

“In order to create a youth justice system that promotes healing, growth, and safety, we must build strong families and surround them with the supports they need to love and care for their children.”

# **Families Not Facilities: Workable Solutions to Protect the Vulnerable Youth in the Department of Children’s Services’ Failing System**

*December 2022*



# TENNESSEE IS WAKING UP TO ITS BROKEN YOUTH JUSTICE SYSTEM

*Tennessee is finally paying attention to its broken youth justice system, but as the Legislature examines different approaches to much needed reform, its recommendations must focus on understanding and supporting children and families and the provision of prevention and rehabilitation services in the community, not facilities and incarceration.*

## OVERVIEW

Tennessee is finally acknowledging that the state's youth justice system is broken and that the Department of Children's Services (DCS), which oversees it, is "near collapse."<sup>1</sup> A "scathing" December 2022 Performance Audit Report by the State Comptroller's Office ("2022 Performance Audit") reveals a multitude of deficiencies and system wide failures on the part of DCS that have endangered the welfare of children in the Department's custody, especially those in residential facilities.<sup>2</sup> **Now, our state's leaders must decide what to do about it.**

**Our primary recommendation is to invest in families, not facilities.** Research shows that keeping youth in the community and close to their families is the most effective way to rehabilitate them. Each one of the top five programs shown to effectively address behavioral challenges in at-risk youth involve family, whether that is a youth's biological or adoptive parents, kinship caregivers, extended family, or foster parents. In order to create a youth justice system that addresses trauma and promotes healing, growth, and safety, we must build strong families and surround them with the supports they need to love and care for their children.

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For too long, the Department of Children's Services has been focused on building more beds in order to address placement issues for youth in the foster care and juvenile justice system. **But what matters most in any child's life is not what bed they sleep in, but who is tucking them in at night.** Unless we believe that youth in DCS custody are destined to remain in facilities all their lives, we must ensure that they are connected to families who can support them in ways big and small as they transition to adulthood.

In order to build a youth justice system that believes in and supports families, the state must first invest time and resources in understanding those youth and families who are impacted by it; the foundation of any functional youth justice system is knowing who is being served and what they need. For example, a youth's prior child welfare involvement, *which almost 90% of youth in DCS's custody on the youth justice side have*<sup>3</sup>, is a strong indicator of childhood trauma and, thus, is a critical consideration in determining what that youth needs.

Tennessee must also create processes to ensure that engagement with youth and their families informs the state's development of services and placements on an ongoing basis. **One of the most powerful long-term investments the state can make is an infrastructure for listening**, which can include, but is not limited to: data reviews; direct feedback from youth and families through focus groups, interviews, surveys or other means; consultation with youth and family advocacy organizations; and support to help those organizations reach more youth and families. In order for Tennessee's system to be effective, it must be able to respond to the growing and changing needs of youth and families over time.

## **Families not Facilities has six major recommendations for youth justice reform – the report includes details on each recommendation:**

1. **Invest** in proven, family-centered interventions, rather than ineffective, expensive, and dangerous facilities.
2. **Utilize** multidisciplinary teams to assess youth and family needs, and to build the services that will meet those needs.
3. **Address** racial and geographic disparities in the availability and quality of services across the state.
4. **Build** out community-based mental health services for youth and families.
5. **Focus** on upstream services to mitigate against child welfare and youth justice systems cross-over.
6. **Reaffirm** Tennessee’s commitment to youth justice by ending administrative transfers to the adult criminal justice system.

## **BACKGROUND**

In April of 2022, Disability Rights Tennessee (DRT) and the Youth Law Center (YLC)<sup>4</sup> released [\*Designed to Fail: A Report on the Wilder Youth Development Center, a Department of Children’s Services Facility \(“the Designed to Fail Report”\)\*](#)<sup>5</sup> which was based on a two-year investigation of Wilder by Disability Rights Tennessee. In that report, we revealed that many youth in the system were youth with disabilities and/or mental health needs, and that many youth had prior history in the child welfare system. In the months since our report was released, testimony by judges, system stakeholders, and DCS itself has reaffirmed these specific findings.

The *Designed to Fail Report* highlighted a broad scope of failures on the part of the Department, including failure to:

1. Protect children from physical and sexual abuse and neglect;
2. Properly assess youth to determine appropriate placement and provision of services;
3. Provide mental health and other services to youth with disabilities;
4. Provide adequate education and future job training;
5. Offer a safe and effective grievance procedure for youth to report serious concerns without retaliation from staff; and
6. Teach and reinforce positive behavior. Instead, we found that the Department subjected youth at Wilder to abuse and neglect.

**While the *Designed to Fail Report* focused on a single facility for youth adjudicated delinquent, it emphasized that the atrocities there are indicative of system wide problems.** Across the system, DCS’s failure to appropriately assess youth upon commitment to its custody leads to a failure to identify or consider a youth’s disability, trauma history, and other areas of strengths or needs in determining what placement and services are appropriate for that youth and their family.

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For example, a youth with a diagnosis of autism needs to be able to access ongoing treatments and services specifically designed for youth with autism, and likely will not benefit from a standard anger management course if it is not adapted for his unique needs. A youth with no history of gang involvement might not benefit from an intensive gang intervention program. A youth who struggles with reading comprehension and writing might need extra support to engage in any treatment programs that include workbooks or journaling. A youth who is a parent needs extra support to maintain their relationship with their child, as well as opportunities to develop strong parenting skills. Supports can go to families, too, like a mother who feels overwhelmed by her daughter’s mental health needs, or an uncle who wants to provide his nephew a safe place to live and a fresh start.

Right now, DCS cannot provide individualized services because it is not appropriately assessing the youth in its care. Thus, it cannot address the underlying problems that led to youth becoming involved with the youth justice system. And worse than that, DCS has no way of identifying gaps in its existing service array so that it can build effective individualized services. Instead, DCS defaults to what it knows best: locking youth up in highly restrictive environments like Wilder, secure treatment centers, or out-of-state facilities where evidence-based services are not provided. The result? Dangerous facilities where youth rights are regularly violated and young people have no chance to grow and heal.

