

ENDING CONFINEMENT OF CHILDREN IN ADULT FACILITIES

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This memo addresses confinement of children in adult facilities and proposes legislation to end the practice.

I. BACKGROUND: CHILDREN IN ADULT CONFINEMENT

On any given day, approximately 5,000 children are detained in adult jails or prisons.¹ Children are especially vulnerable in adult facilities, where they are at risk for sexual victimization and five times more likely to commit suicide than children in juvenile facilities.² Many children in adult facilities are placed in isolation or solitary confinement, resulting in further harm.³ Moreover, children in adult facilities often have little or no access to age-appropriate services and programming.⁴ They are thus less likely than their counterparts in juvenile facilities to receive the training and education they need to succeed upon release.⁵ This is especially problematic because “[t]he majority of youth held in adult prisons are not the most serious offenders and are likely to be released in early adulthood.”⁶

¹ Campaign for Youth Justice, *Key Facts: Youth in the Justice System* 4 (June 2016) [hereinafter *Key Facts: Youth in the Justice System*], available at <http://cfyj.org/images/factsheets/KeyYouthCrimeFactsJune72016final.pdf>; see also Equal Justice Initiative, *All Children Are Children: Challenging Abusive Punishment of Juveniles* 10 (2017) [hereinafter “*All Children Are Children*”], available at <https://eji.org/sites/default/files/AllChildrenAreChildren-2017-sm2.pdf>. In 2011, it was estimated that more than 95,000 youth were admitted each year into adult prisons and jails. *Key Facts: Youth in the Justice System*, *supra*, at 4.

² Campaign for Youth Justice, *Let’s Get Children Out of Adult Courts, Jails, and Prisons* 1 (2018) (citing data); see also Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, *The Atlantic* ¶ 3 (Jan. 8, 2016) [hereinafter “*Steep Costs*”], available at <https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/>.

³ *Key Facts: Youth in the Justice System*, *supra*, at 5.

⁴ *All Children Are Children*, *supra*, at 10.

⁵ *Steep Costs* ¶ 12.

⁶ *Key Facts: Youth in the Justice System*, *supra*, at 5 (“Approximately 80 percent of youth convicted as adults will be released from prison before their 21st birthday, and 95 percent will be released before their 25th birthday.”).

Recently, the number of children held in adult facilities has begun to decrease, thanks to declining youth crime rates and state and federal reforms.⁷ Standards promulgated pursuant to the Prison Rape Elimination Act of 2003 (PREA)⁸ provide that children in the criminal justice system should be housed separately from adults. In particular, the PREA standards provide that “youthful inmates,” defined as “any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail,” should be housed separately from adult inmates in jail or prison.⁹ Outside of housing units, there must either be “sight and sound separation” between juveniles and adults or direct staff supervision.¹⁰ States are slowly moving towards compliance with PREA standards. As of 2017, nineteen states were certified compliant with PREA, two were not participating, and the rest were working toward certification.¹¹ Note, however, that compliance with PREA—by, for example, housing children in separate areas within the adult prison system—may lead to isolation and be insufficient to adequately meet the needs of incarcerated youth.

Indeed, children should not be incarcerated in adult jails and prisons at all, even if housed separately from adult offenders. Instead, children should be placed in therapeutic settings designed for children and aimed at rehabilitation. These juvenile facilities are better able to account for and accommodate the developmental differences between juvenile and adult offenders and prepare children for release.¹²

II. EXAMPLES OF LIMITATIONS OR PROHIBITIONS ON CONFINEMENT OF JUVENILES IN ADULT FACILITIES

- **West Virginia** – By law passed in 1997, West Virginia prohibits holding children under the age of 18—even those convicted of adult crimes—in adult correctional facilities. Prior to transfer from juvenile to adult facilities, at the age of 18, the child is returned to the sentencing court for reconsideration and modification of the sentence based on review of post-conviction rehabilitation.¹³

⁷ Campaign for Youth Justice, *Raising the Bar: State Trends in Keeping Youth Out of Adult Courts (2015-2017)* 21 (2017) [hereinafter *Raising the Bar: State Trends*], available at http://www.campaignforyouthjustice.org/images/StateTrends_Report_FINAL.pdf.

