

**The Bronx
Defenders**

**Redefining
public
defense**

**New York City Council
Committee on Justice System and Committee on Criminal Justice
Oversight Hearing on Implementation and Expansion of RTA
December 3, 2019**

**Testimony of The Bronx Defenders
By Stacey Kennard, Team Leader and Adolescent Defense Project Attorney,
Criminal Defense Practice**

My name is Stacey Kennard and I am a Team Leader and attorney with the Adolescent Defense Project at The Bronx Defenders. Thank you for the opportunity to testify before you today on this important matter.

The Bronx Defenders is a public defender non-profit that is transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called holistic defense that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

The Bronx Defenders forms relationships with hundreds of young clients every year. The team of specialized advocates comprising the Adolescent Defense Project (ADP) includes criminal defense attorneys, social workers, and an education attorney. We represent adolescent clients aged 17 and younger who are charged as adults, primarily young people charged with felonies as Adolescent Offenders and Juvenile Offenders. ADP attorneys and advocates are specialists in the Raise the Age (RTA) law and are trained to represent young people charged

with felonies and misdemeanors in Criminal, Supreme, and Family Court. When our clients' cases are removed from the Youth Part in Supreme Court to Family Court, whether on consent of the prosecution or after litigation, the same attorneys and advocates maintain continuous representation and advocacy through the resolution of delinquency cases. ADP advocates have also developed expertise in adolescent brain development, school discipline and education, and youth programs in the Bronx and across the city. The ADP team also serves as a resource for other advocates in our office working on cases involving young clients.

The number of teens charged with felonies in the Bronx has been significantly reduced since the implementation of RTA. For young people who are still impacted by the criminal legal system, however, there is significant room for improvement. This testimony will focus on the most pressing and harmful issues our adolescent clients face, including:

- Mistreatment by NYPD;
- Prolonged pre-arraignment detention;
- Disproportionate rates of detention for young people in foster care;
- Invasive questioning and presumption of guilt by the Department of Probation;
- Excessive time demands of court appearances and repeated Probation interviews; and
- Lack of transparency for ACS and the Department of Probation.

The momentous changes to our legal system for young people under RTA brings with it an opportunity to rethink the purpose of the system as a whole and, specifically, the way that we approach young people when they are accused of both the most serious and the most minor crimes.

I. NYPD Mistreatment

In recognition of the fact that adolescents are developmentally distinct from adults, particularly when it comes to brain development the RTA legislation put in place additional requirements for police officers dealing with young people. For instance, as we know, adolescents are more likely to take risks without thinking through consequences, more apt to follow the suggestions of authority figures, and more peer-focused than adults. To account for these differences, RTA now requires, among other things:

- Notification of a parent or person legally responsible upon arrest of a young person who will be charged as an Adolescent Offender or Juvenile Offender,

including the fact of the arrest and the location where the young person is being detained;¹

- Advising the young person and a person legally responsible for the young person of rights under Miranda prior to any questioning;² and
- Ensuring that youth charged as Adolescent Offenders or Juvenile Offenders are detained separately from adults.³

While these changes that should theoretically improve the treatment of children in police custody, the actual treatment of our young clients has been marked by systemic abuse and harm. For example:

- Our young clients are routinely held overnight in juvenile rooms of NYPD precincts while awaiting arraignment;
- While detained, our clients are almost always handcuffed to a table continuously and denied beds to sleep on; and
- Our clients are frequently handcuffed in these rooms for close to 24 hours, during which they typically are only provided with one meal and restricted access to water and a bathroom.

Following the letter of the law, the NYPD has not detained young people with adults; instead they routinely handcuff them to a bench at the precinct for hours at a time, an unnecessary and abusive practice that plainly violates the spirit and intent of RTA. Beyond the pain and physical harm of this treatment, the message sent to our clients by these practices is that they are not valuable. This inhumane treatment of children in NYPD custody is unacceptable. We ask that these issues be investigated and that steps be taken to ensure the elimination of these practices.

II. Prolonged Pre-Arrest Detention

After arrest, teenagers spend a significantly longer period of time waiting to meet a lawyer and see a judge than their adult counterparts. Overall, since the passage of RTA, we find that far too many young clients spend up to 24 hours, and sometimes longer, in precincts and courthouse cells prior to arraignment.

¹ CPL §140.20(6).

² CPL §140.20(6).

³ NYPD Patrol Guide, 210-08(5)(h). Effective October 1, 2018.

Additionally, the majority of our clients (young clients as well as adults) are arraigned on nights and weekends. This means that our ADP clients are often arraigned before an accessible magistrate rather than before a specialized judge in the Youth Part. While the Youth Part judges and court staff are well-versed and practiced on RTA, their counterparts in night and weekend arraignment parts are not. Arraignments outside of the Youth Part lead to higher rates of bail being set, more administrative errors, and often additional court appearances for our clients and their families. In many cases, our clients and their families are required to return to the Youth Part the morning after a late night arraignment appearance in front of an accessible magistrate.

