

**New York State Budget Hearing
Regarding the New York State Executive Budget Proposals for Human Services
State Year 2013-2014**

**Testimony of Gabrielle Horowitz-Prisco, Esq.
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My name is Gabrielle Horowitz-Prisco. I am the Director of the Juvenile Justice Project of the Correctional Association of New York and an attorney who previously represented children in New York City's Family Court. The Correctional Association of New York (CA) is an independent, non-profit organization founded by concerned citizens in 1844 and granted unique authority by the New York State Legislature to inspect prisons and to report its findings and recommendations to the legislature, the public and the press. Through monitoring, research, public education and policy recommendations, the CA strives to make the administration of justice in New York State more fair, efficient and humane. The CA does not provide direct services other than leadership training programs, does not engage in litigation, and does not represent a sector or workforce. The Juvenile Justice Project is committed to working toward a youth justice system that is transparent and accountable to children and families, communities, legislators, policy-makers, and the public. The society we envision and work toward is one in which children are given the tools and skills they need to succeed and where working effectively with youth translates into increased public safety outcomes.

Thank you Chairs DeFrancisco, Farrell, Smith, and Titus for this opportunity to testify. We look forward to working with you and your colleagues to ensure that New York's children are effectively served in the session and years ahead.

Introduction

The Governor's proposed expansion of the Close to Home Initiative (Close to Home, or CTH) represents an opportunity to improve the upstate youth justice system, drive down costs, and expand local services, but merely shifting jurisdiction from New York State to local counties is not enough to guarantee success. Ensuring that counties effectively serve children and families under Close to Home will require the development of strong county-level operational plans and program models, public transparency, and an on-going state commitment to rigorous independent oversight. It also requires that youth justice residential placements be operated without a profit motive and located close to children's communities. To be effective, Close to Home facilities should not simply be repurposed OCFS facilities, where the same building is used to the same end, except this time with locally contracted staff.

Successful youth justice transformation in this state also requires ending our shameful practices of prosecuting children as young as 13 as adults, housing 16 and 17 year-olds in adult jails and prisons, and placing children in solitary confinement. True transformation also requires the development of an independent, external monitor of the youth justice system and changes in fiscal policies so that funding is targeted to drive practices that work.

This testimony focuses on the following nine sets of legislative and policy recommendations:

1. There should be no privatization of Close to Home placements;
2. Counties should be required to submit Close to Home plans to OCFS and the public;
3. The expanded Close to Home initiative should include public hearings and mechanisms for on-going community and family engagement;
4. Performance based data and Close to Home evaluations should be publicly released;
5. Close to Home facilities should be close to children's homes;
6. Close to Home facilities should not be repurposed OCFS facilities;
7. Particularly given the planned closure of OCFS' Red Hook facility, more should be done to ensure that LGBTQ youth are served in culturally competent ways throughout the Close to Home and OCFS systems;

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8. New York State should raise the age of criminal responsibility to 18 for all youth;
 9. New York State should develop and fund independent external oversight mechanisms for its youth justice system; and
 10. Fiscal reforms of the youth justice system.
1. **The proposed legislation would authorize “private *or* not-for-profit” entities to operate Close to Home placements. The legislation should be amended to specifically limit the operation of all residential youth justice placements to not-for-profit entities.¹**

The proposed Article 7 legislation (ELFA, Part H) (hereafter “proposed legislation”) authorizes OCFS to “transfer operations for non-secure placements to a private or not-for-profit entity”² and amends Subdivision 3 of section 501 of the Executive Law so that the state can contract with “authorized agencies as defined in section three hundred seventy-one of the social services law for the operation and maintenance of non-secure facilities.”³ The Memorandum in Support of the legislation similarly states that youth would be placed with the “appropriate local commissioner of social services for receipt of services from private *or* not-for-profit entities (italics added).⁴”

Although the state has not thus far, to the best of our knowledge, articulated a specific plan to contract with for-profit providers, the proposed legislation is alarming. For-profit corporations are driven by profit motives that can directly trade-off with successful outcomes for youth; a focus on profit has direct implications for the level and quality of programs and services for offered to children in placement.⁵ Because many private prisons operate on a per diem (daily) rate for each bed filled, a financial incentive exists for both confining youth and for extending confinements for lengthy periods of time. This financial incentive is even larger in the youth justice industry than it is in the adult criminal justice industry because per diem rates for children are higher than those for adults due to children’s eligibility for more education and mental health related services.⁶

In addition to the aforementioned risks and harms of private prisons, there is *no available evidence* that points to *any benefits* to privatizing prisons. As the Sentencing Project notes in a recent report on prison privatization: “Although there are instances where private prisons result in small savings, the structure and demands of for-profit prisons appear to produce a negative overall impact on services.”⁷ One of the greatest

¹ A number of the recommendations in this testimony, including those related to youth justice privatization, independent external oversight, community and family engagement and raising the age of criminal responsibility, draw on research and recommendations from *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, an article written by Gabrielle Prisco, the author of this testimony, 56 N.Y.L. Sch. L. Rev. 1413. This testimony includes both quotes from this article and text that has been slightly revised from this article but is in many ways similar.

² ELFA, Part H, Subpart A.

³ ELFA, Part H, Subpart A.

⁴ Memorandum in Support, Part H- Expand the Juvenile Justice Close to Home Initiative, at 13.

⁵ See generally for this section GABRIELLE PRISCO, *When the Cure Makes You Ill: Seven Core Principles to Change the Course of Youth Justice*, 56 N.Y.L. Sch. L. Rev. 1413.

⁶ *Id.* (PRISCO) See e.g., AMY CHEUNG, THE SENTENCING PROJECT, PRISON PRIVATIZATION AND THE USE OF INCARCERATION 1, http://www.sentencingproject.org/doc/publications/inc_prisonprivatization.pdf (last updated September 2004); Eyal Press & Jennifer Washburn, The At-Risk Youth Industry, THE ATLANTIC, Dec. 2002, at 38, <http://www.theatlantic.com/magazine/archive/2002/12/the-at-risk-youth-industry/2645/>.

⁷ CODY MASON, THE SENTENCING PROJECT, TOO GOOD TO BE TRUE: PRIVATE PRISONS IN AMERICA 2 (2012), http://sentencingproject.org/doc/publications/inc_Too_Good_to_be_True.pdf.

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negative impacts caused by these facilities is arguably the impact they have on youth.

Horrible and abusive treatment of youth has systemically occurred in jurisdictions that have allowed for-private youth justice facilities.

Luzerne County, Pennsylvania's "Kids-for-Cash" scandal illustrates the very real danger of mixing profit and youth justice. The U.S. Attorney filed federal criminal charges against two Luzerne County judges "for accepting nearly \$2.9 million in alleged kickbacks from the developer and former owner of two private for-profit juvenile facilities in exchange for placing children in these facilities through the Luzerne County juvenile court process."⁸ The defendants in the lawsuit included Judges Ciarvello and Conahan, as well as Robert Powell, the former co-owner of the for-profit facilities who paid millions in kickbacks to the two judges for intentionally and unlawfully filling the beds of for-profit facilities.⁹ Over the course of five years (from 2003-2008) the Luzerne County scandal altered the lives of more than 2,500 children and is now characterized as "the largest judicial corruption scandal in U.S. history."¹⁰ Former judge Ciavarella, is currently serving 28 years in an Illinois prison and former colleague Conahan is serving a 17.5-years sentence in Florida. Also in Florida, former facility owner, Powell, is serving an 18-month prison sentence.¹¹

In another example, in 2010, a federal lawsuit was filed on behalf of children residing in Mississippi's Walnut Grove Correctional Facility (WGYCF). Geo Group, Inc., the nation's second largest private prison company, then operated WGYCF. Geo Group is a publicly traded multi-national corporation¹² that operates youth residential facilities in multiple states including nearby Pennsylvania.¹³ The lawsuit "describes a facility where staff sell drugs and engage in sexual relationships with the youth in their care."¹⁴ The lawsuit further alleged that youth suffered serious and permanent physical injuries including life-threatening injuries, and that "youth who are handcuffed and defenseless are kicked, punched and beaten all over their bodies. Youth secure in their cells are blinded with chemical restraints... One young man was tied to his bunk for almost 24 hours, brutally raped and sexually assaulted after prison staff failed to heed his pleas for protection. Other youth suffered multiple stabbings and beatings—including one youth who will live with permanent brain damage as a result of an attack in which prison staff were entirely complicit."¹⁵ According to the Complaint, WGYCF was "[c]onstructed with over \$41 million in taxpayer-funded subsidies, the facility has generated approximately \$100 million for the various for-profit entities that have operated the prison since it opened its doors in 2001."¹⁶ The U.S. Department of Justice also investigated WGYCF and reported "a wide array of inhumane and unconstitutional conditions at the facility."¹⁷

⁸ Luzerne County "Kids-for-Cash" Juvenile Court Scandal at <http://www.jlc.org/luzerne/>

⁹ <http://www.post-gazette.com/stories/business/legal/17-million-settlement-approved-in-luzerne-countys-kids-for-cash-case-668441/>, last accessed 2/4/2013

¹⁰ <http://www.jlc.org/current-initiatives/promoting-fairness-courts/luzerne-kids-cash-scandal>, last accessed 2/4/2013

¹¹ <http://www.post-gazette.com/stories/business/legal/17-million-settlement-approved-in-luzerne-countys-kids-for-cash-case-668441/>, last accessed 2/4/2013

¹² <http://www.geogroup.com/>

¹³ For a map of residential youth facilities, see <http://www.geogroup.com/maps/index/4>.

