

S.B. 1209: MAKING IT WORK
Pre-Trial Detention of Juveniles Certified to be Tried as Adults

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE REPORTS 1

III. THE LEGISLATION..... 3

IV. THE ATTORNEY GENERAL OPINION.....6

V. THE PRISON RAPE ELIMINATION ACT6

VI. CONCLUSION.....7

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I. INTRODUCTION

Before September 1, 2011, the law in Texas was that when a juvenile was certified to be tried as an adult, the transfer for criminal proceedings resulted in the youth being treated as an adult for all purposes, which included being housed in the county jail unless the person could make bail. This practice of treating certified youth as adults in every respect changed during the 82nd Texas Legislature with the passage of Senate Bill 1209. This legislation, which went into effect on September 1, 2011, created a major change in the laws regulating the pre-trial detention of youth under the age of 17 who have been certified to stand trial as adults.

This paper describes the changes brought about by S.B. 1209 and the implications of housing this particular youth population in either juvenile detention facilities or adult county jails. The paper discusses two reports written by Professor Michele Deitch of the University of Texas at Austin LBJ School of Public Affairs, the first of which may have influenced the timing as well as the substance of S.B. 1209. The paper also examines a recent Attorney General opinion addressing whether a child under age 17 who has been transferred to criminal court for prosecution can be detained in an adult facility that does not comply with Section 51.12(f), Family Code, as well as federal legislation requiring “sight and sound separation” of youthful inmates from adult inmates when collocated in adult jails or prisons.

The author would like to thank Kaci Sohr, Manager of the Criminal Courts Division of the Travis County District Clerk’s Office, for graciously sharing her work product on this topic, which she wrote while working as a Staff Attorney at the former Texas Juvenile Probation Commission (TJPC) and at the Texas Juvenile Justice Department (TJJD). Ms. Sohr authored the agency memos, as well as the legal commentary in the *2011 Special Legislative Issue*, that shed substantial interpretive light on S.B. 1209. Also deserving of sincere thanks is Nydia Thomas, Special Counsel for Legal Education and Technical Assistance at TJJD who willingly shared her agency’s written material on S.B. 1209. My chore was simplified thanks to the generosity of these two fine lawyers who I am honored to call both colleagues and friends.

Special thanks as well to Professor Michele Deitch, Senior Lecturer at the LBJ School of Public Affairs, who took time from her busy end-of-semester schedule to review this paper and to add critical pieces, which helped greatly in clarifying this complicated topic.

II. THE REPORTS

In March 2011, The University of Texas at Austin published a Special Project Report by the LBJ School of Public Affairs titled *Juveniles in the Adult Criminal Justice System in Texas*. (The report can be accessed at: <http://www.utexas.edu/lbj/sites/default/files/file/news/juvenilestexas--final.pdf>). Authored by Professor Michele Deitch and two student participants, the report analyzes the differences between youth who are certified to be tried as adults and those who remain in the juvenile system, receiving determinate sentence commitment to the former Texas Youth Commission (TYC), now the Texas Juvenile Justice Department (TJJD). The report finds there are few differences between these youth in terms of their offense types and delinquent histories. It notes that 72% of certified youth have no prior history of violence although they are charged with similar type offenses as determinate sentenced youth; that only 17% are charged with homicide; and that 89% have never spent time in TYC, where they would have received rehabilitative programming designed for juveniles. The report also compares the treatment of certified and determinate sentenced youth in terms of where they are

confined and the services they receive in those settings.

Professor Deitch's report emphasizes that certified juveniles typically await trial while confined in adult jails, sometimes for a year or more, and often in isolation. Among several findings, the report concludes that "adult prisons and jails are a poor fit for juveniles under age 17, regardless of their offense or the court in which they are prosecuted, and cannot meet their specialized needs." *Juveniles in the Adult Criminal Justice System in Texas*, by Michele Deitch, Special Project Report, LBJ School of Public Affairs, The University of Texas at Austin (March 2011), p. x. The report cites studies that transferred juveniles who spend time in adult jails and prisons experience higher rates of violent recidivism and face higher risks of suicide, sexual and physical assault, and mental illness.