## **THE 2022 PERFORMANCE AUDIT CONFIRMS DCS’S FAILURES ARE SYSTEM WIDE, UNDERSCORES THE PREVALENCE OF ABUSE IN RESIDENTIAL FACILITIES, AND HIGHLIGHTS DCS’S CONTINUED LACK OF VISION**

In December 2022, the Tennessee Comptroller of the Treasury released a performance audit of the Department of Children’s Services, described by national news outlets as both “scathing” and “sweeping.”<sup>6</sup> The 2022 Performance Audit, available in full on the [Comptroller’s website](#), cites multiple failures of management, oversight, quality control, and strategic planning, resulting in an overburdened system in which children and youth are placed in harm’s way by the very people who are supposed to protect them. Many of the findings echo concerns raised in our *Designed to Fail Report* and are repeat findings from prior performance audits.

The 2022 Performance Audit’s recommendations, which include improvements to hiring and staffing, placement options, investigation of abuse and neglect allegations, and case management software and practices, are a necessary starting point for a Department in disarray; but they are just that, a starting point. **DCS must address the serious problems raised by the Comptroller’s office, but they must do so with a vision of the system they wish to build.** This

**“ This audit is one more in a long line of reports demonstrating that Tennessee’s system is not working.”**

audit is one more in a long line of reports demonstrating that Tennessee’s system is not working. It includes a number of short-term recommendations to stabilize the Department and mitigate harm to the children in DCS’s care, chief among which is ensuring adequate staffing. But the question remains: Once DCS has hired all of those people, what are they supposed to do?

The first finding in the 2022 Performance Audit is, “Management’s strategic plan and risk assessment processes fall short in developing goals, objectives, and controls to address long-standing issues and make lasting, permanent change to ensure the safety and well-being of children and families.”<sup>7</sup> We concur. We would add that to achieve lasting, permanent change, the Department’s new plans, assessments, goals, objectives, and controls must be centered on strengthening families, not warehousing children in facilities.

A few key points from the 2022 Performance Audit related to residential facilities are below. We reiterate that facilities put youth in dangerous situations, and the audit's findings are supportive of these claims. In the *Designed to Fail Report*, we found that DCS's failure to adequately respond to physical and sexual abuse allegations and to prevent staff with high numbers of abuse allegations from working at Wilder endangered the welfare of youth in that facility. The 2022 Performance Audit confirms this is a system wide problem.

Findings from the 2022 Performance Audit include, but are not limited to, the following:

- Children may have remained in unsafe situations because management did not meet certain key timelines for child abuse and neglect investigations (page 47).
- DCS did not ensure that reported allegations of sexual abuse, sexual harassment, or lack of supervision of custodial children living in residential facilities were investigated (page 50).
- DCS has not developed an effective and efficient process to respond to sexual abuse and harassment allegations to keep children in residential facilities safe (page 55).
- Multiple deficiencies in the Provider Quality Team (PQT) review process, which is meant to identify patterns of misconduct at facilities, such as:
  - An employee continuing to work with children despite repeated allegations of physical abuse; this individual was eventually terminated, but only after allegedly firing a weapon at children attempting to escape a residential facility, for which he was charged with aggravated assault and reckless endangerment with a deadly weapon (page 62).
  - Not requiring a PQT review until an employee has been investigated 10 times in 3 years, or more than 5 times in 3 years as well as a PQT referral, resulting in few reviews of employees with multiple abuse allegations (page 51).
  - Failure to accurately track the number of investigations into employees, resulting in undercounting, and thus, inaccurate assessments of the risk posed to youth by said employees. One employee had 20 investigations into potential misconduct, but DCS reports said he only had 5. Another had been investigated 37 times (page 146).
  - Failure to follow up after PQT reviews to ensure that corrective action had been taken; out of 30 randomly sampled reviews, 5 did not have any documented follow-up (page 145).
- Failure to comply with the Prison Rape Elimination Act (PREA).<sup>8</sup> In 2021, the PREA Compliance Coordinator only conducted PREA reviews at 3 out of 31 facilities and did not document what evidence she reviewed to support her conclusions that those facilities were PREA compliant (pages 58-59). Furthermore, 34 instances of sexual abuse or harassment within residential facilities were not investigated by DCS (page 50).
- Inability to track key data related to patterns of abuse in foster care placements in TFACTS, DCS's information system (page 83).

**“ Given that DCS cannot effectively monitor residential facilities within Tennessee’s borders, we have serious concerns about the safety and well-being of youth placed out of state. ”**

We note, additionally, that the 2022 Performance Audit reports that 371 Tennessee youth were placed in out of state facilities as of September 2022.<sup>9</sup> Youth in out of state placements are particularly vulnerable, given that they are placed far from family members and supportive adults, and systems have limited ability to oversee facilities hundreds of miles away. Given that DCS cannot effectively monitor residential facilities within Tennessee's borders, we have serious concerns about the safety and well-being of youth placed out of state.

## THE DEPARTMENT OF CHILDREN’S SERVICES IS IN A STATE OF TURMOIL

In response to the *Designed to Fail Report*, which garnered national media coverage,<sup>10</sup> the Tennessee Legislature formed a Joint Ad Hoc Committee on Juvenile Justice (the activities of which are discussed in more detail in the following section) to examine and address the issues plaguing Wilder and the youth justice system more broadly. Shortly thereafter, Governor Bill Lee announced that there would be a new Department of Children’s Services Commissioner, Margie Quin, who assumed her position in September of 2022.

