May 5, 2015

REPORT BY THE NEW YORK COUNTY LAWYERS ASSOCIATION ON RAISING THE AGE OF JUVENILE JURISDICTION

The New York County Lawyers Association (“NYCLA”) supports the proposal for raising the age of juvenile jurisdiction as was proposed in part J of the 2015-2016 New York State Executive Budget (the “Proposal”). The Proposal was ultimately not included in the final 2015-2016 budget passed by the legislature; however, the required funding to implement the proposed changes, $135 million, was included in the final budget. NYCLA encourages the Senate and Assembly to reintroduce the legislation and to secure its passage and implementation this session.

A. Introduction

New York is one of only two states that automatically prosecutes youth over the age of 15 in the adult criminal justice system. Jurisprudence, social science research, and neuroscience research have all concluded that youth are not developmentally the same as adults. Developments in adolescent brain research in recent decades have changed our understanding of youth’s developmental ability and culpability. The United States Supreme Court has found repeatedly that, under [various] laws, juveniles under 18 must be treated differently than adults because of developmental differences that impact their ability to understand and protect their own constitutional rights. In banning capital punishment and life sentences without parole for youth under the age of 18, the Supreme Court in Roper v. Simmons, Graham v. Florida, and Miller v. Alabama differentiated youth from adults because of their lessened culpability, their unique vulnerability to peer pressure, their lack of understanding of the consequences of their actions, and their inferior impulse control.3

At the same time, there has been increased attention to the collateral consequences of convictions and the continually growing impact that a conviction has on a young person’s ability to maintain the fundamental elements of a stable, productive, and dignified life—employment, housing, and education. This concern has spurred state and national modifications in our criminal justice system’s response to young offenders, changes that recognize that our legal

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1 This report was originally issued by the NYCLA Criminal Justice Section on March 17, 2015. Subsequent to its release, the report was adopted by the NYCLA Board of Directors on April 13, 2015 and updated and approved by the NYCLA Executive Committee on April 30, 2015. The report was prepared by the following members of the working group on the Raise the Age legislation: Geoffrey Bickford, Alison Wilkey, Honorable Joseph Kevin McKay, Susan B. Lindenauer, and Vincent T. Chang.
2 As set out below, NYCLA opposes one small aspect of the Proposal.
system must account for both the developmental differences and the disproportionate punitive impact that criminal justice policies have on youth.

The harms youth face when held in adult jails and prisons are astonishing. Youth held in adult facilities are 36 times more likely to commit suicide than those in youth facilities. Studies show that youth in adult prisons are twice as likely to report being beaten by staff, and nearly 50% more likely to be attacked with a weapon than those placed in youth facilities. Finally, youth face the highest risk of sexual assault of all inmate groups.

Finally, national and state research has shown conclusively that when youth are prosecuted in the adult system they are more likely to commit future crimes. A study comparing New York youth charged in the adult system with New Jersey youth charged in the juvenile system found significant negative public safety implications for prosecuting young people as adults. The study compared 15- and 16-year-olds with similar demographic and social backgrounds who were charged with violent crimes. The New York youth were charged in the adult system automatically due to New York’s law; the New Jersey youth remained in the state’s juvenile system. Astoundingly, the New York youth were twice as likely to be rearrested for a violent crime, 47% more likely to be arrested for a property crime, and 26% more likely to be re-incarcerated. A review of studies nationwide found that, overall, young people transferred to the adult criminal justice system have approximately 34% more re-arrests for violent and non-violent crimes than youth retained in the youth justice system. This review was conducted by the Task Force on Community Preventive Services of the Center for Disease Control and Prevention. Based on their study, the Task Force recommended against policies that transfer youth to the adult justice system because it is “counterproductive to reducing juvenile violence and enhancing public safety.”

Governor Cuomo appointed a Commission on Youth, Public Safety and Justice (the “Commission”) by Executive Order in April 2014 to make recommendations on how New York could raise the age of juvenile jurisdiction and make other reforms to improve youth outcomes while increasing community safety. The Commission, comprised of law enforcement, advocates, and service providers, released a unanimous Final Report in January 2015 (the

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8 Id. at 61-62.
10 Id.
11 Executive Order (A. Cuomo) No. 131.