Those young people who *are* arraigned in the Youth Part frequently appear before a judge late in the afternoon, leaving attorneys little to no time to meet with our new clients before arraignment. Attorneys are sometimes forced to decide whether to speak with our clients at all before going before a judge or allow our clients to wait - sometimes for multiple hours - before they can be arraigned in a night session. The prolonged arrest to arraignment process contributes to the urgency to get young people in front of a judge experienced in dealing with young people, their families, and their advocates. To be clear, in practice, when faced with this dilemma, our attorneys will ask to have our clients appear in the Youth Part as long as the District Attorney's office is consenting to release. Still, the attorney-client relationship can be harmed when young people have no opportunity to speak to their lawyer until they are standing in front of a judge.

We understand that multiple factors contribute to this delay. We have been informed that these factors include: NYPD consulting with prosecutors to assess whether a young person will be charged initially in Criminal Court or Family Court; the necessity of clearing adults out of Central Bookings to allow youth to enter the area; the District Attorney's office consulting with Corporation Counsel; and the District Attorney's office delaying filing paperwork until witnesses can sign felony complaints. Regardless of the cause, the result is unacceptable. For young people, 24 hours of waiting for arraignment means 24 hours without access to medications or adequate access to food and missed school, activities, and access to loved ones. These deprivations cause physical, emotional, and academic harm to children and often financial harm to families as parents are forced to miss work. We ask that speedy arraignment of young people be prioritized. At a bare minimum, the average arrest-to-arraignment time for young people should be equal to the average arrest-to-arraignment time for adults.

III. Disproportionate Rates of Detention of Youth in Foster Care

In our representation of young people charged with felonies in Family Court, we have seen "crossover youth" (defined as young people who have contact with both the child welfare

and juvenile justice systems) unfairly subjected to punitive detention⁴ as a direct result of their status in foster care. For example, in Family Court delinquency proceedings, we often see children ordered detained by judges at the request of Corporation Counsel when ACS (serving as the young person's guardian) has not identified foster care placements for them. In our experience, we have seen young people in foster care detained when young people living at home would have been paroled to their parents. In these instances, ACS often will treat detention in ACS facilities such as Crossroads and Horizon Juvenile Centers and non-secure detention facilities as though it is a foster care placement and simply stop looking for long-term and appropriate foster care placements.

Likewise, when our clients have been kicked out of a foster home (or any home) — a circumstance beyond their control — they are significantly more likely to have bail set in Criminal or Supreme Court and are also significantly more likely to be remanded to detention or placed in Family Court delinquency proceedings. The effect is that children who have often already undergone the significant trauma of family separation and the experience of unstable housing are forced into even more destabilizing, and often dangerous, settings.

The issue of punitive confinement of so-called “crossover youth” is not unique to RTA or to 16 and 17 year olds. Younger children in foster care were prosecuted in Family Court before passage of the RTA law. We believe that the disparate treatment of “crossover youth” is likely to worsen now that our clients in Family Court include 16 and 17 year olds in addition to younger children. Older youth are more likely to be living independently by choice, out of foster care placement because of a dearth of appropriate foster care homes, or to have been kicked out of their parents' homes due to conflict. These are precisely the scenarios in which young people become more vulnerable to detention and placement in delinquency cases.

IV. Invasive Questioning and Presumption of Guilt by the Department of Probation

The passage of RTA legislation brought with it for the first time the possibility of Probation adjustment for 16 and 17 year olds. Adjustment, a period of usually two months in which a young person is monitored by Probation to support their education and employment, family and peer relationships, and substance use needs, is an incredibly valuable and powerful tool to support young people and our communities. Depending on a young person's circumstances and the nature of an arrest, adjustment can effectively redirect young people to rehabilitative resources and support while avoiding many of the punitive effects of prosecution.

⁴ Detention of a young person while their delinquency case is pending and before a finding is commonly referred to simply as “detention.”

We appreciate the efforts of the Department of Probation in supporting our clients and implementing RTA. Yet these interactions can often be traumatic for our clients, particularly when the questions asked of our clients presume guilt or re-traumatize our clients. The process leading to adjustment is deeply invasive and often completely opaque. As the Department of Probation continues to revise its processes, we look forward to working with them to increase transparency and minimize harm to young people.

Interviews with the Department of Probation tend to be invasive, tend to last for an hour or more, and tend to be repeated multiple times. Moreover, these invasive interviews often happen in quick succession. All young people charged as Adolescent Offenders are referred to the Department of Probation for intake interviews as soon as their cases are removed, or transferred, from Supreme to Family Court. These young people and their parents are questioned extensively by a Probation Officer as part of an initial intake process. If the young person is released from court under supervision of the Department of Probation through Intensive Community Monitoring, they and their parents must participate in *another* intake session where they will answer similar questions, only from a different Probation officer who will be assigned to the young person over the duration of their supervision. Those who are arrested a second time while their first case is pending will be required to complete an additional intake interview. After a finding has been made in Family Court, young people will be sent for yet another intake session with yet another Probation Officer, this time to prepare an Investigation Report (I & R).

