



**TESTIMONY OF:**

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**BROOKLYN DEFENDER SERVICES**

**Presented before**

**The New York City Council Committee on Education**

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My name is Shelle Shimizu and I am an attorney at 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 over 30,000 clients in Brooklyn every year. I thank the Committee on Education for holding this hearing and for providing us with the opportunity to testify.

BDS's employment practice provides legal representation and informal advocacy to people facing employment discrimination due to current or prior contact with the criminal justice system. Our clients face numerous formal and informal barriers to employment. Many are suspended or terminated from employment upon arrest and absent any finding of criminal culpability. Others are completely excluded from employment opportunities due to their criminal histories. In New York State, many occupations are regulated by statutes that limit or exclude people with criminal records—and this includes school bus drivers.

BDS supports the Council's intention to improve our city's school transportation system, but urges due consideration to the widespread harm of demonizing people with criminal records. As an organization that serves people impacted by the immigration, child welfare and criminal legal systems, we frequently work with school-aged children who depend on bus transportation to access their education. Across practice areas, we hear of problematic school transportation practices, including untimely student drop-offs and pick-ups, unnecessarily long bus rides and unprofessional conduct by school bus staff. Our Education Practice assists BDS clients in addressing these concerns, but systematic failures by the Office of Pupil Transportation (OPT) often compromise the speed and extent of available relief. Accordingly, BDS commends the Council's proposals that seek to improve accountability and reliability of the school transportation system.

All that said, it is critically important to distinguish job-related misconduct from past mistakes that have no direct connection to the work. BDS submits this testimony to address Intros 926 and 929, both of which pertain to OPT's process for certifying, investigating and disciplining school bus drivers. As a public defender office, BDS is concerned with legislation that, even unintentionally, could lead to undue employment barriers for people with open cases or prior convictions. Today I would like to highlight the following concerns.

### **School Bus Drivers Are Already Highly Regulated**

Recent articles published in the *New York Daily News* and *New York Post* raised concerns that the vetting process for school bus drivers is too lax.<sup>1</sup> In the articles, an OPT investigator claims to have uncovered six bus drivers with conviction histories that he believes should have precluded their employment as school bus drivers. However, the articles, as well as a subsequent letter from Comptroller Scott M. Stringer calling for change, do not mention the various steps that an individual must take to become a school bus driver.

In order to drive a school bus, an individual must first obtain a Commercial Driver's License (CDL) with the required designations through the New York Department of Motor Vehicles. Certain applicants with criminal convictions are prohibited, either temporarily or permanently, from obtaining a CDL. These convictions are enumerated in Section 509-cc, Article 19-A of New York's Vehicle and Traffic Law.<sup>2</sup> This list is extensive and includes over 80 convictions that could potentially prevent an individual from obtaining a CDL. Notably, the state requires potential bus drivers to either not have one of these disqualifying convictions *or* to present sufficient evidence of rehabilitation to warrant the CDL.

Next, the person typically must apply for a bus driver position through a private vendor contracted by the DOE. While there is concern that these vendors are not properly running background checks on applicants, we have seen evidence to the contrary. One recent client served as a bus driver for many years and after a break from driving he wished to return to the profession. While he was in the process of applying for positions, he was arrested. As a result, all of the school bus vendors that he applied to denied him employment due to his open case. No finding of criminal culpability had been made, and yet our client was presumed guilty by the company and denied the opportunity to serve as a bus driver—a position he held for many years.

