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TESTIMONY

The Role of Probation in Family Court

Task Force on the Future of Probation in New York State
John R. Dunne, Esq., Chair
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Submitted by
THE LEGAL AID SOCIETY
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Good morning. I am Karen Yazmajian, Supervising Attorney of the delinquency practice in the Brooklyn office of the Legal Aid Society's Juvenile Rights Practice. With me are Marty Feinman, Deputy Attorney in Charge of our Brooklyn office and Jacqueline Deane, Director of the Delinquency practice. We thank Chairman Dunne and the entire Task Force for providing the Legal Aid Society with an opportunity to be heard concerning the role of Probation in New York's Family Court.

The Legal Aid Society is the nation's largest and oldest provider of legal services to poor people. In our Juvenile Rights Practice, we provide legal representation city-wide to children who appear before the New York City Family Court in child welfare, juvenile delinquency and other proceedings affecting children's rights and welfare. Last year, our attorneys and social workers represented more than 30,000 children, including some 4000 children aged 7-15 who were charged with juvenile delinquency in Family Court. Our Criminal Defense Practice handled some 225,000 criminal cases, including cases of children ages 13-15 who are charged in adult court with certain enumerated crimes, and children ages 16 and older who, when charged with any criminal act, are accused and tried, and may be jailed or imprisoned, as adults in the adult criminal justice system. The Civil Practice provides comprehensive legal assistance for families and individuals in 30,000 matters annually, involving a broad range of legal problems related to poverty. Legal Aid also provides appeals and law reform representation within each practice area.

Our perspective on New York's juvenile justice system comes from our continual contacts with children and their families, and from our daily interactions with the courts, schools, health care providers, foster care agencies, and City and State government agencies, including: the New York City Department of Probation, Department of Juvenile Justice, Department of

Education, and Administration for Children's Services, and the New York State Office of Children and Family Services, Office of Mental Health, Education Department, and Office of Mental Retardation and Developmental Disabilities.

Background

The New York City Probation Department has the greatest effect upon children in the Family Court after arrest. Children are affected by decisions made by the Probation Department at discrete points in a delinquency proceeding. First, probation officers make decisions to adjust cases, thereby diverting children from the court process. Second, probation officers assess and make recommendations about the level of supervision of children that is required during the pendency of each case. Last, probation officers assess and make recommendations for community supervision or incarceration. The shortcomings that exist in probation in New York contribute to the general failure of our juvenile justice system to meet its mandate of rehabilitation. Probation is key to the mission of the juvenile court system, which is to keep youth in their communities unless it is absolutely necessary to remove them. Given the high caseloads of New York City Probation Officers and the lack of sufficient training, expertise and access to information, Probation staff often fail to identify the needs of young people and their families. This inhibits their ability to link children to appropriate community-based services in order to prevent prosecution and incarceration.

Probation encounters children in a broader context of criminalization of youth. In low-income communities, graffiti, talking back to a police officer and minor school conflicts are not dealt with through counseling, mediation, and the engagement of families, as they are for middle and upper class families. Instead, many minor incidents are blown far out of proportion - often with devastating consequences for children and their families. New York City has created a

juvenile justice system in which primarily low-income children of color are arrested, prosecuted in Family Court, and incarcerated for what frequently amounts to normative teen behavior.¹ When considering the role of Probation in Family Court, it is important to remember that the large majority of young people charged in the Family Courts are accused of delinquent behavior involving nonviolent, misdemeanor offenses. The increase in juvenile arrests in New York City between 2006 and the previous year, for example, were in misdemeanor arrests (11% increase).²

The over-prosecution of children and overuse of detention comes at great financial and human cost. The 2007 Mayor's Management Report indicates that the cost of detaining a child in New York City is now \$551 per day³ (\$201,115 per year). What of the human cost? Youth who are then placed at OCFS juvenile prisons are significantly more likely to be rearrested than those who remain in the community following adjudication of their delinquency case. The last time juvenile recidivism was studied in New York, approximately 80% of boys who spent time in OCFS facilities re-offended.⁴ A recent policy brief released by the national Justice Policy Institute (JPI) showed the harm caused by the unnecessary over-incarceration of children. JPI finds that detention does not deter most children from criminal behavior; congregating youth together for treatment in a group setting produces a higher recidivism rate and poorer outcomes; and youth who are incarcerated are more likely to reoffend than youth who are supervised in a

¹Although the New York City Department of Juvenile Justice no longer posts statistics related to race on its website, almost the entire detention population consistently has been composed of youth of color -- approximately 60% of those detained pre-trial are African-American and 37% are Latino.