¹⁴ See Complaint, C.B. v. Walnut Grove Correctional Authority, No. 3:10cv663 (S.D. Miss. filed Nov. 16, 2010), available at <http://www.splcenter.org/get-informed/case-docket/cb-et-al-v-walnut-grove-correctional-authority>.

¹⁵ *Id.* (Complaint, C.B. v Walnut Grove)

¹⁶ *Id.* at 2.

¹⁷ <http://www.splcenter.org/get-informed/case-docket/cb-et-al-v-walnut-grove-correctional-authority>, last accessed 2/4/2013

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The Walnut Grove lawsuit was recently settled, establishing an agreement ensuring that youth incarcerated in Mississippi would no longer be housed in privately run prisons. Under the decree, youth previously housed in the GEO-operated prison were transferred to a stand-alone youth justice facility.¹⁸

Even if current administration has not specifically indicated a plan to contract with for-profit providers (and even if they promise they would not enter into any such contracts), the language of the proposed legislation is alarming in that it could allow privatization under future administrations.

The proposed legislation references section three hundred seventy-one of the Social Services Law defining “authorized agencies.” It is crucial to understand that although the Social Services Law is currently interpreted to limit contracts for residential youth services to not-for-profit providers, it relies on interpretation. The new proposed legislation is very specific in its bifurcation of private *or* not-for-profit, and as such opens a new and troubling door to contracts with for-profit providers.

There is simply no reason the legislation needs to specifically allow for contracts with agencies other than not-for-profit agencies and every reason to eliminate this language.

Recommendations

- Section 15-a should be amended to read: “...the commissioner of the office of children and family services is authorized to close any non-secure facilities operated by the office of children and family services...and transfer operations for non-secure facilities to a (private or) not-for-private entity...”, whereas the words “private or” are deleted.
- Any other relevant sections of the proposed legislation that would authorize the placement of children with for-profit entities should be similarly amended.
- The proposed legislation should be amended to pro-actively and specifically limit New York State’s ability to contract for residential youth services solely to not-for-profit providers.

2. The Executive budget does not require counties to submit plans prior to opening Close to Home placements. County plans should be mandated and publicly released, and OCFS should have approval power over these plans.

The proposed legislation would expand the “Close to Home” initiative “by requiring youth from counties outside of New York City who would otherwise be placed in non-secure Office of Children and Family Services (OCFS) facilities to be placed with the appropriate local commissioner of social services for receipt of services from private or not-for-profit entities.”¹⁹ There is no requirement whatsoever for an operational plan from these counties or the contract agencies they would work with prior to the transfer of jurisdiction, funds and actual living children from the state to localities.

This approach is dramatically different from the 2011-12 legislative session, during which legislation passed authorizing New York City (NYC) to submit a plan for the operation of Close to Home placements. That legislation required NYC to develop a detailed draft Close to Home plan for non-secure placements, to submit that plan to OCFS for review, to publicly release the draft plan, and to allow for public commentary

¹⁸ <http://www.splcenter.org/get-informed/case-docket/cb-et-al-v-walnut-grove-correctional-authority>, last accessed 2/4/2013

¹⁹ Memorandum In Support of Article 7 legislation, Part H – Expand the Juvenile Justice Close to Home Initiative.

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on the draft plan.²⁰ Last year's Close to Home legislation established mechanisms and timelines for OCFS to review and respond to the city's draft plan.²¹ The legislation also specifically outlined key areas that New York City had to address in their draft plan, including but not limited to how specifically it would: engage communities and stakeholders; train staff; monitor restraint use; develop and implement programs; seek to reduce ethnic and racial disparities in residential programs; reduce recidivism; provide aftercare, competently serve lesbian, gay, bisexual and transgender youth; and secure mental health, education and other services for youth leaving placement.²²

The current proposed legislation wholly lacks a similar requirement for counties to document how they will serve Close to Home youth. What is the framework and philosophy that will undergird a particular county's approach? What is the content of the programs a county will offer? Will they adhere to evidence-informed practices? Will they track and report on outcomes and, if so, how and which measures will they use? What kinds of facilities will they use, and what will those facilities look like? Even if a county will merely be expanding an already existing program or facility (as will be the case for many counties given the small number of youth who will be eligible for transfer under the initiative), how does a county's current facility/ies compare against national best practice standards and what, if any, adjustments can be made to increase compliance with such standards? The proposed legislation does not require counties to answer these and other critical questions prior to the transfer of jurisdiction, funds, and custody of the actual bodies and lives of children.

Given that only OCFS is currently authorized to operate these facilities, to the best of our knowledge, none of the counties and the "authorized agencies"²⁴ they would likely contract with have previously operated facilities for youth at this level of care (what is currently the OCFS "non-secure" level of care). What is at issue is not whether these are "good" agencies or counties; it is whether they have appropriate program models in place to effectively work with this new population.

The implementation of the Close to Home Initiative in New York City has been marked by a number of significant operational challenges as well as by successes. Although the Correctional Association wholly supports the movement of children in New York City and upstate counties closer to their homes, one of the lessons learned in the implementation of the city's Close to Home initiative is that the devil is often in the details, and there is a real need for 1) the careful creation and implementation of on-the-ground operational plans and 2) a sufficient time frame for those plans to be thoughtfully executed, including building in sufficient time for staff training and agency capacity building prior to children entering Close to Home placements.

In particular, county plans should detail the program model or models that would be implemented in Close to Home placements (including within facilities serving both Close to Home youth and other youth, as will likely be the case in most or all counties).

²⁰ S 06257/ A 0957, Part G (2011-12).

²¹ *Id.*

²² *Id.*

²³ The proposed legislation authorizes OCFS to "transfer operations for non-secure placements to a private or not-for-profit entity"²⁴ and amends Subdivision 3 of section 501 of the Executive Law so that the state can contract with "authorized agencies as defined in section three hundred seventy-one of the social services law for the operation and maintenance of non-secure facilities.

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An immense research body makes clear that the successful provision of youth justice services (read services that result in both positive life outcomes for youth and reductions in recidivism) depends on strong programming. A robust body of literature also demonstrates that placing children in correctional type facilities is counter-productive to public safety goals and to positive youth outcomes.

For example, the Missouri Model is commonly recognized as America's gold standard model for children in confinement.²⁵ The Missouri Model is marked by small home-like facilities where children stay in warmly decorated dorm-like rooms, wear their own clothes, and call staff by their first names. This approach has yielded rich dividends for youth and public safety. 8.5% of youth in Missouri are sentenced to adult prison within three years of release/discharge, 17.1 % percent of youth are recommitted to juvenile custody or sentenced to adult prison or probation for a new offense within one year of release/discharge, and 14.5% of youth are recommitted to juvenile custody or sentenced to adult prison for a new offense within two years of release/discharge.²⁶

These recidivism rates stand in sharp contrast to OCFS' recidivism rates. According to OCFS' most recent recidivism study, within 12 months of release, 49% of all children placed on juvenile delinquency or juvenile offense cases were rearrested, with 66% rearrested within two years of release. Boys fare particularly poorly with 53% of boys rearrested within one year, and 70% rearrested within two years of release (note that these percentages represent rearrest rates, whereas the Missouri recidivism stat represents new sentencing).²⁷ Missouri's statistics also stand in sharp contrast to many jurisdictions across the nation. Although OCFS' recidivism rates are high, "they are comparable to, and in some cases, lower than the re-offense rates reported for juvenile offenders committed to residential facilities in other large states."²⁸

Although it may be tempting to simply blame New York State's high recidivism rates on the perils of state-operated placements, it is crucial to note both that the Missouri Model is state-operated (with children placed close to their homes) and that the critical elements of the model relate to *programming, staffing, and architecture*, not to which particular element of the government is responsible for children's custody. While the model is not perfect, it is Missouri's emphasis on small home-like facilities, therapeutic services, and comprehensive community engagement that has been demonstrated to drive success and enhance public safety.

It is incumbent upon this body to ensure that children are not transferred to the custody of counties until those counties have demonstrated to OCFS and other stakeholders, including advocates and communities, that they have a workable and effective plan for serving youth.

