



TESTIMONY OF:

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**Presented before
The Senate Standing Committee on Children & Families
and
Senate Standing Committee on Crime Victims, Crime & Correction**

**Public Hearing
on
Raising the Age of Criminal Responsibility**

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My name is Lisa Schreibersdorf. I am Executive Director of Brooklyn Defender Services (BDS). BDS provides multi-disciplinary, and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for tens of thousands clients in Brooklyn every year. Our office has a specialized adolescent unit, called the Brooklyn Adolescent Representation Team,

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which represented more than 1900 13- to 17-year-olds in Brooklyn criminal and Supreme Court in 2015. In 2016 that number fell to just over 1400. The vast majority of our adolescent clients are charged with misdemeanors and last year only a handful of our clients were sentenced to upstate prison time. At any given time about thirty of our adolescent clients are detained pre-trial at Rikers Island.

I thank the Senate Standing Committee on Children and Families and the Senate Standing Committee on Crime Victims for inviting me to speak today about raising the age of criminal responsibility in New York and its impact on the young people that BDS attorneys currently represent.

There is no doubt that New York can and must do better for young people in the criminal justice system. First and foremost, any legislation must involve removing youth from the custody of local jails and NYS Department of Corrections and Community Supervision (DOCCS) prisons as quickly as is feasible and transferring them to safer and more rehabilitative youth facilities. The horrors that 16- and 17-year-olds suffer in adult jails and prisons are well documented and are discussed in detail in the Governor's own Commission for Youth, Public Safety and Justice Report issued in 2015. Over the past few years advocates across the state have done an incredible job of educating the public and policymakers about the significant harm that 16- and 17-year-olds suffer in adult jails and prisons. We are deeply grateful for their constant efforts to advocate for the immediate removal of youth from adult facilities.

However, as the attorneys who represent these young people in court, we are deeply concerned about any proposal that would harm the tens of thousands of 16- and 17-year-olds who are never exposed to jail or prison time in the adult system, but could potentially face those exact penalties in family court under previous Raise the Age proposals. Yes, we must remove the minority of youth who will be incarcerated from adult facilities, as soon as possible. But we firmly believe that the legislature must not sacrifice the welfare of the vast majority of youth whose cases would be transferred to the more draconian and less transparent Family Court system in its efforts to “raise the age.”

Furthermore, any legislation that intends to improve outcomes for adolescents must navigate the reality that both our adult and juvenile justice system are deeply racist and disproportionately harmful to Black and Latino youth. While only 64 percent of New York City youth are black or Latino, they make up 88 percent of the youth arrested in the city, 92 percent of the youth detained pre-trial, 90 percent of the youth placed in non-secure facilities and a shocking 97 percent of New York City youth in secure Office of Children and Family Services (OCFS) facilities.¹ Some upstate counties have studied and observed even more disparate outcomes. According to the New York State Juvenile Justice Advisory Group, *black youth in Monroe County were 20 times more*

¹ The Vera Institute of Justice, *A Report of the New York City Working Group on Reducing Disproportionate Minority Contact in the Juvenile Justice System* (April 20, 2012), available at <http://www.nysjag.org/documents/nyc-dmc-final-report-4-12.pdf>.

likely than white justice-involved youth to be admitted to secure detention. In Onondaga County, black youth comprised only 15 percent of the county's youth population and only 38 percent of the City of Syracuse's youth population, but they represented almost three-quarters (73%) of the admissions to secure detention in 2010. Black youth in Onondaga were thus detained at a rate almost five times as high as their proportion in the county's population.² In New Jersey, WNYC just exposed that in some counties, family court judges are twice as likely to approve requests from District Attorneys to prosecute black children as adults than for white or Latino kids.³ BDS is deeply concerned about any legislation that will give judges more power to sentence youth harshly without providing any additional procedural safeguards to limit racial bias and the potential for incarceration and harsher treatment for young people of color.

Not surprisingly, some states that have raised the age are now faced with the reality that removing cases to an imperfect juvenile court system does not always create better outcomes for youth.⁴ States that studied the problems with their delinquency system and used raise the age legislation as an opportunity to improve how they treat

² New York State Juvenile Justice Advisory Group, *2011 Annual Report* (2011), available at <http://www.nysjag.org/documents/JJAGReport2011.pdf>.

³ Sarah Gonzalez, *Kids in Prison: Getting Tried as An Adult Depends on Skin Color*, WNYC, Oct. 10, 2016, available at <http://www.wnyc.org/story/black-kids-more-likely-be-tried-adults-cant-be-explained>.