⁸ 34 U.S.C. § 30301 *et seq.*

⁹ 28 C.F.R. §§ 115.5, 115.14.

¹⁰ 28 C.F.R. § 115.14. The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP) and its regulations require, as a condition of federal funding, that juveniles in the state’s juvenile justice system not be confined in jails or other facilities in which they have contact with incarcerated adults. *See* 34 U.S.C. § 11101 *et seq.*; 28 C.F.R. § 31.303.

¹¹ *See Raising the Bar: State Trends, supra*, at 23; Bureau of Justice Assistance, FY 2017 List of Certification and Assurance Submissions for Audit Year 3 of Cycle 1, available at <https://www.bja.gov/programs/17prea-assurancescertifications.pdf>.

¹² *See, e.g.,* Campaign for Youth Justice, *Youth Facilities Are Better Than Adult Facilities*, available at <http://www.campaignforyouthjustice.org/images/factsheets/WhyYouth%20Facilities%20Are%20Better%20Than%20Adult%20Facilities.pdf>.

¹³ W. Va. Code § 49-4-720.

- **Virginia** – Virginia provides that juveniles are not to be detained or confined in adult jails or detention facilities, even if transferred to the adult system for prosecution, unless the juvenile is found to be a threat to the security or safety of the other juveniles at the facility.¹⁴ Before a juvenile may be housed in an adult facility, the facility must be approved by the State Board of Corrections for the detention of juveniles.
- **New Jersey** – New Jersey law creates a presumption against transferring juvenile offenders to adult facilities; waived juveniles remain in juvenile facilities unless good cause is shown to transfer to an adult facility.¹⁵
- **Colorado** – Colorado law requires that juveniles awaiting trial as adults be held in juvenile facilities unless the district court finds after a hearing that detention in an adult facility is appropriate.¹⁶
- **Ohio** – Ohio provides a default of detention in juvenile facilities for juveniles awaiting trial in adult court; transfer is possible only upon motion and after a showing by a preponderance of the evidence that the youth is a threat to the safety and security of the juvenile facility.¹⁷
- **Oregon** – Oregon prohibits the incarceration of children under 18 in adult prisons under any circumstances; instead, children sentenced under the age of 18 may only be incarcerated at an Oregon Youth Authority facility.¹⁸
- **Washington** – Washington requires that any child convicted of a felony in adult court with an earned release date prior to age 21 must be transferred to the custody of the department of social and health services and given access to the same resources and services as children in the juvenile system.¹⁹ If the department of social and health services determines that retaining custody of the child presents a safety risk, the child may be returned to the custody of the department of corrections.

¹⁴ Va. Code § 16.1-249(B), (D), (E), (F), (G).

¹⁵ N.J. S. § 2A:4A-36 (providing, *inter alia*, that prior to and upon conviction “there shall be a presumption that the juvenile shall be detained in a county juvenile detention facility, unless good cause is shown that it is necessary to detain the juvenile in a county jail or other county correctional facility in which adults are incarcerated”).

¹⁶ Col. Rev. Stat. § 19-2-508(3)(c).

¹⁷ Oh. Rev. Code § 2152.26(4)(a).

¹⁸ Or. Rev. Stat. § 137.124(5).

¹⁹ Wash. Rev. Code § 72.01.410(1)(a).

III. MODEL LEGISLATION TO END CONFINEMENT OF CHILDREN IN ADULT FACILITIES

The following model legislation—aimed at ending confinement of children in adult facilities—draws principally from the example of West Virginia (W. Va. Code § 49-4-720).

No person under the age of 18, including one who has been transferred to the jurisdiction of the adult criminal court, shall be detained, confined, or held in the custody of the state department of corrections, or in any adult jail or correctional facility, or at any institution in which he or she has contact with or comes within sight or sound of any incarcerated adults or with the security staff (including management) or direct-care staff of a jail or correctional facility for adults.

Before a child in the custody of the state division of juvenile services is transferred to the custody of the state department of corrections—which may happen only upon the child reaching the age of 18—the child shall be returned to the sentencing court for the purpose of reconsideration and modification of the imposed sentence. This sentence reconsideration and modification shall be based upon a review of all records and relevant information relating to the child’s rehabilitation since his or her conviction under the adult jurisdiction of the court.