Recommendations

- The Legislature should amend the proposed legislation to mandate that any county seeking to operate Close to Home placements must submit an operational and programmatic plan to the Office of Children and Family Services for review and approval, and must further release this plan for

²⁵ See Annie E. Casey Foundation, *The Missouri Model, Reinventing the Practice of Rehabilitating Youthful Offenders* (2010), available at: <http://www.aecf.org/upload/publicationfiles/MOFullreportwebfinal.pdf>. See also Missouri's Department of Social Services website, available at: <http://dss.mo.gov/dys/>; and Missouri Division of Youth Service's Programs and Services summary, available at <http://www.dss.mo.gov/dys/articles/progservice.pdf>.

²⁶ *Id.* (Annie E. Casey Foundation), p. 6.

²⁷ OCFS Fact Sheet: Recidivism Among Juvenile Delinquents.

²⁸ *Id.* (OCFS Fact Sheet).

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public review and comment. These plans should include comprehensive details about how counties will ensure the safety and well being of children in all Close to Home placements and programs, including but not limited to copies of all proposed policies with regard to the use of force, the use of physical and mechanical restraints on children, and the provision of educational, substance abuse, and mental health services. This amendment should mirror the mandates placed on New York City with regard to the elements that had to be included in the city's draft Close to Home plan.²⁹

- The Legislature should amend the proposed legislation to include specific mechanisms for OCFS review and approval of county Close to Home plans.
- The Legislature should mandate that county plans for Non-Secure Placements be submitted to at least one independent national expert on best practices for youth justice placements.

3. Unlike last year's Close to Home legislation for New York City, the proposed Close to Home upstate expansion lacks any provisions for public review or input and lacks any requirement for community engagement. The legislation should be amended to include specific provisions for public hearings and on-going family and community engagement.

The authorizing legislation for the Close to Home initiative for New York City (NYC or the city) required the city to hold "at least one forum in each of the five boroughs within the district for community members and relevant stakeholders including potential provider agencies," as well as "at least one public hearing in each of the five boroughs...held after thirty days (public) notice."³⁰ Families, community members, and advocates turned out at both Community Forums and public hearings to offer the city ideas, suggestions, and critiques. The city also received written comments from the public, and was required to submit to OCFS a written summary of the public feedback they received, including describing which suggestions they incorporated, which they rejected, and, for those rejected, the reason(s) the suggestion was not undertaken. The proposed legislation for upstate Close to Home has zero requirements for any public review or public input. This lack of public transparency runs counter-productive to an expanding evidence body on the importance of engaging communities and families in youth justice reform.³¹

This year's Close to Home legislation is also markedly different from last year's in that it has no requirements for counties to document how they will engage community stakeholders. Last year's legislation required the city to document as part of its draft plan how it would "seek and receive on-going community and stakeholder input related to the implementation and effectiveness of the initiative."³² This lack of mechanisms for community and family engagement does not set the expanded initiative up for long-term success and sustainability.

Research demonstrates that engaging community and family members in the design, implementation and evaluation of programs and services for youth may increase the chances of system success,³³ yet families and

²⁹S 06257/ A 0957, Part G (2011-12), at Subpart A, Section 2.

³⁰S 06257/ A 0957, Part G (2011-12).

³¹ See generally for this section, *supra* note 5 (Prisco).

³² *Id.* (S 06257/ A 0957)

³³ See generally JOAN PENNELL ET AL., CTR. FOR JUVENILE JUSTICE REFORM AT GEORGETOWN, SAFETY, FAIRNESS, STABILITY: REPOSITIONING JUVENILE JUSTICE AND CHILD WELFARE TO ENGAGE FAMILIES AND COMMUNITIES 6 (2011), <http://cjjr.georgetown.edu/pdfs/famengagement/FamilyEngagementPaper.pdf>

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communities are often excluded and even blamed in the youth justice system.³⁴ Parents of system-involved youth report feeling demonized and treated as “the criminals who raised a new generation of criminals.”³⁵ Mass incarceration practices have not only failed to help children, they have made communities, particularly low-income communities of color, worse off.³⁶ Communities have suffered as a result of their children being incarcerated, as well as from the loss of dollars that are tied up in maintaining institutions.³⁷ Community members and community-based organizations, particularly smaller ones, have similarly often been excluded from the youth justice system and from reform efforts.³⁸ When we exclude the voices and experiences of families and communities from reform efforts, we exclude a rich source of data. Family engagement³⁹ is increasingly being recognized as critical to positive youth justice outcomes. New research on evidence-based practices has illustrated that families must be viewed as partners and collaborators in order to ensure the best outcomes for court-involved youth.⁴⁰

A different model is possible. Community engagement includes sharing information about what is happening in the youth justice system with community members and local leaders.⁴¹ “Real system-community partnerships are those in which system stakeholders and community members share information and evaluate and analyze data together for the purpose of identifying the best way to solve problems.”⁴² In community-systems partnerships, both qualitative and quantitative data about system operations and outcomes should be valued.⁴³ Actual system-community partnerships also rely on shared decision-making power, whereby both communities and institutional stakeholders should have “shared authority to define what strategies and responses are chosen as interventions.”⁴⁴

According to *Families Unlocking Futures* new and widely acclaimed national report researched and written by families with youth in the justice system (including an extensive surveying of families with youth in the system): “...we cannot find better solutions for children without listening to their families...Rather than helping families, today’s juvenile justice systems increase their mental and emotional strain, and shunt them

³⁴ *Id.* at 17, (“Current responses to maltreated and delinquent children and youth are built upon a historical foundation that viewed parents as absent, inconsequential, and/or detrimental to the well-being of their children.”).

³⁵ Grace Bauer, Co-director of Justice for Families, Presentation to Associate Marine Institute Kids (Nov. 3, 2011) (on file with author).

³⁶ See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 97–104 (Michael Tonry ed., 2008).

³⁷ See *Building Community Capacity*, *supra* note 64, at 1–2.

³⁸ Gordon Bazemore & Susan E. Day, *Restoring the Balance: Juvenile and Community Justice*, III JUV. JUST. 3, 3 (1996), <https://www.ncjrs.gov/pdffiles/jjjd96.pdf>.

³⁹ Family engagement may be defined as “any role or activity that enables families to have direct and meaningful input into and influence on systems, policies, programs, or practices affecting services for children and families.” PENNELL ET AL., *supra* note 138, at 1. It is crucial to note that “family” can and should be defined broadly and in no way limited to a child’s biological family. Instead, the term family should be “broadly defined to encompass those whom youths see as their family group, whether based on biological, social, foster, or adoptive ties.” *Id.*

⁴⁰ MENTAL HEALTH ASS’N, PENNSYLVANIA & PENNSYLVANIA COUNCIL OF CHIEF JUVENILE PROBATION OFFICERS, MODELS FOR CHANGE-PENNSYLVANIA, FAMILY INVOLVEMENT IN PENNSYLVANIA’S JUVENILE JUSTICE SYSTEM 15 (2009), http://www.njjn.org/uploads/digital_library/resource_1419.pdf (Functional Family Therapy (FFT) and Multisystemic Therapy (MST) are on the list of nationally published evidence-based practice models).

⁴¹ See *Building Community Capacity*, *supra* note 64, at 3.

⁴² *Id.* at 3.

⁴³ See *Id.* (discussing how traditional system stakeholders may have access to more quantitative data while community members may have more access to qualitative data accumulated from living and working in neighborhoods where children in the system come from).

⁴⁴ *Id.*

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aside, rather than enlisting them as key members of the team.”⁴⁵

A useful comparison point might be affluent schools for largely white and upper class schools. In such an environment, a host of relatively minor decisions impacting children in somewhat small ways are deemed worthy of parental notification and of mechanisms for parental feedback. For example, parents may be notified and their feedback solicited about matters such as how a science fair will operate, a curriculum change, or what will be served at lunch. Yet New York’s youth justice system routinely locks children up and isolates them from their families without ever consulting with these families about which approaches to working with children might work (both individually and more systemically) and which approaches might cause further damage, and without ever engaging family members and community supports in partnership.

It is disappointing and disheartening that New York State would seek to undertake such a significant change to its youth justice system without a single mandated public hearing and with zero mandated mechanisms for community and family feedback.

Recommendations

- The Legislature should amend the proposed legislation to mandate that any county seeking to operate Close to Home placements hold at least one public hearing on their proposed Close to Home plan.
 - Each public hearing should have two sessions, one during working hours and one during the evening or on a weekend. Spanish interpreters should be available for these hearings. Each county’s plan should, at a minimum, be available in both English and Spanish at least sixty days before the hearing. The purpose of these hearings should be for the relevant agencies to hear feedback from the public, and the format and structure of the hearings should reflect this purpose.
 - Thirty-day notice about these hearings should be posted in local businesses, community-based organizations, all community schools, transit hubs, well-traveled public spaces, in a wide range of types of houses of worship (including as many faiths and denominations as possible), and with a range of local service providers. Thirty-day notice of these hearings should also be given to local leaders including local community leaders and local elected officials including members of relevant local government councils, school boards, and local community boards.
- The Legislature should mandate that OCFS and local counties detail seek and receive on-going community and stakeholder input related to the implementation and effectiveness of the expanded Close to Home initiative.
 - Mechanisms for family and community engagement should be specifically designed to continue throughout the life of the initiative and should be woven in with other mechanisms for public transparency, including oversight mechanisms and the public release of performance based data described below.