“ **A child welfare and youth justice system in complete disarray.** ”

It is not an exaggeration to say that Commissioner Quin inherited a child welfare and youth justice system in complete disarray. Youth who have been committed to the Department’s custody are sleeping in DCS offices, staying in detention centers well beyond the intended timeline, being sent out of state for placement, and even being committed to 100-day hospital stays because of glaring service gaps in assessment, lack of programming and evidence-based services, and inadequate placement options in Tennessee.<sup>11</sup>

These challenges are true for youth in DCS custody through the child welfare system as well as the youth justice system. It is worth noting that there is broad overlap in these two populations of youth and, in fact, in Tennessee at this time it is more appropriate to think of them as one: ***Almost 90% of youth who have been placed in the custody of DCS on the youth justice side have had prior contact with the Department through child and family services.***<sup>12</sup> This level of population overlap reveals major deficiencies in the state’s provision of child welfare services. DCS has an opportunity to help children and families build positive relationships and heal from trauma, but instead, Tennessee’s system is feeding foster youth into the criminal justice system.<sup>13</sup>

“ **DCS has an opportunity to help children and families build positive relationships and heal from trauma, but instead, Tennessee’s system is feeding foster youth into the criminal justice system.** ”

Youth, including those with disabilities, sleeping in DCS offices, hospitals, and other temporary housing for extended periods of time is a dire situation that has been widely covered by the media.<sup>14</sup> At a legislative Committee hearing in October 2022,<sup>15</sup> Commissioner Quin stated there were 72 youth awaiting placement, but DCS could not locate placements. Somewhere between 11-15 of those youth had been adjudicated delinquent and were sleeping in local DCS offices.<sup>16</sup> **DCS noted that, in some instances, the staff staying in offices with these youth are not trained to do so, resulting in DCS bringing in armed security, such as highway patrol, to supervise these youth. DCS acknowledged that this situation causes trauma to the youth in their custody.**<sup>17</sup>

At the time of the October hearing, there were 125 youth in hardware secure facility placements, which include Wilder and three privately contracted facilities. While Wilder is rated for 144 beds and budgeted for 120, the current population is 32, down from almost 90 youth at the time DRT first started in person monitoring at Wilder.<sup>18</sup> It is encouraging to see DCS acknowledge that they cannot place any more youth at Wilder until they hire more properly trained staff,<sup>19</sup> as the *Designed to Fail Report* found that inadequate staffing ratios at Wilder contributed to facility wide lockdowns, indiscriminate solitary confinement practices, failure to provide education and other evidence-based programming, and other dangerous conditions of confinement.<sup>20</sup> DCS anticipates hiring Wilder staff will be a 4-6 month process, requiring employment outreach efforts and raising the starting salary for Youth Service Officers significantly from the current rate of \$22-23K.<sup>21</sup>

Staffing is a part of the problem leading to children sleeping in DCS offices, but Commissioner Quin has testified that it is not the main cause of the current bed capacity crisis, pointing toward ongoing issues related to contracting with private youth justice facilities.<sup>22</sup> The Commissioner has stated that the state does not pay competitive rates to providers,<sup>23</sup> and that it does not contract to keep beds open in order to meet fluctuating needs.<sup>24</sup> DCS also admitted there is a service gap in Tennessee for children with “moderate to high level needs,” **stating there is currently no service or programming in place in Tennessee to serve these children.**<sup>25</sup> This has led to children with “significant medical or behavioral needs” staying in hospitals for months at a time, with one hospital reporting a youth in DCS custody had a stay of 276 days.<sup>26</sup>

While it is true that issues related to staffing and contracting are negatively impacting our youth justice and child welfare system, one thing is conspicuously missing from these discussions, which are, ultimately, about making sure that all children and youth in Tennessee have a safe, loving home: families.

We do not dispute that there may be instances in which children and youth could benefit from short periods of intensive treatment in an appropriate residential care center, but **by the Department’s own admission, youth are currently staying in hospitals for months, not because they need an acute level of care, but because the Department does not know where else to put them.**<sup>27</sup> In the youth justice context, the Department has implied that they are moving youth into the adult prison system with more frequency and on a shorter timeline than they would like, also because they do not know where else to place youth.<sup>28</sup> These are the most extreme manifestations of a problem that exists throughout the entire DCS system—the Department’s failure to continually develop and support community-based, family-based placements and services.

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To suggest a few concrete examples: if a child who uses a wheelchair is placed in DCS custody, is it better to help her aunt move to a first floor apartment in order to accommodate the child’s disability while remaining with family, or to place that child in a group home? If a youth finishes his treatment program at a detention center, should he sit there for another two years, repeating the same curriculum over and over again, seeing his family once a month when they have enough time off from work to drive to the detention center, or should he and his family get support from a wrap-around program that can help him transition back to school while staying connected with mental health treatment?

Without continued investment in community-based, family-based placements and services, children and youth whose needs would be better met outside of facilities get stuck in places that don’t serve them well. And when they’re stuck, facilities fill up. DCS has a choice, then. It can continue to invest in institutionalization, thus buying itself time before the facilities fill up again. Or, it can actually solve the problem that is leading to facilities filling up to begin with.

**“ \$156 million total new funding request, only \$1 million is for prevention and diversion of system-involved youth, while \$30 million is for private residential provider rate increases. ”**

At DCS’s budget hearing before the Governor on November 17, 2022, there was little emphasis on prevention and community-based services, as compared to investment in facilities: of the \$156 million total new funding request, only \$1 million is for prevention and diversion of system-involved youth, while \$30 million is for private residential provider rate increases.<sup>29</sup>

## LEGISLATIVE RESPONSE TO YOUTH JUSTICE CHALLENGES IS OVERLY FOCUSED ON FACILITIES

With the formation of the Joint Ad Hoc Committee on Juvenile Justice and the appointment of a new DCS Commissioner who has been refreshingly transparent about the Department’s failures and dysfunction, it seemed the path toward a youth justice system that Tennesseans want – one that provides evidence-based preventative and rehabilitative services delivered in the community when possible and eliminates the horrific abuse and neglect of children<sup>30</sup> – was being paved.

The Joint Ad Hoc Committee on Juvenile Justice began meeting monthly in June of 2022. Presenters have included juvenile court judges, the Department of Children’s Services, the Tennessee Department of Mental Health and Substance Abuse Services, the Tennessee Commission on Children and Youth, and others. At the October 25th hearing, the Committee co-chair, Senator Page Walley, stated that they would be wrapping up their efforts and would be prepared to provide their recommendations in early 2023. Recommendations will be informed by, and thus must follow, a building study proposed by the Department of General Services and approved by the State Building Commission; the DCS Budget proposal; and a determination of accreditation for Wilder. **Senator Walley noted seven areas where the Committee would be making improvement recommendations:**

1. Establishing a body for continuous quality improvement and continued legislative engagement;
2. Building new facilities or expanding existing structures;
3. Increasing Wilder staff compensation from \$22-23K to \$45K;
4. Prevention grants expansion so as to serve more than just the 26 counties in East and West currently being served;
5. Establishing a system to allow judges to access records of youth from another county;
6. Increased clinical presence in facilities to provide psychiatric and psychological services for serious behavioral and emotional health needs; and
7. Expanding use of the “incurability” statute to transfer youth under 18 years old from DCS custody to the Department of Corrections.<sup>31</sup>

Many of these suggestions are laudable, but some exhibit the same focus on facilities over families that will not solve Tennessee’s problems long-term.

