

RAISING THE FLOOR

INCREASING THE MINIMUM AGE OF
PROSECUTION OF YOUTH AS ADULTS



CAMPAIGN FOR

YOUTH  JUSTICE

BECAUSE THE CONSEQUENCES AREN'T MINOR

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The Campaign for Youth Justice (CFYJ) is a national initiative focused on the removal of youth under 18 from the adult criminal justice system. The Campaign works with youth, families, legislators and system stakeholders to create more developmentally appropriate ways to hold youth accountable for their actions while eliminating the harms associated with exposure to adult courts, jails, and prisons.

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What is Raising the Floor?

All fifty states and the District of Columbia have one or more mechanisms to transfer youth under eighteen-years-old from juvenile court to adult court.¹ In many states, there is **no minimum age of prosecution as an adult** for youth charged with certain offenses.² In Florida³ and Wisconsin,⁴ state laws have recently permitted the transfer of children twelve-years-old and younger to adult court.



An abundance of research,⁵ the U.S. Supreme Court,⁶ and medical experts⁷ agree that youth are fundamentally different from adults and therefore should be treated differently in the context of the criminal justice system. Children in the adult criminal justice system are more likely to experience abuse, commit suicide, and be exposed to prolonged periods of solitary confinement akin to torture.⁸ **Efforts by state legislatures to set or raise the minimum age of transfer are critical first steps toward protecting children and youth from a system that was not created to serve or rehabilitate them.**

Over the past decade, a number of state legislatures have passed bills to “raise the floor” by raising the minimum age of prosecution as an adult for all or some offenses, thereby narrowing the number of youth who could enter the adult criminal justice system in their state. Some of these states have raised the floor in a way that eliminates one of their state’s transfer mechanisms all together. For many states, raising the minimum age of transfer will roll back transfer legislation passed during the “tough on crime” era of the late 1980s and the 1990s.⁹ During this era, concern over a rise in violent crime resulted in an increase of harsh and often disproportionate penalties against both youth and adults.¹⁰

National Overview of the Minimum Age of Youth Transfer

In the U.S., most states have adopted more than one mechanism to transfer youth to adult court. Judicial waiver, prosecutorial discretion waiver, and statutory exclusion are three of the most widely used mechanisms among the states.

Forty-five states and DC have adopted the use of judicial waiver, which gives a juvenile court judge discretion to transfer a youth to adult court after a hearing in which the judge considers factors of the case.¹¹ Thirteen states and DC have adopted the use of prosecutorial discretion waiver, also known as

direct file, which provides prosecutors with the power to file a youth's case in adult court without the approval of a juvenile court judge.¹² Twenty-six states have statutory exclusion laws, which is when the legislature decides that a youth charged with a certain offense cannot start in juvenile court and instead must start in adult court.¹³

There are additional subcategories of these main transfer mechanisms. Specifically, there are two subcategories of judicial waiver called mandatory waiver and presumptive waiver. Mandatory waiver requires a juvenile court judge to transfer a case to adult court after notice and a hearing to verify the youth's age and that there is cause to charge the youth with the alleged offense.¹⁴ Mandatory waiver does not give the juvenile court judge discretion to consider additional factors about the case before the judge is required to transfer the case to adult court.¹⁵ As of 2019, there are eleven states with mandatory waiver provisions.¹⁶ Presumptive waiver is when it is presumed that a youth will be transferred to adult court and the burden to prove why the youth should remain in juvenile court is placed on the youth.¹⁷ Eleven states and DC have presumptive waiver.¹⁸

An International Perspective on Prosecuting Youth as Adult

The United States model of transferring children and youth to the adult criminal justice system diverges sharply from international peers. In Germany, Greece, Italy, Spain and Switzerland, no youth under eighteen are eligible for adult prosecution or sanctions. This approach is called the "strict model."¹⁹ In countries like the Netherlands, only sixteen and seventeen-year-olds who commit serious offenses are eligible for adult sanctions; however, they remain in juvenile court and generally within the juvenile justice system or the youth section of an adult prison.²⁰ This approach is the "flexible model."²¹ In America, some states utilize the flexible model and allow juvenile court judges to sentence youth to adult sanctions under blended sentencing schemes.²² According to the Office of Juvenile Justice and Delinquency Prevention, fourteen states had juvenile court blended sentencing in 2015.²³

Every year, state legislators have the opportunity to narrow or eliminate their state's transfer provisions. This brief will provide a national overview of current minimum transfer ages by transfer mechanism and highlight states that have successfully "raised the floor."