²Data provided on March 12, 2007 to the Legal Aid Society by the NYC Mayor's Office of the Criminal Justice Coordinator.

³ FY 2007 Mayor's Management Report, http://www.nyc.gov/html/ops/downloads/pdf/_mmr/djj.pdf.

⁴ Bruce Frederick, Ph.D., New York State Office of Children and Family Services, Office of Justice Systems Analysis Research Report (1999).

community-based setting. Significantly, among other things the report highlights the known fact that detained youth face barriers in returning to school, and in the long run, they experience reduced success in the labor market.⁵ Community-based alternatives have proven time and again to be far more effective, more humane, and less expensive, than prosecution and incarceration. These alternatives provide intensive services to children and their families while they remain at home and in school. These children have recidivism rates below 30%, and the programs cost between \$7000 and \$12,000 per year per child. Community-based alternatives should be utilized whenever possible.

The Role of Probation

Probation is positioned to play a key role in preventing the unnecessary and unfair criminalization and incarceration of children. The Department of Probation plays an integral role in the coordination of many different agencies and individuals involved in the juvenile justice system. The mission of juvenile probation must be to recognize the developmental growth of adolescents and connect young people to rehabilitative services. As Chief Judge Kaye reminded us in her 2006 State of the Judiciary address, probation is intended to “help [individuals] reclaim their lives and become productive citizens.”

Adjustment

As the first to interact with children and families after the police make an arrest, Probation is in a unique position to identify the needs of the young person and his or her family. At this initial critical stage, the Probation Officer has the ability to adjust the case—meaning to

⁵Justice Policy Institute (Holman & Ziedenberg), *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and other Secure Facilities*, November 2006.

resolve the case without a delinquency petition being filed.⁶ In order to accomplish this, the Probation Officer must act diligently to obtain information and interview relevant parties, including the youth, his or her family members or guardians, and oftentimes the complainant. To be able to adjust more cases, Probation Officers must be connected to community-based programs and agencies in order to link young people with services prior to prosecution. Additionally, the Probation Department should work with the NYPD in order to focus on facilitating adjustment for suitable cases involving police officers and NYPD school safety agents.

The New York City Probation Department's current adjustment rate is approximately 23%. We are aware that some counties in New York State have much higher rates, and are adjusting approximately half of their cases. We recognize that the NYC Department of Probation has improved its adjustment rate over the last few years, but there remains significant room for improvement. It is critical that training, resources and support be made available to Probation Officers to enable them to adjust suitable cases. Additionally, mediation is an under-utilized alternative to prosecution. Many non-violent, minor offenses are appropriate for mediation at this early stage. We urge the Probation Department to refer all such minor, misdemeanor cases, including "school fights" and fights between peers outside of school, to mediation pre-petition. Where children need preventive services, it is always more appropriate to access those services in the community, outside of a criminal context. We urge the Task Force to work toward achieving the funding shifts necessary to make preventive services available at the point of adjustment.

⁶ See N.Y. Family Court Act §308.1.

Interaction with Schools

When children are arrested for school-based incidents and are referred to the Family Court, certainly Probation should take every opportunity to adjust these cases, using referrals to mediation whenever appropriate and trying their best to minimize the disruption of students' education. This is particularly important given the fact that so many children are being arrested in school for minor disciplinary incidents. New York City has stationed some 5000 members of the police department, known as "school safety agents," in our public schools. We have found that the presence of the SSAs has caused many minor school-based disciplinary incidents to be blown out of proportion, causing great harm to children. Instead of addressing ordinary teenage misbehavior with the expertise of school personnel, the SSAs quite often arrest children. This harsh and punitive environment now pervades many of the public schools, particularly those in the city's most under-served neighborhoods.⁷ When seeking to adjust school-based cases, Probation should be sure to speak with teachers and counselors at the school in addition to evaluating the complaints of SSAs.

Throughout the life of a family court case, Probation acts as a monitor of the young person's compliance with school attendance. Poor school attendance can lead to the denial of adjustment; the difference between parole and remand; and it can also mean that the young person will likely be placed on probation and/or placed outside of his home and community. Oftentimes, poor school attendance may be the sole reason for a Violation of Probation, thus resulting in placement. It is not simply enough to act as a monitor and report to the court that the child is not attending school regularly. Probation Officers must examine the threshold question, "why isn't the young person attending regularly?" "Is the young person fearful or concerned

⁷ See, *Criminalizing the Classroom: The Over-Policing of New York City Schools* (2007), www.nyclu.org; Testimony of the Legal Aid Society on Police in the Schools, before the New York City Council, October 10, 2007.

about his or her safety in school?” “Does this child have a learning disability or some other special educational need that has not been adequately addressed?” “Are there social issues, such as is this child 15 years old and repeating the 8th grade again?” Only with a greater understanding of the individual child’s needs can probation officers begin to adequately address the child’s needs through advocacy and services.

