

# Massachusetts Coalition for Juvenile Justice Reform

Action for Boston Community Development  
ACLU of Massachusetts  
Black and Pink  
Black Lives Matter- Worcester  
Boston Bar Association  
Bridge Over Troubled Waters  
Center for Public Representation  
Center for Teen Empowerment  
Charles Hamilton Houston Institute, Harvard Law School  
Children's Law Center of Massachusetts  
Children's League of Massachusetts  
Children's Mental Health Campaign  
Citizens for Juvenile Justice  
City Mission Society  
The City School  
Coalition for Effective Public Safety  
Committee for Public Counsel Services  
Criminal Justice Policy Coalition  
Dorchester Youth Collaborative  
Ending Mass Incarceration Together  
Fair Sentencing of Youth  
Families for Justice as Healing  
GLBTQ Legal Advocates & Defenders  
Greater Boston Legal Services, CORI & Re-entry Project  
High Risk Youth Network  
#I Have a Future/Youth Jobs Coalition  
InnerCity Weightlifting  
Justice Resource Institute  
Juvenile Rights Advocacy Program, Boston College Law School  
Lawyers Committee for Civil Rights  
Louis D. Brown Peace Institute  
Mass Incarceration Working Group of the First Parish Unitarian Universalist of Arlington  
Massachusetts Commission on LGBTQ Youth  
Massachusetts Society for the Prevention of Cruelty to Children  
Massachusetts Parent Teacher Association  
Mental Health Legal Advisors Committee  
More Than Words  
Mothers for Justice & Equality  
My Life My Choice  
Nat'l Alliance on Mental Illness – MA  
Nat'l Assoc. of Social Workers – MA chapter  
North American Family Institute  
Parents/Professional Advocacy League  
Prisoners' Legal Services  
Progressive Massachusetts  
Project RIGHT  
RFK Children's Action Corp  
Real Costs of Prison  
Roca, Inc.  
Roosevelt Institute @ Boston  
Roxbury Youthworks  
Sociedad Latina  
Spectrum Health Services  
Strategies for Youth  
UTECH  
Unitarian Universalist Mass Action Network  
Vital Village Network  
Year Up  
Youth Build Boston  
YW Boston

## Recommendations for the Conference Committee on "An Act relative to criminal justice reform" (H.4043, S.2200)

January 12, 2018

The Hon. Robert DeLeo  
The Hon. Claire Cronin  
The Hon. Ronald Mariano  
The Hon. Sheila Harrington  
The Hon. Harriet Chandler  
The Hon. William Brownsberger  
The Hon. Cynthia Creem  
The Hon. Bruce Tarr

Dear Speaker DeLeo, President Chandler and members of the Criminal Justice Conference Committee,

We are grateful that both the Senate and the House recognize that comprehensive justice system reform must make a real difference in young people's lives.

We respectfully submit our recommendations to the Conference Committee on the proposed provisions that would hold young people accountable in ways that promote public safety and young people's positive development. Specifically, we support provisions that would:

- promote transparency and accountability through collection and reporting of **juvenile justice data** (House §28, lines 451 to 517)
- create a **Juvenile Justice Policy and Data Commission** (House §28, lines 518 to 599)
- authorize pre-arraignment **juvenile diversion** (Senate §136)
- improve youth outcomes upon re-entry by reducing time to **seal juvenile records** (Senate §299) and allowing for **expungement** (select language from House and Senate bills)
- **exclude "tweens" (under 12)** from delinquency proceedings (Senate §131, §133, §147, §148, §152, and §164)
- **raise the age of juvenile jurisdiction to include 18-year-olds** and study feasibility of including 19- and 20-year-olds as included in the Senate bill (various sections)
- create a **civil infractions** category of offenses for children and decriminalize certain low level offenses for which adults would not be subject to incarceration (Senate §39, §78, §131, §268)
- create a **parent-child privilege** to ensure children can talk freely to their parents (Senate §202)