4. There is a need for performance based data and the on-going evaluation of Close to Home initiatives.

⁴⁵ *Justice for Families, Families Unlocking Futures: Solutions to the Crisis in Juvenile Justice*, available at: <http://www.justice4families.org/file/Home.html>.

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Section 10(b) of last year's Close to Home legislation for New York City mandated that the city provide OCFS with specific information on the initiative and its provision of services to youth as well as on public safety. That legislation required the city to provide this information to OCFS "on a monthly basis for the first twelve months immediately following the implementation of programs for each level of care" and on a quarterly basis thereafter.⁴⁶ Section 11 of last year's Close to Home legislation mandated that the social services district (New York City) shall "submit an annual report to the office of children and family services, the temporary president of the senate and the speaker of the assembly, in the format required by the office, detailed overall initiative performance."⁴⁷ The legislation further detailed a number of key indicators that must be included in such reports.⁴⁸

There are no similar mandates in the proposed legislation expanding Close to Home upstate.

Sustainable long-term positive outcomes depend on the development of a strong performance-based evaluation rubric and on on-going performance evaluations. Policymakers and the public expect this kind of on-going assessment with regard to most goods, services, and contracts including for far less important matters. For example, many bathrooms in fast-food restaurants and highway rest stops have publicly posted sheets recording the last time the bathroom was inspected and cleaned and by whom. Yet, the proposed legislation includes almost no requirements regarding the public release of data regarding the well being of children in government custody.

Comprehensive public transparency over data, including system outcomes and operations is also essential to the protection of children and to positive system outcomes. Members of the public and legislators, including this legislative body, should have easy access to aggregated (de-identified) data about the youth in the system.⁴⁹ Public transparency helps ensure that the public is aware of what is happening to its children so that the public can effectively and appropriately respond when children are being harmed. Additionally, the public transparency of data, including fiscal data, increases the likelihood that public finances are used effectively and responsibly, and may help shield the state and localities from potential liability.

Recommendations

- The Legislature should mandate that performance-based data about the system's operation be collected and shared with the New York State Legislature, the administrations of local judicial systems at the county level, and the public. At a minimum, this data should be reported on a quarterly basis.
 - Data measures should include but not be limited to: the overall number of youth in the system (broken down by offense level); recidivism rates; educational outcomes (including grade levels, promotion rates, and graduation rates); permanency outcomes; staff training data; permanency data; restraint data; the number of movements of youth between facilities and levels of service and care; recidivism data; injuries to youth; injuries to staff; modifications to more restrictive levels of care; number of youth arrested while in county

⁴⁶ S 06257/ A 0957, Part G (2011-12).

⁴⁷ *Id.* (S 06257/ A 0957)

⁴⁸ *Id.* (S 06257/ A 0957)

⁴⁹ Concerns about the confidentiality of records may be raised when the public dissemination of data is discussed. These recommendations are specifically limited to aggregate data where the names and identifying information of young people, complaining witnesses, and others are removed.

custody; and number of children referred to the adult system. Whenever possible and applicable, data should be broken down by REGGO- race, ethnicity, gender (sex), geography and offense⁵⁰ and, when possible and appropriate, LGBTQ status.⁵¹ The data should also be broken down by provider agency and type of program/facility.

5. The proposed legislation should be amended to ensure that counties' Close to Home placements are actually close to children's homes.

The placement of children many hours from their parents, family members, friends and communities has serious negative consequences for both young people and for public safety. The current geographic isolation of many youth in OCFS custody makes it extremely difficult for that agency to engage parents and other supportive adults in a young person's treatment and rehabilitation. Large geographic distances also make it more difficult for OCFS to appropriately plan for a young person's return to their community (and all young people return from OCFS placement to a community) and to engage in and monitor meaningful aftercare services. While shifting youth in custody to county placements may help ensure that they are closer to home, it alone is no guarantee. The legislation does not mandate that children be placed within a certain distance of their home or in their home county. Given that some smaller counties currently have very small numbers of youth in OCFS non-secure placements, it is possible that they may not want to open up their own higher level of care and may band together with regional neighbors. While this might be a useful approach, it is important that any regional coordination ensures that children are in close proximity to their families and communities.

Recommendation

- The proposed legislation should be amended to ensure that children are placed within a close geographic distance of their homes. If smaller counties will plan to collaborate on a shared facility (for example a facility serving youth from a number of smaller counties), these counties should be mandated to ensure that the facility is located in a manner that is easily accessible to families from each of the involved counties. This decision should take into account public transportation and other access issues.

6. The legislation should be amended to ensure that OCFS facilities are not repurposed for Close to Home facilities.

Best practices exist with regard to determining the types of facilities children are housed in, including but not limited to the architecture of facilities and the maximum number of children per facility. It is crucial that any facilities opened under Close to Home not replicate some of the same harms of current OCFS facilities. Both Non-Secure and Limited-Secure facilities should be small, home-like facilities and should not replicate adult corrections-like settings. As stated earlier, ample research demonstrates that placing children

⁵⁰ Advocacy for the "REGGO" data collection technique whereby data is collected by "Race, Ethnicity, Gender, and Offense" originates with the Haywood Burns Institute, a national leader in reducing racial and ethnic disparities for youth in the justice system. In this methodology, gender is generally used to refer to biological sex. The Correctional Association recommends that data also be broken down by gender identity, when available.

⁵¹ For information on the harms faced by LGBTQ youth in the youth justice system, see: Himmelstein, K and Bruckner, H., *Criminal Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*. Pediatrics 127(1) (2011) and Majd et al, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts* (2009), available at: http://www.equityproject.org/pdfs/hidden_injustice.pdf.

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in small home-like settings as opposed to larger, correctional like facilities is crucial to improving both public safety and positive life outcomes for children.

The Correctional Association was disheartened to learn at a public hearing that there are plans for New York City to repurpose OCFS facilities for use as Limited Secure Close to Home placements. With the exception of OCFS' Brooklyn for Brooklyn (or Brooklyn Residential) facility, none of the OCFS facilities within New York State are at all aligned with the espoused Close to Home model and its promise of small, homelike facilities that better serve youth. Reopening NYS facilities under city or county jurisdiction with private agency staff will not inherently translate into better outcomes for youth and will not yield the promises of Close to Home.

Recommendation

- The Legislation should be amended to ensure that no OCFS building is repurposed for a Close to Home facility. This amendment should apply to facilities at any security level in either New York City or any other county.

7. Particularly given the planned closure of OCFS' Red Hook facility, more should be done to ensure that lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth are served in a culturally competent manner.

The CA is deeply concerned that the proposed closure of the Red Hook Residential Center will have a harmful disproportionate impact on lesbian, gay, bisexual, transgender, and questioning (LGBTQ) youth. Research has shown that LGBTQ youth are disproportionately represented in the youth justice system; and suffer routine and systemic mistreatment in detention and placement as a result of their perceived or actual sexual orientation, gender expression, or gender identity. Although Red Hook is not a facility exclusively designed for LGBTQ youth, they are known to specialize in providing LGBTQ affirming placements. Although the CA does not believe that incarcerating children is the most effective method of serving them, this particularly facility is the only OCFS facility with an articulated LGBTQ specialty. Particularly given its proposed closure, OCFS must ensure that youth have a range of placement options at facilities of all sizes and security levels that can provide LGBTQ affirming care. It is crucial that state and local administrations invest the resources needed to replicate the successful LGBTQ affirming model at Red Hook in facilities throughout the OCFS system and the Close to Home system.

On May 30-31, 2012 the CA's Juvenile Justice Project executed a visit to Red Hook Residential Center as part of the SAFETY Initiative. The SAFETY Initiative is a project in collaboration with OCFS to evaluate the safety of LGBTQ youth in custody, assess the effectiveness of the 2008 *OCFS LGBTQ Anti-Discrimination Policy and Guidelines* (hereafter referred to as "the policy"), and ensure meaningful implementation of the policy.

The CA found Red Hook to be a model for an affirming, safe facility for LGBTQ youth – and all youth – in the following key ways:

- 1) A strong leadership that clearly communicates the expected professional values and expectations to all staff. This provides a solid foundation for all staff to effectively work with LGBTQ youth and all youth in their care.

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The director of the facility at the time of our visit articulated a clear set of core values and expectations for his facility, including the importance of affirming LGBTQ youth; this set a unified tone of respect and inclusion throughout the facility. As a result, the staff we spoke with took the policy seriously and displayed knowledge and fluency about the tenets and principles.

- 2) An investment of time and resources into training and staff development on LGBTQ issues.

