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# From the Trenches: The Criminal Defense Bar, Transparency, and Forensic Science

by Anne Goldbach and Nathan Tamulis

## The Profession



We are attorneys for the Committee for Public Counsel Services (CPSC). As public defenders who specialize in forensics, we provide help and support to a multitude of criminal defense attorneys from all over the state. Public defenders and private court-appointed attorneys call, visit, or email us with forensics questions in almost any area you can think of where forensics plays a role in criminal cases.

Last August, on a beautiful late summer day, we traveled to Devens, Massachusetts to participate in the five week training of a very large class of new public defenders. Our regular work would be done in the early morning, during breaks, and in the evenings. The day was proceeding well, with sessions on criminal defender practice, the right to counsel, court structure, and client relations. Suddenly, the afternoon was disrupted by an important and startling announcement: Governor Patrick had ordered the immediate closing of the Department of Public Health (DPH) drug lab in Jamaica Plain! Email was pouring in, the story was all over the web, and reporters were clamoring to reach us. It was hard to imagine what sort of problems would justify shutting down the entire lab indefinitely.

We had been on alert about work coming from this drug lab since February, 2012 when we learned that a breach of protocol had occurred in June, 2011. We had already advised the defense bar that it would be unwise to accept at face value assertions made by the DPH and some prosecutors – that there had been only one minor breach of a clerical nature that hadn't affected the accuracy or integrity of the drug analyses. In short order, we learned that Colonel Alben of the Massachusetts State Police had **announced** that a chemist involved in testing drugs for thousands of cases from 2003 to early 2012 had breached procedures in the handling of evidence. There was concern that people, many of them CPSC clients, were wrongly convicted on tainted evidence. We were eager to find out what the chemist had done, what other problems existed at that lab, and what the authorities knew that we didn't yet know.

## MELLENDEZ-DIAZ & THE NAS REPORT

In the chaotic days that followed, we scrambled to learn more and to advise defense attorneys about how to proceed. In the midst of this, we realized that we were much better equipped to face the challenges of the drug lab scandal than we would have been just four years ago – thanks to a landmark Supreme Court decision and a comprehensive National Academies of Sciences (NAS) Report.

Until 2009, notarized certificates of drug analysis were sufficient to prove that a seized item was a controlled substance. That changed when the Supreme Court handed down the decision **Melendez-Diaz v. Massachusetts**, which held that pursuant to **Crawford v. Washington**, certificates of drug analysis were testimonial in nature and drug analysts were necessary witnesses for purposes of the Sixth Amendment. Thus, the Confrontation Clause of the 6<sup>th</sup> Amendment of the United States Constitution requires that defendants have the ability to confront and cross-examine drug analysts at trial.

This finding was complementary to another watershed moment in 2009 – the publication of the NAS Report, **Strengthening Forensic Science in the United States: A Path Forward**. The NAS Report made wide-ranging recommendations in important forensics applications. Justice Scalia quoted the NAS Report in Melendez-Diaz: *“[f]orensic evidence is not uniquely immune from the risk of manipulation..... A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution. Confrontation is one means of assuring accurate forensic analysis...”*

Both Melendez-Diaz and the NAS Report advanced essential elements of our criminal justice system: transparency, accountability and scrutiny. Melendez-Diaz underscored an important principle: the Confrontation Clause protects more than the accused; it requires the system to demonstrate that it is an open and fair one, for every citizen can now see into the police car, into the laboratory, and into the courtroom. Now we had the ability to question previously inscrutable chemists on the stand, and the NAS Report provided guidance for framing and directing our questions. Now defense counsel was better equipped to fulfill the duty of scrutinizing forensic science in criminal cases to assure that it is fair and accurate.

This was to be an era of increased scrutiny of the drug labs, of their analysts, and their procedures, oversight, and documentation. This was to be an era of improved accuracy and reliability in forensic science. Both the NAS Report and Melendez-Diaz recognized that in a vacuum, test results from analytical machinery can seem impeccably objective and unimpeachable. But test results are only as good as the people who prepped the samples, maintained and calibrated the machinery, and utilized scientifically validated procedures to produce the results.

## THE LAB

In the wake of the drug lab closure, we understood that the teachings of Melendez-Diaz and the NAS Report would be tremendously useful in fighting for our clients' rights. Moreover, they would help us learn how a lab scandal of this magnitude could happen.