To a very large degree, the increase in recidivism seen among juveniles who were transferred to the adult criminal justice system stems from the lack of services and programming available to them in adult facilities, as opposed to what they could have received in juvenile institutions. Youth in adult facilities have limited access to either educational programs or specialized therapy and treatment. Moreover, staff in adult jails and prisons do not have specialized training to work with this age population or to meet their unique needs as very young prisoners. *Juveniles in the Adult Criminal Justice System in Texas*, p. 7.

Significantly for S.B. 1209, the report finds that many states allow certified youth to be confined in local juvenile detention facilities rather than adult jails while awaiting trial, as well as in juvenile correctional facilities rather than adult prisons after conviction. Since Texas, at the time, was not among those states, certified youth had to be confined in adult facilities at all stages of the post-certification process. With regard to pre-trial confinement of certified youth in Texas the report states, "Most county jails have no option for these juveniles but to house them in isolation for their own safety." *Juveniles in the Adult Criminal System in Texas*, p. xi.

As a result of these and other findings, the report makes several policy recommendations including a recommendation to confine certified juveniles aged 14–17 who are awaiting trial in adult court in local juvenile detention facilities rather than adult jails. The rationale in support of this relies on the fact that county-run juvenile detention facilities are already equipped to deal with a youthful population, are familiar with handling juveniles charged with committing serious and violent offenses, can ensure a youth's enrollment in school, and can provide the kind of structure and specialized programming needed for youthful offenders. This specific recommendation was ultimately reflected in S.B. 1209.

Although it was published after the enactment of S.B. 1209, Professor Deitch and her students published a second report in 2012 that focuses more on the conditions for youth who are confined in adult county jails and awaiting trial. *Conditions for Certified Juveniles in Texas County Jails*, by Michele Deitch, Anna Lipton Galbraith and Jordan Pollock, Special Project Report, LBJ School of Public Affairs, The University of Texas at Austin (May 2012). (The report can be accessed at: <http://www.utexas.edu/lbj/sites/default/files/file/news/Conditions%20for%20Certified%20Juveniles%20in%20Texas%20County%20Jails-FINAL4.pdf>).

This project was conducted in collaboration with the Texas Commission on Jail Standards in order to survey every jail in Texas with experience holding certified youth to determine the conditions under which these youth are held. The research confirms the earlier findings, providing additional details about pre-trial confinement of certified youth in Texas, and reinforcing the conclusion that adult jails are ill equipped to house youthful offenders.

Professor Deitch's research found that most certified youth in Texas jails are held in isolation for long periods of time, often for 23 hours a day and for periods of 6 months to a year or longer. Many of these youth also come into incidental contact with adult offenders during recreation or other activities, and

some jails even house certified youth in cells or dorms with adults. Whatever their housing arrangement, certified youth have extremely limited access to educational opportunities or to services and programs while in jail. Most jails provide less than five hours a week of educational programming, which the report notes may be a violation of state and federal laws. It also finds that housing certified youth is an enormous burden on county jails, requiring additional staff time and financial resources well beyond those required to house the general population of adult offenders. *Conditions for Certified Juveniles in Texas County Jails*, pp. x–xi.

Following the passage of S.B. 1209, this second report provided further evidence in support of removing certified youth from adult jail settings and may have helped to motivate county juvenile boards to consider adopting a policy of holding these juveniles in their local juvenile detention facilities. As it turns out, the study showed there are relatively few certified juveniles actually being housed in adult jails (34 statewide during the survey period of September and October 2011). The report concludes that the number of certified youth who would potentially be shifted to juvenile detention centers is much lower than might have been anticipated based on statewide certification numbers, and that it would likely be less burdensome on juvenile detention centers to hold these youth than previously expected. *Conditions for Certified Juveniles in Texas County Jails*, pp. 29–30.

Together, these reports have contributed to the Legislature’s understanding of the risks facing certified youth held in county jails while awaiting trial, the adoption of a statute allowing for the confinement of pretrial youth in juvenile detention facilities, and the deliberations of county juvenile boards in deciding whether to implement this policy.