While the Campaign for Youth Justice does not believe that any youth under eighteen should be eligible for prosecution or incarceration in the adult criminal justice system, if states decide to have a mechanism to transfer youth to adult court, judicial discretion waiver, which gives youth an opportunity to have their individual needs considered in juvenile court first, is preferable to any other form of transfer.

State Spotlight on Successful “Raise the Floor” Reforms

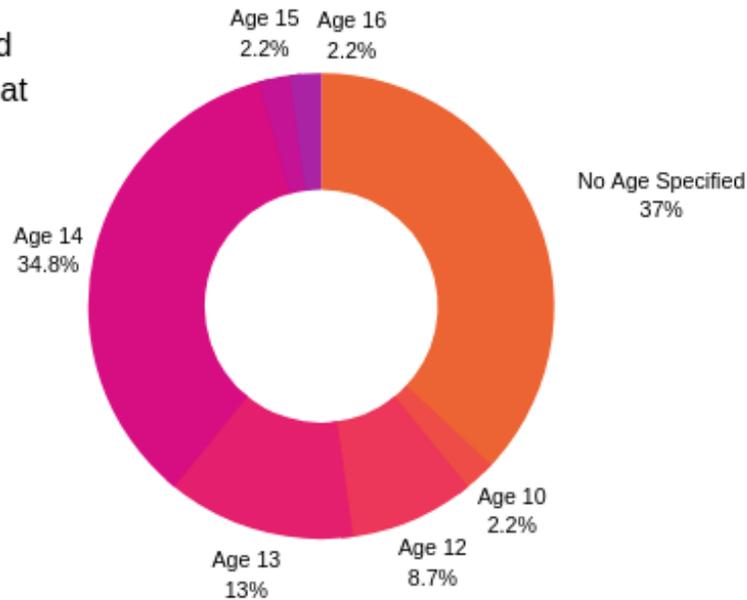
Raising the Floor on Judicial Waiver

Judicial waiver is when a youth starts in juvenile court, but if they are a certain age and charged with a certain offense, a juvenile court judge can *make a decision* to transfer the youth to adult court if there is cause to believe the youth committed the offense. In most states, juvenile court judges are provided a list of factors to consider and weigh about the individual child’s case before making a decision to transfer the child to adult court. These factors generally include the child’s age, maturity, and the severity of their offense.²⁴ Some states are beginning to add additional factors for juvenile court judges to consider, such as exposure to trauma, the child’s special education needs, their involvement in the child welfare system, and racial disparities in the transfer of youth to adult court in the locality.²⁵ Most states have judicial waiver. A third of the states with judicial waiver give judges the discretion to transfer youth at any age. It is notable that in 2019, California stands alone as the only state with a minimum age of sixteen for judicial waiver, but in 1977, thirteen states and the federal government set sixteen as the minimum age.

Judicial Waiver Minimum Age Requirement in 1977 and 2019²⁶

Minimum Age of Transfer for at Least One Offense	States’ Minimum Age of Judicial Waiver in 1977	States’ Minimum Age of Judicial Waiver in 2019
No Minimum Age	Alaska, Arizona, Arkansas, Maryland, New Hampshire, Oklahoma, South Dakota, Washington, West Virginia, Wisconsin, South Carolina	Alaska, Arizona, Delaware, DC, Hawaii, Idaho, Maine, Maryland, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wyoming
Ten-Years-Old	No states	Iowa
Twelve-Years-old	No states	Colorado, Indiana, Missouri, Vermont
Thirteen-Years-Old	Illinois and Mississippi	Georgia, Illinois, Mississippi, North Carolina, New Hampshire, Nevada
Fourteen-Years-Old	Alabama, Colorado, Connecticut, Florida, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, Pennsylvania, Utah	Alabama, Arkansas, Florida, Kansas, Kentucky, Louisiana, Michigan, Minnesota, North Dakota, Nebraska, Ohio, Pennsylvania, Texas, Utah, Virginia, Wisconsin
Fifteen-Years-Old	DC, Georgia, Louisiana, Michigan, Ohio, Texas, Vermont, Tennessee	Connecticut
Sixteen-Years-Old	California, Delaware, Hawaii, Idaho, Kansas, Kentucky, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island	California