- provide a sensible and limited exception to criminal prosecution for close-in-age youth who engage in **consensual sexual activity** (Senate §224 and §232)
- reduce **school-based arrests** by ensuring schools and police set guidelines on school discipline and arrest (Senate §34, §267, and §268)
- require **notification to DCF** when a child under the care and custody of DCF is arrested (Senate §147)
- set limits on **solitary confinement** of young people (Senate §167)
- eliminate certain **fees** for young people, and set limits on the **unnecessary detention of young people** (Senate §192; House §§68-73 with limited language from Senate bill)
- prohibit incarceration of young people for **status offenses** and mandate **sight and sound separation** of young people and adults (House §28, lines 600 to 614)
- raise the **felony threshold** to \$1,500 (Senate §236, §237, §241, §244, §248)
- allow courts to consider non-incarceration sanctions when imposing a sentence on individuals who are the **primary caregivers** of children (Senate §317)
- Codify SJC ruling on **right to counsel at parole hearings** for juveniles sentenced to life sentences (Senate §185)
- Limit DNA collection so that **juveniles are not subject to DNA collection**, nor individuals convicted of misdemeanor offenses. Any DNA collection must be after a conviction and not after arrest. Individuals should be allowed up to one year to submit a DNA sample
- We are grateful that the House and Senate agreed on these proposals:
  - Eliminating **driver's license collateral consequences** for certain offenses (Senate §§251-252; House §47, §60 and §61)
  - set limits on **shackling of young people in court** (Senate §165 and House §147)
  - allow families of homicide victims to access **funeral and burial reimbursement** without limiting eligibility by the circumstances of the homicide (Senate §§207-208 and House §§132-133)

### **Juvenile Justice Data Collection and Reporting: House §28 (lines 451-599)**

Sound juvenile justice policy must be based on comprehensive, uniform, reliable and publicly accessible data. Effective public policy cannot be based on instinct or anecdote; rather, it must be based on solid information that enables policy-makers and practitioners to identify and quantify problems in the system, propose and implement solutions and then evaluate whether the solutions are, in fact, effective. As highlighted by the Council on State Governments analysis, Massachusetts currently fails to collect crucial data at most of the significant decision points in the justice system, and it has no policy and data oversight commission to analyze and evaluate the effectiveness of the system. As a result, taxpayers are blindly funding a system without adequate metrics to assess its fairness or effectiveness, a system that has a profound effect on kids, families and communities.

Any justice reform must include provisions to ensure that the Commonwealth can monitor and evaluate implementation of these reforms by creating a policy and data oversight. The Commission would evaluate policies, oversee the collection and dissemination of aggregate data, study the implementation of any major reforms, and make updates and recommendations to the legislature

based on progress. Robust research, data and reporting requirements must be an integral part of the reform to ensure that the proposals work as intended.

### **Juvenile Diversion: Senate §136 (lines 1212-1298)**

Unlike most states, Massachusetts does not currently provide funding for or require juvenile diversion of any kind. The result is that children across Massachusetts receive starkly different opportunities to avoid court involvement depending on where they live. According to a soon to be published report by the Massachusetts Chiefs of Police Association, affluent towns in Massachusetts are more likely to offer police-level juvenile diversion while low income communities do not offer formal diversion.

Pre-arraignment juvenile diversion allows youths to avoid formal processing in the court system and a juvenile record. Instead diversion allows the courts to concentrate on rehabilitation, directing youth to services, treatment, and opportunities for community involvement and learning. This provision would authorize juvenile court judges to offer pre-arraignment diversion for young people statewide. Diversion programs reduce crime and produce better outcomes for less money. Few young people charged in Juvenile Court are ever found delinquent let alone “committed” to DYS (10% of arraigned youth). Yet, the state spends \$50 million each year incarcerating children for low level offenses and every child who is arraigned, even if their case is eventually dismissed, ends up with a juvenile record.

