Division of Public Defender Services
State of Connecticut

ATTORNEY CHRISTINE PERRA RAPILLO
DIRECTOR OF DELINQUENCY DEFENSE & CHILD PROTECTION

TESTIMONY OF OFFICE OF CHIEF PUBLIC DEFENDER
Christine Perra Rapillo
Director of Delinquency Defense and Child Protection

COMMITTEE ON THE JUDICIARY
MARCH 23, 2012

RAISED BILL 417, AN ACT CONCERNING JUVENILE MATTERS AND PERMANENT GUARDIANSHIPS

The Office of Chief Public Defender supports passage of ***Raised Bill 417, An Act Concerning Juvenile Matters and Permanent Guardianships*** and urges this Committee to report favorably on this proposal. This bill combines a number of important reforms and improvements to juvenile matters in Connecticut. Most of what appears in Raised Bill 417 is not new. The proposals regarding juvenile competency and the transfer of cases from the juvenile to the adult court have been before this committee many times. The language tightening the procedures for granting permanent guardianship was before the legislature last session as Raised Bill 6422. These are proposals that enjoy broad support from a wide range of state agencies and private advocates.

Sections 1 and 2 set seven as the minimum age for which a child can be prosecuted for a crime. This is consistent with other states where a minimum age is specified. This change is necessary, since children under seven are prosecuted in juvenile court. It does not happen frequently but exposes the child to the trauma of a criminal court setting where there is little chance he or she will understand what is happening. These prosecutions are generally done as means to get services to a family, either by forcing the family to comply or pushing social service agencies like the Department of Children and Families (DCF) to provide needed support. Setting seven as the age of capacity to commit allows the court to presume that every defendant is competent to stand trial unless evidence to the contrary is presented.

Section 3 establishes a procedure for determining when a juvenile accused is competent to stand trial. Currently, the juvenile courts use Conn. Gen. Stat. Sec. 54-

56d, which is the adult competency statute. Recent developments in science and law indicate that children and adolescents need to be treated differently. The U.S. Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. ___ (2010) and J.D.B. v. North Carolina 131 S.Ct. 502 (2010) has determined the U.S. Constitution **requires** that a court consider the youth of a defendant when considering sentences including the death penalty or life without parole and in determining the admissibility of a statement to the police. Competency to stand trial represents the basic minimum standards an accused must meet to be able to effectively participate in the proceedings against him or her. Many states, such as Vermont, California and Florida have passed competency to stand trial legislation specifically geared towards juvenile defendants. Connecticut has been at the forefront of juvenile justice reform over the last 5 years and this bill is consistent with other legislative changes that have recognized that accused children must be treated differently that accused adults.

Raised Bill 417 does not change the standard to be applied for a child to be found competent to stand trial. That standard, set out by the U.S. Supreme Court in Dusky v. United States, 362 U.S. 402 (1960) and in Conn. Gen. Stat. §54-56d, provides that a defendant is "not competent if he is unable to understand the proceedings against him or to assist in his own defense." What this proposal does is mandate that the evaluation be conducted by a professional with experience in child and adolescent development and sets out procedures to adequately deal with a child who is found not competent to stand trial.

Conn. Gen. Stat. §54-56d contains no requirement that an evaluator have experience dealing with children. The adolescent brain research accepted by the U.S. Supreme Court as a reason to treat accused children differently from adults also indicates that a child might not be competent in a different way from an adult defendant. Children and adolescents are less able to process the consequences of the important decisions that must be made during a criminal trial, even one in juvenile court. Constitutional rights are at stake and it is critical that the evaluator be able to assess how the accused's development impacts their ability to cooperate with counsel and make knowing and voluntary decisions about things like plea offers, testifying and accepting placement options. This proposal requires that the evaluator have some experience in adolescent and child development.

The current statute fails to provide adequate options for the juvenile matters courts once a child is found not competent. C.G.S. §54-56d generally authorizes commitment of the accused to the Department of Mental Health and Addiction Services (DHMAS) for evaluation and restoration. An accused who is found not competent and not restorable can be civilly committed. DMHAS, the agency that provides evaluation and treatment for adult accused, does not service people under the age of 18. The only option under Conn. Gen. Stat. §54-56d for a child who is not competent and not able to be restored is a commitment to DCF. It is not clear from the language if the commitment is limited to a civil mental health commitment but practice in the courts as been to commit a child to DCF as an Uncared for Specialized needs case. This has resulted in unnecessary commitment to DCF, because the statute left the court with no other option. This proposal provides for the use of the least restrictive means of restoring or establishing competence and sets community based education and treatment as the presumed methods of restoration. It allows the court to balance the security of the charges with the best interest of the child in deciding whether restoration efforts are appropriate after a finding that an accused child is not competent. The court can dismiss the charges and order an investigation as to whether services from DCF is appropriate and allows the court to maintain jurisdiction over the case. For a serious offense, the court is able to keep the case open for supervision, even if the child has been found not competent and not restorable.

