ASSESSMENT OF PUBLIC COMMENT
9 NYCRR 359: Role of Probation in Youth Part of the Superior Court

The Raise the Age ("RTA") law became effective October 1, 2018. Recognizing the need for updated and newly drafted regulations in this area, the Division of Criminal Justice Service ("DCJS") Office of Probation and Correctional Alternatives ("OPCA") convened a probation practitioner workgroup and performed a thorough review of existing regulations to assess the impact of RTA legislation on probation practice. In addition to staff from DCJS, workgroup members included representatives from the New York State Council of Probation Administrators (NYSCOPA) and New York State Probation Officers' Association (NYSPOA) as well as probation professionals from throughout the state.

Several comments from the public were received during the public comment period and are summarized below.

Comment 1:

> We urge you to revise these rules to ensure that adolescents eligible for new voluntary assessment and case planning created by the Raise the Age law cannot be prejudiced by their participation. We also request that you revise the rules to reflect best practice in juvenile probation by requiring case planning and engagement activities to reflect principles of positive youth development.
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> Section 359.5(c) should reflect the Raise the Age statutory protections permitting the youth's counsel to be present at any assessment by also requiring a signed consent from both defense counsel and the youth.
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> [W]e are concerned that initial assessments conducted by probation to link youth with services based on state-approved risk and needs assessments will include information about the underlying allegations associated with the pending charges, and could be transmitted to the court prior to any finding of liability through other probation reporting on compliance with voluntary case plans (see id. "[p]robation may make a recommendation regarding completing of the case plan to Youth Part and provide such information as it shall deem relevant."). This poses the risk of significant prejudice to youth where no criminal liability has been established post-trial or plea agreement.

Response 1:

DCJS recognizes the importance of respecting the due process of youth arraigned in the Youth Part of Superior Court and agrees with the commenters that youth should not be prejudiced in any manner by their participation in voluntary assessment and case planning. The proposed rules follow the RTA law such that Adolescent Offenders and Juvenile Offenders will not be prejudiced. Additionally, DCJS and probation practitioners fully understand the benefits of positive youth development, which is incorporated into a strength-based approach and protective factors, included in the proposed regulation.

CPL 722.00(1) states that the youth "may be accompanied by counsel during any such assessment." Proposed Part 359(c)(3) requires probation departments to have a policy that includes: "Ensuring that the youth is notified that they may be accompanied by their legal counsel during their voluntary assessment." Signed consent of counsel is not required by statute. However, DCJS has developed a standardized "Notice of Agreement for Voluntary Assessment and Case Planning" form that provides for the consent of the youth's attorney and/or parental figures to ensure consistency throughout New York State.

Criminal Procedure Law (CPL) 722.00(4) and (5) provide protections for Adolescent Offender/Juvenile Offender youth against self-incrimination, while allowing the probation department to speak candidly with each youth for the purpose of voluntary assessment and case planning without prejudicing his or her case. The proposed regulations parrot the statute. Specifically, proposed Part 359.5(c)(8) and Part 359.5 (d)(2), requires probation directors to establish policy that *prohibits* the communication of statements made by the youth during voluntary assessment and case planning, and departments further must advise the youth of this protection at the initial interview. The proposed language ("provide such information as it shall deem relevant") comes directly from the statute. Departments are prohibited from communicating statements made by youths nor can any such statements be used against youths pursuant to the CPL.

Comment 2:

> The regulations must be amended to restrict the scope of any evaluation conducted by probation as part of the voluntary assessment and case planning process. These initial voluntary assessments, which are not pre-sentence investigations, should not seek or include any information concerning pending allegations. Such information should be explicitly excluded, and any assessment made by probation should only be for the purpose of identifying appropriate referrals for voluntary services based on mental and/or behavioral health, educational, vocational, or other identified needs and appropriate case planning to match youth with services, and not to "[p]rioritize criminogenic need areas for intervention" (see Sec. 359.6(b)(1)) or address "the risk of recidivism" (see Sec. 356.1(b)) where there has been no finding or admission of guilt. (See also Sec. 359.1 defining "risk and needs assessment" as "as validated protocol . . . to assess the youth's risk of re-arrest/recidivism and identify criminogenic needs.")
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> The regulations should make clear that probation can evaluate and make appropriate service referrals for youth who choose to participate in voluntary assessments and case planning without employing the formal state-approved risk and needs assessment, which includes an inquiry into facts concerning pending allegations. Nothing in the Raise the Age statute requires that youth engage in a formal state-approved risk and needs assessment prior to voluntarily participating in "a voluntary service plan which may include alcohol, substance abuse, mental health or other services." See CPL Sec. 722(2) (as amended).

Response 2:

These regulations, which are very much like the provisions provided in the Family Court Act, protect youth who receive juvenile delinquency intake and adjustment services, and protect youth who participate in voluntary assessment and case planning services from selfincrimination, while allowing the probation department to properly assess a youth's needs and to refer to appropriate services. Therefore, the concerns about self-incrimination and any potential adverse impact against a youth, prior to conviction, are addressed in the statute and are repeated in regulation.

DCJS proposed regulations that follow the RTA Law. Probation uses risk and needs assessment instruments to objectively identify behavioral and educational/vocational needs, and to develop the required case plan and referral to services, to ensure that the youth's *needs* are appropriately addressed. DCJS notes that pursuant to CPL 722.00(1), probation departments have the ability to conduct risk and needs assessments, utilizing a validated risk assessment tool.

Comment 3:

One commenter referenced the use of risk and needs assessment instruments, and specifically the NYC Family Court RAI tool, and asserted the following:

> Section 359.1: Definitions. Subsection (j) states that "[t]he term risk and needs assessment means a validated protocol approved by the Commissioner to assess the youth's risk of re-arrest/recidivism and identify criminogenic needs." Recognizing the recent study and concerns raised about the fairness of risk prediction scores, we urge a serious review of any and all instruments in use or proposed for use.
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> We further caution DCJS and probation agencies against implementing this screening (the Family Court RAI, created in 2006 by the City in partnership with the Vera Institute) for 16- and 17-year olds. Actuarial tools are most accurate when administered to individuals in populations for which they have been validated.[10] Of particular concern with the Family Court RAI is that the instrument considers information, including open delinquency warrants and a youth's school attendance, in determining the young person's risk of failure to appear or risk of re-arrest in adult court. It is wholly improper for this information to be included in any RAI used in adult court regarding 16- and 17-year-olds. Without validation, there is a great risk of unnecessary pretrial detention for 16- and 17-year olds.
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> These concerns about RAIs also apply to the following sections: 359.5(d)(3), 359.6(a), and 359.9(b)(3).

Response 3:

DCJS agrees that validated tools should be used and notes that the New York City Family Court RAI tool is used only in guiding juvenile detention decisions in New York City Family Court. The RAI is not for use in criminal court. Executive Law §530(2)(a) assigns the regulation of risk assessment instruments regarding detention decisions to New York State Office of Children and Family Services (OCFS).

Comment 4:

> DCJS should replace the language of "state-approved risk assessment tool" used throughout Part 359 with "a risk assessment tool properly normed for the youth's location" in the locations listed above. If this language is not replaced, the New York City Department of Probation should decline to opt-in to these sections of the regulations.
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> Finally, if, despite these problems with risk assessment tools, the department moves forward with its plan to use them, we propose that any discussion of the pending criminal matter be excluded from the assessment.

Response 4:

The "state approved" language in the regulation allows for greater flexibility for local validation, and DCJS agrees that state-approved risk and needs assessment tools should be properly validated. CPL 722.00(4) and (5) provide protections against self-incrimination for statements made by youths to probation services during voluntary assessment and case planning.