**Judicial Discretion
Waiver: 45 States and
DC - Minimum Age for at
Least One Offense**



Judicial Discretion Waiver: 45 states and DC- Minimum Age for at Least One Offense

No Age Specified: AK, AZ, DE, DC, HI, ID, ME, MD, OK, OR, RI, SC, SD TN, WA, WV, WY

Age 10: IA

Age 12: CO, IN, MO VT

Age 13: GA, IL, MS, NC, NH, NV

Age 14: AL, AR, FL, KS, KY, LA, MI, MN, ND, NE, OH, PA, TX, UT, VA WI

Age 15: CT

Age 16: CA

Tennessee

In 2018, the Tennessee Legislature passed companion bills, SB 2261 and HB 2271 to amend their juvenile justice code, including their transfer statute.²⁷ These bills raised the minimum age of transfer for thirteen offenses and their attempts. Specifically, youth under fourteen are now only eligible for transfer if they are charged with first or second degree murder or attempted first or second degree murder. Youth ages fourteen through sixteen may be transferred for committing or attempting fifteen offenses: first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, aggravated burglary, especially aggravated burglary, kidnapping, aggravated kidnapping, especially aggravated kidnapping, commission of an act of terrorism, and carjacking. Prior to this legislative change, youth under fourteen could be transferred for thirteen offenses and sixteen-year-olds could be transferred for *any offense*. Under the bill, the transfer of youth under fourteen is limited and sixteen-year-olds can be transferred for the fifteen offenses above as well as robbery and attempted robbery, but are no longer eligible for transfer for misdemeanor and low-level felonies. Seventeen-year-olds are still eligible for transfer for any offense. Under its recent legislative reforms, there will be fewer youth eligible for transfer in Tennessee, but there is no hard floor. Children of any age are still eligible for transfer to adult court.

California

In 2018, the California Legislature passed Senate Bill 1391 to ban the transfer of youth under sixteen years old to adult court.²⁸ California became the first state in the country to limit transfer eligibility to only sixteen- and seventeen-year-olds. After a number of evidence-based and data-driven youth justice reforms in the state, California now only allows sixteen and seventeen-year-olds to be transferred after a judge considers a number of individualized factors and recites the reasoning behind their decision.²⁹ When evaluating the degree of criminal sophistication and prior delinquency record, judges are encouraged to weigh the following factors:

“...the minor’s age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the minor’s impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the minor’s actions, and the effect of the minor’s family and community environment and childhood trauma on the minor’s criminal sophistication.”

California’s reforms leading up to and including SB 1391 bring the state back in line with its waiver statute pre-August 1994,³⁰ before the nationwide concern over “juvenile super predators” spurred “tough on crime” measures.³¹ Research and data have debunked the myth of the juvenile super predator, and, as a result, states are appropriately rolling back severe transfer provisions.³² With this change to their transfer law, California now serves as a model for youth justice reform in the U.S., specifically for keeping more youth out of the adult criminal justice system.

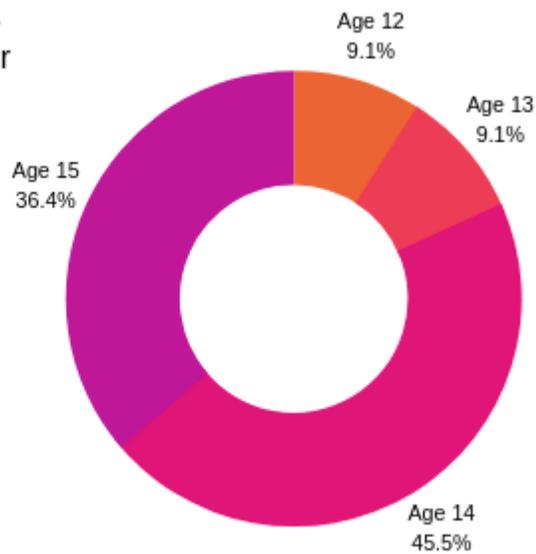
Vermont

In 2016, the Vermont General Assembly passed House Bill 95, which raised the minimum age at which a youth could be transferred to adult court from ten to twelve years old.³³ Over the next several years, Vermont will add eighteen and nineteen-year-olds with low-level offenses into their juvenile justice system.³⁴ That change could lead to the state once again re-evaluating its minimum age of transfer.

