



**A.5258-A**

**M of A Scarborough**

**S.3175-A**

**Senator Volker**

AN ACT to amend the Social Services Law and the Family Court Act, in relation to services for sexually exploited children.

**A5258-A IS APPROVED  
S3175-A IS APPROVED, WITH RECOMMENDATION**

The Sex and Law Committee of the New York City Bar Association urges support for A5258-A, a bill that would permit sexually exploited children to receive vital social services, such as preventative services and safe housing, rather than face prosecution, potential jail time, and a likely return to the streets. This bill is critical to the health and well-being of sexually exploited children who, as it currently stands, are often treated as juvenile delinquents and prosecuted for sexual acts that the law otherwise defines as non-consensual.

The Committee realizes that the Senate version of the Safe Harbor for Exploited Children Act, S3175-A, is virtually identical to A5258-A, and applauds Senator Volker for addressing this important issue. In particular, both bills make changes in the Social Services Law that would require each local social service district to determine the needs of sexually exploited children in their respective districts and provide crisis intervention and community based programs to meet the determined needs. The social service districts would also be required to provide short-term safe housing to children in need. We commend both Assembly Member Scarborough and Senator Volker for recognizing the importance of providing targeted services to this vulnerable population of children.

However, due to a significant difference in section 2 of the bill relating to a change in the Family Court Act, the Committee believes that A5258-A will have a

greater impact on sexually exploited children, as described in more detail below. For that reason, the Committee supports A5258-A over S3175-A and recommends that S3175-A be modified so as to conform with A5258-A's proposed amendment to the Family Court Act.

#### Summary of the Safe Harbor for Exploited Children Act (the "Safe Harbor Act")

Both A5258-A and S3175-A recognize the existence of sexually exploited children and the unique problems they face. If passed, the Safe Harbor Act will reach children - some as young as 12 or 13 - who likely have experienced trauma, homelessness or abuse in their lives<sup>1</sup> and who seek refuge in the arms of pimps, "daddies" and other faux protectors. Continuing to prosecute these children under existing prostitution laws only serves to re-traumatize them and make an escape from their situations more unlikely. By amending the Family Court Act so that juvenile prostitutes are treated as "persons in need of supervision" rather than juvenile delinquents, the Safe Harbor Act seeks to provide a range of services, including crisis intervention and safe housing, to these young victims of sexual exploitation.<sup>2</sup> This represents their best chance at getting help.

A5258-A and S3175-A begin by providing a thorough definition of "sexually exploited child" to include:

"[A]ny person under the age of eighteen who has been subject to sexual exploitation because he or she: (A) is the victim of the crime of sex trafficking as defined in section 230.34 of the penal law; (B) is an abused child as defined in paragraph (III) of subdivision (e) of section 1012 of the family court act; (C) engages in any act as defined in section 230.00 or 240.37 of the penal law<sup>3</sup>; (D) is a victim of the crime of compelling prostitution as defined in section 230.33 of the penal law; (E) engages in acts or conduct described in article 263 of the penal law<sup>4</sup>."

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<sup>1</sup> According to the New York Juvenile Justice Coalition, it is estimated that 80 to 90 percent of exploited children have previously been sexually abused and that two-thirds to three-quarters of exploited children experience mental health problems such as post-traumatic stress disorder. NY Juvenile Justice Coalition, *Stop the Prosecution of Sexually Exploited Youth: FAQ's and Facts*.

<sup>2</sup> As discussed in greater detail below, the process by which juvenile prostitutes become "persons in need of supervision" differs between A5258-A and S3175-A; however, once that designation is made, the social services offered are the same in the two bills.

<sup>3</sup> Section 230.00 of the penal law defines the crime of prostitution as engaging or agreeing or offering to engage in sexual conduct with another person in return for a fee. Section 240.37 of the penal law generally prohibits loitering for the purpose of engaging in prostitution.

<sup>4</sup> Article 263 of the penal law defines the crimes constituting sexual performance of a child.