III. THE LEGISLATION

As enacted, S.B. 1209 amended several sections of the Family Code, as well as provisions in the Human Resources and Government Codes, and the Code of Criminal Procedure. The bill analysis succinctly explains the legislative intent behind these changes:

Under current law, upon certification of a juvenile for prosecution as an adult in a criminal court, the youth is treated as an adult and transferred to the adult county jail for incarceration pending the completion of his or her adult proceeding and trial. In most cases, due to the requirements of separation of sight and sound, the juvenile is housed in conditions that are not conducive to his or her rehabilitation and may be harmful to the juvenile’s mental health. (The bill analysis for S.B. 1209 can be accessed at: <http://www.legis.state.tx.us/tlodocs/82R/analysis/pdf/SB01209F.pdf#navpanes=0>)

The following is an overview of the statutes that were added or amended by S.B. 1209. For the reader’s benefit, newly added language has been underlined.

- a. **Sections 51.12(f) and (h), Family Code** – Section 51.12 concerns places and conditions under which juveniles may be detained. Subsection (f) requires that a child who is detained in a building containing “a jail, lockup, or other place of secure confinement ... shall be separated by sight and sound from adults in the same building.” This “sight and sound separation” in adult jails or prisons derives from the Juvenile Justice and Delinquency Prevention Act (JJDP), which applies to juveniles who are still in the juvenile justice system.

Contact is defined to include any physical or sustained sight or sound contact. Sight contact is defined as clear visual contact between adult inmates and juveniles within close proximity to each other. Sound contact is defined as direct oral communication between adult inmates and juvenile offenders. Sight and sound separation may be accomplished architecturally or through policies and procedures such as time phasing the use of an area to prohibit simultaneous use by juveniles and adults. U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (October 2010), *Guidance Manual for Monitoring Facilities under the Juvenile Justice and Delinquency Prevention Act of 2002*, p. 16. (Last accessed at: <http://www.ojjdp.gov/compliance/guidancemanual2010.pdf>).

“The JJDPAs’ separation requirement applies only to juveniles who are charged with or who have committed an offense that would not be criminal if committed by an adult, or juveniles who are not charged with any offense at all.” See *Youthful Inmates*, 77 Fed. Reg., No. 119, p. 37,127 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115), citing 42 U.S.C. (a)(11)-(12). As it turns out, the Texas “sight and sound separation” mandate is more stringent than that of the JJDPAs, requiring separate staff and excluding even incidental contact or communication between youthful and adult inmates.

Amended Section 51.12(f) specifies, “A person who has been transferred for prosecution in criminal court under Section 54.02 and is under 17 years of age is considered a child for the purposes of this subsection.” Section 51.12(h) says the “sight and sound separation” requirement described in Section 51.12 *does not* apply to a person “who has been transferred to criminal court for prosecution under Section 54.02 and is at least 17 years of age.” The amendments to Section 51.12 are significant: A certified juvenile who is younger than 17 and is awaiting trial in adult criminal court is considered to be a “child” for purposes of Section 51.12, and therefore “sight and sound separation” applies if the youth is housed in an adult jail or facility. However, a 17-year-old, whether certified or not, who is housed in an adult facility is not subject to the separation requirement.

“Sight and sound separation” does not apply if an under-17-year-old who has been certified is housed in a juvenile detention facility. It also does not apply to certified youth once they turn 17 and are housed in an adult facility. Nor does it apply once a youth, regardless of age, has been convicted as an adult of committing a crime. “Sight and sound separation” *does* apply when a certified youth who is younger than 17 is awaiting trial while being held in an adult facility.