Raising the Floor on Mandatory Waiver

Mandatory waiver is when a youth starts in juvenile court, but because they are a certain age and charged with a certain offense, a juvenile court judge *must* transfer the youth to adult court if there is cause to believe the youth committed the offense.³⁵ What makes mandatory waiver different from traditional judicial waiver is that the juvenile court judge does not have the discretion to decide that the youth should remain in the juvenile court because of the individual circumstances of the youth's case.³⁶

Mandatory Waiver: 11 States: Minimum Age for at Least One Offense



Mandatory Waiver- 11 States- Minimum Age for at Least One Offense

Age 12: IN

Age 13: NC

Age 14: KY, ND, OH, VA, WV

Age 15: CT, DE, LA, NJ

Connecticut

In 2015, Connecticut's former Governor Dannel Malloy signed House Bill 7050, which raised the minimum age of mandatory waiver from fourteen to fifteen years old for Class A and B felonies.³⁷ The bill also limits the types of Class B felony offenses that can be mandatorily waived. Specifically, youth are no longer eligible for mandatory waiver if they are charged with larceny in the first degree, kidnapping in the second degree, burglary, and some classes of sexual assault. If a youth is charged with any of these offenses, a judge must hold a hearing prior to making the decision to transfer the youth. In order to transfer the youth to adult court, the judge must determine that the youth is fifteen years old, there is probable cause to believe the youth has committed the offense, and the best interests of the child and public will not be served by keeping youth in juvenile court. Further, the court must consider mitigating factors such as: prior criminal history, disabilities, mental illness, and the availability of services in the juvenile court that could meet the child's needs.

New Jersey

In 2015, New Jersey passed Senate Bill 2003, which raised the minimum age of mandatory waiver from fourteen to fifteen and repealed its judicial discretion waiver and presumptive waiver provisions.³⁸ The law narrows the list of eligible offenses and requires prosecutors to submit a written and individualized analysis of the reasons why transfer is appropriate. If the court is clearly convinced that the prosecutor has not abused their discretion in reviewing transfer factors for the youth, the judge must grant the prosecutor's request to transfer the case to adult court.

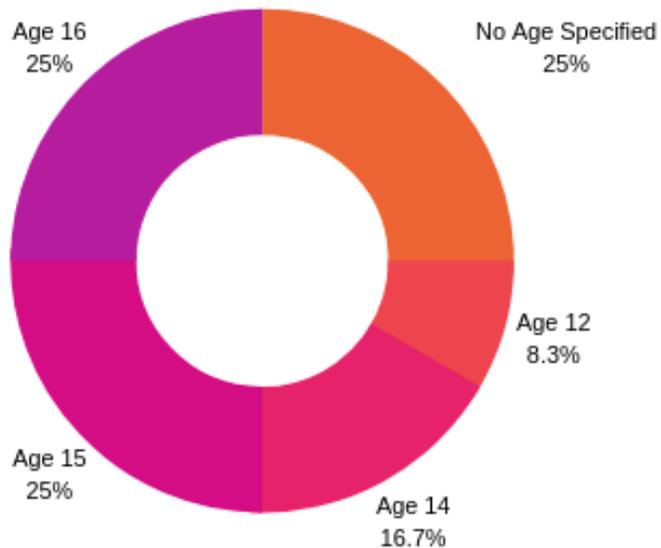
Rhode Island

In 2018, Rhode Island passed House Bill 7503 and its companion Senate Bill 2458.³⁹ Prior to these bills, seventeen-year-olds were mandatorily waived from juvenile court to adult court for murder, first-degree sexual assault, first-degree child molestation, or assault with the attempt to commit murder. These bills eliminated mandatory waiver in Rhode Island by making it so no youth under eighteen could be mandatorily waived to adult court. This is one example of a state eliminating one of its transfer mechanisms for children by raising the minimum age of transfer to the state's age of adulthood, which is age eighteen in Rhode Island.

Raising the Floor on Presumptive Waiver

Presumptive waiver is when a case starts in juvenile court, but there is a strong presumption that the judge will transfer the youth to adult court unless they find that mitigating factors exist to keep the youth in juvenile court.⁴⁰ The burden of proof is on the youth, and not the prosecutor, to rebut the presumption that the youth should be transferred to adult court.