We support the Committee’s plans to recommend formation of a Commission (or the like) for continued quality improvement and legislative engagement. The *Designed to Fail Report* revealed that DCS cannot be the only agency providing oversight and monitoring compliance when it comes to youth justice facilities. We also agree that expansion of prevention grants should be high on the Committee’s list of recommendations. We look forward to seeing these grants in all 95 counties in our state, as they currently only exist in 26 counties in East and West regions, with nothing offered in Middle Tennessee.<sup>32</sup> Stepdown and aftercare services, which come at the conclusion of a youth’s commitment to DCS, are an essential part of any healthy youth justice system, and we applaud the Committee’s discussion of such.

**“No amount of aftercare or stepdown services will mitigate against the harm and trauma flowing from a lack of education, mental health, and rehabilitative services, or from the abuse and neglect youth experience when they are locked up in dangerous facilities, away from their families and communities.”**



However, the provision of aftercare does nothing to address the failure of DCS to provide legally required services for youth while they are in the Department’s custody. No amount of aftercare or step-down services will mitigate against the harm and trauma flowing from a lack of education, mental health, and rehabilitative services, or from the abuse and neglect youth experience when they are locked up in dangerous facilities, away from their families and communities.

Thus, the Committee’s focus on facilities and where to place youth, without discussion of how to adequately assess and serve them, misses the mark. Similarly shortsighted is the Committee’s recommendation for an increased clinical presence for the provision of mental and behavioral health services in facilities, but not in the community. These are contrary to the *Designed to Fail Report* recommendations, which urge against the expenditure of funds on facilities and emphasize the need for evidence-based services provided as part of a continuum of care prioritizing family and community connection.

The Committee’s anticipated recommendation to statutorily expand the use of incorrigibility transfers is also directly at odds with recommendations in the *Designed to Fail Report* and runs afoul of language from the recent Tennessee Supreme Court ruling in *State v. Booker*.<sup>33</sup> Incorrigibility transfers are a mechanism through which DCS can unilaterally move youth who have turned 18 to adult facilities—there is no court oversight, hearings, or appeals. The suggestion to include younger youth in this arguably unconstitutional practice is extremely concerning.

We hope that the Legislature will capitalize on the attention being paid to youth justice reform and choose to implement meaningful changes aimed at rehabilitating youth in the child welfare and juvenile justice system. We offer some recommendations toward that end.

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## **BRINGING FAMILIES INTO FOCUS: RECOMMENDATIONS FOR YOUTH JUSTICE REFORM**

- 1. Invest in proven, family-centered interventions, rather than ineffective, expensive, and dangerous facilities.**
- 2. Utilize multidisciplinary teams to assess youth and family needs, and to build the services that will meet those needs.**
- 3. Address racial and geographic disparities in the availability and quality of services across the state.**
- 4. Build out community-based mental health services for youth and families.**
- 5. Focus on upstream services to mitigate against child welfare and youth justice systems crossover.**
- 6. Reaffirm Tennessee’s commitment to youth justice by ending administrative transfers to the adult criminal justice system.**

### **1. Invest In Proven, Family-Centered Interventions, Rather Than Ineffective, Expensive, And Dangerous Facilities.**

If the state wants to invest in strategies that are proven to rehabilitate youth and make Tennessee safer, it should be looking first at families, not facilities. Keeping youth in the community and close to their families is the most effective approach to rehabilitation; every program shown to effectively address behavioral challenges in at-risk youth involves family, which can be a youth’s biological or adoptive parents, kinship caregivers, extended family, or foster parents.<sup>34</sup> **As DCS stated during a presentation to the Joint Ad Hoc Committee on Juvenile Justice, “Healthy families equal healthy children.”**<sup>35</sup>

Facilities do not create healthy families. Youth are often placed in facilities far away from their families, and even in other states such as Texas and Michigan, making it virtually impossible for families to meaningfully participate in treatment or decision-making for their children.<sup>36</sup> Facilities such as Wilder limit youth phone calls to five ten minute calls per month, an amount of time that barely allows youth to maintain a relationship with a single person, let alone build a network of healthy, supportive family connections.<sup>37</sup> Disability Rights Tennessee has worked with multiple families who wanted and requested greater contact with their children, but were met with many barriers to access, like transportation or inflexible visitation hours.

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Tennessee’s continued reliance on facilities over families reflects a dismissive attitude towards families, and a belief, as expressed by some staff, that the youth in their care are throwaways—youth who have never had adults who care for them, who do not deserve to have a loving family, and who never will. A system that believes that youth do not and should not have families will create a self-fulfilling prophecy.

DCS must treat youth and families as partners in problem solving, rather than as problems to be solved. Families want to take care of their children, but often struggle to access the educational, mental health, and other support services that can meet their needs—as noted in the *Designed to Fail Report*, some parents were so desperate to get help for their children that they were initially hopeful when their children were being sent to Wilder. In order to effectively support family centered interventions, changes to policy and practice in both child welfare and juvenile justice will be required—spanning topics such as family finding, information sharing, placement processes, decision-making, case management, and others. These are investments in a future in which Tennesseans are safer because all youth in Tennessee are connected to loving families—a future that an expansion of hardware secure facilities could never create.

