



**BROOKLYN
DEFENDER
SERVICES**

March 3, 2015

Carl Heastie
Speaker, New York State Assembly
Legislative Office Building, Room 932
Albany, NY 12248

RE: Recent legislation on sex offenders

Dear Speaker Heastie:

As the Executive Director of Brooklyn Defender Services (BDS), I write regarding a package of legislation relating to sex offenders that recently passed the New York State Senate, and is currently under consideration in the New York State Assembly. BDS provides innovative, multi-disciplinary, and client-centered criminal defense, family defense, immigration, civil legal services, social work support and advocacy to more than 40,000 indigent Brooklyn residents annually. In addition to providing our clients with a zealous defense and wraparound services, we endeavor to share our on-the-ground experience with the implementation of the laws of our City and State to inform the work of policymakers and enhance public policy.

On February 26, the New York State Senate passed nine bills that generally augment existing restrictions on the movement and residence of individuals convicted of sex offenses, expedite risk level determinations, and impose a reporting mandate on school districts. While I have concerns about each piece of legislation, I will focus my comments on those which relate to broadening restrictions on subject offenders' movement and residence.

One key provision that would be expanded by **S.1520/A.5165**, **S.2950/A.752**, **S.3926/A.1658** and **S.2981/A.889** prohibits subject offenders from "knowingly enter[ing]" any area within 1000 feet of a school or child-care facility. Contrary to the way it is often described, this provision is far broader than a residency restriction—it is wholesale exclusion from any densely populated area, like New York City. The prevalence of these exclusion zones effectively precludes many subject offenders from legally entering their home neighborhoods, and even boroughs.

Such wholesale exclusions substantially burden New Yorkers' constitutional rights. First, the exclusion statute substantially interferes with subject offenders' First Amendment right to

maintain intimate associations with their Brooklyn-rooted families without in any way furthering the State's interest in preventing prospective sex abuse against children.

Second, the exclusion statute violates the substantive due process rights of all subject offenders to travel to and around their homes for any innocent purpose—to be with their children, to work or obtain medical or rehabilitative services, or to otherwise visit the State's most populous regions—with no determination that such banishment even marginally serves a compelling government interest in child safety.

Finally, the exclusion statute constitutes an *ex post facto* punishment, effectively increasing the penalty imposed for an individual's crime by exiling her from her home and community well after imposition of a sentence that included no such banishment. The Constitution's *ex post facto* clause prohibits an increase in punishment for a crime after it was committed—which is exactly what any expansion of the existing exclusion would do. Indeed, a New York Supreme Court judge in Brooklyn recently ruled that the statute was retroactively punitive as written, without further enhancement, and was thus being applied in violation of the Constitution.¹

The substantial burden on constitutional rights imposed by these enhanced restrictions would only be permissible if they furthered New York's interest in protecting children, but exclusions and residency restrictions are actually counter to public safety. The stated purpose of the exclusion statute is to prevent high-risk sex offenders from committing sex crimes against children. This is an important goal for all of us. I am a parent and I understand as well as anybody the urge to protect one's child. That said, the exclusion statute is not an effective, or even rational, means of achieving this result.

Studies highlighted by the New York State Division of Criminal Justice Services ("DCJS"), the State agency responsible for administering the Sex Offender Registry, show that most offenders who molest children molest family members and close acquaintances. The U.S. Department of Justice reports that 93% of sexual assault victims under the age of 17 were assaulted by someone they knew.² Thus, opportunities for the most likely offenses against school-aged children are not diminished by keeping offenders away from schools, and the prohibition does not advance that purpose.

Furthermore, statistical research demonstrates that most sexual assaults take place in a home, and not in a park or on a school ground. Only 11% of sexual assaults on victims aged 12 and older occurred on school property or in a yard, park, field or playground; and only 16% of sexual assaults on youth below the age of 12 occurred in a place other than a residence.³ The Colorado Department of Public Safety found that convicted child molesters in Colorado who committed another sex offense while on probation were randomly scattered throughout the geographical area, and did not seem to live closer to schools or child care centers than those who did not commit another sex offense.⁴

¹ See *Devine v. Annucchi*, 5406/12, NYLJ 1202672226429, at *1 (Sup., KI, Decided September 29, 2014).

² See DCJS Website, "Myths and Facts: Current Research on Managing Sex Offenders," Myth 1, available at http://www.criminaljustice.ny.gov/nsor/som_mythsandfacts.htm (last visited Apr. 1, 2014).

³ *Id.* at Myth 9 (citing recent Bureau of Justice statistics).

⁴ *Id.* (citing Colorado Department of Public Safety, 2004).

Yet more evidence-based research shows that, among the small group of offenders who do attack strangers, most do so away from their own neighborhoods. A meta-analysis on the journey-to-crime of sex offenders found that on average, most sexual offenders traveled a minimum of one mile from their home to commit their crime.⁵ Another study in Minnesota showed that when offenders did make contact with juveniles, they often did so more than a mile away from where the offender lived. Of the few offenders who directly contacted a juvenile near the juvenile's home, none did so near a school, park, or playground. The study concluded that none of the 224 offenses examined would have been prevented by an exclusion restriction.⁶ Thus there is no valid suggestion that New York's exclusion statute, which prevents offenders from living near schools, will appreciably reduce sex offenses against children. Potential sex offenders travel to areas they do not live to commit such crimes.