Presumptive Waiver: 11 States & DC: Minimum Age for at Least One Offense



Presumptive waiver – 11 States and DC – Minimum age for at least one offense

No Age Specified: AK, RI, ME

Age 12: CO

Age 14: ND, PA

Age 15: DC, IL, NH

Age 16: MN, NV, UT

Kansas

In 2016, the Kansas Legislature passed Senate Bill 367, which raised the minimum age of transfer from twelve to fourteen years old.⁴¹ With the passage of SB 367, Kansas joined a growing number of states setting their minimum age of transfer at fourteen years old or older. This bill also eliminated presumptive waiver of youth to adult court. Now, juvenile court judges have full discretion over the transfer decision.

Nevada

In 2009, the Nevada legislature passed AB 237, which raised the minimum age of presumptive waiver for youth prosecuted as adults from fourteen to sixteen years old.⁴² The law now specifically provides that a juvenile court judge “shall certify a child” unless the juvenile court judge finds:

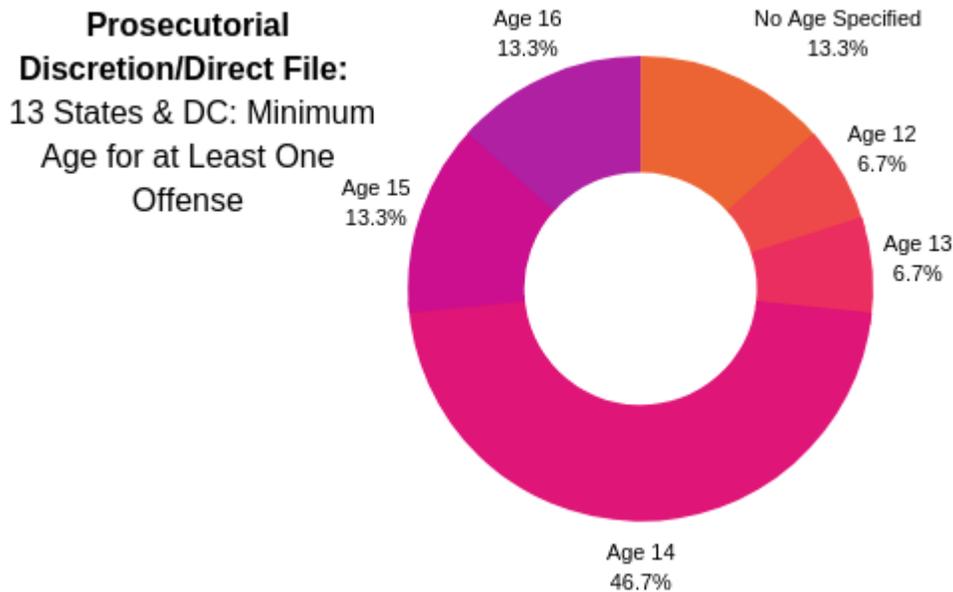
“[C]lear and convincing evidence that: (a) The child is developmentally or mentally incompetent to understand his situation and the proceedings of the court or to aid his attorney in those proceedings; or (b) The child has substance abuse or emotional or behavioral problems and the substance abuse or emotional or behavioral problems may be appropriately treated through the jurisdiction of the juvenile court.”⁴³

New Jersey and California

In 2015 and 2016, New Jersey⁴⁴ and California, respectively,⁴⁵ both eliminated their presumptive waiver statutes. New Jersey’s only form of waiver now is mandatory waiver, and California’s only form of waiver is judicial waiver.

Raising the Floor on Prosecutorial Discretion / Direct File

Prosecutorial discretion, also known as direct file, is when a prosecutor has the power to file a case in adult court without the approval of a juvenile court judge. In thirteen states and DC, prosecutors have power over whether to file a youth's case in adult court if they are a minimum age and charged with a certain type of offense.⁴⁶



Prosecutorial Discretion- 13 States and DC - Minimum Age for at Least One Offense

No Age Specified: GA, NE

Age 12: MT

Age 13: WY

Age 14: AZ, AR, FL, MI, VA, VT

Age 15: LA, OK

Age 16: CO, DC

California

In 2016, California voters approved Proposition 57, a criminal and juvenile justice reform ballot measure that included ending the direct file of youth to adult court and ending any presumption that a youth should be waived to adult court.⁴⁷ This is another example of a reform raising the minimum age of transfer to the state's age of adulthood, thereby eliminating the transfer mechanism, because youth under eighteen are no longer eligible to be sent to adult court under the mechanism. Since the passage and implementation of Proposition 57 in November 2016, the number of youth receiving adult court dispositions has declined from 376 in 2016⁴⁸ to 190 in 2017,⁴⁹ a nearly fifty percent reduction in one year.