We find that young people with identified special educational needs are too often “dumped” into the juvenile justice system. Many students with disabilities exhibit behaviors that must be addressed in the schools through the provision of mental health and other legally-mandated services. Instead, however, when those needs are not addressed, those students are often arrested and prosecuted. Probation’s role in these cases should be to try to adjust the cases by ensuring that Probation staff are knowledgeable about special education services and equipped to make appropriate service referrals. For example, the NYC Probation Department needs to work with the City Department of Education to secure appropriate educational services for children in the community or residentially. This would serve the dual purpose of meeting children’s educational needs and reducing unnecessary referrals to Family Court.

Disposition

After the fact-finding stage of a case, the Family Court Act mandates that “the court shall order the least restrictive available dispositional alternative ... consistent with the needs and best interests of the respondent and the need for the protection of the community.”⁸ In 2004, 32% of all youth charged as delinquents in Family Court were placed on probation.⁹ A large number of cases monitored by the New York City Probation Department result in violations of probation,

⁸ Family Court Act 352.2(a).

⁹ See Widening the Lens: A Panoramic View of Juvenile Justice in New York State, New York State Task Force on Juvenile Justice Indicators (February 2007) at 32.

including “technical violations” which include for example, failure to meet curfew and or attend school regularly. When youth fail at probation, they are incarcerated. The effect is that probation is not the least restrictive alternative at all.

In anticipation of the dispositional phase of the Family Court case, the Probation Department prepares its Investigation and Report (I & R) for submission to the Court. In preparation for the I & R, probation officers must gather a multitude of information from the young person, his family, and collateral sources, such as schools and community based programs. The I & R, among other important information, contains the probation officer’s recommendation to the court regarding what he or she believes is the appropriate dispositional alternative for the young person. In general, the Probation Officer can recommend dismissal of the case, an Adjournment in Contemplation of Dismissal (ACD), a Conditional Discharge (CD), Probation or Placement. More often than not, we see recommendations for Probation and Placement. With the recent introduction of alternatives to detention and the emphasis on gaining greater access to community based programs, we look forward to seeing more recommendations for ACDs, CDs and where appropriate, outright dismissals.

It is critical that probation officers take an individualized approach to preparing these reports. In order to be afforded greater weight, probation officers must be trained to interview and gather information relevant to support its recommendations. Probation officers must be objective when gathering information. Probation officers should take a strength-based approach to preparing these reports with recommendations. It is not enough to gather the relevant information and make a recommendation. All relevant information supporting the probation officer’s recommendation must be included in the reports. For example, if a probation officer recommends an ACD, given the young person’s strengths, the probation officer must be trained

to marshal this information in such a way that it is included in the I & R to support his or her recommendation for the least restrictive alternative, such as the ACD.

Links to Community-Based Education and Mental Health Services

The services and monitoring provided by Probation often fail to prevent or adequately address the family and individual crises which often trigger non-compliance with the terms and conditions of probation or further delinquent behavior. The New York State Office of Children and Family Services (OCFS) has identified 90% of youth entering their facilities as having at least one special service need, including mental health services, required by fully 52% of the children.¹⁰ The majority of youth detained in New York City's DJJ facilities are in need of special education services, and 90% of the students (whose average age is 15), read below the 7th grade level while 25% read below the 4th grade level. Eighty-three percent of these students have math skills below the 7th grade level.¹¹ In New York City, DJJ admits more than 5,000 youth each year to its detention centers.¹²

New York must attend to the serious and unmet mental health and educational needs of our young people. The best way to prevent arrests is to remedy the triggers for delinquent behavior, yet so many of our young people have unrecognized or unmet mental health and special educational needs. When children are referred to Probation, Probation is the crucial link between children in need and community-based organizations with the expertise to work with children and families and address their needs. Community supervision can be expanded if

¹⁰New York State Office of Children and Family Services, Division of Rehabilitative Services, *Youth in Care: 2004 Annual Report*, at ii-iii and Tables 1 and 2. In OCFS' residential centers, 63% of the young people come from New York City.

¹¹DJJ Website, 2001. These categories of information are no longer posted on the DJJ website.

