October 6, 2018

Natasha M. Harvin-Locklear
Division of Criminal Justice Services
80 South Swan Street
Albany, NY 12210
Via email: dcjslegalrulemaking@dcjs.ny.gov

Re: Comments on proposed regulations creating New Rule 359: Role of Probation in Youth Part of Superior Court and amendments to existing Parts 351 and 352

Dear Ms. Harvin-Locklear:

The Legal Aid Society of New York City, The Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Service of Harlem and New York County Defender Services jointly submit these comments to the proposed regulations creating New Rule 359: Role of Probation in Youth Part of Superior Court of Title 9 NYCRR, issued on August 8, 2018 pursuant to the mandate of the "Raise the Age Law" that the Division of Criminal Justice Services "update job specifications and required knowledge, skills, and abilities for probation professionals employed by localities". We also submit brief comments to the proposed amendments to existing 9 NYCRR Parts 351 and 352.

Our offices jointly represent hundreds of thousands of people facing criminal allegations in New York City's criminal and Supreme courts every year, including thousands of teenagers ages 16 or 17. Each of our offices employs experienced attorneys and social workers who specialize in representing adolescents and advocating for their unique needs. It is based on our collective work with thousands of adolescents and their family members that we offer these comments.

Court-involved youth often present with complex problems and require individualized interventions that are age-appropriate, tailored and flexible. As New York State moves into the implementation of Raise the Age, it is critical that probation, along with all the other actors in the criminal legal and juvenile systems, adopt developmentally-appropriate assessments and programming that support young people towards success. However, for those youth who will still be prosecuted in the adult court system after implementation of Raise the Age, all stakeholders must pay particular adherence to the due process protections afforded to those facing consequences of lifelong criminal convictions and adult sentences in an adult prison system.

Comments on the Proposed Regulations

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.

Risk Assessment Instruments (RAIs) are actuarial tools that use large datasets of past events to predict future outcomes for categories of people. RAIs are most often used in the criminal legal system to predict failure to appear, risk of re-arrest, and risk of future violence. RAIs assess static and dynamic factors, such as criminal history, warrant history, and employment history, that seek to serve as predictors of future behavior. A statistical algorithm is used to combine these factors in effort to "categorize individuals into population sub-groups with shared characteristics and similar levels of risk."[1] RAIs have been implemented widely in the criminal legal system as a means to remove individual bias and reduce mass incarceration.[2] RAIs have garnered support due to the purported claim of objectivity and accuracy to predict outcomes, in contrast to the professional expertise of a provider or judge. There is insufficient evidence, however, to demonstrate that RAIs used in criminal justice settings are either objective or accurate.[3]

One of the most highlighted concerns related to risk assessment tools is that "people of color, especially black people, are more likely to be arrested than whites for the exact same behavior. Black Americans are disproportionately likely to be stopped and searched by police, whether they are driving or walking. White and black Americans use marijuana and other drugs at similar rates, but black Americans are much more likely to be arrested for drug possession."[4] Thus, living in communities with greater levels of policing can lead to unacceptable racial bias in risk scores. Moreover, these models assess data that predict not only individual behavior, but events influenced by police decision-making. Using arrests as an unbiased source of information on individual behavior assumes a racially unbiased criminal justice system, which, unfortunately

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[1] Eric Silver, & Lisa L. Miller, A Cautionary Note on the use of Actuarial Risk Assessment Tools for Social Control, 48 Crime & Deliquency, 138-161 (January 2002), available at http://journals.sagepub.com/doi/10.1177/0011128702048001006

[2] Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 Fed. Sent'g. Rep. 238, 2015, available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/fedsen27&div=40&id=&page=

[3] *See, e.g.,* Seena Fazel et al., *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 samples involving 24 827 people: Systematic Review and Meta-Analysis*, The British Medical Journal (July 2012), available at https://www.bmj.com/content/345/bmj.e4692.full.print ("The current level of evidence is not sufficiently strong for definitive decisions on sentencing, parole, and release or discharge to be made solely using these tools.")

[4] Eckhouse, L., Lum, K., Conti-Cook, C., Ciccolini, J. "Layers of Bias: a Unified Approach for Understanding Problems with Risk Assessment", p. 24, January 19, 2018. Available at https://docs.wixstatic.com/ugd/b323fb_7417dd5179fc45d5b20a11b7d6ea7ca3.pdf
Cf, Angwin, J., Larson, J., Mattu, S., Kirchner, L., "*Machine Bias*", Pro Publica, May 23, 2016. Available at https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing

does not exist at this time.[5] RAIs continue to enforce race and class-based inequities in the criminal system and, in practice, rationalize and systemize the incarceration of racial minority and low-income populations.