### **Expungement**

We are grateful to the House and Senate for committing to offering young people opportunities for expungement of records and find that there are strengths in both versions. We respectfully submit our recommendation that the conference committee adopt the best from each bill. Please see appendix B for recommended language:

- **Definitions:** we recommend adding DNA and finger print records to the list of records subject to expungement
- **Juvenile Record Expungement Eligibility:**
  - Offense committed prior to age 21 (House §87, subsection 100I, lines 1915-1916)
  - 3 year waiting period for misdemeanors; 7 year waiting period for felonies (House §87, subsection 100I, lines 1917-1921)
  - No prior adjudication or conviction during the waiting period (Senate §303, subsection 100F, lines 3246-3253)
  - No current pending cases (House §87, subsection 100I, lines 1930-1932)
- **Juvenile Record Expungement Exclusions:** Serious felonies would not be subject to expungement (House §87, subsection 100J, lines 1933-1951)
- **Types of dismissals and dispositions for both juvenile and adult expungement:** dismissed cases, *Moe* and *Boe* cases; fraud on the court; where the offense is no longer a crime; errors by court, police, witness, etc. (House §87, subsection 100K, lines 1952-1976)
- **Notification to individual of right to expunge:** require court to notify juvenile at the end of the court case of the right to expunge (Senate §303, subsection 100F, lines 3258-3261)
- **Notifications to various state agencies to expunge records:** The House bill is more specific on which agencies will be notified of an expungement order (House §87, subsection 100L, lines 1977-2017)

- **Immediate sealing of non-convictions:** Senate allows for immediate sealing of juvenile records (Senate §299, subsection 100B, lines 3199-3204) and criminal records (Senate §303, subsection 100I, lines 3281-3289).
- **Employment, housing and licensing applications:** Adopt the Senate language includes protections in housing and licensing applications (Senate §303, subsection 100I, lines 3290-3301).
- **Public Records:** recommend stating that expungement petitions and proceedings are not public (House §87, subsections 1000 to 100Q, lines 2049-2063) and police logs shall also be redacted (Senate §303, subsection 100G, lines 3270-3273)
- **Expungement not subject to plea agreements:** DA's can't negotiate away the right to expunge a record during plea agreements (House §87, subsection 100R, lines 2064-2065)
- **Employer and landlord liability:** Both house and senate have similar language. No preference.
- **FBI Notification:** The House bill (§87) adds section 100T specifying that probation notify the FBI of sealing or expungement and to request the FBI do the same with its records on the same offenses. Senate bill (§17) adds a similar provision to inform the FBI of sealing and expungement, but requires fingerprinting of anyone who is arrested which has the negative effect of increasing the number of people in the FBI database. (House §87, subsection 100T, lines 2071-2075)

### **Raising the Lower Age of Juvenile Jurisdiction to Age 12: Senate §131, §133, §147, §148, §152, and §164**

We are grateful that both the House and Senate raise the lower age of delinquency jurisdiction. We, however, support the Senate language raising the lower age to 12. Ten and eleven year-old “tweens” bear the largest burden of the under 12 population with open delinquency cases, despite the fact that **NO child under the age of 12 has been committed to DYS in the last 6 years.** In 2016, 154 children under the age of 12 had open delinquency cases in Massachusetts, including 30 ten-year-olds and 111 eleven-year-olds. Of those who were arraigned, most were arraigned on low-level charges, simple assault (fights) or destruction of property.

Introducing a child at such a young age to the juvenile justice system will actually increase their likelihood of future offending. **Children that young are unlikely to be found competent to stand trial, resulting in delays in their case - typically by two or three years - and delaying court supervision.** The juvenile court would still have jurisdiction and can require more immediate services for young children in crisis through the juvenile court's child welfare cases (starting at birth) or Child Requiring Assistance cases (starting at age 6).

