TASC Training & Advocacy Support Center

TASC is sponsored by the Administration on Developmental Disabilities (ADD), the Center for Mental Health Services (CMHS), the Rehabilitation Services Administration (RSA), the Social Security Administration (SSA), and the Health Resources Services Administration (HRSA). TASC is a division of the National Disability Rights Network (NDRN).

FACT SHEET

Mental Health Screening and Assessment in the Juvenile Justice System: Self-Incrimination Issues And Potential Solutions

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With a grant from the Training and Advocacy Support Center (TASC)

June 2008

1. Introduction

It is a well established that a large percentage of the children incarcerated in juvenile detention facilities have diagnosable psychiatric disorders. The most recent study by the National Center for Mental Health and Juvenile Justice found that over 70% of youth involved with the juvenile justice system had at least one diagnosable mental health disorder and over 60% of those with at least one diagnosis in fact met the criteria for three or more mental health disorders.[1] The study also showed that girls experienced a higher rate of mental health disorders, with over 80% of the girls meeting the criteria for at least one mental health disorder.[2] These results are consistent with the findings of other recent studies.[3]

While mental health disorders are common in youth in the juvenile justice system, the system's capacity to meet the needs of these children is woefully inadequate. The Special Investigations Division of the House Committee on Government Reform issued a report in 2004 documenting that many children in need of mental health treatment are warehoused in juvenile justice facilities due to the lack of

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[1] Shufelt and Cocozza, *Research and Program Brief: Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study* (NCMHJJ 2006) at 2-3 (copy online at http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf).
[2] *Id.* at 4.
[3] *Id.* at 2; *see also* Teplin, McClelland, Dulcan & Mericle, *Psychiatric Disorders in Youth in Juvenile Detention,* 59 Archives of General Psychiatry 1133 (2002)(finding 69% prevalence); Wasserman, McReynolds, Ko, Katz & Carpenter, *Gender Differences in Psychiatric Disorders at Juvenile Probation Intake*, 95 American Journal of Public Health 131 (2002)(finding 68.5% prevalence).

community-based treatment resources.[4] The Department of Justice reports year after year findings of "systemically inadequate medical and mental health care … in many of the juvenile justice facilities under investigation."[5] DOJ has brought numerous lawsuits and entered into many settlements aimed at curing these deficiencies, yet problems persist.[6]

In an effort to address these concerns, whether in response to litigation or otherwise, some states, with support from the Substance Abuse and Mental Health Services Administration (SAMHSA), have begun to improve and expand mental health screening and assessment of youth in the juvenile justice system.[7] These are unquestionably positive developments.[8] However, they raise serious concerns regarding confidentiality and self-incrimination for the youth involved which must be resolved for the screening and assessment to operate properly.[9]

2. Common Mental Health Screening and Assessment Tools

A mental health screen is a relatively short process designed to determine whether a particular youth *may* have a mental health need. Generally the person conducting the screen uses a screening instrument that has been developed for this specific purpose. Most mental health screening instruments used in the juvenile justice system are designed so that they can be administered by individuals with little or no formal mental health training. If the screen indicates an imminent risk (e.g. suicide), immediate measures should be initiated to protect the youth, pending a more comprehensive assessment. If the screen indicates a potential mental health problem, the youth should be referred for a mental health assessment. [10]

A mental health assessment is conducted by a mental health clinician and

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[4] United States House of Representatives, Committee on Government Reform—Minority Staff, Special Investigations Division, *Incarceration of Youth Who Are Waiting For Community Mental Health Services in the United States* (2004)

[5] United States Department of Justice Report, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act, Fiscal Year 2006* at 15 (2006)(online at ; United States Department of Justice Report, *Department of Justice Activities Under the Civil Rights of Institutionalized Persons Act, Fiscal Year 2005* at 15 (2005)).

[6] 2006 DOJ Report at 4-5, 11. *See also*, Koppelman, *Mental Health and Juvenile Justice: Moving Toward More Effective Systems of Care* at 12 (National Health Policy Forum 2005); Rosado & Shah, *Protecting Youth from Self-Incrimination when Undergoing Screening, Assessment and Treatment within the Juvenile Justice System* at 7-8 (copy available at http://www.jlc.org/files/publications/protectingyouth.pdf).