**B. Summary of the Proposal**

1. **Raises the Age of Juvenile Jurisdiction**

The Proposal would raise the age of juvenile jurisdiction to 18 years old. Thus, Family Court would have original jurisdiction over most youth who were arrested—using current numbers, this would shift approximately 86 percent of the cases of 16- and 17-year-olds to Family Court. However, the Criminal Court would retain jurisdiction over youth charged with serious crimes and offenses charged under the Vehicle and Traffic Law. The current Juvenile Offender Law, under which 13- to 15-year-olds are charged automatically in adult court for a specified list of “Juvenile Offender” crimes, would remain unchanged. 16- and 17-year-olds charged with the existing list of juvenile offender crimes, all violent felony offenses, and Vehicle and Traffic Law offenses would also be automatically prosecuted in the Criminal Court.

The change of juvenile jurisdiction would be phased in, moving to Family Court youth who are age 16 at the time of the offense beginning on January 1, 2017, and youth who are age 17 beginning on January 1, 2018. This phased implementation seeks to ensure that sufficient planning can occur and resources will be in place in the Family Court system for the additional cases.

Current requirements for arrest and interrogation for youth in Family Court would be extended to all youth under the age of 18. Thus, when a 16- or 17-year-old is arrested, the police would be required to make reasonable efforts to contact a parent or other legally responsible adult. Youth would also be questioned in a location deemed suitable for youth and a legally responsible adult must be notified of the youth’s Miranda rights.

The cases of 16- and 17-year-olds who remain in Criminal Court would be heard in a new Youth Part created in the superior court of every county. Youth Part judges would receive

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14 As defined by Criminal Procedure Law § 1.20(42) and Penal Law § 30.00.
15 As defined by Penal Law 70.02(1).
19 Id.
specialized training and would have expanded discretion to remove cases to Family Court or to retain cases in the Youth Part, but apply all of the provisions and protections of the Family Court Act upon finding that it is in the interests of justice.\textsuperscript{21} Additionally, the juvenile probation department will conduct a risk and needs assessment of all youth in the Youth Part who are not detained, and provide referrals to appropriate intervention services in order to enhance case outcomes.\textsuperscript{22} Finally, all 13- to 17-year-olds would be sentenced under a new determinate sentencing scheme that would require a period of post-release supervision.\textsuperscript{23}

The Proposal contains some modifications of the Family Court Act specific to 16- and 17-year-olds. These youth, whose cases would now originate in Family Court under the change in juvenile jurisdiction, would retain the right to bail.\textsuperscript{24} Also, 16- and 17-year-olds could be charged in Family Court with disorderly conduct and harassment in the second degree, both violation-level offenses that youth can be charged with in Criminal Court, but not Family Court, under the current system.\textsuperscript{25}

The Proposal would also raise the lower jurisdiction of Family Court for juvenile delinquency petitions. Currently, children can be charged as juvenile delinquents at the age of 7. The legislation would raise that age to 12, except for children charged with Murder in the First and Second Degrees, for which the age would be 10.\textsuperscript{26}

2. \textit{Removing Youth from Adult Jails and Prisons}

Under the Proposal, no youth under the age of 18 would be detained in adult jails, regardless of whether they are in Family or Criminal Court.\textsuperscript{27} The new facilities developed by the Office of Children and Family Services (OCFS) to accommodate these additional youth will be smaller, more home-like facilities that follow a group-oriented system of change model.\textsuperscript{28} Youth adjudicated as Juvenile Offenders or Youthful Offenders in Criminal Court will be held in OCFS custody if they are under 21-years-old at the time of sentencing and may remain in OCFS custody until the age of 23.\textsuperscript{29} OCFS may transfer youth who turn 18 while in OCFS placement to

\textsuperscript{21} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §§71, 80. Different standards for waiver would apply depending on the severity of the crime.
\textsuperscript{22} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §80.
\textsuperscript{23} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §§55, 57.
\textsuperscript{24} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §14.
\textsuperscript{26} Id.
\textsuperscript{27} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §60.
\textsuperscript{28} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §508.
\textsuperscript{29} New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §95.
DOCCS adult prisons only if the commissioner certifies that there is not a substantial likelihood that the youth will benefit from OCFS programs.  

3. Reducing Collateral Consequences

Consistent with the current understanding of adolescent neurobiology, which indicates that important parts of the human brain continue to develop until the mid-20’s, the Proposal expands the eligibility for a youthful offender adjudication, which replaces convictions and makes the court records confidential, from age 19 to age 21. The Proposal also requires the court records for all youth who are eligible for a youthful offender adjudication (except those charged with sex offenses) be confidential while the case is pending and that the proceedings can be held confidentially upon request. Confidentiality of records while cases are pending ensures that if a young person is eventually granted a youthful offender adjudication, the full effect and intention of this adjudication are not thwarted because the information has been obtained previously by online “mugshots” websites, background check companies, or other publicly available sources.