**“DCS must treat youth and families as partners in problem solving, rather than as problems to be solved.”**

## **2. Utilize Multidisciplinary Teams To Assess Youth And Family Needs, And To Build The Services That Will Meet Those Needs.**

DCS must invest resources in understanding the youth and families who are impacted by the youth justice system. ***The place to start is individualized case reviews of all youth in secure facilities, in order to better understand how they got there, any missed opportunities to intervene, and what evidence-based and/or trauma informed services need to be built out to serve them.***

All youth in hardware secure placements and, ideally, any youth with prior child welfare contact, should receive comprehensive assessments by a multidisciplinary team, in partnership with the youth, the youth’s family/supportive adults and/or advocates for the youth. The multidisciplinary team should consist of professionals who can provide information related to prior child welfare history, as well as those who can evaluate for disability, education needs, and mental health conditions.<sup>38</sup> Following this collaborative assessment, the focus of the multidisciplinary team should be providing joint recommendations to the juvenile court and building out a long-term plan for how the youth will be returned to the community, with an emphasis on service referrals both within and outside the youth justice (and, when relevant, the child welfare) system. Services can and should include a wide range of supports including, but not limited to, case management, therapeutic interventions, supportive peer networks for youth and,

families, youth leadership and development, involvement with extracurricular activities, and assistance with school enrollment and academic engagement, depending on youth interests and needs.

Also, there must be a process in place that allows for regular meetings of the multidisciplinary team and ongoing feedback about youth and family needs. Crucial to this system is some mechanism to capture referral information from all team members as well as follow-up data, such as changes in family status or whether a youth is connecting to the agency/services to which he or she has been referred.

Youth with intellectual and other disabilities, as well as serious mental health conditions, are slipping through the system, going unidentified, and being placed in settings that are neither appropriate nor the least restrictive to meet their needs. Hardware secure facility placements should only be used in the most limited of circumstances, and expanding the use of multidisciplinary teams and comprehensive evaluations for any youth being considered for such a placement would go far toward eliminating the improper placement of high needs youth in secure facilities.

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### 3. Address Racial And Geographic Disparities In The Availability And Quality Of Services Across The State.

Throughout our investigations and in testimony to legislative committees, two important disparities have been spotlighted. **One is the disproportionate representation of Black youth in the youth justice system**, and in particular, in our most restrictive settings. **The second is significant disparities between the services available in urban and rural areas.**

All youth, regardless of their race or the neighborhood they live in, deserve access to high quality prevention and intervention services. Culturally-relevant, community-based services that have the flexibility to adapt to changing circumstances are an integral component of a youth justice continuum that actually meets the needs of youth and families throughout all areas of the state. Tennessee should invest not only in identifying and funding promising programs, but also in helping them scale, sustain their operations, and network in a community of practice that includes programs and experts from across the state.

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### 4. Build Out Community-Based Mental Health Services For Youth And Families.

Expanding access to high quality mental health services is essential to the wellness of our youth, communities, and youth justice system. Effective mental health treatment extends beyond writing a prescription, and in our Wilder investigation, we found that youth were actually being prescribed medication in ways that put them at risk. Expanding mental health services and focusing on treatment that extends beyond the prescription of psychotropic medication is paramount. Youth and families should be able to access mental health treatment regardless of where they live—youth should not have to live in facilities to access mental health treatment that can be provided in a community-based setting, and families should be helped to develop

“ Expanding mental health services and focusing on treatment that extends beyond the prescription of psychotropic medication is paramount. ”

skills and access networks of support to help them in parenting youth with unique mental health needs.

Community based mental health plays a role not only in intervention, but also in preventing contact with the youth justice system through effective diversion programs, which allow youth to avoid deeper penetration of the youth justice system. Studies show that diversion leads to better results than formal court processing.<sup>39</sup> Early involvement in the court system leads to increased future arrests, poorer school attendance, higher dropout rates, heightened delinquency, etc.,<sup>40</sup> while diversion programs boast excellent results when it comes to recidivism. For example, Davidson County diverted 60% of its delinquency cases in 2019, and 94% of the youth diverted did not recidivate.<sup>41</sup> Conversely, the recidivism rate for youth leaving DCS custody is 21.6%, meaning those youth are placed in Department of Corrections within two years of exiting the youth justice system.<sup>42</sup>

“ **Early involvement in the court system leads to increased future arrests, poorer school attendance, higher dropout rates, heightened delinquency, etc., while diversion programs boast excellent results when it comes to recidivism.** ”

## 5. Focus On Upstream Services To Mitigate Against Child Welfare And Youth Justice Systems Crossover.

As previously noted, a staggering statistic was revealed by the Joint Ad Hoc Committee on Juvenile Justice: 86.2% of youth who have been adjudicated delinquent and placed in the custody of DCS on the youth justice side have had prior contact with the Department through child welfare. Although crossover between the child welfare and youth justice systems is a nationally documented issue,<sup>43</sup> it is one that often falls under the radar, and we are heartened that the Committee was able to uncover the extent of the connection between foster care and youth justice in Tennessee.

“ **86.2% of youth who have been adjudicated delinquent and placed in the custody of DCS on the youth justice side have had prior contact with the Department through child welfare.** ”

While it is difficult to ascertain a national average for crossover youth, Tennessee’s rate is significantly higher than existing estimates, which suggest approximately 50% of the national youth justice population have had prior child welfare involvement.<sup>44</sup> So, why is Tennessee’s crossover youth rate so high? Research consistently indicates placement instability and group home placements can increase the likelihood of delinquency,<sup>4546</sup> and one study revealed that crossover youth with long durations of child welfare involvement and high levels of placements have the worst outcomes of all dual system youth.<sup>47</sup> Given the current crisis affecting DCS’s child welfare placements, it is worth investigating whether an emphasis on placement in facilities, rather than families, is contributing to the crossover of foster youth into the youth justice system.<sup>48</sup>

Given that child welfare contact typically comes first for crossover youth, DCS can play a critical role in preventing subsequent encounters with the youth justice system. Unlike many other states, Tennessee is well-situated to address this crossover because DCS is responsible for providing services across both the child welfare and youth justice systems. Accordingly, **Tennessee should be examining how to mitigate against the high occurrence of crossover youth by stabilizing youth and their families through compassionate upstream services and treatment, rather than focusing on punishment downstream.** As one Knoxville juvenile court judge put it, “Foster care and the work we do there...is what keeps these children from [delinquency adjudication]. If we give them the goods and services they need when they’re little, then we don’t have to protect society from them when they get older.”<sup>49</sup>

## 6. Reaffirm Tennessee’s Commitment To Youth Justice By Ending Administrative Transfers To The Adult Criminal Justice System.