In the event that a person obtains a CDL and is subsequently hired by a vendor, they must then be certified by the Office of Pupil Transportation. Per the OPT website, in order to receive certification an individual must provide a litany of documentation including: a 19-A final

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<sup>1</sup> Selim Agar and Bruce Golding, *DOE Probing Alleged School Bus Driver Approval Fraud*, N. Y. POST (Sept. 18, 2018), available at: <https://nypost.com/2018/09/18/doe-probing-alleged-school-bus-driver-approval-fraud/>; Ben Chapman and Graham Rayman, *City School Bus Drivers with Criminal Past Slip Through Gaping Loopholes*, N.Y. DAILY NEWS (Sept. 14, 2018), available at: <http://www.nydailynews.com/new-york/ny-metro-school-bus-drivers-criminal-record-20180914-story.html>

<sup>2</sup> Article 19-A Information Packet, Dept. of Motor Vehicles, Bus Driver Unit. DS-700 (updated 09/2017), available at <https://dmv.ny.gov/forms/ds700.pdf>.

qualification letter provided by the DMV, a 13 county criminal history check letter dated within 60 days, negative drug test results dated within 60 days, and three letters of recommendation.<sup>3</sup>

People seeking employment as a school bus driver must proceed through a vetting process with multiple junctures at which they can be excluded due to their criminal record. While OPT and the city's school transportation employers are entitled to their own review of school bus candidates, it should be considered within the context of the preceding steps of review.

### **A Criminal Conviction Should Not Automatically Exclude Individuals from Employment Opportunities and OPT Must Consider Evidence of Rehabilitation**

A criminal conviction is not determinative of a person's character or their abilities as an employee. People can and do change. New York State and City have created a variety of legal protections to support those truths. In enacting Article 23-A of the Correction Law,<sup>4</sup> New York State created standards for employers to follow with the goal of limiting unjust discrimination against a candidate due to a past conviction. The law requires employers to consider a number of factors, including the age of the individual at the time of the offense and the amount of time that has lapsed, to analyze whether the prior conviction should bar employment. In establishing the law, the Legislature also recognized the importance of rehabilitation:

"Observers of our criminal justice system agree that the key to reducing crime is a reduction in recidivism (i.e. repeated criminal conduct by the same individuals). The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual's return to society his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination. Providing a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime."<sup>5</sup>

New York City's Fair Chance Act and New York State's sealing statutes 160.58 and 160.59, further reflect a commitment to the fundamental premise that people can be rehabilitated—that they can reenter their communities and live positive lives after involvement with the criminal legal system.

The articles in the *New York Post* and *New York Daily News* center around an OPT investigator claiming to uncover several bus drivers with criminal histories that he believes should preclude them from working as a bus driver. While we recognize the instinct to be alarmed, we question the premise that the convictions alone should preclude them from employment, especially without any other information. New York State and City law recognizes the need to consider a variety of factors, including rehabilitation, before drawing such conclusions. In fact, one of the Article 23-A factors an employer must consider is that "New York public policy encourages the licensure and employment of people with criminal records." We ask that the Council keep this in mind as it solicits information regarding the criminal histories of current school bus drivers.

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<sup>3</sup> New York City Department of Education, Office of Pupil Transportation, Driver Information, available at: <http://www.optnyc.org/vendors/DriverInformation.htm>

<sup>4</sup> Full cite

<sup>5</sup> Mem in Support, Bill Jacket, ch. 931, L. 1976.

## **Any Legislation Must Be Carefully Drafted to Avoid Reinforcing Harmful Stereotypes and Disproportionately Impacting Communities of Color**

Black and Latinx people, with or without criminal records, have long faced discrimination in hiring practices. Criminal records only compound the barriers to obtaining or maintaining a job, and blanket bans on employees with such records exacerbate inequality in our society without improving public safety.

This pervasive discrimination inspired New York City’s Fair Chance Act—a local version of the Ban-the-Box laws enacted in jurisdictions across the country. At its core, the Fair Chance Act aims to dismantle stereotypes about the desirability of formerly incarcerated workers and increase hiring rates for that population.<sup>6</sup> Employers have expressed reluctance to hire people with criminal records on the basis that they are seeking what some have called “work readiness”—a term that one leading economic research institute defined as encompassing “personal qualities such as honesty and reliability, an inclination to arrive at work on time every day, a positive attitude toward work.”<sup>7</sup> Employers may, without good reason, regard the existence of a criminal record as a proxy for the absence of those qualities.<sup>8</sup> However, research shows that these presumptions are not only discriminatory, but are indeed false.<sup>9</sup>

Intro. 929 requires that OPT disclose the “number of notifications received from the New York state of division of criminal justice services that a school bus attendant has been arrested for charged criminal activity.” We are concerned about the message that this reporting sends—that those with criminal justice involvement are inherently dangerous and a hidden threat that must be uncovered. This message conflicts with the City’s overall purpose of expanding employment opportunities for all, including people with records.