Red Hook is a good illustration that there must be consistent and repeated training on LGBTQ issues to ensure equitable and effective treatment of LGBTQ youth in OCFS facilities. The facility includes a training module every year on LGBTQ issues to staff. As a result, the staff we met in the course of our visit displayed a high degree of knowledge and understanding about adolescent development and sexual orientation, gender identity, and gender expression; they also viewed the acceptance of LGBTQ youth as part of their required duties as employees.

- 3) Youth input and feedback about the facility must be routinely solicited and integrated into programs, services, and operations.

The staff at Red Hook view the youth in their care as “partners and stakeholders.” As a result, the needs of LGBTQ youth, especially transgender and gender non-conforming youth can be voiced and accommodated in decisions related to programs and recreational options. We were impressed with Red Hook’s efforts and genuine commitment to include the voices of residents in decisions related to programming and operations. A mechanism to regularly gather feedback and input from residents, and their families, should be instituted at each OCFS facility.

- 4) The facility integrates the needs of LGBTQ youth in all of its resources, dissemination of information, supplies and materials, etc.

The facility shares resources for LGBTQ youth with all residents; this is routine practice. They also thoroughly explain the LGBTQ anti-discrimination policy and guidelines to each resident at admission. By ensuring that all protocols and materials are inclusive of LGBTQ youth, Red Hook relays a clear and powerful signal that the facility is inclusive and affirming. This practice of including LGBTQ referrals, materials, resources, and non-gender specific supplies should be incorporated into the operations of all facilities.

- 5) The facility utilizes effective positive youth development practices; recognizing that the development of strong relationships to caring adults is critical to the safety, growth, and success of youth. In addition, the staff at the facility demonstrate an understanding that the exploration, expression, and integration of identity – including sexual orientation, gender identity, and gender expression – is a vital part of healthy adolescent development.

Red Hook places an emphasis on building strong relationships and engaging in dialogue with residents. Their commitment to positive relationship building and mentoring – a cornerstone of positive youth development – is perhaps the most crucial component to their success creating and maintaining a safe and affirming facility for LGBTQ and all youth. The staff continuously emphasized the importance of building strong, trusting relationships with youth, “to raise spirits and self-esteem, not to punish. Our job is to teach.” Staff members saw their role as being “counselors, not bouncers.” Red Hook’s emphasis

on education, positive youth development principles, as best exemplified and reflected in their ongoing dialogue with residents, ensures that the facility is safe for all residents, including those who are LGBTQ, and that healthy adolescent development is supported.

The culture at Red Hook is one which promotes diversity, acceptance, and provision of services grounded in positive youth development principles; one that values the voices and input of youth; and strives to foster healthy supportive relationships between staff and residents as well as positive peer relationships. This underlying culture – one that has been established due to the dedicated efforts of strong effective leadership – has been an integral part of Red Hook’s overall success working with LGBTQ youth. To ensure that LGBTQ youth in the care of OCFS receive the affirming, safe, and effective youth justice services they deserve after Red Hook closes, it is essential that the aforementioned fundamentals of Red Hook’s model are replicated to effectuate the culture change across OCFS facilities that is necessary for a lasting and in-depth transformation that benefits *all* youth.

Recommendations

Particularly given the proposed closure of Red Hook, it is imperative that state and local administrations invest the resources needed to replicate the successful LGBTQ affirming model at Red Hook in facilities throughout the OCFS and Close to Home systems. Specifically this model must include:

- Agency leadership that understands, embodies, and conveys the value of inclusiveness, especially as it pertains to diverse sexual orientations, gender identities, and gender expressions of residents and staff; and reinforces this message, as well as the LGBTQ Anti-Discrimination Policy and Guidelines, to all levels of staff through consistent repeated training and professional development;
- Meaningful mechanisms for youth in care, and their families, to provide regular input and feedback about programming, recreational options, and their placement experience;
- The integration of the needs of LGBTQ youth in all of the facility’s resources, supplies, and materials; and thorough dissemination of information pertaining to LGBTQ specific services, including the anti-discrimination policy, to all youth;
- The implementation of a positive youth development framework in all programming; the development of strong relationships to caring adults is a key component of such a framework. Such relationships between staff and youth directly contribute to the safety and protection of LGBTQ youth. In addition, facility staff must be able to facilitate residents’ exploration, expression, and integration of all aspects of their identity, including sexual orientation, gender identity, and gender expression – a critical and normative part of healthy adolescent development.

8. New York State should raise the age of criminal responsibility to 18 for all children

New York is one of only two states in the nation that prosecutes all 16- and 17-year-olds who are charged with crimes in the adult criminal justice system, regardless of the severity of their alleged crimes. Under the “Juvenile Offender” laws, New York also prosecutes 13-, 14- and 15-year-olds charged with certain serious offenses as adults. Every year, over 45,000 16- and 17- year-olds are arrested as adults in New York State.⁵² Because they are legally defined as adults, these youth can be questioned by the police without parental notification and confined alongside adults in prisons and jails. Youth of color are more likely to be targeted

⁵² For 2009 arrest statistics see Schuyler Center for Analysis and Advocacy, *Raising the Juvenile Justice Jurisdictional Age: Treating Kids as Kids in New York State’s Justice System* (March 2012).

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by the police and over-represented at every point in the justice system.⁵³ Youth of color are more likely than white children to bear the serious and lasting consequences of being charged as adults.

Compared to those who have been prosecuted as youth, young people who have been charged as adults--including for serious crimes--have been shown to be *more* likely to commit future acts of violence and crime and return to prison at higher rates. For example, a study of New York and New Jersey youth charged with felonies, where in New York youth as young as 13 were prosecuted as adults and in NJ nearly all of the youth were prosecuted in juvenile court, found that New York youth “were **85% more likely to be re-arrested for violent crimes** than those prosecuted in the New Jersey juvenile courts, and **44% more likely to be re-arrested for felony property crimes.**”⁵⁴ Further, published scientific evidence demonstrates a “**34% relative increase in subsequent violent or general crime**” for youth transferred to the adult system as compared to youth prosecuted in the juvenile system, and that transferring young people to the adult system--including for serious crimes--is “counterproductive to reducing juvenile violence and enhancing public safety.”⁵⁵

One reason adult prosecutions and sentences fail is that adult prisons and jails are not equipped to provide safety or services to children. All children have a right to safety and to access developmentally appropriate services, programs, education, and treatment, yet adult jails and prisons generally provide none of the above for the adolescents in their care.

Jonathan McLard was barely seventeen when he committed suicide in Missouri while awaiting transfer to an adult prison. Jonathan had committed a serious gun crime. Even though he hurt another young person, his sentence should not have included suicide. Jonathan's death is not an anomaly. Children in adult jails and prisons are in extreme danger. Children, like Jonathan, are thirty-six times more likely to commit suicide when in adult jails than when in juvenile detention facilities.⁵⁶ Jonathan's mother Tracy, a former schoolteacher turned activist, told Congress that Jonathan was constantly trying to strengthen his body to survive present and future attacks.⁵⁷ In Congressional testimony, Tracy described visiting Jonathan in an adult facility:

As Jonathan approached his side of the glass, my husband and I were shocked by what we saw. Jonathan had cuts and bruises all over his face, ears, and head. His hair was shaved off and he had a tattoo under his eye. He was told by the other inmates in the

⁵³ See generally JAMES BELL & LAURA JOHN RIDOLFI, THE W. HAYWOOD BURNS INST. 1, ADORATION OF THE QUESTION: REFLECTIONS ON THE FAILURE TO REDUCE RACIAL & ETHNIC DISPARITIES IN THE JUVENILE JUSTICE SYSTEM 8 (Shadi Rahimi ed., 2008), http://sccounty01.co.santa-cruz.ca.us/prb/jdai/bi_dmc.pdf, CHARLES PUZZANCHERA & MELISSA SICKMUND, NAT'L CTR FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2005 21 (2008), and Campaign for Youth Justice, *Critical Condition: African-American Youth in the Justice System: Key Findings from the Report*, at 1, http://www.campaignforyouthjustice.org/documents/impact_on_african-american_youth.pdf (last visited March 27, 2012).

⁵⁴ Juszkievicz, J. (2007, October); *To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution*. Washington, D.C.: Campaign for Youth Justice citing Jeffrey Fagan, “The Comparative Advantage of Juvenile vs. Criminal court Sanctions on Recidivism Among Adolescent Felony Offenders,” *Law and Policy*, Vol. 18., Nos. 1& 2, January/April, 1996.

⁵⁵ Angela McGowan et al., “Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review,” Department of Health and Human Services, Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report*, November 30, 2007 / Vol. 56 / No. RR-9, p. 10.

⁵⁶ Neelum Arya, Campaign for Youth Justice, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America* 1 (2007).

⁵⁷ Testimony of Tracy McLard before the House Education and Labor Committee, available at <http://www.campaignforyouthjustice.org/parent-testimony.html#mclard>.