The Joint Ad Hoc Committee on Juvenile Justice has heard from a number of experts on the science of adolescent brain development and the importance of recognizing the unique opportunities the state has to intervene with youth and to move them toward healthy adulthood. But there has also been testimony indicating that some people believe that the state’s problems in the youth justice system are because of a failure to treat youth like adults; in fact, the prior DCS administration initiated a change in accreditation to allow them to run youth facilities more like adult prisons, and insinuated that problems at facilities were due to staff inability to be physically violent with youth.<sup>50</sup> In reality, current DCS policy allows for appropriate behavior management techniques, including limited periods of physical restraint, for crisis situations.<sup>51</sup> Such an approach does not consider the fundamental difference between adolescent and adult brains, which DCS itself has emphasized in legislative committee testimony.<sup>52</sup> Both the United States Supreme Court<sup>53</sup> and the Tennessee Supreme Court<sup>54</sup> have acknowledged the need to treat youth offenders differently than adults.

Tennessee’s current system is not responding to youth as if they are youth; it is treating youth like prison inmates. In fact, under an obscure statutory provision related to “incurrigibility”, the prior DCS administration deemed “incurrigible” and transferred 15 youth to adult prisons<sup>55</sup> without an opportunity to appear before a judge, the right to consult an attorney, or the right to appeal.<sup>56</sup> This process requires a determination that a youth cannot be rehabilitated in spite of all the services being offered to him or her. How, though, could DCS in good faith make this determination when we know youth are not receiving the services they need for rehabilitation?

**“ Tennessee’s current system is not responding to youth as if they are youth; it is treating youth like prison inmates. ”**

Furthermore, Commissioner Quin has testified that the Department is resorting to transfers of youth from detention centers to the adult corrections system under the incurrigibility statute with more frequency and on a shorter timeline than they would like because they have no viable placement options.<sup>57</sup> She noted that once they increase bed capacity, the incurrigibility statute will “truly be a last resort.”<sup>58</sup> The decision to transfer a youth to the adult system should never be rooted in capacity issues or made out of administrative convenience, and yet that is exactly how DCS is using the incurrigibility statute.

**“ The decision to transfer a youth to the adult system should never be rooted in capacity issues or made out of administrative convenience, and yet that is exactly how DCS is using the incurrigibility statute. ”**

It is a weighty decision to transfer a youth to the adult system, and one that, in the Juvenile Court, requires a petition by the District Attorney and a three-pronged determination by a Juvenile Court judge after a comprehensive evaluation of the youth.<sup>59</sup> Juvenile justice panelists at the October 5th legislative committee hearing opined that this decision is not taken lightly by the District Attorney or the juvenile court judge because it changes the trajectory of the youth’s life forever.<sup>60</sup> We could not agree more, and therefore think DCS should stop using the incurrigibility transfer statute, especially considering the Tennessee Supreme Court’s finding that youth “cannot with reliability be classified as incurrigible or irredeemable at such a young age.”<sup>61</sup>

A good-faith first step toward reforming our youth justice system would be for DCS to cease all administrative transfers of youth to adult prisons, and we strongly oppose the Joint Ad Hoc Committee on Juvenile Justice’s consideration of expanding the incurrigibility statute to apply to sixteen and seventeen year olds.

## CONCLUSION

In sum, creating a healthy youth justice system requires prioritizing families over facilities. The first step is understanding the youth and families who are impacted by the youth justice system. Assessing who is being served and identifying their strengths and needs is paramount to connecting them with appropriate placements and developing the programs and services that will be effective. Tennessee also needs processes in place to ensure that youth and family data is collected on an ongoing basis, that it informs the placements, programs, and services developed, and that those programs and services are provided with fidelity to the model and in the community whenever possible.

There are two sides to every story. The overwhelming connection between youth in juvenile justice custody in Tennessee and their prior child welfare experience is evidence that each and every youth in the state's system has a story in which DCS is a key player. It is time for the state to start listening and to give consideration to the fact that how DCS chooses to show up in a child's life has a profound impact on his or her lifelong trajectory.

Tennessee has the opportunity to make great strides when it comes to youth justice reform. The Legislature should ensure those strides move the state forward and not backward.

*This report is a joint effort of Disability Rights Tennessee and the Youth Law Center.*

*Disability Rights Tennessee (DRT) is part of the national Protection & Advocacy (P&A) System — a network of 57 federally mandated legal advocacy agencies serving people with disabilities and making up the National Disability Rights Network. As the P&A agency for Tennessee, DRT has broad authority to advocate for the rights of individuals with disabilities in this state, to monitor certain facilities, including juvenile justice facilities, and to investigate allegations of abuse and neglect. This report is based on records and information that DRT is authorized by law to collect in order to advocate for and protect the rights of people with disabilities. DRT is supported at taxpayer expense by the U.S. Department of Health & Human Services, The Administration for Community Living; Substance Abuse & Mental Health Services Administration; U.S. Department of Education, Rehabilitation Services Administration; and the Social Security Administration. This report does not represent the views, positions or policies of, or the endorsements by, any of these federal agencies.*

*Youth Law Center (YLC) is a non-profit law firm that advocates to transform foster care and juvenile justice systems across the nation so that every child and youth can thrive. For over forty years, YLC has pursued policy and advocacy to protect the rights of youth in the child welfare and juvenile justice systems and to promote positive youth connections to community and family.*

*For more information, please visit DRT at [www.DisabilityRightsTN.org](http://www.DisabilityRightsTN.org) and YLC at [www.YLC.org](http://www.YLC.org).  
For questions or other inquiries, please contact YLC at [Info@YLC.org](mailto:Info@YLC.org) and  
DRT at [Inquiries@DisabilityRightsTN.org](mailto:Inquiries@DisabilityRightsTN.org).*