- b. **Section 51.13(c), Family Code** – Section 51.13 describes the effect of an adjudication or disposition on a juvenile, e.g., that it is not a criminal conviction and can only be used in limited circumstances. Amended Subsection (c)(2) states that a child may not be committed or transferred to a prison or other adult facility, except “after transfer for prosecution in criminal court under Section 54.02, unless the juvenile court orders the detention of the child in a certified juvenile detention facility under Section 54.02(h).” This is a conforming change relating to the amendments made to Sections 51.12 and 54.02(h), Family Code, that allow a certified youth to be detained in a juvenile facility rather than in county jail pending trial. “This specifies that if the juvenile court has ordered the child detained in a juvenile facility, he may not be transferred to a facility used primarily for convicted persons to serve their sentences.” *2011 Special Legislative Issue*, 25 State Bar of Texas Juvenile Law Section Report, No. 3 (August 2011), p. 56.
- c. **Section 152.0015, Human Resources Code** – This newly added section says, “A juvenile board shall establish a policy that specifies whether a person who has been transferred for criminal prosecution under Section 54.02, Family Code, and is younger than 17 years of age may be detained in a juvenile facility pending trial as provided by Section 51.12, Family Code.” While this provision is mandatory, it does not *require* a juvenile board to adopt a pre-trial policy of housing certified under-17-year-olds in a juvenile detention facility. Instead, it mandates that a juvenile board establish “a policy specifying whether or not the board will allow children certified as adults to be detained in juvenile facilities pending trial.” *2011 Special Legislative Issue*, p. 96. Travis County, for example, passed a juvenile board resolution on September 14, 2011, shortly after S.B. 1209 went into effect, formally adopting “a policy allowing persons under 17 who are certified to stand trial as adults to be detained in a juvenile detention facility pending trial and on the order of the juvenile court judge.”
- d. **Section 54.02(h), Family Code** – Section 54.02 is the waiver of jurisdiction and discretionary transfer to criminal court, a.k.a., certification statute. S.B. 1209 amended Subsection (h) to create an exception to the previous rule that upon transfer of the child for criminal proceedings, the youth is to be treated as an adult for all purposes. It says that the certified youth must be treated as an adult and in accordance with the Code of Criminal Procedure, “except that if detention in a certified juvenile detention facility is authorized under Section 152.0015, Human Resources Code, the juvenile court may order the person to be detained in the facility pending trial or until the criminal court enters an order under Article 4.19, Code of Criminal Procedure.” (Emphasis added).

This amendment gives the juvenile court the *discretion* to order a certified youth to be detained in a juvenile detention facility if: 1) the juvenile board has adopted a policy authorizing that practice; and 2) until a criminal court judge orders the child to be transferred to an adult facility. If a juvenile board *has not* established a policy specifying whether a certified under-17-year-old may be detained in a juvenile facility pending trial, then the juvenile court has no choice but to remand that person to the custody of the sheriff for transport to county jail

where “sight and sound separation” requirements will apply. Regardless of where the youth is housed, he or she retains the right to bail under Chapter 17, Code of Criminal Procedure.

- e. **Article 4.19, Code of Criminal Procedure** – New Article 4.19 gives the criminal court judge the authority to trump the adopted policy of the county’s juvenile board, as well as the decision of the juvenile court judge to house a certified youth in a juvenile detention facility. “Notwithstanding the order of a juvenile court to detain a child in a certified juvenile detention facility under Section 54.02(h), Family Code, the judge of the criminal court having jurisdiction over the child may order the child to be transferred to another facility and treated as an adult as provided by this code.” Again, the authority of the criminal court judge is *discretionary*, not mandatory. As noted by TJJD in its legislative commentary, “Testimony in hearings indicated this provision is to be used when the juveniles present a threat to the safety of others in juvenile detention.” *2011 Special Legislative Issue, p. 69.*
- f. **Section 23.101(a)(2)(E), Government Code** – Finally, S.B. 1209 added Subsection (a)(2)(E) to Government Code Section 23.101 to clarify that criminal actions against children who have been certified and are detained in juvenile facilities are to receive priority handling in criminal court. “This is consistent with the priority given to anyone detained in jail pending a criminal action, as provided by Section 23.101(a)(2)(A).” *2011 Special Legislative Issue, p. 79.*
- g. **Legislative Recap** – S.B. 1209 created the following processes and options concerning the housing of certified juveniles who are younger than 17 in Texas:
 1. Juvenile Boards *must* adopt a policy establishing whether or not they will permit the juvenile court to order certified youth under age 17 to be held in a juvenile detention center pending trial in criminal court. Section 152.0015, Human Resources Code.
 2. If the Juvenile Board adopts a policy that *does not* allow such youth to be held in juvenile detention pending trial, the youth must be transferred to an adult jail upon certification. Section 51.13(c)(2), Family Code.
 3. If the Juvenile Board *does* adopt a policy allowing certified youth to be held in a juvenile facility pending trial, then the juvenile court judge still has *discretion* whether to house such youth in a juvenile detention facility or in an adult jail. Section 54.02(h), Family Code.
 4. If the juvenile court orders a certified youth to be held in juvenile detention, the criminal court judge may nevertheless order that youth to be transferred to an adult facility and treated as an adult under Article 4.19, Code of Criminal Procedure.
 5. If the juvenile court orders a certified under-17-year-old to be held in an adult jail or if the criminal court judge orders such a youth to be transferred to an adult facility, then “sight and sound separation” requirements will apply until the youth turns 17.