The NYC Juvenile Detention Risk Assessment Instrument, also called the Family Court Risk Assessment Instrument, is administered to all youth at Family Court intake. The instrument assesses risk of failure to appear (FTA) and risk of re-arrest based on 10 static risk criteria, addressing a youth's past juvenile justice involvement, school attendance, and appearance of an adult at intake. The tool offers one opportunity to identify a protective factor, school attendance of 80 percent or more in the previous full semester of school. A level of risk (low, mid, or high) is determined using a risk score matrix of FTA and re-arrest scores. During the implementation of the RAI in NYC Family Courts, 10,285 youth were screened, 55 percent low risk, 32 percent mid risk and 13 percent high risk.[6]

The Family Court RAI was created in 2006 by the City in partnership with the Vera Institute, and was validated through an empirical research study. The tool is designed for use by court staff with youth under the age of 16.[7] The RAI has not been subject to the same rigorous, empirical study for validation with a new population. This is acknowledged in a footnote of the Raise the Age Implementation Guide by the Mayor's Office of Criminal Justice[8], which states,

> The Data Analytics and Risk Assessment Working Group of the Raise the Age Implementation Task Force recommended that the City continue to use the current Family Court Risk Assessment Instrument for older teens following Raise the Age. Based on an analysis, the group concluded the current Family Court RAI will adequately predict the likelihood of failure-to-appear and rearrest for older teens. The City will track and closely monitor outcomes following implementation, and consider whether adjustments to the tool are required.[9]

We further caution DCJS and probation agencies against implementing this screening 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

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[5] Id. at 25.

[6] Jennifer Fratello, Annie Salsich, and Sara Mogulescu, Juvenile Detention Reform in New York City: Measuring Risk through Research. New York: Vera Institute of Justice, (2011)

[7] See Fratello, et al. 2011. ("Youth arrested at age 16 and over are automatically screened and handled in the adult criminal justice system, in addition to some youth—termed juvenile offenders—who are arrested under the age of 16 for acts that are deemed serious enough to be prosecuted in the adult criminal court; juvenile offenders and youth arrested for acts committed at age 16 or above were not included in this study.")

[8] Mayor's Office of Criminal Justice, *New York City Raise the Age Implementation Guide,* (2018).

[9] *Id.,* p. 7.

[10] Joel A. Dvoskin and Kirk Heilbrun, *Risk Assessment and Release Decision-Making: Toward Resolving the Great Debate,* Journal of American Academy of Psychiatry and the Law, (2001), available at https://pdfs.semanticscholar.org/8977/4eeadf43c52fc5cfc54dad0beb86f4da9564.pdf

regarding 16- and 17-year-olds. Without validation, there is a great risk of unnecessary pretrial detention for 16- and 17-year olds.

Assessments and algorithms have been introduced across fields in an effort to remove personal bias and subjectivity. In practice, RAIs typically use a series of highly discriminatory metrics that provide little or no utility to seeing the future. The Family Court RAI relies primarily on static risk factors, past behavior including prior JD or PINS warrants, past JD adjudication, prior arrests, and school attendance. This methodology fails to account for any personal growth, behavioral changes, or positive outcomes following participation in past ATI or compliance with probation. Additionally, a youth's risk score is assessed higher if an adult does not appear upon their behalf at intake. This is most likely to impact vulnerable youth, including runaway and homeless youth, undocumented youth[11], and youth in the foster care system.

Risk assessment instruments draw from historical data to determine which individuals resemble those who have failed to appear or recidivated. Common factors include housing status, school enrollment, age, family connections, prior convictions, and prior incarceration. RAI developers argue their tools are not discriminatory because they do not consider demographic information, but this analysis ignores the pre-existing sharp disparities in the aforementioned factors. RAIs are modeled on historical data. Due to the obvious racial and economic disparities in policing and incarceration, the data used to create these tools is likely to bias low income men of color. In the creation of the Family Court RAI, the sample of youth (n=1,053) was largely male (n= 866, 82%) and Black (n=640, 61%) or Hispanic (n=305, 29%). In the validation of the Family Court RAI, researchers were unable to control for the impact of race or gender on risk score. The researchers acknowledge the limitations of this. We encourage additional evaluation on racial and class based bias in the Family Court RAI.

