

Innovation Brief

Mental Health Needs and Due Process Rights: Finding the Balance

Models for Change sites have launched a variety of initiatives to identify and treat justice-involved youths with mental health and substance abuse problems. They include screening and assessment protocols in detention and at court intake, innovative diversion programs, and evidence-based treatment programs. But to reap the benefits of these initiatives, youths often have to answer questions about offending behavior. That puts many of them at risk of incriminating themselves and facing prosecution for new offenses. The challenge facing Models for Change sites was how to implement creative initiatives to identify and treat these youths while upholding their due process rights. Stakeholders in Pennsylvania and Illinois framed and helped to enact legislation balancing these competing interests.

The Issue

Empirical studies suggest that 65 to 75 percent of youths involved with the juvenile justice system have one or more diagnosable psychiatric problems, including major depression, anxiety, mood disorders, and substance abuse. Without identification and treatment, these youths may pose a safety risk to themselves and others in juvenile justice facilities. Moreover, untreated youths face serious obstacles to leaving the system and are at risk of sinking even deeper into it as they “fail to adjust” to probation conditions and the demands of institutional placements. Juvenile courts have launched important initiatives to address the needs of this population, including screening and assessment at one or more stages of the juvenile court process. And in keeping with the juvenile court’s rehabilitation and treatment goals, judges regularly order youths into treatment, including therapy and counseling.

But there is a very real potential for youths to incriminate themselves in these situations, leaving them open to prosecution for new offenses. Many screening and assessment instruments designed for use in the juvenile justice system ask questions about illegal activities such as current and past drug use, violent or assaultive behaviors, sexual deviancy and offenses, victimization, abuse, and weapons possession (see sidebar on next page). Similar information may be elicited during clinical interviews conducted as part of a more comprehensive evaluation, and during individual and group therapy.

Youths charged with offenses have a constitutional right not to give evidence against themselves. This critical right against self-incrimination is threatened, however, when a youth answers questions and provides information during screening, assessment, or treatment. Without explicit protections, youths are at great risk of prosecution for statements procured for the purpose of identifying

Screening questions hold potential for self-incrimination

Massachusetts Youth Screening Instrument—Second Version (MAYSI-2)

- Have you hurt or broken something on purpose, just because you were mad?
- Have you thought a lot about getting back at someone you have been angry at?
- Have you done anything you wish you hadn't, when you were drunk or high?
- Have you gotten in trouble when you've been high or have been drinking? If yes, has the trouble been fighting?
- Have you ever seen someone severely injured or killed (in person—not in movies or on TV)?

GAIN-Short Screener (GAINS-SS)

When was the last time you...

- used alcohol or drugs weekly?
- had a disagreement in which you pushed, grabbed or shoved someone?
- took something from a store without paying for it?
- sold, distributed or helped to make illegal drugs?
- drove a vehicle while under the influence of alcohol or illegal drugs?
- purposely damaged or destroyed property that did not belong to you?

Child Behavior Checklist (CBCL), Youth Self-Report Form

Yes or no...

- I destroy things belonging to others.
- I physically attack people.
- I set fires.
- I steal from places other than home.
- I threaten to hurt people.

and treating their behavioral health problems. Defense counsel, in accordance with their professional and ethical duties, could reasonably advise their young clients not to participate in screens and assessments because of the risk involved. Moreover, clinicians are obligated, under their professional codes of conduct, to tell any youth they assess how information the youth reveals can be used in legal proceedings. Such warnings might well inhibit the youth from fully disclosing information to these mental health professionals, undermining the effectiveness of diagnostic and therapeutic interventions.

Innovations

The challenge facing Models for Change sites was how to launch and implement creative initiatives to identify and treat youths with behavioral health disorders while upholding their due process rights. As the Pennsylvania and Illinois experiences show, balancing these sometimes competing interests presents challenges as juvenile justice stakeholders with different mandates strive to collaborate on reform efforts.

Pennsylvania. As part of the state's participation in Models for Change, Pennsylvania issued a policy statement in 2006 setting out a vision of a comprehensive system that: (1) prevents the unnecessary involvement of youths with behavioral health disorders in the juvenile court; (2) allows for their early identification; and (3) provides for timely access to evidence-based treatment in the least restrictive setting consistent with public safety. Professionals from the juvenile justice and mental health systems formed a joint work group to begin to bring this vision to life.

The work group was in the process of launching a behavioral health screening and assessment initiative as part of probation intake when members identified a gap in Pennsylvania laws: youths were not protected from potential self-incrimination in these processes. The group embraced the fundamental principal that information gathered during screenings and assessments should not be shared or used in a way that jeopardized the youths' legal interests, including their right against self-incrimination. Consequently, the group organized and led a successful effort to enact legislation to protect youths. Juvenile Law Center, the lead entity for Models for Change in Pennsylvania, had already published a monograph that surveyed the laws in other states (see sidebar on next page). Using this resource, the work group drafted legislation and vetted the language with major juvenile justice stakeholders—including juvenile court judges, prosecutors, defense attorneys, and probation officers—and individuals in other child-serving systems. The group obtained feedback from these groups, edited the language, and circulated revised drafts for further comment and discussion.