IV. THE ATTORNEY GENERAL OPINION NO. GA-0927 (2012)

In May 2012, the Office of the Attorney General issued Opinion No. GA-0927 concerning whether Article 4.19, Code of Criminal Procedure, permits a certified juvenile under the age of 17 to be detained in a facility that does not comply with Section 51.12(f), Family Code. Subsection (f) was amended in 2011 to require that a certified youth “under 17 years of age is considered a child for the purposes of this subsection.” Before it was amended, Section 54.02(h), Family Code, had provided that Section 51.12 did not apply after a juvenile had been transferred to criminal court for prosecution. That, of course, changed with the amendment to Section 54.02(h) referencing the juvenile board policy concerning detention in a certified juvenile detention facility or the criminal court judge’s order to transfer certified youth to the county jail under Article 4.19, Code of Criminal Procedure.

The opinion concluded:

When we construe Code of Criminal Procedure article 4.19 with subsection 51.12(f) of the Family Code, a juvenile certified as an adult may be transferred to a facility and treated as an adult under the Code of Criminal Procedure, but if the juvenile is not at least seventeen years of age, the juvenile is considered a child who must be detained according to the separation requirements of subsection 51.12(f) of the Family Code. Consequently, we conclude that article 4.19 of the Code of Criminal Procedure does not authorize the detention of a child under the age of seventeen who has been transferred to criminal court for prosecution in a facility that does not comply with subsection 51.12(f) of the Family Code.

The opinion makes it clear that a child younger than 17 who has been certified to stand trial as an adult is still considered a “child” under Section 51.12(f) and, if housed in an adult jail, must be separated by sight and sound from adult inmates. The stark reality is that it is virtually impossible for any county jail or adult facility in Texas to completely ensure “sight and sound separation” of certified youth who are under 17 from adult inmates.

V. THE PRISON RAPE ELIMINATION ACT (PREA)

First passed in 2003, the Prison Rape Elimination Act (PREA) is intended to curb sexual assaults in adult and juvenile jail, prison and detention facilities through “zero-tolerance” policies, as well as national standards to prevent incidents of sexual violence in prisons. The national PREA standards were released by the Department of Justice in May 2012; they were published in the Federal Register on June 20, 2012. The PREA standards immediately went into effect for the federal Bureau of Prisons. They became effective for jails and juvenile facilities 60 days after being published, which fell on August 20, 2012. Audits on the PREA standards will begin on or about August 20, 2013. (The standards can be accessed at: http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

PREA Standard Section 115.14 pertains to “youthful inmates,” defined in Section 115.5 as “any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail.”