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facility he needed the tattoo to survive. I immediately broke down and wept because I was utterly powerless to keep him safe. As I questioned him about what happened, I learned that he was attacked the night he arrived there. He said there was a meth lab in the jail and the person who attacked him was someone he shared a cell with and who was coming down off of meth. This person took Jonathan's shirt and pulled it over his head so he couldn't see and so his arms were trapped. Jonathan kept trying to reassure me that he would be okay and this was his fault because he'd gotten himself into this nightmare. We both knew he wouldn't be okay.⁵⁸

Tracy was right, Jonathan would not be okay. And his ordeal and death had a devastating impact on her family, including leading to a suicide attempts by her husband. Tracy has pledged her life to ensuring that not one more parent goes through what she and her husband have.

In addition to shockingly high suicide rates, children in adult prisons are twice as likely to be beaten up by staff than are youth in juvenile Children in adult prisons are five times more likely to be sexually assaulted than children in juvenile facilities and are far more likely to be attacked with weapons than youth in juvenile facilities.⁵⁹ Children in adult prisons are five times more likely to be sexually assaulted than children in juvenile facilities.⁶⁰

Children in adult jails and prisons in New York State are regularly placed in solitary confinement, including for extended periods of time. A 2012 national report by Human Rights Watch and the American Civil Liberties Union (ACLU) on youth in solitary confinement raised local and national awareness about this deeply troubling practice. New York State is one of the states featured in a case study within the report. The report uses first-person quotes like this one from Elizabeth K. (pseudonym) to illustrate the experiences of youth in solitary confinement: "(I was) upset, scared—bugging out. Like, 'they cannot keep me in this cell for 23 hours.' I was kicking the door, crying hysterically. They called mental health and put me on suicide watch." Elizabeth was held in jail on Rikers Island at age 16. The report details the legal and policy landscape of youth in solitary confinement, and documents the research findings of the report's author. For example, "Human Rights Watch and the American Civil Liberties Union interviewed seven young people who reported being held in solitary confinement while in pre-trial detention in jail in New York City. A number of those adolescents reported spending significant periods in punitive solitary confinement. Five young people said they had spent a total of longer than thirty days in solitary confinement while under age eighteen; two of those adolescents said they had spent *longer than six months in solitary confinement* (italics added)."⁶¹ According to the report, the average length of stay for adolescents in solitary confinement inside New York City jails is 4.31 days.⁶²

Additionally, young people prosecuted as adults are subject to lifelong criminal records. The consequences of an adult record can include:

⁵⁸ Testimony of Tracy McLard before the House Education and Labor Committee, available at <http://www.campaignforyouthjustice.org/parent-testimony.html#mclard>

⁵⁹ Fagan, Jeffrey, Martin Forst and T. Scott Vivona. "Youth In Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy." *Juvenile and Family Court*, No. 2, 1989.

⁶⁰ *Id.* (Fagan & Forst)

⁶¹ Human Rights Watch and American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, October 2012, at 131.

⁶² Human Rights Watch and American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, October 2012.

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- Denial of educational loans
- Barriers to employment
- Deportation
- Loss of housing for both themselves and their families
- Limitation of voting rights (prior to even being old enough to vote)⁶³

A robust body of developmental research has shown that the brains of children, even in late adolescence, are not fully formed. Children lack the critical decision-making and risk assessment capabilities of adults while simultaneously being more susceptible to peer pressure.⁶⁴ Furthermore, children have not yet developed the ability to understand consequences and are less in control of impulses and aggression.⁶⁵ As Dr. Ruben C. Gur, neuropsychologist and Director of the Brain Behavior Laboratory at the University of Pennsylvania, states:

The evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. . . . Indeed, age 21 or 22 would be closer to the ‘biological’ age of maturity.⁶⁶

“The region of the brain that is the last to develop is the one that controls many of the abilities that govern goal-oriented, ‘rational’ decision-making, such as long-term planning, impulse control, insight, and judgment.”⁶⁷ In addition, during adolescence, the brain is undergoing profound changes that impact the ways in which adolescents process and react to information.⁶⁸ The Supreme Court recognized the growing science of adolescent psychosocial and brain development in both *Roper v. Simmons*,⁶⁹ outlawing the death penalty for crimes committed by persons under eighteen, and *Graham v. Florida*, holding that children cannot be sentenced to life without parole in non-homicide cases.⁷⁰

We as a society recognize this type of categorical and bright line distinction between children and adults in a myriad of legal and social situations. For example, we do not allow any child under the age of eighteen to vote, serve in the military, get married without parental permission, drop out of school, or, in most situations, consent to medical care. As a society, we also categorically state that all children under the age of eighteen lack the sufficient maturity to make any legal contract including a cell phone contract, view “adult” content, or attend R-rated movies without a parent. Our society even believes that eighteen, nineteen and

⁶³ See e.g. Corriero, M.A. *Judging Children as Children: Reclaiming New York’s Progressive Tradition*, 56 N.Y.L. Sch. L. Rev. 1413, 1419 (2011–12); and Juskiewicz, J. (2007, October); *To Punish A Few: Too Many Youth Caught in the Net of Adult Prosecution*. Washington, D.C.: Campaign for Youth Justice.

⁶⁴ Brief for Am. Psychological Ass’n & Missouri Psychological Ass’n as Amici Curiae Supporting Respondent at 2, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

⁶⁵ *Id.* at 2; Adam Ortiz, *Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability*, A.B.A. JUV. JUST. CTR. 1, 2 (2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf.

⁶⁶ Ortiz, *supra* note 23, at 2 (Petition for Writ of Certiorari, *Patterson v. Texas*, 541 U.S. 1038 (No. 03-10348) (Declaration of Ruben C. Gur).

⁶⁷ ARYA, *supra* note 20, at 9.

⁶⁸ *Id.*

⁶⁹ 543 U.S. 551

⁷⁰ *Id.* at 569. See *Graham v. Florida*, 130 S. Ct. 2011, 2026.

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twenty-year-olds lack the sufficient emotional and cognitive development to legally drink alcohol or gamble. We as a society do not draw behaviorally based distinctions in any of these myriad situations. We do not, for example, say that some children have demonstrated through their actions, an adult-like tendency, and so should be able to serve in the military, vote, or enter into a contract with AT&T. Similarly, because children have engaged in violent behavior does not mean they have morphed into adults and should be treated by such.

Usually a leader in criminal justice reform, New York State is shamefully behind on this issue. Over the last decade, many states, including nearby Connecticut, have successfully raised the age of criminal responsibility without overwhelming the courts or the youth justice system. Data from other states, including Connecticut, also demonstrates that raising the age of criminal responsibility does not result in the kinds of astronomical costs that opponents often site in opposing such reforms.

It's time our state follows suit of the rest of the nation and raises the age of criminal responsibility in New York to 18. It is essential that in doing so, legislators design a solution that does not exclude youth charged with violent crimes. Although it may be easy to say that youth charged with violent crimes should be treated as adults based on the severity of their cases, this approach has repeatedly been demonstrated to increase recidivism, hurt public safety and harm youth.

9. The Legislature should authorize and fund the creation of robust independent and external oversight mechanisms for the youth justice system.

In the words of Patricia Wald (who later became a federal circuit judge) in 1975, juvenile detention is the "hidden closet for the skeletons of the rest of the system." These words have, sadly, held their truth to date, and they may be applied to both juvenile detention and longer-term residential placement institutions across the nation. As an organization that has served as an independent outside monitor of New York's adult prison system for over 166 years, the Correctional Association is well aware of the myriad risks faced by individuals in custody. Children in residential facilities are uniquely susceptible to abuse and mistreatment by virtue of the combination of their age, their isolation from the public, and the generally closed nature of such facilities. These risks are not unique to New York State or New York's local counties. For example, the federal Department of Justice has documented constitutional violations including the excessive use of force in residential youth placements, including locally operated facilities.⁷¹

⁷¹ In August 2009, the federal Department of Justice concluded a two-year investigation of four New York State-operated juvenile prisons, finding routine incidents of physical abuse and excessive use of force, a complete lack of staff accountability, and woefully inadequate mental health services. *Investigation of the Lansing Residential Center, Louis Gossett, Jr. Residential Center, Tryon Residential Center, and Tryon Girls Center*, U.S. Dept. of Justice, August 2009. The DOJ has similarly investigated and made findings against a host of jurisdictions. See Mendel, Richard A., *No Place For Kids*, p.5; U.S. Dept. of Justice Investigation on the Walnut Grove Youth Correctional Facility in Mississippi, March 2012: <http://www.justice.gov/opa/pr/2012/March/12-crt-352.html>; U.S. Dept. of Justice Investigation Report of Arthur G. Dozier School for Boys and the Jackson Juvenile Offender Center, Marianna, Florida, December 2011: http://www.justice.gov/crt/about/spl/documents/dozier_findltr_12-1-11.pdf; U.S. Dept. of Justice Investigation of Terrebonne Parish Juvenile Detention Center, Houma, Louisiana, January 2011: http://www.justice.gov/crt/about/spl/documents/TerrebonneJDC_findlet_01-18-11.pdf; U.S. Dept. of Justice Investigation of the Los Angeles County Probation Camps, October 2008: http://www.justice.gov/crt/about/spl/documents/lacamps_findings_10-31-08.pdf; U.S. Dept. of Justice Investigation of Marion County Juvenile Detention Center, Indianapolis, Indiana, August 2007: http://www.justice.gov/crt/about/spl/documents/marion_juve_ind_findlet_8-6-07.pdf; For more examples please see: <http://www.justice.gov/crt/about/spl/findsettle.php#Juveniles%20Findings%20Letters>.