### **Raising the Upper Age of Juvenile Jurisdiction to include 18-year-olds: Senate §1 and multiple sections in the Senate bill; Create a task force to study feasibility of including 19- and 20-year-olds: Senate §335**

According to the Council on State Governments (CSG), 18- to 24-year-olds in Massachusetts have the worst recidivism rates of any age group (76% re-arrestment within three years), and evidence shows that exposing young adults to toxic environments like adult jails and prisons can actually *increase*

offending. CSG also stated, “Younger people [in HOCs and DOCs] also have longer lengths of stay than other groups, making them the most costly group of recidivists.”<sup>1</sup>

Since Massachusetts raised the age to include 17-year-olds in the juvenile system in 2013, juvenile crime (including by 17-year-olds) has declined by 34% in the Commonwealth – outperforming national trends in property and violent crime reductions. **Unlike the adult system, Massachusetts’ juvenile system state leaders from across two branches of government have worked collaboratively to develop a system-wide “Recidivism Reduction Strategy”<sup>2</sup>**. The result of an 18-month process, this Strategy incorporates the first inter-agency definition of recidivism and includes activities from DYS, Probation, Juvenile Court and CPCS that aim to improve youth outcomes and reduce recidivism.

The statewide decline in juvenile crime has resulted in a significant reduction in the juvenile caseload, signifying an availability in the capacity of the juvenile system to absorb 18 year olds within the time frame of this legislation.

This proposal will hold young people accountable in developmentally appropriate ways, by keeping 18 year-olds (many of whom are still in high school) in the juvenile system where, unlike the adult system:

- court cases are confidential;
- records have more protections than adult records;
- more supervision and intensive services are typically imposed while in confinement and in the community than within the adult criminal justice system. Education programs are mandatory, as well as participation in treatment and rehabilitative programming;
- DYS staff and Juvenile Probation Officers are trained to work with young people through age 20 using the Positive Youth Development framework which is effective with young people;
- DYS’ LGBTQ policy is a national model;
- DYS has banned the use of solitary confinement and is still able to work effectively with the 18-20 year olds in their care;

The most serious crimes would continue to be eligible for adult sentences under the “youthful offender” statute.

Massachusetts already recognizes emerging adults as a distinct population and serves “transition age youth” through child- and adolescent-serving agencies and divisions: DCF, healthcare, DESE, DMH, DDS, labor and other state agencies have created dedicated policies and programs to support young adults’ transition to independent adulthood.

DYS has a strong history of preventing the mixing of older and younger youth. DYS has been handling youth up to their 21st birthday for over two decades. In 2016, 80% of new commitments to DYS were between the ages of 16-20. The department has a thorough evaluation process to ensure that placement is appropriate. It is not one-size fits all. DYS has many small programs that range from locked facilities to community-based programs, creating many options to separate older and younger individuals.

## **Sealing Juvenile Records: Senate §299**

<sup>1</sup> Council on State Governments, “Massachusetts Criminal Justice Review, Working Group Meeting 3 Interim Report, July 12, 2016” [https://csgjusticecenter.org/wp-content/uploads/2016/07/Justice-Reinvestment-in-Massachusetts\\_Third-Presentation.pdf](https://csgjusticecenter.org/wp-content/uploads/2016/07/Justice-Reinvestment-in-Massachusetts_Third-Presentation.pdf)

<sup>2</sup> “Massachusetts Strategy for Youth Positive Outcomes and Recidivism Reduction 2017-2019”

This provision would reduce the waiting period for individuals to be eligible to petition to have their juvenile records sealed (from three years to one year after court supervision and sentence). It also permits the sealing of juvenile records of cases that did not end in adjudications without a waiting period.

#### **Civil Infractions for Low Level Offenses: Senate §39, §78, §131, §268**

This provision would update the delinquency statute by creating a “civil infraction” category of offenses –minor violations for which a punishment is no more than a fine. Currently this category of offense is available to adults but not an option for young people. This bill would address the unnecessary, costly and harmful court processing and incarceration of children by decriminalizing offenses for young people that adults are subjected to no more than a fine for, such as violations of city ordinances and town by-laws, and minor motor vehicle violations, as well as minor misdemeanors. Youth could still be subject to civil fines in the same way that adults are.