[7] Koppelman at 12-13; Rosado & Shah at 8-10.

[8] For a general discussion about screening in juvenile justice facilities, *see*, CPR's Q&A on Mental Health Screening in Juvenile Facilities (http://www.ndrn.org/TASC/pub/qa/2004/0403jj_mh.pdf).

[9] There are also concerns about stigma. This Fact Sheet does not address the stigma issue.

[10] In addition to mental health screens and assessments, many juvenile justice agencies also administer other screens or assessments (e.g. educational, general medical, literacy, risk). This Fact Sheet only addresses the confidentiality issues in mental health screens and assessments.

involves a more lengthy and detailed examination of the youth's mental health. Generally, such assessments also involve an assessment instrument. The assessment leads to a mental health diagnosis and may also include specific treatment recommendations.

The most common mental health screening tool in use in the juvenile justice context is the Massachusetts Youth Screening Instrument—Second Version (MAYSI-2). It is used in at least some facilities in 49 states.[11] It consists of 52 yes or no questions. Some of the questions ask whether the youth has:

- Hurt or broken something on purpose?
- Thought a lot about getting back at someone you have been angry at?
- Done anything you wish you hadn't, when you were drunk or high?
- Gotten in trouble when you've been high or have been drinking? And, if so, has the trouble been fighting?
- Ever seen someone severely injured or killed?[12]

As is evident from the above listed questions, the likelihood that a child responding to these questions might provide statements that would be incriminating is significant.

Because a mental health assessment involves a more in depth evaluation of the adolescent, the risk of self-incrimination during an assessment is even greater. One of the most commonly used assessment tools is the Child and Adolescent Needs and Strengths—Juvenile Justice (CANS-JJ). The person administering the CANS-JJ interviews the youth and scores him/her in a variety of areas including the seriousness and history of the youth's criminal behavior and substance abuse. A score of 3 regarding seriousness of criminal behavior indicates that "youth has engaged in felony criminal behavior that places other citizens at risk of significant physical harm." A score of 3 regarding history of criminal behavior indicates that "youth has engaged in multiple criminal/delinquent acts for more than one year without any period of at least 3 months where he/she did not engage in criminal or delinquent behavior." [13] Other screening and assessment tools elicit similar information.[14]

Such screens and assessments may be administered at various stages in the progression of a child through the system. In some cases, police are administering mental health screens prior to referring the child to the juvenile court. Screens may be administered by probation officers prior to the filing of formal charges against the child. In most cases, the screens and assessments are administered in detention centers, post-charge, but pre-adjudication. Finally, screens and assessments should be

[11] Koppelman at 12.
[12] This subset of questions is taken from Rosado & Shah at 22. They also list similar questions from other commonly used screening instruments such as the GAIN—Short Screener and the Child Behavior Checklist.
[13] CANS-JJ Manual available online at http://www.buddinpraed.org/form/cans-jj.asp.
[14] Rosado & Shah at 22-24 (containing sample questions from many of the more commonly used mental health screening and assessment instruments).

administered for children who have been adjudicated when they first arrive at the secure facility to which they have been sentenced. At each of these different stages, the legal rights to confidentiality and against self-incrimination shift, although the clinical interests in confidentiality remain constant throughout.

3. The Clinical Importance of Confidentiality

In order to accurately screen, assess or treat[15] an individual who may have a mental or emotional disorder, it is essential that the individual provide accurate and honest responses to the person administering the screen, assessment or treatment. Without complete confidentiality, the individual being screened, assessed or treated is not likely to be completely candid. While this is true in general, the motivation to conceal potentially incriminating information is particularly great in situations where the individual is already caught up in the criminal or juvenile justice system. Indeed, absent clear and enforceable guarantees of confidentiality, most defense attorneys will advise their clients not to participate in such activities prior to trial.

