New York State Bar Association

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NYSBA

Memorandum in Opposition

May 27, 2022

S. 9116 — By: Senator Skoufis
A.10361 — By: Assemblymember Gunther
Senate Committee: Codes
Assembly Commite: Codes
Effective Date: Immediately

AN ACT permits the detention of juveniles with adults in certain circumstances.

THE NEW YORK STATE BAR ASSOCIATION
STRONGLY OPPOSES THIS LEGISLATION

The New York State Bar Association ("Association") opposes S.9116/A.10361. This bill, which amends Criminal Procedure Law 530.15 to require courts to place youth in local adult jails when there are no facilities in a reasonable distance with sight and separation between youth and adults, is likely to result in an increased use of harmful jail placements – contrary to one of the centerpieces of the "raise the age" reform in 2017, that is, the prohibition of jail placements of youth. Significantly, it is exactly the opposite of what is intended by the 2018 amendments to the federal *Juvenile Justice and Delinquency Prevention Act,* which substituted a judicial "interests of justice" hearing for the prior authority for administrative agencies to direct jail placements.

Additionally, the amendment to Family Court Act §304.1 proposed under this legislation is ambiguous as to its implications since accused adolescent offenders, whose cases are removed to Family Court, are no longer subject to placement in specialized secure juvenile detention facilities but are instead eligible for placement in non-secure and secure juvenile detention facilities under the Family Court Act. Relegating youth to placements in adult jails removes any incentive for the State to take active steps to relieve existing shortages of appropriate specialized secure juvenile detention facility and to expand the alternatives to detention available for accused adolescent and juvenile offenders.

The Association, in its long-standing support of the "raise the age" statute, stressed the critical importance of removing youth from adult jails. Youth placed in adult jails are far more likely to be physically and sexually assaulted, to commit suicide at alarming rates (five times higher than their peers in the general population and eight times higher than youth in juvenile detention facilities) and to recidivate at higher rates than their peers in

juvenile facilities[1]. Moreover, depending upon the county, youth in adult jails have uneven access to educational programming and other services provided more uniformly in juvenile facilities, often causing them to fall further behind in school and exacerbating the likelihood of recidivism after release. Significantly, there is such a dearth of services for girls that any jail placement may be tantamount to a period of prolonged solitary confinement.

The amendments to the federal *Juvenile Justice and Delinquency Prevention Act of 1974* (JJDPA) that were enacted in 2018 and became effective on Dec. 21, 2021, do not require that a State statute be enacted to ensure compliance. In fact, counties across the State have been complying since the effective date without an implementing State law by conducting jail placement hearings when requested to do so. The best way to comply with the federal statute is to eliminate jail placements of youth altogether–or at least, minimize them so that they are imposed truly as a last resort in emergency situations.
The federal law made two significant changes to the original *JJDPA,* both aimed at shoring up the jail removal mandate, one of the "core requirements" of State plans for States to be eligible to receive Federal juvenile justice funding. The changes are: (1) that the core requirements, including jail removal, apply to youth tried as adults, i.e., juvenile and adolescent offenders in the Youth Parts in Supreme and County Courts in New York; and 2) that, in lieu of the administrative approvals previously permitted, jail placements are only allowed after a judicial determination following a hearing that it is in the "interests of justice" for a particular youth to be housed in an adult jail.

The federal law delineates the factors to be considered by the court, prohibits use of solitary confinement, requires hearings at least every 30 days and limits the total duration to 180 days except for good cause. The proposed legislation not only requires courts to rubber-stamp the decisions of the administrative agencies by using the term "shall," instead of "may," but it also omits a significant, long-standing *JJDPA* requirement that "*there is in effect a State policy that requires individuals who work with both such juveniles and such adult inmates, including in collocated facilities, have been trained and certified to work with juveniles*." [34 U.S.C.A. 11133(a) (12)]. Also omitted is any reference to the youth's constitutionally guaranteed right to counsel both for the hearings and to ensure that any waiver of rights is knowing, intelligent and voluntary.

Importantly, contrary to the entirely youth-specific federal "interests of justice" factors justifying jail placements in the *JJDPA*, this legislation bases jail placement decisions upon purely systemic factors unrelated to the youth, i.e., New York's chronic, systemic shortage – and in some counties, a total lack—of the specialized secure detention beds that are required for adolescents under the "raise the age" statute. The federal law requires that jail placement decisions must be based upon factors relating to the youth, his or her age and physical and mental maturity, his or her alleged crime and prior criminal history and the relative ability of the juvenile and adult facilities to meet the juvenile's needs and the interest in community safety.

[1] *See* L. Knoke, "See No Evil, Hear No Evil: Applying the Sight and Sound Separation Protection to All Youths Who Are Tried As Adults in the Criminal Justice System," 88 *Fordham L. Rev*. 791, 793 n.14 (2019).

In counties lacking sufficient detention beds, youth, their attorneys and the courts charged with determining jail placement applications are faced with a Hobson's choice – placing the youth in an adult jail close to home or finding a juvenile detention bed that may be located at the other end of the State, forcing long drives to and from courthouses, cutting the youth off from contact with family and impeding preparation of the youth's case for trial. Ironically, youth may be subject to prolonged adult jail placement during the pretrial phase when the youth is presumed innocent, even though upon sentence the youth can only be placed in a juvenile facility operated by the NYS Office of Children and Family Services. This proposed legislation would force the courts to choose the adult jail close to the youth's residence.

Instead of requiring use of the jail placement mechanism as the default response to a lack of bed capacity, Legislation should instead delineate affirmative steps that both the NYS Office of Children and Family Services and the counties must take to remedy the bed shortage and enhance alternatives to secure detention,, compelling greater cooperation between contiguous counties and greater use of long-term facilities that are either closed or underutilized may all be appropriate approaches.

Based on the foregoing, the New York State Bar Association **OPPOSES** this legislation.

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