#### **Parent-Child Privilege: Senate §202**

**Last session the House and Senate passed legislation creating parent-child privilege.** Today, children cannot be forced to testify against their parents, but parents can be compelled to testify against their children. This undermines the parent-child relationship, and parents’ critical role at all stages of the juvenile justice process. This provision would give minor children the right to speak freely to their parent when they seek their help. Privilege exists with attorneys, doctors, clergy, and spouses. **It is impossible to believe that a child's relationship to their parent is any less important or worth protecting.** A child can not testify against their parent – except in cases where a family member is the victim – and this provision would make this privilege reciprocal.

#### **Consensual Adolescent Sexual Activity: Senate §224 and §232**

The legislation is an effort to come into line with a majority of states to recognize the reality that young people have sexual contact with one another and criminalizing that contact is not the best way to respond to it. Consensual sexual activity is an issue for families, faith communities, and public health officials. When it becomes an issue for police and DAs, it undermines the ability of trusted adults – including health care providers, clergy and teachers – to effectively address the health and safety of teens.

This provision would remove criminal penalties from underage sex involving consenting parties within two years of age of each other. For example, if a 16-year-old and a 15-year-old have an intimate relationship, the older youth would not be subject to arrest, incarceration or a lifetime on a sex offender registry – as is the case today. The proposed law does not endorse the morality or advisability of such a relationship; it merely prevents lives from being ruined over it.

The current law is used in a selective and arbitrary fashion. Although the law applies equally to both genders, it is used almost exclusively to prosecute boys (even when both youth are under the age of consent), and particularly against boys engaged in same-sex relations.

#### **School-based arrests: Senate §34, §267, and §268**

Too many Massachusetts students – disproportionately students of color and those with disabilities. – are being handcuffed, booked, and sent to court for minor misbehavior that was once handled by

schools and parents, such as swearing, slamming doors, failing to follow directions, or being disruptive in hallways. In some schools, well over half of those arrested in school are charged with public order offenses such as “disorderly conduct” and “disturbing school assembly.”

This proposal would reduce school arrests for disorderly conduct or “disturbing lawful assembly” and set requirements on the role of school resource officers. We consistently find a pattern with young people who are more deeply justice involved, that their first-time involvement with the justice system was a school based referral for a low-level offense. In those cases, their first-time justice referral resulted in their being disassociated from school, either through school exclusion or transfer to an alternative school. In one year, taxpayers spent \$1.2 million in detaining children whose most serious offenses were “disturbing public assembly” or “disorderly conduct” – the two offenses decriminalized by this legislation.

### **Notification to DCF at arrest of child under care and custody of DCF: Senate §147**

Current law requires the notification of a parent or guardian when a child is arrested, leaving foster children vulnerable to overnight lock up because DCF is not notified of the arrest.

### **Involuntary Room Confinement of Young People: Senate §167**

This section would stay in line with the House bill intent, but is more appropriately drafted to the juvenile system. DYS currently has a model policy to prohibit the use of involuntary room confinement for punishment or retaliation. The Senate bill replicates language in DYS’ current policy, prohibiting placing young people in solitary as punishment, retaliation or harassment. The House bill intended a ban on solitary for juveniles, however we oppose the way it was drafted in House §34 subsection (f) in lines 762 to 764. The House bill as drafted would not help juveniles as there are no “juvenile inmates” in the (adult) penal system, but would instead set a precedent for DYS to be considered a criminal corrections agency subject to Ch. 127. Chapter 119 §53 explicitly says that children shall not be treated as criminals and “proceedings against children [...] shall not be deemed criminal proceedings”.

### **Elimination of Cash Bail for Juveniles and Setting Limits on Detention: Senate §192 and House §§68-73 with adopted amendment language from Senate bill**

The SJC recently limited the setting of financial conditions unaffordable to defendants, resulting in incarceration of defendants due to their inability to pay. **We support calls for placing on hold any bail reform this session until the impact of the *Brangan* case is evaluated.**

If the Conference Committee chooses to address bail reform this session, we respectfully ask that the conference committee adopt the House language (§§68-73) which codifies the *Brangan* ruling, and we ask that it include only limited language from the Senate related to juveniles:

- Eliminating cash bail for children (similar to Senate §192) by inserting “**No financial condition shall be imposed on a defendant under the age of criminal majority.**” at the end of House §68:

Children have no independent capacity to post a cash bail and research shows they rarely pose any real flight risk. **Massachusetts is one of very few states which still imposes cash bail on children.** Almost 30% of children in detention are detained for failure to pay bail. Even youth in Massachusetts who are considered to be “high risk for failure to appear” make it to court 75% of the time. Moreover, only about 25% of children who are held

pretrial receive a sentence of incarceration, so it is clear that we are detaining a significant number of children who pose no danger to the community.