Guided by these two milestones, defense attorneys recognized the importance of educating themselves in detail about technical aspects of drug analysis. They sought the kind of discovery that would allow them to more closely scrutinize the basis of drug analysis and the people who conducted those analyses. They asked for the written procedures, the documentation of equipment calibrations, and the chain of custody which should follow drug samples from the moment of seizure, through the laboratory, and their return to police custody. They developed detailed cross-examination of the chemists who tested drugs in their clients' cases.

As packages of discovery were turned over, a much clearer and astonishing picture of the lab started to emerge. There were no written testing procedures, no training records, insufficient documentation, insufficient Quality Control and Assurance, lax supervision, and management woes. The lab was unaccredited and unregulated by any third party organizations. Problems went unaddressed for years. One of these problems was Annie Dookhan.

Annie Dookhan was hired in November of 2003. She began testing in earnest in January of 2004 and quickly took the lead by far in number of samples tested. In 2004 and 2005 she performed three times the number of tests than her average co-worker, some of whom had years of experience. This remarkable level of performance continued through her entire eight year career at the lab. She became a mass spectroscopy chemist and also assumed responsibility for other tasks, including instrument maintenance and Quality Control and Assurance tasks. She carried on, unchecked, until the June 2011 discovery of a "small" breach that ultimately led to the unraveling of the entire laboratory. Some of the most alarming allegations thus far are that she falsified records and purposely contaminated drug samples.

#### GOING FROM SWIFT JUSTICE TO THE LONG HAUL

Months have passed, and the path to justice for our clients is shaping up to be a long march. The task of identifying the hundreds to thousands of clients who have been affected is ongoing. The drug lab scandal has affected so many people – those who are in custody awaiting trial, those who stand convicted on the basis of potentially tainted evidence and are serving sentences or are on probation and parole, and those who have completed their sentences. On the basis of these tainted cases, people have been held in custody by immigration, or lost their jobs, public housing, drivers' licenses, or even lost custody of their children. The list goes on and on.

Courts are working to find ways to handle these cases. Motions to withdraw guilty pleas and motions for new trials have been heard and will be heard. In some cases, clients have obtained resolutions by way of

pleas to lesser charges and more lenient sentences. Other cases are moving to the Appeals Court and the Supreme Judicial Court as the District Attorneys challenge the authority of specially assigned magistrates and the allowance of some motions. Calls from the defense bar for a unified, systemic solution have gone unanswered to date.

The NAS Report says “... *the quality of forensic practice in most disciplines varies greatly because of the absence of adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight. These shortcomings obviously pose a continuing and serious threat to the quality and credibility of forensic science practice.*” These were all serious problems at the DPH Drug lab, issues that allowed misconduct to go uncorrected for years.

As put forth by Melendez-Diaz, the heart of our adversarial system is confrontation and inquiry. The defense bar will continue to ask questions of the analysts to see that justice is done for our clients. Armed with the NAS Report, and a new appreciation for how forensics should properly be viewed by the courts, we will continue to fulfill our role as zealous advocates. Proper advocacy by defense counsel is not only important to the rights of individual defendants but also *essential* to the proper functioning of our justice system. We will improve the system.

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# The Child Requiring Assistance Statute: A Step in the Right Direction

by Judge Dana Gershengorn

**Voice of the Judiciary**



Until recently, 8,000 Massachusetts families with children who were not attending school, who were not responding to parental guidance, or who were struggling with mental health issues, domestic violence or other problems, were routed through the court system each year through the filing of a Child in Need Of Services (CHINS) petition. That system, established in 1973, has now been changed to incorporate what we have since learned about how to help troubled children and families, and how best to achieve the original CHINS goal of preventing children from ever becoming involved in the juvenile justice system. On November 1, 2012, St. 2012, c. 240, titled “An Act Regarding Families and Children Engaged in Services” took effect. This statute amended G.L. c. 119 section 39E-J, (the CHINS statute). The new statute, referred to as the “Child Requiring Assistance” statute (“CRA”), made significant changes to the CHINS law, and is a legislative effort to address some of the most difficult cases handled by the Juvenile Court.