In sum, even according to the State of New York's own criminal justice agency and the studies it proffers to the public,⁷ there is not even a suggestion, let alone evidence, that a serious constitutional infringement is justified because an exclusion restriction like the one expanded by these pieces of legislation actually makes children safer or reduces the likelihood of a child sexual assault by a convicted offender—even marginally. To the contrary, by making it more difficult, if not impossible, for offenders to readily comply with rehabilitative post-release conditions—making it harder for them to keep medical appointments, attend treatment programs, check in with a parole officer, and gain and keep employment—all because the appointments, doctors, and jobs are located within 1,000 feet of a forbidden area, the statute likely *increases* the risk to the public that the designated “high-risk” offenders will re-offend.

In a case recently litigated by BDS attorneys, our client's primary physician was indeed located in the excluded area. His attorneys and the courts were within the excluded area as well. So was the parole office to which our client had been required to report, forcing him to choose between “knowingly enter[ing]” a forbidden area, thus subjecting himself to re-incarceration, or not checking in to his assigned parole office, which also subjected him to re-incarceration. The same was true of the $\frac{3}{4}$ home to which our client was required to report after being forcibly removed from his family home—it, too, sat squarely in an excluded area, as did his sex offender treatment program. Absurdly, he was subject to re-incarceration for dutifully reporting to the offices and facilities to which State officials have ordered him to report, until his exclusion was overturned

⁵ *Id.* (citing study by Beauregard, Proulx & Rossmo, 2005).

⁶ *Id.* (citing study by Duwe, Donnay & Tewksbury, 2008).

⁷ The studies cited in this Memorandum are limited to those advanced as credible by the State of New York on the DCJS website and materials, but there are many more. *See, e.g.*, Neil Osterwell, “Study Finds Fault With Sex-Offender Restriction Laws,” *Clinical Psychiatry News* (Nov. 2011), *available at* [http://www.clinicalpsychiatrynews.com/index.php?id=2407&cHash=071010&tx_ttnews\[tt_news\]=88778](http://www.clinicalpsychiatrynews.com/index.php?id=2407&cHash=071010&tx_ttnews[tt_news]=88778) (accessed Apr. 1, 2014) (discussing recent studies, some focused on New York, showing how blanket residence restrictions are counter-productive, stating: “[Residence restrictions] often keep offenders far away from needed psychiatric services, job prospects, and social support,” and “one of the conclusions that has come from a number of studies is that the legislation is not only not helping with the recidivism rates of sex offenders in the community, but may actually be worsening recidivism rates, and that the collateral damage being done by this legislation nationally is self-defeating”); Beth M. Huebner, et al., Report, “An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri,” at 10 (July 2013) (quantitative study concluding that “[t]he findings from the current research suggest that the residency restrictions had little effect on recidivism. The geographic and qualitative analyses indicate that restrictions may further complicate reentry.”).

by a judge on the aforementioned constitutional grounds. Judges in other jurisdictions are also recognizing that these sweeping exclusions are unconstitutional and unworkable.⁸

Efforts to rehabilitate offenders and minimize the rate of re-offending, which should be the goal of any legislation, are much more successful when offenders are employed, have family and community connections, and have a stable residence—all of which are undermined by exclusion restrictions. Exclusion statutes are known to drive offenders into homelessness, which makes it harder to supervise them. Within six months of the implementation of Iowa's exclusion restriction, for example, thousands of sex offenders became homeless or transient and thus more difficult for authorities to track and monitor. According to a report by the New York State Division of Criminal Justice Services, “The number of registered sex offenders in Iowa who could not be located more than doubled, damaging the reliability and validity of the sex offender registry.” The report quotes an Iowa Sheriff: “We are less safe as a community now than we were before the residency restrictions.”⁹ And in January 2008, the California Sex Offender Management Board reported an increase of 715% in parolees subject to exclusion restrictions who registered as “transient” since the law took effect.¹⁰ General criminal recidivism research also shows that forcing sex offenders into homelessness doesn't mitigate the problem either: risk of re-incarceration increased 17% with post-release shelter stays.¹¹

There is no known correlation between exclusion statutes and reducing sex offenses against children. Instead, such restrictions cause offenders to become homeless or to change residences without notifying authorities, and do not serve public safety. I respectfully request that you consider the integrity of the Constitution and the safety and well-being of all New Yorkers, and oppose these misguided bills.

Sincerely,

Lisa Schreibersdorf
Executive Director
Brooklyn Defender Services

Cc:

Assembly Member Daniel J. O'Donnell, Chair, Committee on Correction
Assembly Member Joe Lentol, Chair, Committee on Codes
Daniel Salvin, Assistant Secretary for Program and Policy

⁸ See, e.g., “California Supreme Court Rejects Blanket Ban on Where Sex Offenders Can Live,” Los Angeles Times (Mar. 2, 2015), available at <http://www.latimes.com/local/lanow/la-me-ln-california-supreme-court-sex-offenders-20150302-story.html>.

⁹ See DCJS Website, “Myths and Facts: Current Research on Managing Sex Offenders,” Myth 9, available at http://www.criminaljustice.ny.gov/nsor/som_mythsandfacts.htm (citing Rood, 2006; Human Rights Watch, 2007).

¹⁰ *Id.* (citing California Sex Offender Management Board, 2008).

¹¹ *Id.* (citing Metraux & Culhane, 2004).