Nebraska

In 2014, the Nebraska legislature passed LB 464, which raised the minimum age at which a prosecutor could direct file a youth to adult court for a felony offense.⁵⁰ Prior to 2014, a prosecutor could file a felony case against any child under the age of eighteen in adult court without permission from a juvenile court judge. Now, prosecutors have the discretion to file felony charges in adult court against children who are fourteen years old or older.

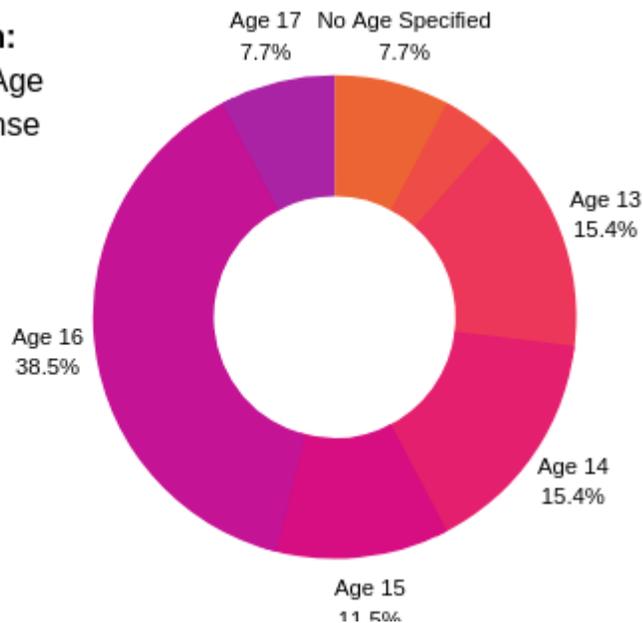
Colorado

In 2012, Colorado passed House Bill 1271, which raised the minimum age of prosecutorial discretion from fourteen to sixteen years old. The bill also limited the types of offenses for which sixteen- and seventeen-year-olds could be eligible for direct file to serious felonies.⁵¹ If the adult court determines there is no probable cause that a direct file eligible offense occurred, or if the direct file eligible offense is dismissed, the case must be sent back to the juvenile court.

Raising the Floor of Statutory Exclusion from Juvenile Court

Statutory exclusion is when a state's legislature passes a law requiring that youth of a certain age who are charged with certain offenses must be automatically excluded from the jurisdiction of the juvenile court.⁵² Twenty-six states have statutory exclusion provisions. Research suggests that this type of transfer provision is the least effective and efficient because such provisions are less likely to accurately identify youth who will be convicted and sentenced to adult prison instead of having their cases dismissed or having the youth return to the community on probation.⁵³ Additional research suggests that statutory exclusion does not deter violent offenses.⁵⁴ As a result, the lack of judicial discretion in statutory exclusion does not have the deterrent effect anticipated and can lead to worse long-term outcomes for youth and their communities.⁵⁵

Statutory Exclusion: 26 States: Minimum Age for at Least One Offense



Statutory Exclusion - 26 States - Minimum Age for at Least One Offense

No Age Specified: NV, PA

Age 10: WI

Age 13: GA, MS, NY, OK

Age 14: ID, MD, MA, VT

Age 15: AZ, LA, NM

Age 16: AL, AK, DE, IL, IN, IA, MN, SD, UT, WA

Age 17: MT, SC

Illinois

In 2015, Illinois passed House Bill 3718 to decrease the number of youth automatically transferred to adult court.⁵⁶ The law went into effect on January 1, 2016. The minimum age of statutory exclusion was raised from fifteen to sixteen years old. Additionally, the bill eliminated statutory exclusion for armed robbery with a firearm and aggravated vehicular hijacking with a firearm.