- Prohibiting the detention of children due to lack of placement or for failure to attend school (language adopted in Senate amendment #143) by inserting at the end of House §71: **“A defendant younger than the age of criminal majority shall not be detained: (i) because the defendant lacks a suitable, alternative place to live; (ii) to permit convenient administrative access to the defendant; or (iii) because the defendant failed to attend school”.**

DCF-involved children are detained at disproportionately higher rates and are detained for disproportionately longer times, often because DCF fails to identify a placement for them. Incarcerating children should not be an acceptable alternative to placement when they simply lack a home or safe place to live.

- Require least restrictive conditions of release on juveniles (Senate lines 2974-2980) by inserting at the end of House §70: **“Where a bail commissioner or bail magistrate orders that a defendant who is younger than the age of criminal majority be detained until the next day that court is in session because no condition or combination of conditions will reasonably assure the appearance of the defendant as required, the bail commissioner or bail magistrate shall provide findings of fact and a statement of reasons for the decision, in writing, explaining why no alternative, less restrictive condition or combination of conditions will suffice to assure the defendant’s presence at future court proceedings.”**

#### **Prohibit incarceration of children on status offenses; require separating juveniles and adults: House §28, lines 600 to 614**

This section reinforces the state’s commitment to federally required protections for justice-involved young people.

#### **Raising the Felony-Larceny Threshold: Senate §236, §237, §241, §244, §248**

We support raising the felony threshold from \$1,000 to \$1,500.

#### **Primary Caretaker: Senate §317**

This provision allows courts to consider non-incarceration sanctions when imposing a sentence on individuals with primary caretaker responsibility to minor children, **including teen and young adult parents in the juvenile system**. Incarceration of a parent is strongly correlated with adverse outcomes for their children, with increased risk of: physical health problems; mental health problems; behavioral problems; poor academic outcomes; foster care placement; and the child being incarcerated themselves.<sup>3</sup>

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<sup>3</sup> Human Impact Partners and Families for Justice and Healing. September 2017. **Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Massachusetts**. Oakland, CA.

## **Codifying Constitutional Right to Counsel at Parole Hearings for Juveniles sentenced to life imprisonment: Senate §185**

The SJC ruled that juveniles subject to life sentences, have a constitutional right to legal representation at parole hearings. This language would codify this ruling.

### **DNA Collection**

The primary purpose of DNA collection is to match DNA samples to past or future crimes. This interest does not outweigh the rights of individuals to be protected from unreasonable search and seizure. **We are specifically opposed to expanding the DNA collection requirement to juveniles and to those not convicted of a crime.** The US Supreme Court stated, “For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”<sup>4</sup>

We also oppose the Senate’s proposal requiring DNA collection at the point of arrest, when the individual has not been convicted and is presumed innocent. The House bill requires a conviction (§6, line 151) and allows DNA collection within one year of conviction (§6, line 154), which is more reasonable.

Finally the legislation does not create a mechanism for the sealing or expungement of DNA records once an individual’s case is sealed or expunged and we request that the conference committee consider adding DNA records to sealing and expungement orders.

Thank you for considering our recommendations. Please feel free to contact Sana Fadel at sanafadel@cfjj.org or 617-338-1050

**Respectfully,**

**Members of the Massachusetts Juvenile Justice Reform Coalition**

Appendix A: Summary of Juvenile Justice Priorities for Conference Committee (Chart)

Appendix B: Expungement Recommendations to Conference Committee (Chart)

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<sup>4</sup> *Roper v. Simmons* (03-633) 543 U.S. 551 (2005) at 570