The Juvenile Court typically handles three types of cases: Care and Protection, Delinquency/Criminal, and CRA. Of those, it may be surprising to some that CRA cases can be the most difficult and complex to address. Certainly Care and Protection cases, which focus on the abuse and neglect of very young children, can be horrific. And delinquency cases, which range from the relatively minor (shoplifting) to the extremely dangerous (rape and manslaughter), pose all the legal challenges commonly associated with adult misdemeanor or felony cases. But CRA cases – where a parent comes before the court pleading for help with a high risk, potentially dangerous child, or a school seeks help getting a child to attend or to stop disrupting the school in a way that prevents other students from learning, are truly unique in their confluence of complex mental health issues, substance abuse concerns, and family dynamics.

The CRA legislation contains several changes to the prior CHINS procedure that are intended to limit the exposure of CRA youth to the court system. For example, section 39E provides that when a parent files for assistance with the court, the clerk’s office must give the parent a list of service providers in the area – compiled by the Massachusetts Department of Health and Human Services - who can offer direct

services (individual counseling, family counseling, substance abuse, mentoring) to the family without court involvement. Unfortunately this section, arguably the most important in the statute, is presently unfunded, with an effective date three years hence; an advisory board will make recommendations on how to fund this mandate.

The importance of the community-based service programs cannot be overstated. The Juvenile Court does not provide direct services to families, other than supervision by probation staff. In a CRA case, the Juvenile Court's authority is largely limited to (1) probation monitoring and support (including providing contact information for community service providers) or (2) transferring custody of a child from a parent to the Department of Children and Families ("DCF") if necessary to get services or placement. Beyond that authority, the Juvenile Court can play little direct role in resolving the underlying issues presented in a CRA case.

Other changes within the CRA also evidence the intent to limit the exposure of CRA youth to the courts. For example, CRA cases can be open with the court for only 390 days post adjudication, whereas in prior CHINS cases there was no time limit and cases would routinely last several years. The CRA statute removes CRA records from a child's CORI, and it also prohibits the restraint or temporary detention of CRA youth who are taken into protective custody either with or without a warrant. No doubt some of these changes, while well-intentioned, pose challenges for the court. For example, when a run-away child is brought into court on a warrant, there is now no mechanism to keep that child at the court until the child's parent arrives. An unintended result of removing any form of temporary hold is that run-away adolescents can, and do, simply run back out the door of the courthouse before the parent arrives, leaving the Juvenile Court with no statutory authority to prevent this dangerous behavior. Other concerns include the elimination of "diversion panels" which some courts formerly used to screen CHINS cases away from court before a child ever appeared before a judge. This change now allows a petitioner/parent in a CRA case immediate access to a hearing before a judge, after which the court can refer the case to the Probation Department for "informal assistance." The change provides a parent with access to a judge within 15 days, but it also removes some effective diversion services that existed under the CHINS statute.

Whatever its unintended flaws, the CRA is a laudable attempt to destigmatize CRA youth by removing them from traditional court procedures, and to place the emphasis in these cases on the people most important to resolving the problem: direct service providers.

But despite legislative intent to divert CRA cases from the judicial system, more and more such cases are filed every month. Why? In part, because juvenile counsel in delinquency cases may see a CRA case as a way to avoid having their clients committed to the Department of Youth Services ("DYS"). A juvenile delinquent client headed to DYS on a delinquency charge might be able to avoid such a fate if counsel can get the court to "commit" the child to DCF custody with an out-of-home placement (a DCF group home bed or a foster home) on a quickly brought CRA petition instead. The desire to use the CRA



statute this way is understandable – ample evidence exists of the negative impact of DYS commitment on a youth. However, using the CRA to circumvent DYS commitment can be problematic. In some cases the structure of DYS and its accompanying services can be a positive – and necessary – influence on a troubled youth. DYS services include education, counseling, employment services and continued support to a juvenile and his/her family from release until the juvenile turns eighteen. Using the CRA to avoid DYS commitment also begs the question of how best to allocate DCF's limited placement resources, and who should be making those allocation decisions. The appellate courts have noted that agencies are in the best position to properly allocate their resources. Every time a court places a child into DCF custody and orders an out-of-home placement, the court is impacting the agency's discretion to allocate its limited resources; such decisions should not be taken lightly.

Another reason for the increase in filings is the increase in children with significant mental health trauma who are not receiving necessary services from the Department of Mental Health ("DMH"). Until mentally ill children have greater access to necessary services from DMH – an agency that has seen millions of dollars stripped from its child and adolescent mental health services due to the economy – CRA filings will continue to rise, as parents struggle to find the necessary services for those children.