South Carolina

In 2016, the South Carolina General Assembly unanimously passed Senate Bill 916 which not only raised the age of family court jurisdiction in the state from under age seventeen to under age eighteen, but it also raised the floor on statutory exclusion.⁵⁷ The law, effective July 1, 2019, raised the statutory exclusion age from sixteen to seventeen-year-olds charged with Class A-D felonies.⁵⁸

Delaware

In 2018, House Bill 306⁵⁹ raised the minimum age that a youth is statutorily excluded from juvenile court for possession of a firearm during the commission of a felony. Under the bill, “[e]very person charged under this section over the age of 16 years” shall be tried as adults for firearm offenses following an evidentiary hearing where the superior court finds “proof positive or presumption great” that the accused used, displayed or discharged a firearm. Before this change, the law allowed for the statutory exclusion of a child of at least “fifteen charged with possession of a firearm.”⁶⁰

Florida

In 2019, the Florida Legislature passed the Florida First Step Act, House Bill 7125, which included the elimination of mandatory direct file, Florida’s statutory exclusion law.⁶¹ It was estimated that between FY 2011-2012 and FY 2015-2016, the percentage of mandatory direct files increased from a little over twenty percent of the direct files to a little over thirty percent of the direct files to adult court.⁶² Now, youth under eighteen are no longer **automatically** excluded from juvenile court in the state; however, judges and prosecutors will still have the discretion to transfer youth fourteen-years-old or older to adult court.

Oregon

During the 2019 session, the Oregon Legislature passed Senate Bill 1008, a bill that ended statutory exclusion from juvenile court of fifteen-, sixteen-, and seventeen-year-old youth charged with serious felonies.⁶³ This bill required a two-thirds majority of the legislature because it rolled back Measure 11, a ballot initiative voted in by the public in 1994.⁶⁴ This law will have a significant impact on racial disparities for youth in the criminal justice system in Oregon. Under Measure 11, Black youth were “8.6 times more likely to be indicted on a Measure 11 charge than would be expected based on relative

proportion of the general population.”⁶⁵ Nearly twenty-five years later, with the passage of S. 1008, youth will no longer be automatically prosecuted as adults. It is important to note that youth will still be eligible for judicial discretion waiver under the new law. Judges will now have the discretion to transfer youth fifteen-years-old or older for the highest level felonies, Class A or B felony, and certain Class C felonies like escape in the second degree, assault in the third degree, and robbery in the third degree.⁶⁶

Conclusion

The adult criminal justice system was not created to serve youth. Prosecuting, sentencing, and incarcerating youth as adults will never serve the best interest of the youth and data suggests that it is both costly and harmful to the community.⁶⁷ Transfer also has a notable disproportionate impact on children of color, particularly black youth who make up thirty-five percent of youth in juvenile court, but as of 2017, fifty-four percent of youth transferred to adult court by juvenile court judges.⁶⁸

The Campaign for Youth Justice does not believe that any youth under eighteen should be prosecuted or incarcerated as adults. While we advocate for the complete removal of youth from the adult system, we recognize that setting or raising the minimum age of transfer is an important first step toward this goal.