Comment 5

Subsection (b) states that "[t]he policies and procedures shall require a probation presence at the initial appearance of the regularly scheduled Youth Part, upon notification from the court." We believe that this language is not true to the spirit of the Raise the Age statute which specifically notes the voluntary nature of the probation assessment and case planning services. The proposed language suggests that the Court determines when probation shall be called to initiate the assessment and case planning process. In order to better reflect the intent and plain language of the statute, we propose this alternative: "[t]he policies and procedures shall require a probation presence at the initial appearance of the regularly scheduled Youth Part, upon notification from the court *based upon the request of the adolescent and defense counsel."*

Response 5:

DCJS agrees that representation of counsel is important. The regulations were drafted to mirror the statute and provide for the same protections. The presence of probation at Youth Part arraignment is a practical consideration for probation departments to offer services. Having a probation presence at the initial appearance ensures that probation will have the opportunity to offer services in the presence of defense counsel.

Comment 6:

Subsection (c)(1) sets forth "[t]he policies and procedures shall address, at a minimum: Notification to Adolescent Offenders and Juvenile Offenders of the availability and provision of Probation Voluntary Assessment and Case Plan services in the Youth Part". Given that CPL §722.00(1) states that a youth may be accompanied by counsel during the assessment, the notification process must include defense counsel. It is imperative to the protection of an adolescent's due process rights that such an important decision be made in close consultation with defense counsel. We propose this alternative: "[t]he policies and procedures shall address, at a minimum: Notification to Adolescent Offenders and Juvenile Offenders *and defense counsel* of the availability and provision of Probation Voluntary Assessment and Case Plan services in the Youth Part."

Response 6:

As previously noted above, the regulations were drafted to mirror the statute and provide for the same protections. Pursuant to CPL 722.00(1) "[a]ll juvenile offenders and adolescent offenders shall be notified of the availability of services through the local probation department." While the statute provides for notice to the Juvenile Offender and Adolescent Offender, it states that such youth may be accompanied by counsel during such assessment and does not provide for an initial notice to defense counsel.

Comment 7:

With regard to term "criminogenic" in Section 359.5(c)(6):

Subsection (c)(6) requires that a case plan address the "identified criminogenic needs based upon the nature of the behaviors contributing to the present offense". The emphasis on "criminogenic needs" seems to rely too heavily on past practices of viewing adolescents through the lens of the charged offense. We encourage a strength based, trauma-focused analysis that evaluates a young person's history, including family story,

trauma experience, educational and mental health needs, social-emotional strengths and weaknesses. We propose alternative language that a case plan address "a young person's life history, including family, educational, mental health, social emotional stage and trauma history". We recommend this suggestion be considered in the following sections where "criminogenic needs/need areas" is currently proposed: Sections 359.6(b)(1); 359.7(a); 359.8(b). We further recommend that the language "criminogenic needs" be eliminated in Sections 351.7(b)(1) and 351.7(2) of Part 351 of the proposed regulations and be replaced with the words "the probationer's individual needs."

Response 7:

DCJS agrees to remove "criminogenic" from Part 359, in recognition that voluntary assessment and case planning occurs pre-plea/conviction.

Comment 8:

With regard to the right to counsel during the risk and needs assessment:

Subsection (d) fails to recognize the statutory right of adolescents to have counsel present during the risk and needs assessment. In order to ensure that the due process protections of youth are fully protected, a signed consent for the assessment should be required from defense counsel as well as the adolescent. We propose the following language in subsection (d)(1): "Advise the youth *and defense counsel* of the voluntary nature of the assessment, case planning and service referral process. And [O]btain a signed Notice of Agreement for Voluntary Assessment and Case Planning Services from the youth *and defense counsel* indicating his/her willingness to participate in the assessment, case planning and services processes.

Response 8:

As noted in Comment 1, CPL 722.00(1) provides that the youth "may be accompanied by counsel during any such assessment." Proposed Part 359(c)(3) requires probation departments to have a policy that includes: "Ensuring that the youth is notified that they may be accompanied by their legal counsel during their voluntary assessment." Signed consent of counsel is not required by statute precluding DCJS from mandating it in regulation. However, DCJS will encourage probation officers to obtain the consent of counsel and has developed a standardized "Notice of Agreement for Voluntary Assessment and Case Planning" form that provides for the consent of the youth's attorney and/or parental figures to ensure consistency throughout New York State.

