s case were to happen here in Ohio, today, Ohio’s rule would not guarantee him counsel.

All of Ohio’s children should have the protection of counsel in juvenile court. Research has demonstrated that even seemingly inconsequential contact with the formalized processes of the juvenile court can pull a child further into the deep end of the justice system. Research has shown that, once a child is detained, he is more likely than non-detained youth of going deeper into the system, including being incarcerated following adjudication.⁴ This means that children who are court-involved for non-felonious conduct, including misdemeanors, unruly behavior, and status offenses, all have the potential for long-term consequences for their system involvement.

³ 387 U.S. 1 (1967).
Recent developments in U.S. Supreme Court precedent necessitate a rule change. Over the past 14 years, the United States Supreme Court has shifted the landscape of juvenile justice, based on what we now know to be true about children. From outlawing the death penalty for juveniles to creating a separate custodial interrogation standard for children, the Court has increased the due process protections for children facing adjudication because the distinct characteristics of children and teens—namely, immaturity, impulsivity, susceptibility to peer pressure, and an incomplete moral character, make children less culpable and less deserving of the same methods that are employed in the traditional criminal justice system. Providing children with counsel for misdemeanor and status offenses and unruly conduct will help ensure that the juvenile court process is fair and that the diminished culpability of the child is properly considered at every stage of the proceeding, for every child. Since the Supreme Court has decided to not address this situation through rule, OPD hopes to work with the legislature to address this matter statutorily.

Conclusion

Thank you for the opportunity to provide written testimony in opposition of the proposed amendments to Ohio Juv.R. 4, and comments regarding the withdrawn proposed amendments to Ohio Juv.R. 3. A juvenile’s right to maintain the confidentiality of statements made to their counsel necessitates the General Assembly adopts a concurrent resolution of disapproval of the proposed amendments to Ohio Juv.R. 4.