NEW YORK STATE BAR ASSOCIATION
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Memorandum in Opposition

March 2, 2022

A.9006-a, Part Q	By:	Budget
S.8006-a, Part Q	By:	Budget
	Assembly Committee:	Ways and Means
	Senate Committee:	Finance
	Effective Date:	Immediately

AN ACT TO amend the executive law and the criminal procedure law, in relation to the detention of juveniles

THE NEW YORK STATE BAR ASSOCIATION OPPOSES THIS LEGISLATION

Incorporation into State law [S 8006-a/A 9006-a, Part Q] of most of the detailed federally required judicial hearing procedures that are now prerequisites for approval of jail placements of minors is likely to invite frequent use of the hearing process and result in more jail placements – exactly the opposite of what is intended by the federal law, and contrary to one of the centerpieces of the "raise the age" reform in 2017, that is, the prohibition of jail placements of youth.

The NYS Bar Association, in its long-standing support of the "raise the age" statute, stressed the critical importance of removing youth from adult jails. The Association cited the Governor's Commission on Youth, Public Safety and Justice, which noted in its Final Report in 2015 at pages 79-80, that youth placed in adult jails are far more likely to be physically and sexually assaulted, 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 recidivate at higher rates than their peers in juvenile facilities. *See also* 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). 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. *See* Public Law 115-385 [34 U.S.C. §11103, 11133]. 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. Rather, 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 NYS Division of Criminal Justice Services must certify the State's compliance periodically and, in conjunction with the State Commission on Corrections, has an auditing system in place]. 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. All of these provisions are replicated verbatim in Part Q of S 8006-a/A 9006-a, but a significant, long-standing *JJDPA* requirement was omitted, that is, 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, entirely absent from the Federal "interests of justice" factors justifying jail placements is one that frequently underlies use of jail placements in New York State, that is, a 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, 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. It should not be based upon purely systemic factors unrelated to the youth, i.e., lack of detention beds. In those 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.

Instead of encouraging use of the jail placement mechanism as the default response to a lack of bed capacity, Part Q 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 incarceration, while at the same time incorporating fiscal incentives and/or disincentives into the "aid to localities" budget. Regional approaches, compelling greater cooperation between contiguous counties and greater use of long-term facilities that are either closed or underutilized may all be appropriate approaches. In fact, Part Q contains a provision that affords NYS OCFS discretion to make unused or underutilized secure facilities available to localities upon request which may be a partial solution in some cases, at least on a stopgap basis. *See* proposed CPL §510.15(3) (c); S 8006-a/A

9006-a, Part Q, page 52, lines 9-14]. The provision in Part Q (proposed CPL §510.15(3)(f), page 52, lines 52 *et seq.*) requiring counties in which jail placements have been made to "actively seek appropriate and available detention options" in particular cases is simply insufficient to solve a significant problem which is systemic in nature.

The New York State Bar Association OPPOSES S 8006-a/A 9006-a, Part Q, as written and urges that it be replaced with provisions that will actually remedy the systemic deficiencies that have caused excessive use of the jail placement exception so that youth will not have to face the harmful effects of adult incarceration.[1]

Based on the foregoing, the State Bar Association **OPPOSES** the enactment of this legislation.

[1] In light of the replacement of administrative authority with the federal hearing requirements, the Association does not oppose the provisions deleting the former authority of NYS OCFS to administratively approve jail placements and transfers of youth to correctional facilities operated by the NYS State Department of Corrections and Community Supervision. *See* S 8006-a/A 9006-a, Part Q, page 50, lines 7-12, 22-27, and page 51, lines 15-19.