By the time the work group approached a key state senator for sponsorship, the proposal had been endorsed by all key stakeholders. Passed in 2008, Pennsylvania’s law provides that no statements, admissions, confessions, or incriminating information obtained from a child in the course of a screening or assessment undertaken in juvenile court proceedings may be admitted into evidence against the child on the issue of guilt.

Illinois amended its Juvenile Act in 2010 to provide that a “statement, admission, confession, or incriminating information made by or obtained from a minor related to the instant offense, as part of any behavioral health screening, assessment, evaluation, or treatment, whether or not court-ordered, shall not be admissible as evidence against the minor on the issue of guilt only in the instant juvenile court proceeding.”

Self-incrimination provisions in other Models for Change states

New Jersey

Statements made during a suicide or mental health screening cannot be provided to the court, prosecutor, or law enforcement without the juvenile’s consent and may not be used in any investigation or delinquency or criminal proceeding.

Texas

Any statement or information obtained in a mental health screening by probation is inadmissible against the child at any hearing.

Connecticut

Information obtained during any mental health screening or assessment can only be used for planning and treatment purposes and is confidential.

Maryland

Any statements or information obtained during a mental health evaluation may not be admitted into evidence on the issue of guilt.

Illinois. Civitas ChildLaw Center, at Loyola University of Chicago School of Law, is the Models for Change lead entity in Illinois. Civitas kick-started the process in that state by consulting with the juvenile justice committee of the Illinois Children’s Mental Health Partnership. Civitas reviewed statutes in other states and drafted a model statute to begin educating members of the General Assembly and the larger community about the need for self-incrimination protection. The Partnership then targeted legislators with a demonstrated interest in mental health issues. The Juvenile Justice Initiative, a co-chair of the Partnership’s juvenile justice committee, took the lead in educating these legislators about the need for protections to promote early identification and treatment. The Initiative’s staff developed fact sheets describing the proposed legislation not simply as a juvenile justice bill but as an essential step to prioritize children’s mental health and well-being.

Results and Lessons

The Pennsylvania and Illinois groups that led the charge both had to accept compromises to their initial draft legislation in order to win support from prosecutors. In Pennsylvania, legislation initially proposed by the Models for Change state work group would have extended the evidentiary prohibition to statements made in treatment, a provision that was supported by many stakeholders including the state’s juvenile court judges. While district attorneys in Pennsylvania supported the provision with respect to screening and assessment, they were unwilling to endorse a bill that would explicitly limit the use of statements made in treatment. Understanding how critical it was to obtain support from the prosecutors, the work group ultimately decided to revise the draft language.

In Illinois, state’s attorneys opposed draft language that would have prohibited statements being admitted into evidence on the issue of guilt at any hearing or trial, including those for yet-uncharged offenses. To gain prosecutorial support, the bill’s sponsor limited the reach of the bill to admissions about the current charges. Thus, while the Illinois statute goes further than Pennsylvania’s law in one respect—extending the protection to statements made in treatment—it is more limited in not protecting statements regarding uncharged offenses.

The enacted legislation in both states does create significant new protections for youths. But defense attorneys still need to counsel their clients closely and clinicians need to explain to them the limits of confidentiality.

Looking Forward

The potential for self-incrimination arises in other juvenile justice reform initiatives and is not limited to projects focused on mental health screening and assessment. For example, there is a growing interest in using validated instruments to assess a youth's risks and needs to aid juvenile justice professionals in making key decisions. And juveniles must frequently receive court-ordered assessments to determine whether they are competent to stand trial. Both processes—risk/needs assessment and competence evaluation—can elicit incriminatory statements about offending behavior in the same ways as mental health screenings and assessments. Jurisdictions must examine their statutes and court rules to determine if sufficient protections are in place to protect youths' due process rights in these contexts.

Resources

L. Rosado (2012). "Outside the Police Station: Dealing With the Potential for Self-Incrimination in Juvenile Court," *Washington University Journal of Law & Policy*, Vol.38:177 (2012). <http://law.wustl.edu/journal/38/Rosado.pdf>

Child Welfare League of America and Juvenile Law Center (2008). Models for Change Information Sharing Tool Kit. <http://www.modelsforchange.net/publications/282>

L. Rosado & R. Shah (2007). Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System. http://www.jlc.org/sites/default/files/publication_pdfs/protectingyouth.pdf

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This brief is one in a series describing new knowledge and innovations emerging from Models for Change, a multi-state juvenile justice reform initiative. Models for Change is accelerating movement toward a more effective, fair, and developmentally sound juvenile justice system by creating replicable models that protect community safety, use resources wisely, and improve outcomes for youths. The briefs are intended to inform professionals in juvenile justice and related fields, and to contribute to a new national wave of juvenile justice reform.