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The Office of Children and Family Services (OCFS) leadership and other current youth justice stakeholders have expressed a strong commitment to helping children achieve successful behavioral changes and outcomes, and have undertaken significant and laudable reforms. Yet we are mindful of the tensions inherent to *any* agency or body tasked with its own oversight. These tensions are what drive independent inspections and oversight of many private and public spheres where the well being of the public is at stake, including, for example, the New York City Department of Health and Mental Hygiene's *unannounced* and *independent* inspections and grading of food establishments.⁷² In a similar vein, just as we do not allow restaurants to be solely responsible for their own oversight, the safe operation of the youth justice system requires a system of both internal and external oversight⁷³ and checks and balances.

The American Bar Association (ABA) outlined twenty standards for effective youth and adult residential facility oversight including the following essential points. These points include that the overseeing entity must be:

- 1) Independent, specifically meaning that it must not be located within the agency it oversees and it must operate from a separate budget;
- 2) Statutorily guaranteed the right to conduct unannounced and unfettered visits including the ability to have confidential conversations with youth in the facilities and programs;
- 3) Granted the power to subpoena witnesses and documents and have the power to file suit against the agency operating a facility(ies);
- 4) Assigned the power and duty to report its findings to the executive, legislative, and judicial branches, and also to the public;
- 5) Allocated adequate funding and appropriate staffing levels necessary for effectiveness; and
- 6) Facility administrators must be required to respond publicly to monitoring reports.⁷⁴

Governor Paterson's Task Force on Transforming Juvenile Justice key recommendations included the need to "(e)stablish and fund an independent, external oversight body to monitor and report on OCFS' juvenile justice policies and practices."⁷⁵ The Task Force was charged with looking at the state-system; their analysis and conclusions regarding the need for an independent, oversight body are applicable to locally operated systems as well.

Independent monitoring can also include family members of youth in the justice system. One example is the monitoring being done by Families and Friends of Louisiana's Incarcerated Children (FFLIC) in collaboration with local and state youth justice authorities.⁷⁶ FFLIC participated in the monitoring of a local

⁷² See <http://www.nyc.gov/html/doh/html/rii/index.shtml>.

⁷³ For more information on effective oversight, see: Deitch, Michele, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?* Pace Law Review, Volume 30, Number 5, p. 1397-1410, Fall 2010 and Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, Pace Law Review, Volume 30, Number 5, Fall 2010. Additionally, Governor Paterson's Task Force on Transforming Juvenile Justice made a number of key recommendations for youth justice reform in New York State including the need to "(e)stablish and fund an independent, external oversight body to monitor and report on OCFS' juvenile justice policies and practices." The Task Force was charged with looking at the OCFS state-system although their analysis and conclusions regarding the need for an independent, oversight body are applicable to a city-run system and to private agencies. The Task Force report is available at: <http://www.vera.org/download?file=2944/Charting-a-new-course-A-blueprint-for-transforming-juvenile-justice-in-New-York-State.pdf>.

⁷⁴ The American Bar Association Criminal Justice Committee, Report to the House of Delegates (2008).

⁷⁵ See *Charting a New Course: A Blueprint for Transforming Juvenile Justice in New York State*, A Report of Governor Paterson's Task Force on Transforming Juvenile Justice, December 2009.

⁷⁶ *Id.* (Justice for Families, *Toward a Family Centered Justice System*), at 5.

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detention center and is now also participating in monitoring of the state's residential facilities.⁷⁷

It is our understanding that there will be approximately 30 full time OCFS employees working on oversight of New York City's detention facilities, New York City's Close to Home placements, local county detention facilities, and local county Close to Home placements. While NYS has an important oversight role to play, and we laud the expansion of OCFS' dedicated oversight staff, oversight by the same agency that is responsible for many aspects of the youth justice system, does not obviate the need for true independent oversight in satisfaction of the ABA recommendations.

The distinction between an internal review body and independent oversight is highlighted in national research on this issue. Professor Michele Deitch is widely regarded as a national expert on oversight of confinement facilities. She served as a consultant to the American Bar Association as they developed their recommended standards for residential oversight. In "Distinguishing the Various Functions of Effective Prison Oversight," Professor Deitch directly addresses this distinction:

I should mention at the outset that I am referring to external oversight mechanisms, that is, to entities that exist outside the correctional agency. While it is critical that prisons and jail systems have their own internal accountability mechanisms—for identifying problems, informing management about these concerns, and addressing wrongdoing—such internal measures do not provide public accountability. Moreover, most internal review processes are designed to remain confidential. They support the needs of management for information and accountability without being designed to further the additional goal of public transparency.⁷⁸

Recommendations

- The state should require a mechanism for independent external oversight and monitoring of the youth justice system consistent with the American Bar Association's standards.
 - This independent external oversight body should be charged with oversight all residential youth facilities, including those operated by OCFS, ACS, local social service districts and private agencies.
- The Legislature should mandate that any county operating or contracting for the operation of a Close to Home facility release for public consideration a detailed plan for internal oversight mechanisms (at both the county and contract provider level).
- The Legislature should mandate that OCFS release for public consideration a detailed plan for its own internal oversight mechanisms.
- The Legislature should mandate that all youth facilities and programs be open to routine public inspection by family and community members along with other outside monitors.⁷⁹

⁷⁷ *Id.* (Justice for Families, *Toward a Family Centered Justice System*).

⁷⁸ Michele Deitch, *Distinguishing the Various Functions of Effective Prison Oversight*, Pace Law Review, Volume 30, Number 5, Fall 2010, p. 1439.

⁷⁹ FN 29 (Justice for Families, *Toward a Family Centered Justice System*), discussing how any facilities in New York City should be open to regular public inspection that includes family members.

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- The Legislature should mandate that the Office of Children and Family Services regularly collect and publicly release data about youth in its custody and youth in custody under the Close to Home Initiative in both New York City and upstate counties. This data should include but not be limited to: the number of physical and mechanical restraints used; the number of injuries to youth and staff; any use of isolation; any use of force; the provision of mental health services; the provision of substance abuse services; and the provision of educational services including educational stability and progress metrics (that allow for an understanding of the educational transitions a young person makes after placement and how many credits they successfully accrue while in placement and upon return to a home school). This data should be publicly released on a monthly basis.

10. Fiscal Reforms

Finally, a number of fiscal reforms will enhance the system's performance and improve outcomes. Specifically:

- a. **The legislature should restore \$400,000 to the fund for alternative, community-based programs.**

As documented elsewhere in this testimony, community-based programs have been shown to decrease recidivism and increase positive youth life outcomes. They also save huge sums of taxpayer money. The proposed budget eliminates \$400,000 from these programs. This funding should be restored.

- b. **Amending the Fiscal Infrastructure of the expanded Close to Home initiative**

Decades of research demonstrates that children who have committed a crime or delinquency⁸⁰ and then interact with the system—particularly those who are detained and/or incarcerated—commit *more* future acts of crime and violence as compared to children who commit similar crimes or delinquencies and never become system involved or those who are not detained or incarcerated and instead receive community-based services.⁸¹

⁸⁰ An act of delinquency is generally defined as an act that would be considered a criminal act but for the age of the person committing the act. In other words, a twelve-year-old who is found by law to have committed the act of robbery is said to have committed an act of "delinquency" or of "juvenile delinquency," whereas a twenty-five-year-old who is found by law to have committed the act of robbery is said to have committed a crime. States differ in terms of the youngest and oldest ages at which children can be prosecuted for acts of juvenile delinquency. New York prosecutes children as young as seven for acts of juvenile delinquency. See N.Y. Family Ct Act § 301.2.

⁸¹ See, e.g., Gatti, Tremblay, and Vitaro, *Iatrogenic effect of juvenile justice*, Journal of Child Psychology and Psychiatry 50:8 (2009), pp 991-998. Finding that youth who are "poor, impulsive, poorly supervised by their parents, and exposed to deviant friends are more likely, for the same degree of antisocial behavior, to undergo intervention by the Juvenile Court, and that this intervention greatly increases the likelihood of involvement with the penal system in adulthood" at 991. This research also found that juvenile court interventions involving placement had the most negative impact. Although the research sample used in this analysis was from Canada, much of the reasoning applies to the United States. Similar outcomes have been found in other jurisdictions both inside and outside of the United States. See, e.g., *Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending* (finding that those who faced a juvenile hearing were nearly twice as likely to admit engaging in serious offending (forty-eight percent versus twenty-eight percent) in the following year as youth with identical backgrounds and prior self-reported offending behavior who did not face court hearings); *The Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior*, (a 2003 study tracking youth in Denver and in Bremen, Germany and finding that "those arrested and sanctioned display higher frequencies of involvement in crime at later stages in their life than do their delinquent age mates who were not so sanctioned.")