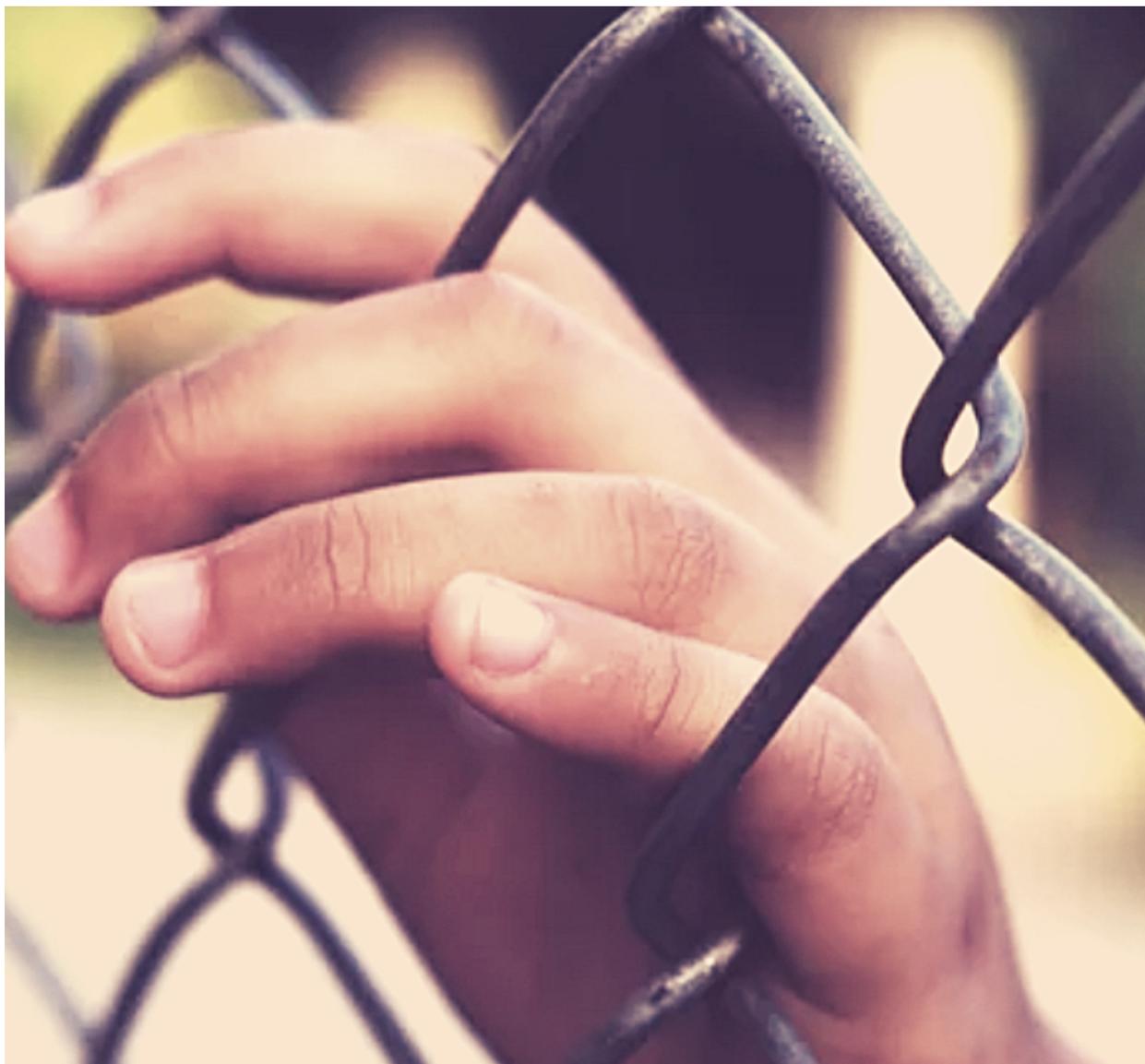
- **We recommend that states continue to raise their minimum age and start all youth in juvenile court where there is an opportunity for the youth’s individual needs to be considered before the collateral consequences associated with an adult court record are imposed.**
- **We also recommend simultaneously collecting and analyzing data on the long-term impact on youth and public safety in the state.**

The states discussed in this brief have all used data and research to guide reform efforts to reduce the likelihood of youth entering the adult system. However, the fact that many states still have very low minimum ages for a broad array of offenses is evidence that there is a tremendous amount of work remaining to do to protect some of the most vulnerable and high-need youth in their states.

ENDNOTES

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- ³⁹ HB 7503, Gen. Assemb., Reg Sess. (R.I. 2018).
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- ⁴² AB 237, 2009 Leg. Sess. (Nev. 2009)
- ⁴³ *Id.*
- ⁴⁴ SB 2003, 2015 Leg. Sess. (N.J. 2015).
- ⁴⁵ JUDICIAL COUNCIL OF CALIFORNIA, PROPOSITION 57 INVITATION TO COMMENT (2017). <http://www.courts.ca.gov/documents/W17-02.pdf>
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- ⁴⁸ CALIFORNIA DEPARTMENT OF JUSTICE. JUVENILE JUSTICE IN CALIFORNIA, 50 (2016). <https://oag.ca.gov/cjsc/pubs#juvenileJustice>
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- ⁶⁸ MELISSA SICKMUND, ANTHONY SLADKY, WEI KANG, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985-2017 (2019) www.ojjdp.gov/ojstatbb/ezajcs



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