Each of these sessions typically takes an hour or longer to complete. Questions detail the allegations against the young person, the young person's home and family life, suspected gang involvement, educational history and current progress, mental health or substance use. In total, youth whose cases have been removed to Family Court will be subjected to at least two in-depth and nearly identical intake interviews with at least two different Probation officers. Repeated rehashing of sensitive topics often has the effect of alienating our clients. The Department of Probation should make efforts to streamline this process so that, to the extent that young people have to be questioned about sensitive topics, they will only have to be subjected to this kind of questioning once.

These repeated interviews exact a toll on our clients and their families. In particular, we are concerned about the following effects of Probation interviews as they are currently implemented:

- Probation officers re-traumatize clients by questioning them repeatedly about potentially traumatic experiences, including past abuse.

- Officers subject young people and their families to invasive and sometimes embarrassing questioning with no clear purpose. Some of the questions routinely asked of our clients and their parents include:
 - Is anyone in your family on parole or Probation?
 - Has anyone in your family ever had any police involvement?
 - Have you ever been physically abused?
 - Have you ever been sexually abused?

- Similarly, parents (and sometimes our clients) are routinely asked the following questions:
 - What is your income?
 - Do you receive public assistance?

- Additionally, Probation officers communicate a presumption of guilt to young people by repeatedly asking questions that assume the young person has committed the charged conduct (even after a young person has explained that they were not involved in a charged act), routinely asking the following questions:
 - How do you think the victim has been affected?
 - How could you make things right?
 - What could you have done to avoid being arrested?

- Young people and families express confusion and frustration at being asked the same extensive list of questions by multiple representatives of the Department of Probation.

As a rule, our advocates accompany our clients to Probation intake interviews. The right to counsel at the initial post-removal Probation intake interview for a young person charged as an Adolescent Offender is mandated by statute. Because of the potential for punitive consequences at case Disposition, it is just as important, if not more so, that attorneys be permitted to attend Probation interviews with our clients after findings have been entered against them in Family Court. These post-finding interviews are the basis of the Investigation Report that courts rely heavily on for reaching a final disposition in the case. Yet attorneys have not been permitted to attend these interviews, at least in the Bronx.

V. Adverse Effects of Overscheduling and Repeated Probation Interviews and Court Requirements

In our practice, we regularly see young people being detained due to factors outside their control, including poor relationships with people in parental roles and occasions when people in parental roles are simply unable to take time off work or arrange for childcare in order to appear at court dates. These stresses and negative consequences are exacerbated by the sheer number of court appearances our clients and their parents are expected to attend. In addition to repeated Probation interviews, it is not unusual for 16 and 17 year olds — including those who are initially released on their own recognizance — to have three court dates within a week of their initial arraignment.

The cumulative effects of required appointments with the Department of Probation and repeated required court appearances within a short time frame include:

- Absences from school, missed instructional time, and the potential for academic and social disengagement;
- Absences from sports and other pro-social activities;
- Loss of wages and potential job loss for young people who are employed;
- For parents and guardians, loss of wages and risk of job loss;
- For parents and guardians, interference with caretaking duties and childcare; and
- Incurrence of expenses to travel back and forth from numerous appointments.

The cost of multiple court dates, particularly in a short period of time, can be extremely destabilizing to our clients. Fulfilling their obligations to court can derail the progress of young people in school and at home and can be an impediment to successful outcomes.

VI. Lack of Transparency and Int 1628

The Bronx Defenders supports Int 1628. Transparency is critical for accountability. Of course, it is critical that data be reported and collected in a manner that maintains the privacy rights of our clients. In particular, we believe that Int 1628 will aid in shedding light on the reasons that some young people are denied access to adjustment.

Bearing this important consideration in mind, we recommend that the Council require the collection of additional data:

- Disaggregate all data to include children with an identified disability (using the existence of an IEP or 504 plan as a proxy);
- Disaggregate the detention and placement of children in foster care specifically (and not only those with ACS history, which is overbroad);
- Disaggregate data about incidents and injuries in detention by age/gender/race/disability;
- Collect data on the specific reasons for ACS moves of young people in detention or placement from setting to setting (less restrictive to more restrictive and vice-versa); and
- Collect data on specific de-escalation measures used to prior to moves from less restrictive to more restrictive settings and moves from facility to facility at the same restrictiveness level.

The first step toward understanding the problems and issues inherent in implementation of RTA requires a shared understanding of the underlying facts and data. This bill is an important first step towards that necessary transparency.

VII. Conclusion

BxD appreciates the Council's attention to the treatment of young people arrested in New York City. We look forward to working with the Council to address the issues raised here. BxD would be happy to assist the Council in these efforts moving forward.

Thank you,

Stacey Kennard, Esq.
Team Leader and Criminal Defense Attorney
Adolescent Defense Project
The Bronx Defenders