¹²2006 New York City Mayor's Management Report, Department of Juvenile Justice, pp. 135-137.

community-based organizations are partners, and probation officers are knowledgeable about available programs.

We urge the Department of Probation to develop a partnership with the City Department of Education in order to train Probation staff on the appropriate methods to access educational services on behalf of probationers. Probation staff must develop expertise in navigating the City's school system. They must understand enrollment processes and special education services in particular to be able to refer young people to access appropriate school-related services. Understanding these processes is particularly important to ensure the successful completion of probation. Additionally, many probation officers work with young people recently discharged from detention attempting to re-enroll in school. Probation officers must be able to guide young people and their families through this oftentimes arduous process.

In order for the Department of Probation to identify and address the unmet mental health needs of many of our young people, the Department of Probation should develop contacts with the State's Office of Mental Health (OMH) so that Probation staff can access mental health services on behalf of probationers. We suggest that Probation hire mental health consultants who will review relevant information about young people in order to identify mental health needs and appropriate treatment options. Once the needs are identified, probation officers must be well-versed in the documentation necessary to make appropriate referrals to OMH. In order for such referrals to be effective and timely processed, all referrals must be made consistent with OMH stringent application requirements. Additionally, in extreme cases when community-based treatment is not viable, probation officers should be trained to identify and refer appropriate youth to OMH Residential Treatment Facilities for placement as part of the Exploration of Placement.

Alternatives to Detention

The time is now to create viable probation services. The climate in New York City and throughout the state supports an increased reliance on alternatives to detention, and our juvenile justice system needs an effective Probation Department to monitor and expand a variety of newly created alternatives. The City's new Alternative to Detention (ATD) programs have only recently begun, and thus far only in Queens and Brooklyn Family Courts. For too long, too many children have been detained in juvenile detention centers by judges due to a lack of available and reliable community based alternatives. Children have been ill-served because the City did not have alternatives in place when it closed the previous ATD program in early 2006. We are encouraged that at least the first part of the continuum is now up and running. We look forward to the roll-out of the RAI and the use of the ATD programs in Manhattan, the Bronx and Staten Island.

The new ATDs are accessed by judges after a review of the "Risk Assessment Instrument" (RAI). The RAI, designed to evaluate children's appropriateness for ATD, is administered by Probation and the results are shared with judges and parties to delinquency cases. At Probation intake, prior to the initial court appearance, probation officers utilize the RAI to evaluate each child's appropriateness for the various ATD programs available along the continuum. As a result of this new initiative, the role of Probation has been expanded to include the administration of the RAI to every young person involved in the Family Court delinquency process. It continues to be our view that the appropriate role of Probation is not to make recommendations about detention or release, but rather to be well trained in gathering information, administering the RAI and sharing the RAI's results with judges, defense counsel and prosecutors so that judges can make decisions about detention.

Raising the Age of Prosecution as Adults

The Legal Aid Society supports the concept of raising the jurisdictional age in New York State, which currently requires all young people aged 16 and older to be prosecuted and treated as adults. It is unacceptable that teenagers aged 16 and 17 are incarcerated on Riker's Island and in adult Department of Correctional Services facilities. These facilities do not have staff appropriately trained to work with teenagers, nor do they have appropriate staff-to-inmate ratios. All young people under the age of 18 should have staff ratios modeled on the ratios that currently exist for youth under the age of sixteen.

It is important, however, to approach raising the age in a careful, measured way. Currently, the Family Courts of New York City place an unacceptably large number of adolescents on delinquency cases, many of them involving minor offenses, with OCFS in incarceratory settings far from their communities. These placements are made for reasons that include truancy, school failure, weak family structure, and untreated substance abuse and mental health problems. After completing these placements, many of these youth commit new crimes. They, and our communities, would be far better off if the young people received treatment in their communities or in residential therapeutic settings more narrowly tailored to the needs of the children, and which have been shown to have greater success in reducing future recidivism.

Since a large number of older teenagers would have to be absorbed by the already overburdened Family Court system if 16- and 17-year-olds were considered juveniles for the purpose of criminal prosecution, we recommend that this Task Force consider recommending the creation of a blended court in Criminal or Supreme Court. A Criminal or Supreme Court judge would also have the powers of a Family Court judge and could adjudicate the eligible teenagers as juvenile delinquents, rather than adults. This practice would allow the age change to take

place without having to first solve the issue of the Family Courts being already overburdened.

Conclusion

Thank you for the opportunity to testify. We will be happy to address any of the Task Force members' questions.