Thus, the universe of individuals affected by the Safe Harbor Act is narrowly defined by its terms. Other than an “abused child” as defined under § 1012 of the Family Court Act, the only persons to whom this bill will apply are minors who have engaged in or been subjected to sex trafficking, prostitution<sup>5</sup> or sexual performance. This is precisely the universe of children who need and will benefit most from the social services contemplated by the bill.

On this much, the Assembly and Senate versions of the Safe Harbor Act appear to agree. Indeed, A5258-A and S3175-A are identical, with one exception: the way in which each bill proposes to amend § 311.4 of the Family Court Act. A5258-A would *require* – at least initially - that juvenile prostitutes be treated as a “persons in need of supervision”. S3175-A does not.

### *Analysis of the Proposed Amendments to the Family Court Act*

Both A5258-A and S3175-A seek to amend §311.4 of the Family Court Act. A5258-A’s amendment would require the family court to designate a respondent juvenile delinquent<sup>6</sup> charged with the crime of prostitution as a “person in need of supervision” or PINS.<sup>7</sup> The substitution of a PINS petition for a delinquency proceeding would take the child out of juvenile delinquency status (and potential incarceration) and place him or her squarely within the realm of services contemplated by the bill, including short-term safe housing and appropriate counseling. Under S3175-A, the conversion of a juvenile delinquency prostitution case to a PINS proceeding would remain at the discretion of the family court.

### *The Current Law*

Section 311.4 of the Family Court Act provides:

“At *any time* in the proceedings the court, upon motion of a respondent or its own motion, may, *with the consent of the presentment agency*<sup>8</sup> and with the consent of the

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<sup>5</sup> This is in accord with the federal Trafficking Victims Protection Act of 2000, pursuant to which a minor prostitute is automatically considered a victim of sex trafficking.

<sup>6</sup> Only children under the age of 16 are charged as juvenile delinquents in family court. FCA § 301.2(1).

<sup>7</sup> A person in need of supervision is defined as: “A person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child’s care, or other lawful authority, or who violates the provisions of section 221.05 of the penal law [unlawful possession of marijuana].” FCA § 712(a). Both A5258-A and S3175-A propose to amend this definition to include violations of § 230.00 (prostitution) and § 240.37 (loitering for purposes of prostitution) of the penal law (*see n. 3, supra*).

<sup>8</sup> “[P]resentment agency” refers to the prosecutor of the delinquency proceeding in family court. In New York City, the Office of the Corporation Counsel, through its Assistant Corporation Counsel acts as the presentment agency.

*respondent*, substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent. At *the conclusion of the dispositional hearing* the court, upon motion of the respondent or its own motion, may in its discretion and *with the consent of the respondent*, substitute a finding that the respondent is a person in need of supervision for a finding that the person is a juvenile delinquent.”

(Emphasis added.)

Therefore under current law, in any juvenile delinquency matter under the jurisdiction of the family court, the question of whether to treat a respondent as a juvenile delinquent or a person in need of supervision falls within the discretion of the judge, only to be decided after holding a dispositional hearing. Before the conclusion of the dispositional hearing, the consent of the presentment agency is required. This is the current procedure governing all juvenile delinquency cases in family court.

*S3175-A's Proposed Amendment to FCA § 311.4*

S3175-A proposes to add a new subdivision 3 to § 311.4 of the Family Court Act, which would provide a carve-out for those cases involving juvenile delinquents charged with prostitution. Specifically, it provides as follows:

“When a petition alleging that the respondent is a juvenile delinquent charges the respondent with violating the provisions of section 230.00 of the penal law, and such petition includes no felony charges, the court *may*, upon motion of the respondent or its own motion at any time in the proceedings, substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent.”

(Emphasis added.)

The change proposed by S3175-A is relatively slight: the family court may convert a juvenile prostitution charge to a PINS case earlier in the proceeding than under current law and without requiring prosecutorial consent. Otherwise, S3175-A maintains the status quo by treating juvenile prostitution cases as ordinary criminal cases, insofar as the PINS conversion remains discretionary.