It is also important to acknowledge any policy that targets people with arrests or convictions will replicate the biases of our criminal legal system and disproportionately affect Black and Latinx people, particularly those experiencing poverty. In 2016, Black people accounted for approximately 48% of total arrests while Latinx people accounted for 34% of total arrests despite representing 26% and 29% of the total New York City population respectively.<sup>10</sup> Consequently,

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6 Jessica S. Henry and James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, National Employment Law Project (October 16, 2007), available at: <https://www.nelp.org/wp-content/uploads/2015/03/Henry-Jacobs.BantheBox.article.Oct-07.pdf>

7 Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Reentry?*, URB. INST. 1-2 (2002), <https://www.urban.org/sites/default/files/publication/60761/410803-Can-Employers-Play-a-More-Positive-Role-in-Prisoner-Reentry-.PDF>

8 *See id.*

9 In a study comprised of over a quarter million applicants for customer service positions, researchers at the Kellogg and Northwestern University School of Law found that people with criminal histories did not perform their duties any worse than non-offenders. Based on the research of Dylan Minor, Nicola Persico, and Deborah Weiss, *Should You Hire Someone with a Criminal Record?* (February 3, 2017), available at: <https://insight.kellogg.northwestern.edu/article/should-you-hire-someone-with-a-criminal-record>. *See also*, Jena McGregor, *Why Former Felons May be Good Employees*, Washington Post (May 6, 2015), available at [https://www.washingtonpost.com/news/on-leadership/wp/2016/05/06/why-former-felons-may-be-good-employees/?utm\\_term=.8616ba5ae69f](https://www.washingtonpost.com/news/on-leadership/wp/2016/05/06/why-former-felons-may-be-good-employees/?utm_term=.8616ba5ae69f)

<sup>10</sup> Data obtained through the Department of Criminal Justice Services. Available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf>

any regulation or policy that regulated the employment of individuals with criminal records will disproportionately and unfairly discriminate against people of color.<sup>11</sup>

We know that this Council has taken many steps forward to protect those with criminal records from employment discrimination. While we recognize that the bills today seek to gather information on OPT's vetting process, we hope that this data collection will not be used to further limit the employment of those with criminal histories.

## **Recommendations:**

### **1. Add a Section to Intro 929 to Ensure That the Office of Pupil Transportation Abides by Its Legal Obligations Under Article 23-A**

The Office of Pupil Transportation's vetting process should be transparent and should abide by New York Correction Law Article 23-A. Article 23-A prohibits an employer from denying or terminating employment due to a criminal conviction unless the employer is able to establish that the conviction directly relates to the position at hand or that they are an unreasonable risk to public safety. This law requires employers to consider numerous factors in making this determination.

Intro. 929 would require OPT to disclose:

“The timeframe and a description of the actions taken by the department for each substantiated notification for which a driver or attendant lost their department qualifications...”

BDS agrees that greater transparency into OPT's “investigative process” is necessary. Accordingly, we ask that Intro. 929 specifically require OPT to disclose how it incorporates Article 23-A in its process. In our experience, it is unclear whether OPT follows Article 23-A and considers the factors appropriately before taking any adverse action, including evidence of rehabilitation.<sup>12</sup> This bill should be amended to ensure that Article 23-A is formally incorporated to protect the rights of all OPT employees.