Recognizing the importance of confidentiality in the exchange of information between patients and mental health providers, all fifty states have established a patient-psychotherapist privilege.[16] It has also been incorporated into the federal common law.[17] As the Supreme Court explained

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffe, 518 U.S. at 10.[18]

For similar reasons, the developers of the various screening and assessment

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[15] While this Fact Sheet does not discuss self-incrimination in the treatment context, many of the concerns raised with respect to screening and assessment apply with equal force in the treatment context, especially where treatment is mandated. For a discussion of self-incrimination issues in the treatment context, *see* Shah & Rosado at 38-40.

[16] *Jaffe v. Redmond*, 518 U.S. 1, 12 n.11 (1996)(collecting statutes from all fifty states and the District of Columbia). The precise contours of the privilege vary from state to state. For a discussion of the differences among the states with respect to the privilege as applied to psychiatric social workers, *see Jaffe*, 518 U.S. at 33-34 (Scalia, J. dissenting).

[17] *Id.* at 10-15.

[18] While *Jaffe* is a Supreme Court case, it created only a federal rule of evidence. As such, it has no applicability to juvenile delinquency proceedings (except the rare juvenile charged with a federal law violation).

instruments commonly used in juvenile justice settings all include instructions regarding the importance of confidentiality. The developers of the Comprehensive Adolescent Severity Index (CASI) caution in their instruction manual that:

> Procedural safeguards MUST be in place to assure that information is NOT used to incriminate the youth in any type of criminal conduct or for pursuing an investigation or charges against others who the juvenile may implicate. Agreements with the juvenile/criminal justice system must stipulate that information collected as part of juvenile intake CANNOT be admitted as evidence in future court proceedings against the juvenile.[19]

In a similar vein, the Center for the Promotion of Mental Health in Juvenile Justice (CPMHJJ) instructs with regard to the use of the Diagnostic Interview Schedule for Children-IV (DISC-IV) that "justice facilities must have protections in place so that either information provided in an intake screen cannot be used in support of current or future charges, or facilities do not ask questions by which youths may self-incriminate."[20]

Similar protocols to protect the confidentiality of information divulged during mental health screening, assessment and treatment are also recommended by a variety of professional organizations, including the National Commission on Correctional Health Care and the National Council of Juvenile and Family Court Judges.[21]

While there is widespread agreement that confidentiality is essential from a clinical perspective in order to ensure that the necessary information is provided so that an accurate mental health assessment can be made, the law does not always provide the needed protection.[22]

4. Legal Protections Against Self-Incrimination During Screening and

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[19] Rosado & Shah at 26 (quoting Meyers, *Comprehensive Adolescent Severity Inventory (CASI) Administration Manual with Scoring Information* at 18 (2005)).

[20] Wasserman, Jensen, Ko, Cocozza, Trupin, Angold, Cauffman, & Grisso, *MentalHealth Assessments in Juvenile Justice: Report on the Consensus Conference*, 42 J. Am. Acad. Child Adolesc. Psychiatry 742, 755 (July 2003); Rosado & Shah at 27.

[21] Rosado & Shah at 28-29 & nn. 52-61.

[22] While this Fact Sheet focuses only on screening and assessment, similar issues arise in the treatment context as well. Indeed, in many sexual offender treatment programs, participants are not merely encouraged, but required to acknowledge and discuss all prior offending conduct in order to "graduate". In *McCune v. Lile*, 536 U.S. 24, 37-38 (2002), the Supreme Court held that a mandatory sex offender therapy program for incarcerated adults did not violate the Fifth Amendment privilege against incrimination by depriving those who did not participate of certain prison privileges. Justice O'Connor, who cast the deciding vote, indicated that she might decide differently if harsher consequences, such as additional jail time, resulted from a refusal to participate. *Id.* at 52; *cf., Pentlarge v. Murphy,* 521 F.Supp. 2d 421, (D.Mass. 2008)(*McCune* analysis inapplicable to post-incarceration civilly committed sex offenders). State courts have taken various approaches to the extent of confidentiality accorded in the treatment context. For a collection of cases, *see* Rosado & Shah at 38-40.