## Endnotes

- 1 8/31/22 Joint Ad Hoc Committee on Juvenile Justice hearing testimony by juvenile court judge, Hon. Tim Irwin, available at: [https://tnga.granicus.com/MediaPlayer.php?view\\_id=627&clip\\_id=27105](https://tnga.granicus.com/MediaPlayer.php?view_id=627&clip_id=27105) (6:25).
- 2 The Tennessee Comptroller of the Treasury's December 2022 Performance Audit Report of DCS covers the period of August 1, 2020 – August 31, 2022 and is available at: <https://comptroller.tn.gov/content/dam/cot/sa/advanced-search/2022/pa22033.pdf>. The 2022 Performance Audit was released on 12/13/22 and was presented at a legislative hearing before the Joint Government Operations Subcommittee, with the DCS Commissioner's response, on 12/14/22, video available here: [https://tnga.granicus.com/MediaPlayer.php?view\\_id=678&clip\\_id=27203](https://tnga.granicus.com/MediaPlayer.php?view_id=678&clip_id=27203). The Audit Report, specifically those findings related to the abuse of children in residential facilities, received national news coverage. E.g., <https://www.usatoday.com/story/news/nation/2022/12/13/tennessee-department-of-childrens-services-sex-abuse-reports-audit/10894085002/>; <https://apnews.com/article/tennessee-sexual-abuse-government-and-politics-3b9e7b973daae52c78311cd2af257738>
- 3 7/18/22 Joint Ad Hoc Committee on Juvenile Justice hearing presentation by DCS, available at: [https://tnga.granicus.com/MediaPlayer.php?view\\_id=627&clip\\_id=27055](https://tnga.granicus.com/MediaPlayer.php?view_id=627&clip_id=27055) (49:30).
- 4 Disability Rights Tennessee is part of the national Protection & Advocacy (P&A) System — a network of 57 federally mandated legal advocacy agencies serving people with disabilities and making up the National Disability Rights Network. As the P&A agency for Tennessee, DRT has broad authority to advocate for the rights of individuals with disabilities in this state, to monitor certain facilities, including juvenile justice facilities, and to investigate allegations of abuse and neglect. The Youth Law Center is a non-profit law firm that advocates to transform foster care and juvenile justice systems across the nation so that every child and youth can thrive. For over forty years, YLC has pursued policy and advocacy to protect the rights of youth in the child welfare and juvenile justice systems and to promote positive youth connections to community and family.
- 5 <http://www.ylc.org/wp-content/uploads/2022/04/DRTN-wilderreport.pdf>.
- 6 See USA Today and Associated Press articles, available at: *supra* n. 2.
- 7 <https://comptroller.tn.gov/content/dam/cot/sa/advanced-search/2022/pa22033.pdf> at p. 8.
- 8 With regard to DCS's failures when it comes to complying with the Prison Rape Elimination Act (PREA), the December 2022 Performance Audit states, "Despite the seriousness and prevalence of sexual abuse and sexual harassment among juvenile delinquents in confinement facilities, management has not designed an effective and efficient process that lends itself to successfully identify, investigate, and take corrective action related to sexual abuse and sexual harassment allegations." *Id.* at p. 55 and n. 35.
- 9 *Id.* at p. 30.
- 10 E.g., <https://www.usatoday.com/story/news/nation/2022/04/29/wilder-youth-development-center-tennessee-department-childrens-services-abuse/9574585002/?gnt-cfr=1>.
- 11 Commissioner Quin discussed factors contributing to the placement crisis when she presented to the Governor at the 11/17/22 Budget Hearing for the Department of Children's Services, available at: <https://sts.streamingvideo.tn.gov/Mediasite/Channel/mediasiteadmin-tn-budget-hearings-2023/watch/d2f3c1160f4c47cfb49c8cdd6aac73af1d> (1:30).
- 12 7/18/22 Joint Ad Hoc Committee on Juvenile Justice hearing presentation by DCS, available at: *supra* n. 3 (49:30).
- 13 This foster care to prison pipeline was noted by Governor Lee's staff at the DCS Budget Hearing on 11/17/22, available at: *supra* n. 11 (36:35).
- 14 <https://www.tennessean.com/story/news/politics/2022/10/19/tennessee-department-of-childrens-services-kids-spent-1134-nights-offices/69572198007/>; <https://tennesseelookout.com/2022/11/29/department-of-childrens-services-housing-children-many-disabled-in-hospitals-for-up-to-8-months/>; <https://www.tennessean.com/story/news/politics/2022/12/05/tennessee-department-of-childrens-services-tensions-with-hospitals/69695726007/>.
- 15 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, available at: [https://tnga.granicus.com/MediaPlayer.php?view\\_id=627&clip\\_id=27139](https://tnga.granicus.com/MediaPlayer.php?view_id=627&clip_id=27139)
- 16 *Id.*
- 17 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, available at: *supra* n. 15.
- 18 <http://www.ylc.org/wp-content/uploads/2022/04/DRTN-wilderreport.pdf> at p. 18, n. 32.
- 19 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: [https://tnga.granicus.com/MediaPlayer.php?view\\_id=627&clip\\_id=27159](https://tnga.granicus.com/MediaPlayer.php?view_id=627&clip_id=27159).
- 20 <https://www.ylc.org/wp-content/uploads/2022/04/DRTN-wilderreport.pdf>
- 21 This was cited as the starting salary for Youth Service Officers at the 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing; however, Commissioner Quin said \$27K is starting salary for Wilder YSOs at the 11/17/22 DCS Budget Hearing. DCS's proposed budget would raise the starting salary for Wilder YSOs to \$45k.
- 22 In response to questioning from Rep. Parkinson at the 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, Commissioner Quin expressly stated that children were still sleeping in DCS offices due to lack of placement opportunities, not staffing issues.
- 23 11/17/22 Budget Hearing for the Department of Children's Services, available at: *supra* n. 11 (27:45).

24 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: *supra* n. 19 (33:00).

25 11/17/22 Budget Hearing for the Department of Children’s Services, available at: *supra* n. 11 (19:30).

26 <https://www.tennessean.com/story/news/politics/2022/12/05/tennessee-department-of-childrens-services-tensions-with-hospitals/69695726007/>.

27 11/17/22 Budget Hearing for the Department of Children’s Services, available at: *supra* n. 11.

28 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: *supra* n. 19 (32:30).

29 11/17/22 Budget Hearing for the Department of Children’s Services, available at: *supra* n. 11; [https://www.tn.gov/content/dam/tn/governoroffice-documents/governorlee-hearingfiles/fy23-budget-hearing/Childrens\\_Services.pdf](https://www.tn.gov/content/dam/tn/governoroffice-documents/governorlee-hearingfiles/fy23-budget-hearing/Childrens_Services.pdf) at 7-8.