Comment 9:

Subsection (e) proposes court notification if a young person does not appear for the initial interview. We object to this section in its entirety. As set forth in the statute and the regulations, the assessment and case planning process is voluntary and failure to participate should not trigger or mandate court notification.

Response 9:

DCJS appreciates this concern, however, it is necessary for probation to notify the Court if a young person does not appear at initial intake for the purpose of managing the Court's docket/case schedule.

Comment 10:

Subsection (f) states that "[t]o the extent practicable, such services shall continue through the pendency of the action." This appears to assume requirements not mandated by the statute or in best practices of individualized adolescent service provision. We suggest the following language in place of the proposed language: "*All service plans should be specifically tailored in length and intensity for each young person."*

Response 10:

CPL722.00(2) provides that "to the extent practicable such services shall continue through the pendency of the action and shall further continue where such action is removed in accordance with this article." Thus, the regulation mirrors the statute. Probation case plans are person-specific, and tailored to address the needs of the individual.

Comment 11:

Subsection (g) addresses notification of the court if a youth ends or completes services. We believe this contravenes the specific voluntary directive in CPL §722.00. As such, we suggest the following language in lieu of the proposed regulatory section: *"Upon request by the Court, the Probation department shall provide the status of a youth's participation in services."*

Response 11:

DCJS agrees. Proposed subsection 359.5(g) directs ceasing services upon achieving maximum benefit. DCJS will add the suggested language to include "upon request of the court."

Comment 12:

With regard to comments on Section 359.6: Voluntary Assessment and Case Planning Services, the following comment was provided**:**

Subsection (b)(4) mandates that a case plan shall "include input from parent(s) or other person(s) legally responsible for his/her care and youth to identify any barriers and strengths toward meeting case plan goals". We suggest that the word include be replaced by "evaluate" as our experience has demonstrated that in some cases the interests of a young person and their parent or guardian are not necessarily aligned. A young person should not be held accountable for issues that are created by a parent or guardian or the failure to live up to unrealistic expectations or judgments of a parent or guardian. Our proposed language allows a parent or guardian's input to be considered but not necessarily incorporated into a service plan."

Response 12:

DCJS shares the concern regarding the undue influence of parent/guardians. However, probation officers are trained to evaluate information and the "input" from parent/guardians, and to give such information the appropriate consideration.

Comment 13:

Subsection (c) requires that a re-assessment be conducted every 90 days. This potentially creates an unnecessary burden on both the youth and the department. We suggest that an evaluation of the plan be done every 45 days to assess the propriety of the services and the ability of the youth to meet the demands. This timeline is also consistent with new court dates, which are often set six weeks out. We propose the following language "*Evaluate the case plan every 45 days to monitor progress and assess the propriety of services."*

Response 13:

Reassessment at 45-day intervals is contrary to evidence for this population as it is too brief of a period of time to effectively evaluate change. The research literature supports the position that re-assessment occurs no sooner than every 90-days. Conducting assessments more frequently creates an unnecessary burden on the youth and the family.

Comment 14:

Subsection (b)(1) addresses early screening of youth for pretrial services. In New York City, pretrial services are not provided by probation prior to appointment of counsel. Given that there has been no discussion of changing this practice in New York City, we request that New York City be specifically excepted from this section. If the Department is disinclined to do so, we propose that the language of the subsection be changed as follows: "*Screening of youth at the earliest possible time after appointment of counsel."*

Response 14:

DCJS recognizes that pretrial services are not generally provided by the Probation Department in New York City, but rather through the Criminal Justice Agency. DCJS proposed regulation Part 359.9 have been specifically drafted to recognize this.

General Comments:

Additionally, DCJS received numerous comments commending the agency and urging the adoption of the proposed regulations.