⁴ See Eli Hager, *In Some States, Raising the Age for Adult Court is the Easy Part, But in South Carolina, Making the Juvenile System More Humane Will Be Much Harder*, THE MARSHALL PROJECT, Sept. 27, 2016, available at <https://www.themarshallproject.org/2016/09/27/in-some-states-raising-the-age-for-adult-court-is-the-easy-part#.aHVsPpX0k>.

adolescents in Family Court have fared much better.⁵ BDS calls upon the legislature to work with defenders, the people who have spent their lives fighting for young people in court, to pass raise the age reform that will, beyond ensuring that no young person is worse off than they are under the current law, that New York leads the way in the creation of an adolescent justice system that meets the unique needs of older adolescents in line with modern neuroscience and social science research.

We propose two options for the legislature:

- 1. Move all youth under the age of 18 into Family Court, no matter what crime they are charged with, and amend the Family Court Act to ensure that youth do not receive harsher punishments in family court than they do in adult court.*

Sending all 16- and 17-year-olds to Family Court would allow judges to see the wide range of adolescent behavior and allow them to better discern between normal but inappropriate adolescent behavior, like taking another student's backpack or cell phone at school, and the small percentage of young people who actually commit serious crimes, like rapes and murders. If the ideological underpinning of raise the age is that adolescents are neurologically different than adults and thus less culpable for their actions, then the same holds true for adolescents who commit serious crimes. We

⁵ See LSU Health New Orleans Institute for Public Health and Justice, *A Legislated Study of Raising the Age of Juvenile Jurisdiction in Louisiana: The Future of 17-year-olds in the Louisiana Justice System* (2016), available at

<http://media.nola.com/politics/other/LSUHSC%20IPHJ%20HCR73%20RAISE%20THE%20AGE%20STUDY%20REPORT%202016.pdf>.

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believe that if Family Court judges saw the whole spectrum of adolescent behavior, they would not be inclined to punish low-level crimes with extended terms of probation with onerous conditions or send a child into placement as they often do today.

Furthermore, the legislature should take away the power of Family Court judges to punish a child more harshly under the Family Court Act than they would be able to punish an adult, for the same action, under the Penal Law and the Criminal Procedure Law. If we are committed to raising the age to promote better outcome for youth and communities, then we must also make long-overdue changes to New York's Family Courts to ensure due process protections, fairness and transparency for all youth, including younger teenagers.

You must also provide funding for more judges and court staff, as our state's family courts are severely under resourced and overcrowded. Currently, Article 10 child welfare cases can take well over a year from opening arguments until a judge's decision. Vulnerable families with cases in other parts of the family court system should not be further harmed because of any raise the age legislation.

2. *In the alternative, BDS proposes the creation of hybrid adolescent courts where judges would have the authority to act under either the Criminal Procedure Law or the Family Court Act.*

Because of many of the systemic problems ingrained in our family courts, we propose that New York institute adolescent courts that combine the protections of the

adult criminal system with the programming and possibilities for rehabilitation and sealing in the family court. The court would provide a series of options for quick resolution prior to invoking the highly intrusive procedures in the Family Court Act. Adolescents would maintain their constitutional rights to a jury trial, to be free from self-incrimination and the ability to plea bargain. However, no adolescent should be eligible for adult sentencing, and certainly no adolescent should be eligible for a life sentence. The default should be that most adolescents would avoid incarceratory sentences altogether, and the court would be resourced with alternative to incarceration programs to ensure that even more youth diverted from possible jail and prison sentences. *BDS testified in detail about what such a court could look like at the New York City Council Hearing last month. A copy of that testimony is available at: <http://bds.org/wp-content/uploads/2017.01.19-City-Council-testimony-on-RTA.pdf>.*

The Lippman Bill

Fortunately, the legislature already has a bipartisan model for such legislation that could serve as an important starting point for a more nuanced raise the age conversation. We would ask your committees to take a look at **S. 7394 (Saland)/A.10257 (Lentol)** from 2012 and **S. 4489A (Nozzolio)/A.7553A (Lentol)** from 2013. The bills were iterations of Former Chief Justice Lippman's Raise the Age Proposal, titled the "Youth Court Act" that would establish a new "Youth Division" to adjudicate cases involving

16- and 17-year-olds and combine the best features of the Family Court and the criminal courts.