*A5258-A's Proposed Amendment to § 311.4*

A5258-A also proposes to add a new subdivision 3 to § 311.4 of the Family Court Act, which would, like S3175-A, provide a carve-out for those cases involving juvenile delinquents charged with prostitution. It provides as follows:

“When a petition alleging that the respondent is a juvenile delinquent charges the respondent with violating the provisions of section 230.00 of the penal law, and such petition includes no felony charges, the court *shall*, upon motion of the respondent or its own motion at any time in the proceedings, substitute a petition alleging that the respondent is in need of supervision for a petition alleging that the respondent is a juvenile delinquent.”

(Emphasis added.)

Thus, under A5258-A’s approach, and *only* in cases where the respondent is a juvenile delinquent (*i.e.*, under the age of 16) charged with prostitution, the family court is *required*, upon motion of the respondent or its own motion, to convert the proceeding to a PINS proceeding. Once the matter is converted to a PINS proceeding, the respondent is then entitled to receive the social services outlined in the bill.

#### *The Committee’s Preference for A5258-A*

Although only one word (“shall” versus “may”) separates A5258-A from S3175-A, the Committee favors the approach taken by A5258-A. The Committee believes that in the case of children under 16 charged with prostitution, the substitution of a PINS petition should be made mandatory – as is the case under A5258-A - in order to enact a change in the law that will truly benefit sexually exploited children and effect a policy change in this area.

First, A5258-A’s proposed amendment to § 311.4 is narrowly drafted and does not provide a permanent “free pass” to these individuals. Instead, the court retains the discretion to treat respondents as juvenile delinquents subsequent to the PINS substitution if they do not comply with the court’s directives.<sup>9</sup> As amended by A5258-A, § 311.4 would provide that:

“If, subsequent to issuance of a substitution order under this subsection, the respondent is not in substantial compliance with a lawful order of the court, the court may, in its discretion, substitute a petition alleging that the respondent is a juvenile delinquent for a petition alleging that the respondent is in need of supervision.”

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<sup>9</sup> In a PINS proceeding, the judge can make any number of orders, including, remanding the respondent to a safe house and directing the respondent to cooperate with services, comply with a curfew or attend school.

Therefore, A5258-A adequately protects against a scenario of revolving-door PINS cases involving juvenile prostitutes who refuse to engage in the process of receiving social services or otherwise comply with the court's directives.

Second, the Committee does not believe that S3175-A goes far enough towards reconsidering New York's current policy of charging children under the age of 16 with prostitution and treating them as criminals. The Committee believes that A5258-A does a better job of recognizing "that the sexual exploitation of children is a child welfare issue, not a criminal justice issue"<sup>10</sup> and that this universe of children should not be incarcerated and otherwise left to demonstrate that they need help and will benefit from the social services contemplated by the bill. Moreover, if a child abuses this opportunity to receive services and violates an order of the court, he or she can be reclassified as a juvenile delinquent and treated accordingly. A5258-A strikes a reasonable balance between these competing concerns. By contrast, S3175-A does not effect a true change in the law and the Committee is concerned that the practice of treating sexually exploited youth as criminals will remain unabated.

The Committee is aware, based in part on a panel discussion hosted by the Bar Association in October 2007, that some opposition has been voiced against the mandatory PINS language contained in A5258-A in favor of the discretionary PINS language contained in S3175-A. The main reason for this opposition is a belief that the juvenile prostitute should be "locked down" so that he or she can receive services and perhaps be persuaded to provide information against his or her pimp.