Assessment

A. Federal Law

It is axiomatic that both adults and juveniles are protected by the United States Constitution against being compelled to be a witness against themselves.[23] However, determining whether an incriminating statement was coerced or voluntarily made is a question of fact, determined based upon the totality of the circumstances. The Supreme Court applied the totality of circumstances test to juvenile confessions in *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979). In *Fare*, the Court explained that in the case of a juvenile, the totality of circumstances must include evaluation of "the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him and the nature of his Fifth Amendment rights, and the consequences of waiving those rights." *Id.* at 725. However, in *Fare* the Court reversed the California Supreme Court and held that the juvenile's request to talk to his probation officer after being given his *Miranda* warnings did not indicate that his subsequent questioning without being allowed that contact rendered his admission involuntary.

The leading case regarding the admissibility of statements made to a psychiatrist during a court-ordered psychiatric examination is *Estelle v. Smith*, 451 U.S. 454 (1981). *Estelle* involved an adult charged with murder who was ordered by the court to undergo a competency examination. While the defendant was represented by counsel who was present in court when the examination was ordered, counsel was not advised that the examination might be used for any purpose other than to determine his client's competency to stand trial. Following Smith's conviction on the murder charge, the prosecution called the psychiatrist in the penalty phase of the capital proceeding to testify as to Smith's future dangerousness. The Supreme Court reversed Smith's death sentence, finding that the information provided from the court-ordered competency examination during the penalty phase of the case violated Smith's Fifth Amendment right against self incrimination. The three salient points that the Court relied upon in reaching this decision were that Smith's participation in the competency exam was compelled by the court, that his attorney was not advised that the exam might be used in the penalty phase of the case and no separate *Miranda* warnings were given, and that Smith did not attempt to introduce any psychiatric evidence. *Id.* at 468-69. Certainly, where these factors are present in a juvenile delinquency proceeding, *Estelle* should control and the statements made to the mental health screener or evaluator should be suppressed. *See*, *e.g., In re J.S.S.*, 20 S.W.3d 837, 846-47 (Tex. App. El Paso 2000)(applying *Estelle* to a probation officer's pre-disposition interview of the defendant without *Miranda* warnings); *but cf., McCracken v. Clarke*, 2005 WL 2405927 at *6-*7 (D.Neb. 2005)(allowing court-ordered competency exam to be used at juvenile transfer hearing because the transfer hearing is not concerned with guilt or punishment, but serves a "neutral" purpose of ascertaining the juvenile's amenability to treatment

[23] The Fifth Amendment right against self incrimination was extended to juveniles in *In re Gault*, 387 U.S.1 (1967) as a matter of due process under the Fourteenth Amendment.

within the juvenile system).[24]

Estelle provides limited assistance to juveniles who are administered mental health screens or assessments for a variety of reasons. In some instances, mental health screening may occur before the youth is formally in state custody. Until custody attaches, there is no right against self incrimination. Also, the screens and assessments are frequently matters of administrative routine for the probation department or juvenile justice agency. Because *Estelle* relied heavily on the fact that the competency exam was court ordered and the defendant was, therefore, required to attend, it may not be extended to custodial situations in which the juvenile's participation is more "voluntary." Certainly, without sufficient guarantees of confidentiality, competent defense counsel is likely to advise the juvenile not to participate in the screening and assessment. Of course, while this may protect the youth's chances of prevailing at the delinquency trial, it may prevent or delay the juvenile from obtaining needed treatment and may also undercut the child's chances of being diverted to community-based treatment or placed on probation.

B. State Law Protections

As mentioned above, virtually every state recognizes the patient-psychotherapist privilege. Many also recognize a client-social worker privilege. However, the scope of such privileges varies greatly. Some are limited to providers who are treating the patient. Some have exceptions that permit disclosure of criminal conduct.[25] However, what ultimately makes such privileges of limited use with respect to screening and assessment in the juvenile justice system is that the screens are generally not administered by either physicians or social workers who are subject to such privileges. Screens are frequently administered by probation officers or intake staff at juvenile detention centers. Mental health assessments are more likely to be administered by mental health workers, but if those workers are not licensed psychologists or physicians, they may not be covered by the state's privilege. Thus, while it is important to consult your state's general law regarding privilege, something more specific is likely needed to provide the requisite protection so that a juvenile facing delinquency or criminal charges can freely respond to the screening and assessment questions.