Importantly, the 2012 bill required young people tried in the youth part to be held in juvenile facilities, but the 2013 bill did not.⁶ BDS firmly believes that 16- and 17-year-olds who have their cases heard in this specialized court part must be removed from adult jails and prisons. Any raise the age legislation that will garner our support must move youths charged with crimes committed when they were 16 or 17 years old into juvenile facilities.

BDS notes that both the 2012 and the 2013 Lippman bills would exclude youth charged with violent crimes from having their cases heard in the part.⁷ For the same reasons stated above, it is critical that judges in this part see the wide range of adolescent behavior, including violent criminal behavior. Instead of having the Family Court Act sentencing procedures apply, however, the court could apply the Juvenile Offender Act sentencing to youth charged with violent crimes and be entitled to serve out their sentences until their 21st birthdays in rehabilitative youth facilities. We strongly recommend that the legislature insist that all cases involving 16- and 17-year-olds go to the youth division, as the Lippman bill calls it, and that those young people not face adult sentencing if convicted.

⁶ See 2012 bill p. 8, 722.20(4)(a) and p. 11 line 30 versus 2013 bill, also page 8 at 722.20(4)(a) and p. 11 line 33.

⁷ See 2012 bill p. 2, CPL 1.20(44) and 2013 bill, pp. 2-3, CPL 1.20(44).

Finally, additional steps should be taken to mitigate the long-term consequences of court contact for 16- and 17-year olds, including raising the age of youthful offender status, opportunities for sealing of prior criminal records, and the elimination of fines, surcharges and civil judgments previously imposed.

Problems with the Governor's Raise the Age Proposal (2017)

BDS has serious concerns about the Governor's Raise the Age proposal as drafted in the FY2018 NYS Executive Budget Education, Labor and Family Assistance Article VII Legislation. We raised these concerns with the legislature and executive branch in previous years yet they remain unaddressed in the current version.

Our gravest concern is that the young people most in need of the rehabilitative programming available in the Family Court are excluded from the court altogether and would have their cases heard in adult court as Juvenile Offenders under a new, expanded list of crimes. But perhaps more troublingly, the bill would move youth charged with low-level crimes to Family Court, where they face long periods of probation and placement for misdemeanor crimes where the vast majority receive an Adjournment in Contemplation of Dismissal (ACD) on the first court date. Furthermore, according to the Governor's Commission report, 75 percent of 16- and 17-year-olds already have their convictions converted to Youthful Offender adjudications, sealing their conviction from the public and protecting them from adult sentencing

ranges. The Governor's bill, and indeed many of the bills put before the legislature in previous sessions, would subject this group of young people, the vast majority of 16- and 17-year-olds charged with crimes in New York, to harsher sentencing under the Family Court Act.

While it may seem counterintuitive, the research is clear: when it comes to youth, it is best to steer non-violent youthful offenders out of the justice system. Studies show that the vast majority of first-time offenders will never be arrested again, regardless of any intervention they receive. Almost 70 percent of youth who are arrested once are never arrested again. 20 percent of young offenders are re-arrested two or three times, with only six to eight percent falling into the category of three arrests or more.⁸ Re-arrest rates appear to mirror the reality in the streets. A recent study found that 91.5 percent of justice-involved youth reported decreased or limited illegal activity during the first three years following their court involvement.⁹ Re-offense statistics hold true whether or not first-time offenders are provided diversion interventions.¹⁰ What New

⁸ Center on Juvenile and Criminal Justice, "Widening the Net in Juvenile Justice and the Dangers of Prevention and Early Intervention" (August 2001), 4-6, available at <http://www.cjcj.org/uploads/cjcj/documents/widening.pdf>. See also Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, *Delinquency in a Birth Cohort*, Chicago: University of Chicago Press, 1972; Michael Schumacher and Gwen A. Kurz, *The 8% Solution: Preventing Serious, Repeat Juvenile Crime*, Thousand Oaks, California: Sage Publications, 1999.

⁹ Edward P. Mulvey, "Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders," OJJDP JUVENILE JUSTICE BULLETIN (March 2011), available at <https://ncjrs.gov/pdffiles1/ojjdp/230971.pdf>.

¹⁰ Ted Palmer and Roy V. Lewis, *An Evaluation of Juvenile Diversion*, Cambridge: Oelgeschlager, Gunn & Hain, 1980.

York should be doing then, is diverting first time offenders from the system as quickly as possible, as most adult criminal courts already do in most counties in this state, and investing significant resources only in the 20% of cases that are medium or high-risk: cases involving violent or serious crimes. This bill would do the opposite.