30 When 500 Tennessee adults were asked “Compared to the way things are now in the youth justice system, if you had to choose, do you think there should be more focus on punishment and incarceration or more focus on prevention and rehabilitation?” 79% of respondents favored prevention and rehabilitation, with 71% of Republicans in favor, 84% percent of Democrats in favor and 85% of Independents in favor. The Youth First Initiative, Tennessee Statewide Survey was conducted in February 2021 with a Margin of Error of +/- 4.4 percentage points, by GBAO, a research firm based in Atlanta, GA.

31 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: *supra* n. 19 (23:45).

32 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: *supra* n. 19 (26:40).

33 Where the Court reasoned that youth “have diminished culpability, are unlikely to contemplate the potential for punishment before acting, and cannot with reliability be classified as incorrigible or irredeemable at such a young age.” State v. Booker, No. E201801439SCR11CD, 2022 WL 17072990, at \*24 (Tenn. Nov. 18, 2022).

34 <https://www.cebc4cw.org/topic/behavioral-management-for-adolescents-in-child-welfare/>.

35 7/18/22 Joint Ad Hoc Committee on Juvenile Justice hearing presentation by Julie Rotella, Assistant Commissioner DCS, available at: *supra* n. 3 (50:15).

36 According to the 2022 Performance Audit, as of September 16, 2022, DCS had 371 children placed out of state. <https://comptroller.tn.gov/content/dam/cot/sa/advanced-search/2022/pa22033.pdf> at p. 30.

37 Wilder Point and Level System, dated Oct 2022, available at: <https://files.dcs.tn.gov/policies/chap18/Wilder.pdf>.

38 Given our concerns about the use of chemical restraint in staff and hardware secure placements, as highlighted in our Designed to Fail Report, we recommend that mental health assessments specifically address the reduction of poly-pharmacy, or the prescription of multiple psychotropic medications. This aligns with the 7/18/22 Joint Ad Hoc Committee on Juvenile Justice hearing presentation by Dr. Seth Scholer, of Vanderbilt University Medical Center, acknowledging the need for more screening and therapy prior to medicating children with multiple psychotropic medications, available at: *supra* n. 3 (24:42).

39 <https://www.sentencingproject.org/reports/diversion-a-hidden-key-to-combating-racial-and-ethnic-disparities-in-juvenile-justice/>.

40 *Id.*

41 This information was provided on 11/17/22 during The Sentencing Project’s webinar, “Juvenile Diversion: Keeping Kids Away from Court Builds Safer Communities.”

42 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, available at: *supra* n. 15.

43 See Denise C. Herz, Ph.D., Carly B. Dierkhising, Ph.D., OJJDP Dual System Youth Design Study: Summary of Findings and Recommendations for Pursuing a National Estimate of Dual System Youth (2019), available at: <https://www.ojp.gov/pdffiles1/ojjdp/grants/252717.pdf>.

44 *Id.* at p. 128.

45 E.g., Ryan, J. P., & Testa, M. F. (2005). Child maltreatment and juvenile delinquency: Investigating the role of placement and placement instability. *Children and Youth Services Review*, 27(3), 227-249, available at: <http://dx.doi.org/10.1016/j.childyouth.2004.05.007>.

46 Ryan, J. P., Marshall, J., Herz, D., & Hernandez, P. (2008). Juvenile delinquency in child welfare: Investigating group home effects. *Children and Youth Services Review*, 30, 1088 –1099.

47 *Supra* n. 43 at p. 131.

48 Research suggests group homes per se may lead to youth justice system involvement. For one, those settings often rely on strict regulations of many aspects of a youth’s life, over which he or she, under different living circumstances, would exercise a certain amount of autonomy and decision making. Undermining that autonomy can lead to defiance and other normal adolescent behavior that is penalized, and often criminalized, in the group home setting. Dozier, M. et al (2014). Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association. *American Journal of Orthopsychiatry*, 84(3), 219 –225, available at: <https://www.apa.org/pubs/journals/features/ort-0000005.pdf> at p. 221. These settings also penalize youth for their traumatic reactions, such as irritability, unexpected outbursts, and avoidance. *Supra* n. 43 at p. 22. Nearly all crossover youth have experienced child maltreatment, and many have experienced multiple forms of trauma. *Id.* This was certainly the case with youth DRT encountered at Wilder.

49 8/31/22 Joint Ad Hoc Committee on Juvenile Justice hearing testimony by juvenile court judge, Hon. Tim Irwin, available at: *supra* n. 1 (6:45).



50 <https://www.localmemphis.com/article/news/local/dcs-blames-wilder-youth-development-center-problems-on-ac-creditation-limitations/522-831c6ab8-fbea-4596-a131-d866eef69929>.

51 <https://files.dcs.tn.gov/policies/chap19/19.11.pdf>.

52 7/18/22 Joint Ad Hoc Committee on Juvenile Justice hearing presentation by Assistant Commissioner of DCS, Julie Rotella, available at: *supra* n. 3 (48:45) (noting that grey matter in the brain continues to grow and expand until age 25, and this growth occurs in the prefrontal cortex, which controls decision making, planning, processing, and reasoning).

53 *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

54 *State v. Booker*, No. E201801439SCR11CD, 2022 WL 17072990 (Tenn. Nov. 18, 2022).

55 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, available at: *supra* n. 15.

56 TCA § 37-5-206(a).

57 10/25/22 Joint Ad Hoc Committee on Juvenile Justice hearing, available at: *supra* n. 19 (32:30).

58 *Id.* (33:00).

59 Three findings are required for a juvenile court judge to transfer a youth to the adult corrections system, rather than committing him/her to DCS custody, pursuant to a petition filed by the District Attorney, which usually has the benefit of a full forensic evaluation: (1) probable cause that the child committed the offense; (2) probable cause that the youth is not committable to mental institution; and (3) probable cause that transfer is “in the interest of the community.” Transfer to the adult system pursuant to the incorrigibility statute does not require the same careful consideration.

60 10/5/22 Joint Ad Hoc Committee to Review the Adequacy of the Supervision, Investigation, and Release of Criminal Defendants hearing, available at: *supra* n. 15.

61 *State v. Booker*, E201801439SCR11CD, 2022 WL 17072990, at \*24 (Tenn. Nov. 18, 2022).