While actuarial tools may help predict outcomes, the risk of an incorrect prediction may have deleterious consequences. A meta-analysis of over 24,000 cases using RAIs identified great flaws in predictive accuracy of RAIs.[12] *In their finding, the authors stress that "the view that violence, sexual, or criminal risk can be predicted in most cases is not evidence based."*[13] *Another meta-analysis of RAIs found that most tools have "poor to moderate accuracy" in most applications*.[14] Perhaps more troubling, authors cited a high risk of false positives, particularly in minority ethnic groups.[15] For someone falsely deemed high risk, the error may mean incarceration. In NYC Family courts, the rate of pre-trial detention for high risk youth has increased from 49 to 72 percent following the implementation of the Family Court RAI.[16]

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[11] http://bds.org/wp-content/uploads/BDS-MOS-Protect-Our-Courts-Act-FINAL.pdf

[12] Seena Fazel et al., *Use of Risk Assessment Instruments to Predict Violence and Antisocial Behavior in 73 samples involving 24 827 people: Systematic Review and Meta-Analysis*, The British Medical Journal (July 2012), available at https://www.bmj.com/content/345/bmj.e4692.full

[13] *Id.*

[14] T. Douglas et al, *Risk assessment tools in criminal justice and forensic psychiatry: The need for better data*, 42 EUROPEAN PSYCHIATRY 134-137 (May 2017), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5408162/.

[15] *Id.*

[16] Fratello. et al., (2011).

RAIs function as a proxy for a series of subjective, human decisions.[17] RAIs come with a unique threat to liberty in New York State: a concurrent push to allow judges to make assumptions about dangerousness, using RAIs, in pre-trial detention decisions. Under current state law, judges may only consider a risk of flight, with certain exceptions. While RAIs can be used exclusively to measure this risk, many high-level policymakers, including Mayor de Blasio, are urging changes to the bail statute so that dangerousness may be assessed and considered as well. As such, the first order of business is to stop this rush toward dystopic preventive detention. There is ample evidence that even a few days in jail can be criminogenic; preventive detention is a counterproductive tool of public safety. Moreover, there is no guarantee that adding dangerousness to the statute would significantly reduce jail populations. Results across the country are mixed, and courts in New York City already have comparatively high rates of releasing people on their own recognizance.

In short, RAI's, by their nature, bypass an individual's right to due process and the individualized, case by case, analyses required of prosecutors, judges, and defense attorneys. "[W]hen predictive models are applied to core state decisions—especially liberty decisions like pretrial detention or sentencing—they raise an even deeper set of constitutional, legal, and conceptual concerns about fairness…Even if a risk assessment were made using a fair model based on unbiased data, there is a fundamental problem: these models evaluate a defendant's risk using data about *other people…*As a constitutional matter, defendants are entitled to have their sentence based on what they, personally, did, rather than based on what people who share their social, demographic or geographic group affiliations did."[18] If risk assessment tools are racially discriminatory because the data is inherently biased, using them can result in a disparate impact.[19]

These concerns about RAIs also apply to the following sections: 359.5(d)(3), 359.6(a), and 359.9(b)(3).

We are thus deeply concerned about language describing a "state-approved risk assessment tool." This language appears throughout Part 359, specifically in sections 359.5(c)(5), 359.5(d)(5), 359.6(a), 359.9(b)(3). As noted above, risk assessment instruments need to be normed to a particular population in order to even to attempt to properly assess the risk of a given person. New York State has a population of over 19 million people. Youth living in New York City have drastically different life experiences than youth in rural, suburban and upstate cities. For example, New York City youth often have increased exposure to police, child welfare and other systems involvement, as compared to their Long Island or upstate counterparts. As such we do not believe that a RAI can properly be normed for all youth in New York State.

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[17] Eric Silver, & Lisa L. Miller, *A Cautionary Note on the use of Actuarial Risk Assessment Tools for Social Control*, 48 Crime & Delinquency 138-161 (January 2002), available at http://journals.sagepub.com/doi/10.1177/0011128702048001006

[18] Id. at 29.

[19] Id. at 30.

Instead, 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.

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.

Section 359.5: General Requirements for Probation Voluntary Assessment and Case Planning Services in Youth Part.

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."*

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, we believe that 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."

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."

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."

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 <u>voluntary</u> and failure to participate should not trigger or mandate court notification.

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."*

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."*

<u>Section 359.6: Voluntary Assessment and Case Planning Services</u>

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.

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."*

Section 359.9: Pretrial Release Services in Youth Part of Superior Court

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."*

Part 352, Section 352.6: Procedures for non-compliant behaviors and Probation violations in criminal and family court cases

Subsection (a)(4)(i) addresses administrative review of probation violations. Pertinent language currently states "*When the youth is a 16 or 17-year-old, the Probation Officer shall include the parent or other person(s) legally responsible for the youths care, where feasible*." We recommend that the language be amended to allow defense counsel for the youth to be present at the administrative review meeting and for probation to make best efforts to contact defense counsel. We recognize that, in most cases, defense counsel's representation will have terminated. However, public defender offices like ours would often be able to make attorneys available to attend these meetings to help the youth and their family avoid a violation or incarceration as a result of the alleged violation. We suggest the following language in place of the proposed language: "*When the youth is a 16 or 17-year-old, the Probation Officer shall include the parent or other person(s) legally responsible for the youth's care, and make best efforts to contact defense counsel of record, where feasible*."

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Thank you for your attention and consideration of our concerns.

Sincerely,

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