The standard [Section 115.14] imposes three requirements for juveniles placed in adult prisons or jails. First, it mandates that no youthful inmate may be placed in a housing unit in which he or she will have contact with any adult inmate through use of a shared day room or other common space, shower area, or sleeping quarters. Second, it requires that, outside of housing units, agencies either maintain ‘sight and sound separation’ between youthful inmates and adult inmates—i.e., prevent adult inmates from seeing or communicating with youth—or provide direct staff supervision when youthful inmates and adult inmates are together. Third, it requires that agencies make their best efforts to avoid placing youthful inmates in isolation to comply with this provision and that, absent exigent circumstances, agencies comply with this standard in a manner that affords youthful inmates daily large-muscle exercise and any legally required special education services, and provides access to other programs and work opportunities to the extent possible. *Youthful Inmates*, 77 Fed. Reg., No. 119, p. 37,127 (June 20, 2012) (to be codified at 28 C.F.R. pt. 115).

In adopting this standard, the Department of Justice opted for flexibility in deciding not to impose a complete ban on collocating youthful inmates and adult inmates. While prohibiting the placement of youth in housing units where they can interact with adults, Section 115.14 *does* allow youthful inmates to commingle with adult inmates as long as there is direct staff supervision. “Such supervision must be sufficient to ensure that youth are within sight at all times.” *Youthful Inmates*, p. 37,129. The standard also requires that agencies make their best efforts to avoid placing youthful inmates in isolation in order to comply with Section 115.14. “[A]gencies should attempt to designate dedicated units, wings, or tiers for confined youth; enter into inter-agency, inter-facility, or cooperative agreements for the common placement of youth; temporarily house youth in a juvenile facility; construct partitions or other low-cost facility alterations; or explore alternatives to detention or incarceration for youth in the agency’s custody and care.” *Youthful Inmates*, p. 37,130. Again, Section 115.14 of the PREA standards applies only to youth who are under the jurisdiction of adult courts, and is therefore worth reading in conjunction with the changes brought about by S.B. 1209.

There is another aspect of PREA that is significant, although it does not necessarily apply to certified youth in Texas. As previously mentioned, Section 115.14 pertains to “any person under the age of 18” who is held in an adult jail or prison. While most of the country sets the age of juvenile court jurisdiction until age 18, in Texas

juvenile court jurisdiction ends at age 17. Consequently, 17-year-olds in Texas are by law considered adults and are confined in adult jails. S.B. 1209 does not apply to them since they are not certified as adults. Similarly, certified youth do not receive special protection under S.B. 1209 after turning 17. Yet the jailing of these 17-year-olds violates the PREA standards and the federal requirement that these youth also be “sight and sound separated” from adult offenders. Since the PREA standards are new, the Legislature has not had a chance to address this issue. The question of where 17-year-old offenders should be housed pre-trial, whether they have been certified or not, should be considered by the Legislature in an effort to avoid any violations or sanctions once the monitoring of PREA standards begins in August 2013.

VI. CONCLUSION

S.B. 1209 ended the legal requirement that all certified juveniles in Texas must be treated as adults for all purposes. Newly amended Section 51.12(f), Family Code, makes it clear that a certified youth who “is under the age of 17 is considered a *child* for purposes of this subsection.” (Emphasis added.) When the Attorney General construed Subsection (f) and Article 4.19, Code of Criminal Procedure, it concluded that while a certified youth under the age of 17 may be housed in an adult jail, that youth is still a “child” who must be detained separately from adult inmates. As a result of S.B. 1209 and GA-0927, counties face many new questions: Will their juvenile boards establish a policy that authorizes housing certified youth in juvenile detention facilities? If so, will juvenile court judges abide by the adopted policy? Even if a juvenile board adopts a policy in favor of keeping certified youth in a juvenile detention facility, under Section 54.02(h) the juvenile court judge does not *have* to follow the policy. Will criminal court judges override a juvenile court’s decision to house certified youth in a juvenile detention facility? Article 4.19, Code of Criminal Procedure, grants them the authority to do so. Finally, will county jail officials be able to comply with the “sight and sound separation” requirements imposed not only by Section 51.12(f) and the Attorney General opinion, but also by the PREA standards that went into effect on August 20, 2012?

S.B. 1209 is made up of many moving parts and pieces. Making it work begs for detailed discussions among county officials about how best to implement the new laws.

LINK FOR SB 1209

<http://www.njcn.org/uploads/digital-library/Texas-Increases-Protections-for-Youth-Transferred-to-Adult-System-SB-1209.pdf>