The Proposal also creates two new sealing mechanisms for youthful convictions. Any youth under the age of 21 who is convicted as an adult would be eligible to have his or her case conditionally sealed after remaining conviction-free for a specified number of years. The sealing will be automatic unless the district attorney requests at the time of sentencing that any future sealing application be made on notice and to the sentencing court.

A person with a conviction that occurred before the age of 21 and prior to the effective date of the legislation will be able to apply to the sentencing court to have the conviction sealed after remaining conviction-free for specified time periods. Upon application, the court will provide notice to the district attorney’s office and determine whether the sealing criteria have been met and whether a preponderance of the evidence shows that sealing is in the interests of justice.

In either instance, the sealing is conditional; it will be revoked upon a new arrest. However, if the new arrest does not result in a criminal conviction, the sealing will be restored.

33 New York State Executive Budget 2015-16, Education, Labor, and Family Assistance Article VII Legislation, Part J, §67. Two years for a misdemeanor, 5 years for a non-violent felony, and 10 years for a juvenile offense or violent felony. The applicant can have no pending cases.
34 Id.
35 Id.
36 Id.
37 Id.
In addition, courts, criminal justice agencies, and law enforcement agencies, will still have access to sealed information for law enforcement and gun licensing purposes.38

4. Expanded Diversion from Courts and Placement

Under the Proposal, the process of adjustment—whereby a youth who has been arrested meets with a juvenile probation officer who determines whether probation monitoring or referral to services is an appropriate alternative to being referred to the court for prosecution—will be available to a larger number of youth. This process is consistent with research showing that when low-risk youth penetrate deep into the justice system they are more likely to re-offend; thus, diverting low-risk youth from courts early decreases recidivism while providing access to low-cost interventions that have been proven successful, such as mediation, youth courts, and restorative justice practices. In addition to making adjustment available to the 16- and 17-year-olds whose cases will now be in Family Court, the Proposal also requires departments of probation to “diligently attempt” to adjust violation and misdemeanor allegations.39 It also mandates the use of validated risk assessments to inform adjustment, while mandating that probation departments consider the extent of physical injury to the complainant, where applicable.40

Probation departments will also be armed with more tools and resources to facilitate adjustment. Instead of two months, the legislation would give probation departments an initial four months to make adjustment attempts, with an additional two months upon court approval.41 The Proposal would also allow probation officers to apply to the court for an order of protection as part of the terms of adjustment.42 Finally, the Proposal would expand the authority of probation departments to adjust designated felony charges, unless there was physical injury to the complainant, and allow adjustment of cases that have been removed from Criminal Court, with the court’s permission.43

The Proposal also addresses concerns that moving 16- and 17-year-olds under juvenile jurisdiction might increase their exposure to confinement for minor offenses or minor violations of probation. In New York City, 59% of detention admissions are for youth charged with misdemeanors.44 Statewide, 53% of youth placed in OCFS facilities are charged with misdemeanors.45 It is also believed that a significant number of youth are placed in OCFS facilities for violating the terms or conditions of probation, other than commission a new offenses, which are known as technical violations of probation.46 To address these concerns, the

38 Id.
40 Id.
41 Id.
42 Id.
43 Id.
44 Commission Report at 96.
45 Id.
46 Data collection about technical violations probation is inconsistent throughout New York State. However, the Office of Juvenile Justice and Delinquency Prevention estimates that, nationally, 16% of youth in out-of-home
Proposal would prohibit detention and placement of low-risk youth charged with violations and most misdemeanor charges, unless the court finds that there is an imminent risk to public safety and states the reasons on the record. Similarly, courts could not detain or place youth for technical violations of probation where no new crime is alleged, unless the youth poses a specific, imminent threat to public safety or is on probation for a violent felony and graduated sanctions have been exhausted.