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<sup>11</sup> Excluding individuals with criminal histories from employment opportunities further disenfranchises low-income, black and brown individuals who are targeted by racially biased law enforcement practices. From stop-and-frisk to the over prosecution of people of color for minor offenses such as turnstile jumping or marijuana, we cannot ignore the prevalence of prejudice in our criminal justice system. *See*, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that New York Police Department officers engaged in “indirect racial profiling” by targeting racial minority neighborhoods at higher rates); see also a report published by the Community Services Society, *The Crime of Being Short \$2.75: Policing Communities of Color at the Turnstile* (October 2017) available at, [http://ghhttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Fare\\_Evasion\\_FINAL\\_10\\_6\\_17\\_s\\_maller.pdf](http://ghhttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Fare_Evasion_FINAL_10_6_17_s_maller.pdf); see also, Innocence Project, *Racial Disparities in NYC Arrest Data for Marijuana Possession*, available at <https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/> (finding that between January-March of 2018, 93% of those arrested for marijuana use were persons of color.)

<sup>12</sup> The Article 23-A factors to be considered are the following:

Notably, Article 19-A of the Vehicle and Traffic Law allows individuals with disqualifying convictions to potentially obtain a CDL if five years have passed since the conviction and the individual obtains a Certificate of Relief from Disabilities. The Legislature enacted this thoughtful provision and we believe that this demonstrates a commitment to the idea that rehabilitation is possible and that a conviction should create a permanent bar to employment. As this Council obtains more information on OPT's vetting process, we encourage this committee to ensure that OPT abides by Article 23-A and that it affords proper weight to any evidence of rehabilitation.

## **2. Remove Section 2 from Int. 929, Which Does Not Comport with the City's Values**

Intro. 929 would require OPT to disclose the "number of notifications received from the New York State Division of Criminal Justice Services that a school bus attendant has been arrested for charged criminal activity..." We are concerned that such information may be used to take adverse action against employees or applicants with open criminal cases. Moreover, public reporting may pressure employers to unfairly exclude qualified drivers based on unfounded allegations.

An arrest is not an indication of criminal culpability—by definition, neither guilt nor innocence has been adjudicated by a court of law at the charging stage of the criminal process. Further, people are often arrested and processed through the criminal legal system without any criminal culpability: overpolicing of communities and people of color and/or false reports very often factor into an individual's arrest.

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1. That New York public policy encourages the licensure and employment of people with criminal records;
  2. The specific duties and responsibilities of the prospective job;
  3. The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
  4. The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
  5. The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
  6. The seriousness of the applicant's conviction history;
  7. Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct;
  8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
  9. Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.

We cannot discount that individuals may be arrested on unsubstantiated allegations or very little evidence. Further, many are later found to be not criminally culpable. In fact, in 2017 only 23% of New York City adult arrests resulted in a criminal conviction.<sup>13</sup> Yet, we believe that OPT's current practice is to automatically and immediately suspend an employee upon any arrest. All individuals are innocent until proven guilty in a court of law, and this practice violates fundamental precepts of justice and fairness.<sup>14</sup>

The proposals today do not in themselves create any additional regulations or limitations on individuals who are arrested. However, data on arrests are not probative and we are concerned with how this data will be used in the future. The Department of Education already implements an overly aggressive policy when an employee is arrested. Individuals are immediately suspended upon arrest based on attenuated charges without any opportunity for immediate review of this decision. We hope that the proposals today will not be the first step towards greater inappropriate barriers for those with criminal histories, particularly those with arrests that never lead to a conviction.

### **Conclusion**

Thank you for your consideration of our comments. If you have any questions, please feel free to reach out to Andrea Nieves in my office at 718-254-0700 ext. 387 or [anieves@bds.org](mailto:anieves@bds.org).

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<sup>13</sup> Data obtained through the Department of Criminal Justice Services. *Available at* <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf>

<sup>14</sup> Losing employment due to an arrest can result in severe and debilitating consequences. Our clients are largely from low-income communities, and their jobs are often their only source of income. Many live paycheck to paycheck. They are heads of households, mothers and fathers. When our clients lose their employment due to an arrest, their lives are completely upended. Even if a person is innocent of the charges against them, their case could take months to resolve. Unemployed and without income, they will not only face an uphill battle to obtain government benefits, but will also find it very difficult to find alternative work as certain employers will hold applications in abeyance until the case is resolved.