After charges have been filed against a juvenile, *Estelle* requires that *Miranda* warnings must be provided before any compelled interrogation, including any court-ordered mental health screening or assessment. *State v. Diaz-Cardona*, 123 Wash. App. 477, 98 P.3d 136 (Wash.App. Div. 2004); *but c.f., State v. Escoto*, 108 Wash.2d 1, 735 P.2d 1310 (Wash.1987)(suggesting that *Estelle* should not apply in juvenile proceedings based on the rehabilitative, as opposed to punishment, focus of the sentencing proceeding). Whether *Estelle* applies to screenings or assessments that are

[24] The *McCracken* court's suggestion that a transfer hearing is a "neutral" event is certainly troubling. The consequences of being tried as an adult, rather than a juvenile, can be devastating, both in terms of the punishment meted out and the conditions of confinement.
[25] *See, e.g.,* Mo.Rev.Stat. § 337.636(2) (exception to social worker privilege for information relating to criminal acts); Okla. Stat., Tit. 59, § 1261.6(2) (same).

not court-ordered is less clear, although there are compelling arguments that a mental health screen or assessment administered to a juvenile in custody by a person in a position of authority at the detention facility is every bit as coerced by the state as one that is ordered by a court. In the absence of the provision of *Miranda* warnings, any incriminating statements by the juvenile should be inadmissible. *Cf., Matter of J.S.S.*, 20 S.W.3d at 846-47 (applying *Estelle to* probation interview). However, *Miranda* warnings alone are an entirely inadequate response to the issue for a number of reasons.

First, there is increasing evidence that adolescents lack the necessary judgment and decision-making skills to appropriately evaluate and respond to a *Miranda* warning.[26] Nevertheless, the Supreme Court recently held that a child's age is not a factor that warrants special consideration in determining whether an interrogation is "custodial", thereby requiring a *Miranda* warning. *Yarborough v. Alvarado*, 541 U.S. 652, 666-68 (2004). In *Yarborough,* the parents of the 17 year old suspect brought him to the police station for questioning about a murder and robbery that had occurred about a month earlier. The parents requested, but were refused, permission to be present during the interrogation. No *Miranda warnings* were given. Alvarado initially denied any involvement, but after two hours of questioning, admitted to his involvement in the crime. *Yarborough* was a 5 – 4 decision in which Justice O'Connor cast the deciding vote. In her concurrence, Justice O'Connor emphasized the fact that Alvarado was 17 years old and suggested that she might not reach the same decision with respect to younger children. *Id.* at 669. *Yarborough* also came up to the Court on appeal from a federal habeas corpus proceeding which was subject to the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1), which permits federal habeas relief only if the state court disposition "was contrary to … clearly established Federal law as determined by the United States Supreme Court." Perhaps if the standard of review were plenary, a different result might have been reached.

Nevertheless, *Yarborough* is troubling, because it signals a departure from earlier Supreme Court cases which specifically took age into account in invalidating confessions. As the Court in *Haley v. Ohio*, 322 U.S. 596,599-600 (1948) explained in throwing out the confession of a fifteen year old:

> Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces.

See also, *Gallegos v. Colorado*, 370 U.S. 49, 52-55 (1962)("[A] 14-year-old boy, no

[26] *See*, Barry Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 Minn.L.Rev. 26, 41-48 (2006)(and authorities cited). Additional information on current research into the developmental capacities of adolescents is available from the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice (http://www.adjj.org/content).

matter how sophisticated, … is not equal to the police in knowledge and understanding … and … is unable to know how to protect his own interests or how to get the benefits of his constitutional rights"). *Yarborough* appears to distinguish cases such as *Haley* and *Gallegos* by drawing a distinction between the standard for determining custody for purposes of *Miranda* warnings and the standard for determining the voluntariness of confessions (which it acknowledges can take into account factors such as age and experience).*Yarborough,* 541 U.S. at 667-68, Nevertheless, *Yarborough's* refusal to consider age in the *Miranda* analysis is at odds with compelling scientific evidence that adolescents lack the maturity and competence to understand their rights during police questioning or to make knowing and voluntary waivers of their right against self-incrimination and signals that cases such as *Haley* and *Gallegos* will be narrowly interpreted.[27]

A number of states have built in additional protections for juveniles during police interrogations. Some require the presence of a parent or other "interested" adult at the interrogation as a prerequisite to admissibility of any statements or a valid *Miranda* waiver. Some create a presumption of incompetence that can be rebutted.[28] Most states, however, do not provide such additional protection.