This argument is not persuasive. While we do not seek to repeat the findings of the oft-cited WESTAT report prepared for the NYS Office of Children and Family Services in April 2007<sup>11</sup>, it is particularly relevant on this point. The report makes abundantly clear that the needs of sexually exploited children, often the victims of abuse and lacking any semblance of a healthy support system, are intrinsically linked to the issue of trust. It is time to demonstrate to these children that they can trust the state and experienced community based organizations – *not their pimps* - to provide what they need to be safe. Treating them as criminals who need to be locked down does not send that message.<sup>12</sup>

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<sup>10</sup> See n. 1, *supra*.

<sup>11</sup> See Gragg, F. et al., *New York Prevalence Study of Commercially Sexually Exploited Children*, April 2007.

<sup>12</sup> Likewise, "locking down" juvenile prostitutes because they are potential witnesses against their pimps does not send the right message or help to build trust. It may not even serve the prosecutor's purpose. According to the WESTAT report, many juvenile prostitutes – especially in New York City – are part of an extended pimp "family" (comprised of other juvenile prostitutes and perhaps a head "mother" prostitute), which exerts extreme control over its members. Giving testimony against the pimp is viewed as a betrayal of the family. *Id.* at 73 – 74. The only thing that may break that bond is trust with another adult, something that the report says requires "positive attitudes and tailored services." *Id.* at 96 – 97. And, even if a prostitute is persuaded to give information against her pimp, the pimp's penalty will amount to "little more

Finally, as a procedural matter, the Committee believes that A5258-A enacts a more substantial change to § 311.4 so that a greater number of sexually exploited children will actually receive the contemplated social services. Under current law, the family court has discretion to convert a juvenile prostitution charge to a PINS case – without requiring prosecutorial consent – only after conducting a dispositional hearing. S3175-A simply moves that discretion to an earlier point in the proceeding. That is, under S3175-A, the family court will have discretion to convert a prostitution charge to a PINS case at any time in the proceeding, but it will not be required to do so. Based on conversations with expert practitioners in this area, the Committee understands that PINS conversions in juvenile delinquency cases (including prostitution) are relatively rare. There is simply no reason to believe that the slight procedural change of S3175-A will result in a greater number of children actually receiving the services outlined in the bill. If family court judges are reluctant to convert these cases to PINS proceedings under current law, we are hard pressed to see why judges would be *more* willing to do so without holding a hearing. The Committee is concerned, therefore, that PINS conversions of these cases would remain a rarity under S3175-A, and that the delivery of vital social services would not become a reality.

Within reasonable parameters, and striking a workable balance among competing interests, A5258-A goes a long way towards delivering the right message to sexually exploited youth, *i.e.*, that they are not criminals and deserve a real chance at being helped. The message may not reach everyone, but as fully discussed in the WESTAT report, it is certainly worth the effort to reach as many youth as possible. The Committee believes that A5258-A guarantees that effort; S3175-A – by essentially maintaining the status quo – does not.<sup>13</sup>

For these reasons, we respectfully urge swift passage of A5258-A and support a modification of S3175-A to reflect A5258-A's approach towards amending the Family Court Act.

Thank you for considering the Committee's position on the Safe Harbor Act.

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than a 'slap on the wrist.'" *Id.* at 91 – 92 (*citing* discussions among the report's Study Advisory Group comprised of agencies and individuals working with sexually exploited children in New York).

<sup>13</sup> We applaud Senator Volker's decision to address this very difficult issue by introducing S3175-A, and hope that a consensus can be reached. To that end, we have also reviewed S5455-A and agree, in principle, with the approach of creating a new category of "unlawful prostitution" under the penal law, which is a step towards achieving the desired result of treating minor prostitutes as people in need of assistance, not criminals. However, it is unclear how necessary services would be delivered to those who have committed the violation of unlawful prostitution and how the matter would move to family court. We are not now expressing an opinion on the other provisions of S5455-A, except to state that this Committee has always maintained, in prior memoranda addressing the 2007 NYS Human Trafficking Bill, that an individual charged with prostitution should be permitted to show, via affirmative defense, that he or she is a victim of sex trafficking. We strongly support the inclusion of such an affirmative defense in S5455-A.

Respectfully,

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