Section 4 deals with the procedures and records surrounding findings of paternity in juvenile matters cases. This section presents some concerns, as it requires the court to take evidence and make findings regarding intimate activity between parties in a child welfare action, after a DNA test has found with a 99% probability that one party is the father of the child at issue. Given that the science behind DNA testing has long been accepted as legally sufficient, testimony on the parties' activities is unnecessary.

Section 5 deals with changes that were made last year to the statutes governing the appointment of counsel in child welfare proceedings. P.A. 11-51 made clear that children in child protection cases are entitled to a lawyer who will advocate for their wishes in court. Children's counsel had been appointed as both attorney for the child and guardian ad litem which created a conflict and often left the child without an advocate

who would argue for what he or she wanted. Children are entitled to be heard when their custody is at issue and the changes made last session helped ensure they received due process of law. The proposal before this committee makes clear that attorneys can use protective measures when advocating for clients who are non verbal or unable to speak on their own behalf. Section 1.14 of the Rules of Professional Conduct governs this situation. Section 5 makes clear that the lawyer can act in a protective manner without the appointment of a guardian ad litem and makes clear that the court can use discretion appointing a separate GAL in cases where the child is very young or non verbal. This proposal is consistent with model legislation promulgated by the Child Law Section of the American Bar Association.

Section 6 makes minor changes to the sentencing options after a child is convicted as delinquent.

Section 7 would allow a family member to intervene in a child welfare matter for the purposes of obtaining guardianship of the youth or child. This is a change, since current law only allows for intervention for the purpose of obtaining permanent guardianship.

Section 8 deals with establishment of permanent guardianship in juvenile matters. It allows the Superior Court for Juvenile Matters to grant permanent guardianship in child welfare cases and places restrictions on how often a biological parent can apply for reinstatement as guardian. This helps maintain stability for the children who are subject to petitions alleging abuse and neglect. The Office of Chief Public Defender has some concerns about the language in subsection (k)(1), as it appears to loosen the rules regarding the use of hearsay at hearings where the permanency plan for a child is being reviewed. Specifically, the language would allow the use of "credible hearsay" regarding a party's compliance with the steps ordered by the court to achieve reunification with their children. There is no definition of what "credible hearsay" is. The removal of a child from a parent's custody implicates important, basic rights. Permanency hearings are often a precursor to a move to terminate parental rights, particularly if there is a dispute over whether the parents are complying with their orders. The standards of proof should not be diluted simply because it is easier for DCF and faster for the courts to allow hearsay evidence that is categorically less reliable than direct evidence, such as records of a person's behavior.

Section 9 changes the statutory definition of permanent guardian to make clear that the permanent guardian appointment lasts until the subject child reaches majority and that the rights of the biological parents are not terminated by the establishment of a permanent legal guardian.

Sections 10 through 15 set out criteria for the court to use when considering appointing a permanent legal guardian for a child and for when a parent can seek to have guardianship reinstated.

Section 15 addresses the law on the transfer of cases from the juvenile matters docket to the adult criminal docket. Conn. Gen. Stat. §46b-127(b) currently does not provide a hearing before a child charged with a felony is moved from juvenile to adult court. The Connecticut Supreme Court in State v. Fernandes, 300 Conn. 104 (2011) held that this procedure violated a child's constitutional right to due process of law and ordered that hearings must be held before a child can be deprived of the protections granted by the juvenile court. The decision left the hearings in adult court and provided no guidance on what procedure should be used or what standards should be applied in determining if a case should go back to juvenile court.

First, this proposal moves Class B felonies from the mandatory transfer provisions of Conn. Gen. Stat. Sec. §46b-127a to the discretionary 46b-127b. This is to reflect current practice, since several studies have shown that prosecutors transfer less than half of the B felonies that are supposed to be mandatorily moved to adult court.

Second, this proposal seeks to move the hearings to juvenile court. It makes no sense to find that a child has a constitutional right to a hearing before being deprived of his juvenile status but to force him to argue to have the status reinstated after it has been taken away. Currently, the cases are moved from juvenile court without a hearing and the burden is on the adult court judge, who often lacks any knowledge of the services and procedures available at the juvenile court to determine if a case should go back to juvenile court. The transfer hearing should be held in juvenile court, where judges and staff are trained in both adolescent issues and on the services available to best treat these children and youth. A person's due process rights are best protected if they have an

opportunity to be heard before the right is tampered with and a pre transfer hearing in juvenile court is the best way to ensure that the protections recognized in Fernandes are safeguarded.

Finally, this proposal sets out criteria for the court to use in determining if a case is appropriate for transfer to the adult court. This includes considering the age and criminal history of the accused, the seriousness of the crime, any mental health or developmental issues the accused may have and the treatment options that are available in the two courts. Passage of Section 15 as a whole is necessary to bring our juvenile transfer laws into compliance with the constitutional mandates set out in State v. Fernandes.

The Office of Chief Public Defender urges this committee to report favorably on Raised Bill 417.