The most common additional protection, the presence of a parent or other "interested" adult, is not really much of a protection at all. In some cases, the parent may be the direct or indirect victim of the adolescent's allegedly illegal conduct and may, therefore, have interests antagonistic to those of the youth. The police are trained in techniques to neutralize the presence of parent's during questioning.[29] In the context of a mental health screen or assessment, parents are also not likely to be focused on issues of self-incrimination to the same extent that they would in a standard police interrogation. As a result, absent the actual provision of counsel to the child prior to the decision regarding whether to waive *Miranda* rights in the context of mental health screens and assessments,[30] these state laws do not provide sufficient protection for adolescents.

In addition, without solid guarantees against the admissibility of admissions made during screening or assessment at either the guilt or disposition phase of the proceeding,[31] those juveniles with counsel will, more often than not, be advised by their

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[27] Whether the Court's recognition in *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) of the recent scientific evidence that juveniles under age 18 have diminished decision-making capacities and self-control may lead to a possible softening of the position taken in *Yarborough* remains to be seen.

[28] *See*, Feld, *Juveniles' Competence,* 91 Minn.L.Rev. at 36-39 & nn. 30-40 (collecting cases and statutes and discussing rationales for the differing approaches); Rosado & Shah at 14 & n. 10 (same).

[29] Feld, *Juveniles' Competence*, 91 Minn.L.Rev. at 38 n. 35.

[30] Such provisions are rare and very limited. *See*, *e.g.* 705 Ill. Comp. Stat. 405/5-170 (requiring attorney's presence during custodial questioning of juveniles under age 13 accused of murder or sexual assault).

[31] There is a fine line to be drawn between admissions that might implicate the juvenile in criminal or delinquent activity and the opinion of a mental health professional regarding the

attorney not to participate. Finally, many unrepresented juveniles who do understand the *Miranda* warning and, nevertheless, proceed with the screening or assessment will withhold potentially incriminating information, thereby undermining the validity of the screen or assessment.

Many states, recognizing the serious self-incrimination issues posed by mental health screens and evaluations, have gone ahead and enacted statutory protections against the disclosure of such information in the juvenile proceeding. Virginia's code states,

> [s]tatements made by a child to the intake officer or probation officer during the intake process or during a mental health screening or assessment … and prior to a hearing on the merits of the petition filed against the child, shall not be admissible at any stage of the proceedings.

Va. Code Ann. § 16.1-261. Connecticut's statute states,

> any information concerning a child that is obtained during any mental health screening or assessment of such child shall be used solely for planning and treatment purposes and shall otherwise be confidential…. Such information may be further disclosed only for the purposes of any court-ordered evaluation or treatment of the child or provision of services to the child [or in child or elder abuse proceedings]. Such information shall not be subject to subpoena or other court process for use in any other proceeding or for any other purpose.

Conn. Gen. Stat. § 46B-124(j). Other states provide that admissions made during intake may not be used during the guilt phase of the proceeding, but can be used at sentencing. *See*, *e.g.*, 15 Maine Rev. Stat. § 3204. Still others require the provision of *Miranda* warnings as a predicate for admissibility. *See*, *e.g.,* N.M. Stat. Ann. §§ 32A-2-7(B), 32A-2-14(D) & (E).[32] Courts in California and New York have held that statements made by a juvenile during intake are inadmissible during the guilt phase of the proceeding, People *v. Macias*, 941 P.2d 838 (Cal. Sup. Ct. 1997)(but allowing statements made to probation officer for impeachment purposes if the minor testifies); *People v. Pokovich*, 141 P.3d 267 (Cal. Sup. Ct. 2006)(statements made during mental

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appropriate treatment of the youth. Obviously, the objective of the assessment is to determine the necessary services and treatment for the youth. As a result, it seems that the opinion regarding appropriate treatment, but not the facts underlying it, should be admissible at the disposition stage. To the extent that this opinion is influenced by information provided by the child regarding other potentially illegal activities (s)he had engaged in, the opinion itself could lead the court, in some instances, to order a more restrictive disposition than it would otherwise have done. Of course, in other cases, the opinion will result in a more lenient and less restrictive disposition. However, not permitting the treatment opinion based on the assessment to be introduced at the disposition stage of the proceeding would largely undermine the beneficial objectives of the screening and assessment.