Our concerns do not end there. This year and last year's Governor's budget bill would also:

- Increase the mandatory minimum for 16- and 17-year-olds convicted of B violent felonies to 5-20 years with a possible bump down if the judge determines that sentence to be "unduly harsh", as compared to the 3.33-10 years that 14- and 15-year-old face under the existing Juvenile Offender statute.
- Expand the list of designated felonies that expose youth in Family Court to a mandatory 3-5 years in placement, harming youth in the Family Court system as compared to the existing law.
- Allow 16- and 17-year-olds to be charged with violations of harassment and disorderly conduct in Family Court, unlike their younger counterparts, exposing older teens to greater police intervention and much harsher punishment for non-criminal acts in Family Court than they could ever face in adult court.
- There is a post-conviction sealing option in the bill, but it would require people to wait ten years before making the application for sealing, even though Raise

the Age is supposed to be about ensuring that adolescents have the right to second chances in their youth.

- While the bill would technically raise the age of Youthful Offender status, it does not allow 19- and 20-year-olds to be eligible for YO sentencing and the adjudication would count against them if they were to pick up charges at a future date, in stark contrast to the existing law.
- The bill would increase the number of Juvenile Offender cases, significantly increasing the number of youth whose cases would be heard in adult court, and removing the opportunity for youth charged with more serious crimes (but not the *most* serious crimes) from the protections of Family Court.
- While the bill slightly increases the scope of cases that probation should be required to adjust in delinquency cases, it provides so many exceptions (and exceptions to exceptions) so as to make the new presumptions nearly meaningless.
- There is no mention of concurrent jurisdiction under both the criminal procedure law and the Family Court Act for judges in the Youth Part in Supreme.
- And finally, this bill, as compared to previous bills, puts much of the financial responsibility of raising the age back on to cash-strapped counties who can ill afford any increase in costs for the juvenile and criminal justice systems.

In contrast to the executive budget proposals, in 2014 New Jersey state bill S2003/A4299 raised the minimum age for what we in New York would call JO eligibility from 14 to 16, narrowed the list of offenses that would be JO eligible, and amended the standard governing such standards.¹¹ The New Jersey bill went into effect in 2016.

Under the new law, prosecutors must prove by clear and convincing evidence that the reasons for transfer to adult court outweigh the probability of the juvenile's rehabilitation by the use of the procedures, services and facilities available to the Family Court prior to the juvenile reaching the age of 26. The new bill also requires due process, including representation by counsel, before a young person who is confined in a juvenile facility can be transferred to an adult prison. The bill also eliminates the use of solitary confinement as a disciplinary measure in juvenile facilities and detention centers, and places time limits on the use of solitary confinement for reasons other than punishment, such as safety concerns.

In regards to the transfer of young people most in need of the intensive services that family courts can provide, New Jersey improved their statute to make it more in line with modern brain science. In contrast, New York's 2016 same-as bill applied the outdated existing statute to 16- and 17-year-olds and the Governor's bill increased the list of crimes and punishments for 16/17 year-olds who would be tried as JOs. More

¹¹ See New Jersey Juvenile Justice Commission Office of the Deputy Executive Director, Operation, *Memorandum on S-2003- 13:91 Amendments Implementation Directive Effective March 1, 2016*, available at <http://www.state.nj.us/lps/jjc/pdf/S-2003--Interim-Implementation--DFTJTD0C.pdf>.

punitive policies such as these are particularly harmful to young people of color who make up the majority of cases referred to New York's Family Courts.

My staff and I are willing to explain further why many of these details are of concern. As the people who currently represent adolescents ages 13- to 17-years old in adult courts, we know that the details are the difference between a second chance and prison time. We firmly believe that any of our clients, no matter their age, is entitled to the protections provided to them by the New York and U.S. Constitutions. The words in the legislation matter and will have a direct impact on the young people that we are purporting to help by raising the age.

It is clear that the legislature must act to remove 16- and 17-year-olds from adult jails and prisons. But we hope that the concerns and proposals we raise today help you to move forward on legislation that, at the very least, will not make any young people worse off tomorrow than they are today, and even better, may drastically improve outcomes for *all* adolescents, their families and communities. New York can and should do this. Your public defenders are here to help.

If you have any questions about my testimony, please feel free to reach out to me at lschreib@bds.org or 718-254-0700 or BDS policy attorney Andrea Nieves at anieves@bds.org.