Finally, to create additional capacity in the youth systems, the Proposal contains provisions that would reform the Persons in Need of Supervision (PINS) system, thereby reducing the overall number of youth in detention and placement. A PINS is defined as a youth under the age of 18 who does not attend school as required, is incorrigible, is ungovernable, is habitually disobedient and is beyond the lawful control of a parent or other person legally responsible; violates the penal code regarding marijuana or prostitution; or appears to be a sexually exploited child. Currently, these youth can be removed from their homes and detained or placed in out-of-home facilities. New York City undertook reform of its PINS systems in the past ten years; however, in 2013, 627 youth in New York State were placed in out-of-home facilities after adjudication as a PINS, with a median stay of 18 months. This response is expensive and disrupts a young person’s education and health, including mental health care, while doing little to strengthen family response.

Thus, the Proposal would require the creation of Family Support Centers in the highest need areas of the state. The Family Support Centers, based on a promising model from Connecticut, would provide referrals for a broad range of family services and crises responses, including counseling, mediation, mental health care, and respite care. The Proposal would simultaneously prohibit detention and placement of youth who are the subject of a PINS petition. Importantly, the lead PINS agency (either the local social services district or the probation department) would be required to assess all youth for sexual exploitation, and it would leave open the option of placement in a long-term safe house for youth who are exploited.

C. Analysis

With one limited exception, NYCLA supports the Proposal. The Proposal represents a comprehensive approach to reforming youth justice that is research-based and is designed to lead

placements had a technical violation of probation listed as the most serious offense leading to placement.
Commission Report at 97.


49 Family Court Act §712(a). PINS are also widely known as “status offenders.”

50 Commission Report at 100. 89 percent of PINS placements were youth outside of New York City. Id.

51 Commission Report at 103.


to better youth outcomes and increased public safety. Integral to the ultimate success of these reforms, the 2015-16 New York State budget includes $25 million for planning and implementation of this Proposal and $110 million in capital appropriations for OCFS.

The Proposal has the support of many key system players. The Office of Court Administration has announced its full support for the Proposal, stating that the Family Court is in a position to absorb the additional cases and that it is “the best court for these cases.” In a letter to Governor Cuomo, a bi-partisan group of sheriffs from around New York State supported the proposal and urged its passage. Joel Copperman, President and CEO of CASES, and a member of the Commission, stated that “The Governor’s Proposal is a bi-partisan and pragmatic approach to creating a youth justice system that better serves the needs of youth, families, and communities.”

NYCLA’s only concern is that the Proposal would allow prior youthful offender or juvenile offender adjudications for violent felonies to be used as a predicate sentence for future charging and sentencing decisions by imposing a “second felony offender” label in these cases. Effectively, under the Proposal, youth with prior youthful or juvenile offender adjudications who are charged with a felony in the future would now be subject to mandatory minimum sentences. The rationale for the change to mandatory minimum sentences in these cases is that it would allow judges to consider these prior adjudications in sentencing decisions; however, this rationale does not survive scrutiny. Under the current law, judges and prosecutors have access to these adjudications and may take them into consideration. There is enough room and discretion in the current sentencing statutes for the courts to sentence youth in a second case more harshly without imposing the “second felony offender” label. This regressive proposal would remove a judge’s discretion by requiring mandatory minimum prison sentences attendant with second felony offender status; therefore, NYCLA opposes it.

NYCLA also recommends several additional items as part of the Proposal. First, Youthful Offender eligibility should not require that a judge make a finding of specific mitigating circumstances surrounding the commission of armed felony offenses. Judges should have full discretion to impose a Youthful Offender adjudication where it is in the interests of justice, without being limited solely to the circumstances of the offense. Additionally, although we applaud the Proposal for including planning and implementation funding, there must also be sufficient court staffing, full training to all court actors on dispositional options, and funding for court diversion models, such as youth courts and restorative justice practices. In this regard, NYCLA has long been aware of the shortfall in funding in the Family Courts and urges vigilance to ensure that the increased responsibilities that the Proposal would impose on the Family Courts are adequately funded.

54 New York State Executive Budget 2015-16, Capital Projects Budget.
55 Jeff Story, State Court System Back Cuomo Juvenile Justice Plan, NYLJ, February 20, 2015.
D. Conclusion

The Proposal, and the Commission Report upon which it is based, describe a comprehensive framework to improving the youth justice system in New York. The work of the Commission included a thorough study of the current systems, and best practices in New York and across the nation. The Commission’s recommendation were informed by a broad spectrum of key justice system players, including advocates, community members, law enforcement, prosecutors, and public defenders.

NYCLA supports the Proposal and urges that it be reintroduced and passed this legislative session.