[32] For a list of state statutory provisions regarding confidentiality at the intake stage, *see* Rosado & Shah at 35-36 & nn. 3-8. Rosado & Shah also provide detailed analyses of the law (both statutory and case law) in all 50 states regarding confidentiality as it applies in the juvenile justice context at Appendix A.

competency exam not admissible, even for impeachment); *Matter of Randy G.*, 487 N.Y.S.2d 967, 969 (N.Y.Fam.Ct.,1985)(statements to probation or at mental health evaluation inadmissible at guilt stage, but admissible at disposition).

While it is encouraging that many states have stepped partially into the breach and enacted statutes or court rules providing that statements made during intake or mental health evaluations are inadmissible during the guilt phase of the juvenile proceeding, these qualified confidentiality provisions are inadequate to insulate youth undergoing screening and assessment from self-incrimination. Similarly, the judicial decisions which provide some protection against consideration of information obtained during mental health screenings or assessments are generally limited to court-ordered evaluations and the provision of *Miranda* warnings that, as discussed above, do not resolve the self-incrimination problem.[33] Virginia and Connecticut provide examples of two states that have gone the final step and categorically prohibit the admissibility of statements made during screening and assessments, whether or not court-ordered. Va. Code Ann. § 16.1-261; Conn. Gen. Stat. § 46B-124(j) (limited exception for use in child or elder abuse proceedings). Without comprehensive protection similar to that afforded by Virginia and Connecticut, the beneficial goals underlying mental health screening and assessment will not be fully realized.[34]

5. What Can Be Done

If your state does not provide comprehensive protection against the disclosure of statements or admissions made by a juvenile during mental health screenings or assessments, educating policymakers regarding the statutory protections insulating such information from use against the juvenile during either the guilt or disposition phase of the proceeding appears to offer the most promising course to follow. The Virginia and Connecticut statutes referenced above provide good models.[35] In some states, protections may also be provided through adoption of court rules. While litigation has provided some limited protection, the courts tend to apply *Estelle* which, as discussed above, is an inadequate response to the problem. Without entirely discounting litigation as a possible response, it seems much less likely to result in the kind of comprehensive protection that is essential to make screening and assessment effective.

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[33] For a detailed discussion of the case law, *see* Rosado & Shah at 36-38.

[34] Even comprehensive protections against the admissibility of admissions at either the guilt or disposition phase of the juvenile proceeding do not entirely insulate the juvenile from adverse effects from such admissions. Probation officers routinely make recommendations to the court regarding the appropriate sentence or disposition for an adjudicated juvenile offender. If the probation officer is aware of additional offending conduct, even if it cannot be divulged to the court and should not be relied upon by the probation officer, that conduct will frequently influence the sentencing recommendation. Nevertheless, with comprehensive protections, the benefits that flow from early mental health screening and assessment would appear to far outweigh this risk.

[35] *See also* Rosado and Shah at 52 for draft model legislation language. The language protects statements or admissions from being "admitted into evidence … on the issue of whether the child committed a delinquent act … or on the issue of guilt in any criminal proceeding."

Natural allies in such an effort to educate policymakers include the mental health provider community, the criminal defense bar, civil liberties organizations, organizations focused on the rights of individuals with mental disabilities, and juvenile justice organizations. Creation of a commission or committee to study the issue and make recommendations to the legislature or judicial rule-making body is often a good first step. Policymakers are frequently receptive to proposals to study and report on problems, and a good first step may be to seek the creation of such a study commission. Having your organization and/or other advocacy organizations sharing your goals as members of the commission is obviously a plus. However, even if you are not a member of the commission, you can respond to its recommendations by providing information to the commission and testifying at hearings. The recent research regarding adolescent cognitive development, impulse control and decision-making abilities provides powerful ammunition in the effort to constrain the admissibility of admissions by juveniles.[36] This can be supplemented with research regarding the effectiveness of evidence-based treatments for youth with serious behavioral and emotional disorders to make a compelling case for appropriate protections to ensure the efficacy of early screening and assessment.[37] A well researched recommendation from such a commission enhances the likelihood of a fully protective bill being adopted.