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Involvement in the youth justice system has been shown to increase future rates of both childhood delinquency and adult penal system involvement.⁸² This negative impact increases as the type of intervention used becomes more restrictive, isolating, and punitive in nature.⁸³ An ever-increasing body of evidence demonstrates that incarcerating children leads to increased violence, recidivism, and poor life outcomes for youth (even when controlling for severity of offense).⁸⁴ Youth with mental health concerns, detention (pretrial) and incarceration (posttrial) have been shown to exacerbate mental health symptoms and increase the likelihood that youth will engage in self-harm and commit suicide.⁸⁵ Youth who have experienced secure detention or incarceration are also less likely to return to school.⁸⁶ Economists have shown that incarcerating youth decreases both the chance that they will remain in the labor market and their future earning potential.⁸⁷

The current proposal does not contain sufficient fiscal incentives to encourage counties to fund the community-based programs and services demonstrated to reduce recidivism and increase positive youth outcomes.

This legislative body previously and successfully recognized that fiscal incentives above and beyond the mere price differential between placement and community programs are necessary and useful. In FY 2011-12, New York State via Governor Cuomo's state budget provided a significant fiscal incentive to local

⁸² A 2010 report on twenty-nine experiments involving 7300 youth over a thirty-five-year period determined that involvement in the juvenile justice system actually increases delinquency. See Anthony Petrosino, Carolyn Turn-Petrosino, Sarah Guckenburger, *Formal System Processing of Juveniles: Effects on Delinquency*, Campbell Systematic Reviews, 37, Jan. 2010.

⁸³ A Canadian study by Uberto Gatti, Richard E. Tremblay, and Frank Vitaro, which followed over 1000 boys from youth to adulthood, illustrated that involvement in the justice system has iatrogenic effects on youth. The strongest predictor was placement in an institution, illustrating that the more restrictive the punishment the more damaging the long-term effects. Their research was consistent with previous theories on the concept and effects of labeling: that being labeled as "delinquent" has the effect of altering one's self perceptions, reducing social opportunities, and, in turn, becoming more susceptible to the influence of deviant groups and behaviors. The authors also note that those subjects who were poor, deprived, and members of minority groups, and therefore already at an increased level of vulnerability, were more likely to be arrested in the first place and subsequently labeled as deviants. As a result, they were more likely to become more deeply involved in the justice system in the long run. Gatti, Tremblay, and Vitaro, *Iatrogenic effect of juvenile justice*, Journal of Child Psychology and Psychiatry 50:8 (2009).

⁸⁴ See Holman, Barry, and Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (2007), p. 5. See also Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, (2007); Arya, Neelum, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, Campaign for Youth Justice, (2007); Task Force on Community Preventive Services, "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System A Report on Recommendations of the Task Force on Community Preventive Services," Morbidity and Mortality Weekly Report, Department of Health and Human Services Centers for Disease Control and Prevention (2007); Justice Policy Institute, *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense*, Appendix A (May 2009).

⁸⁵ *Id.* Holman, Barry and Ziedenberg, Jason. *The Dangers of Detention: The Impact of incarcerating Youth in Detention and Other Secure Facilities* (2007), citing Mace, D. et. al., *Psychological Patterns of Depression and Suicidal Behavior of Adolescents in a Juvenile Detention Facility*, Journal of Juvenile Justice and Detention Services Vol. 12 No. 1 18-23 (1997); Justice Policy Institute, *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense*, Appendix A (2009); Campaign for Youth Justice, *The Consequences Aren't Minor: The Impact of Trying Youth as Adults and Strategies for Reform*, (2007); and Arya, Neelum, *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, Campaign for Youth Justice, (2007). Additionally, youth who have been detained or incarcerated also have a significantly higher mortality rate than the general population, including homicide-related deaths; this increase in mortality rate disproportionately impacts youth of color and female youth, with the highest mortality rate found among African-American male youth. See Teplin, Linda A. and McClelland, Gary M., Karen M. *Early Violent Death Among Delinquent Youth: A Prospective Longitudinal Study*. Pediatrics (2005).

⁸⁶ *Id.* (Holman and Ziedenberg), pp. 9-10.

⁸⁷ *Id.* (Holman and Zeidenberg), p. 2.

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counties to reduce detention use. For the first time ever, a pot of “detention” dollars was made available to counties for reimbursement of spending on community-based alternative-to-detention and alternative-to-incarceration programs. This new funding stream, entitled the Supervision and Treatment Services for Juveniles Program (STSJP) fund, is set up to incentivize community based programming--the state will reimburse counties for alternative programming at up to 62% (counties must provide a 38% match), whereas they will reimburse counties for detention spending at the lesser rate of up to 49% (with a 51% county match). Prior to this legislative change, counties were reimbursed by the state solely for detention costs and these costs were previously split roughly in half by counties and the state. In budget year April 1st 2011- March 31st 2012, sixteen New York State counties shifted nearly 2 million dollars (\$ 1,973,195) from their detention allocation to an allocation into the STSJP fund for use toward community-based programming and services. During the budget year April 1st 2012 - March 31st 2013, seventeen counties shifted over \$1.2 million (\$1,242,123.53) from their detention allocation to their STSJP allocation. In sum, \$3,215,319 over a two-year period has been invested in community-based programming as opposed to detention.⁸⁸

More can be done to build on this fiscal success. A cap on detention and placement costs would be a strong policy driver for ensuring that New York’s revamped youth justice system, including the expanded Close to Home initiative, is steering funding toward what has been repeatedly shown to work to help youth and increase public safety.

It is our understanding that significant forecasting by (a) professional researcher(s) was done as part of the Close to Home Initiative in New York City. This forecasting, to the best of our knowledge, included projected offense rates and projections about the kinds of services that would be necessary under New York City’s Close to Home initiative. Similar forecasting could be done for the rest of the state. New York City, upstate counties and the state would then have robust data to use when determining a statewide appropriate cap on detention and placement costs eligible for state reimbursement. There could, of course, be a built-in safety valve for ensuring that if offense rates significantly change from these projections the amount available to localities would increase accordingly.

Recommendations

- A “maintenance of effort” clause should be required of all counties, both in New York City and upstate, operating Close to Home placements. It is our understanding that the funding for the Close to Home Initiative depends on funding streams from both counties and state. The legislation, however, codifies and commits millions of dollars in state funding without a parallel codification and commitment to county funding.
 - The legislation should mandate that counties cannot reduce in its investment in the system. The state will, if this legislation passes, be required to maintain its investment in programs and services. The same should be required of local counties.
- Fiscal incentives for alternatives to placement should be codified in the legislation, including:
 - a) a capped allocation on the amount of funds that can be spent by all New York State counties on detention and residential placement; and
 - b) a higher reimbursement rate for alternatives to placement than for placement under the Close to Home legislation in all New York State counties. This would essentially build fiscal incentives similar to those undergirding the STSJP reforms into Close to Home’s financing

⁸⁸ The Office of Children and Family Services provided this information on funding shifts in 2011 and 2012.

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structure.

- The proposed legislation should be amended to mandate that future savings resulting from the implementation of the expanded initiative be reinvested in youth justice prevention and other proven community-based approaches.

Conclusion

In conclusion, ensuring that children in the youth justice system remain close to home is an important step and one that the Correctional Association has long advocated for. Given the unique vulnerability of children in the youth justice system and the complexity of their needs, it is equally crucial that the Close to Home Initiative include the specific, comprehensive, and durable protections recommended in this testimony.

The proposed Close to Home Initiative presents this legislative body and other system stakeholders with a unique and important opportunity to create a new youth justice system from the ground up. This system has the potential to serve as a model state- and nation-wide. The ultimate success of the Close to Home Initiative and the success of the children and communities impacted by the new system depend on more than jurisdictional and geographic shifts. Amending the proposed Close to Home Initiative to include the aforementioned recommendations will help ensure that any new city-based system is poised for excellence, both now and during the tenures of future city and state administrations.

Successful youth justice reform also depends on New York State ending the shameful practice of prosecuting children as young as 13 as adults, and housing 16 and 17 year-olds in adult jails and prisons, including in solitary confinement. Prosecuting children as adults may sound tough on crime, but in reality it is a counter-productive crime prevention strategy. It also disproportionately impacts youth of color, who are unequally burdened with the lifetime consequences of adult criminal records and the trauma of having been incarcerated in adult facilities.

The Correctional Association of New York recognizes that we as a state stand at a crossroads, with the possibility of true system transformation ahead of us. We welcome the opportunity to work together with New York State and local communities to ensure robust protections for all children in the justice system while offering a wide, effective and cost-effective range of community-based services, programs and treatment options. Thank you.