Another course of action would be to enter into agreements with the key players in the juvenile justice system to keep mental health screening and assessment information confidential. Ideally, all stakeholders in the juvenile justice system involved with screening and assessment should be parties to the agreement. This would include the juvenile court, the probation office, the public defender's office, the district attorney's office, the agency responsible for any detention facilities in the jurisdiction, and any mental health facilities routinely used to conduct screening or assessments. The cast of characters may change depending upon the organization of the juvenile justice system in your area. It also may not be possible to get all the relevant stakeholders to participate or agree to the restrictions on the use of information. At a minimum, it is essential that the district attorney's office and the public defender's office participate and sign the memorandum of understanding, as they generally control what information is introduced during the guilt phase of the proceeding. The probation office is another critical player, because it often provides a written report and recommendation to the court at the disposition stage of the proceedings.[38]

It is important to recognize that such a Memorandum of Understanding is just a stop-gap measure. By providing for limits on the use and admissibility of admissions

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[36] For further information regarding this research, *see* CPR's Q&A, "The Impact of Adolescent Development on Juvenile Justice Issues" (available at http://www.ndrn.org/TASC/pub/qa/2005/0511jj_ad_dev.pdf).

[37] For a discussion of these evidence-based treatments, *see* CPR's Fact Sheet, Treatment Alternatives to Incarceration for Juvenile Offenders with Psychiatric and Emotional Disabilities: Effective Services and Potential Legal Strategies (available at http://www.ndrn.org/TASC/pub/fs/2007/1007Treatment-alternatives-for-juv-offenders.pdf).

[38] A sample Memorandum of Understanding can be found in Rosado & Shah at Appendix B.

and other incriminating statements obtained during screening and assessment, such an agreement may facilitate and encourage greater participation in such activities. However, there are risks as well. It is far from clear that such an agreement would be enforceable were the district attorney, probation office or court to violate it.[39]

6. Conclusion

Providing early mental health screening and assessment of youth entering the juvenile justice system is critically important to ensure that those children with psychiatric or emotional disorders get the treatment and services that they need. Comprehensive protections are needed to ensure that statements or admissions made during the course of such screening or assessment are not used by the court, the probation office, or the youth correctional agency to either establish guilt or enhance the juvenile's sentence. Without such protections, many juveniles will opt not to participate in such screens or, when doing so, will not be entirely forthright in their responses, thereby undermining the accuracy and utility of the screening and assessment. In order to enhance both participation in mental health screening and assessment and the quality of the clinical assessment, states can provide added protections through state laws that insulate statements or admissions made during the administration of such screens and assessments from consideration during both the adjudication and disposition phases of the juvenile delinquency proceeding. The measures discussed above are important to ensure that the mental health needs of youth in the juvenile justice system can be identified and addressed soon after their entry into the system without the risk that statements made by the youth in these settings can and will be used against the child at either the adjudication or disposition phase of the case.

[39] Whether there is sufficient consideration for such an MOU to qualify as a contract is questionable. *See*, *e.g., US Ecology, Inc. v. State of California*, 92 Cal.App.4th 113, 129, 111 Cal.Rptr.2d 689, 701-02 (Cal.App. 4th Dist. 2001). While there might be a possible promissory estoppel claim, often such claims against governmental entities must overcome a "contrary to public policy" defense. *Id.* at 92 Cal.App.4th 135, 111 Cal.Rptr.2d 706-07. In the context of a serious criminal or delinquency charge against a juvenile, a court certainly might find that enforcing the MOU and excluding the evidence would be contrary to public policy. Finally, to the extent that the claim is viewed as belonging to the youth, there may be standing issues, because the youth will not be a party to the MOU, but at best an intended beneficiary.