Appearing before a Juvenile Court judge should be the last resort to obtain services for children. While the Juvenile Court is experienced in working with youth and adolescents, judges are not themselves service providers. Bringing a child before a judge for any type of adversarial proceeding should be undertaken cautiously, and only when absolutely necessary for the child's and family's safety. An ideal system is one in which families are first guided to effective community-based services and other appropriate providers, and appear before a judge only when parents have been forced to conclude that a change of custody is needed. If the full potential of the CRA is realized, it could be an important step in that direction.

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# Have No LGBTQ Youth Clients? Think Again: What Every Attorney Representing Youth Needs to Know

by Vickie L. Henry

## Practice Tips



All lawyers will have clients who are or are perceived to be LGBTQ. To fulfill your professional and ethical obligation to be a zealous advocate, particularly when you represent LGBTQ children and adolescents, it is essential that you educate yourself about the unique stressors and risk factors of this largely hidden population, and how they might affect your client's experience in court.

But first, let's cover some basic vocabulary so we understand each other:

- **LGBTQ** means lesbian, gay, bisexual, transgender and queer. (For some, the Q means questioning.)
- **Queer** is an umbrella term that includes anyone who a) wants to identify as queer, and b) who feels somehow outside of the societal norms in regards to gender, sexuality and/or even politics, including young straight allies.
- **Sexual orientation** refers to a person's physical and/or emotional attraction to the same and/or different gender. "Heterosexual," "bisexual" and "homosexual" are all sexual orientations. A person's sexual orientation is distinct from a person's gender identity and expression.
- **Gender identity** is the individual's internal sense of being male or female.
- **Gender expression** refers to all of the external characteristics and behaviors that are socially defined as either masculine or feminine, such as dress, grooming, mannerisms, speech patterns, and social interactions.
- **Transgender** individuals are people with a gender identity that is different from the sex assigned to them at birth.
- **Gender transition** is the process by which a transgender person goes from living and working as one gender to another.

For more explanation, see [\*\*The Genderbread Person\*\*](#).

### Why You Need to Know if Your Client is LGBTQ

At a minimum, under Massachusetts's ethical rules, an attorney shall not "engage in conduct manifesting bias or prejudice based on . . . sex . . . or sexual orientation against a party, witness, counsel, or other person." **Mass. R. Prof. C. 3.4**, 426 Mass. 1308 (1998). Bias and prejudice are harmful. But ignorance can be just as harmful.

If a youth's LGBTQ status is a significant factor in their case (e.g., if it relates to why they are court-involved or which parent should get custody), failure to have this issue on your radar screen means your representation may fall short of your ethical obligation to provide competent representation, including inquiry into and analysis of the factual and legal elements of the matter. **Mass. R. Prof. C. 1.1 (comment 5)**. Even if the relevance of your clients' LGBTQ status is not immediately apparent, various statistics indicate that their actual or perceived sexual orientation and gender expression can affect their experience in the judicial system.

### LGBTQ Status Makes a Difference

Here are just some of the statistics:

- Though LGBTQ youth represent only 5-7% of the overall youth population, they comprise:
  - 13-15% of the juvenile justice system; see **Majd, Marksamer & Reyes, "Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts," 2 (2009); Irvine, "We've had three of them': Addressing the invisibility of lesbian, gay, bisexual, and gender non-conforming youths in the juvenile justice system," 19:3 Colum. J. Gender & L. 675, 676-677 (2010);**
  - 40% of out-of-home or at-risk youth; see **Durso & Gates, "Serving Our Youth: Findings from a National Survey of Services Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless or At Risk of Being Homeless," 3 (2012).**
- LGBTQ adolescents experience punishment by school and criminal justice authorities disproportionate to their rates of transgressive behavior, being between 1.5 and 3 times as likely as their peers to experience sanctions for similar behavior; see **Brückner & Himmelstein, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study, Pediatrics, 49-57 (2010).***
- LGBTQ youth in the juvenile justice system are twice as likely as their peers to have experienced family conflict, child abuse, and homelessness; see Irvine.
- LGBTQ youth without family support and involvement in their case face more negative outcomes at every stage in the juvenile justice system; see [Majd](#).

- LGBTQ youth who have experienced family rejection are at very high risk for health and mental health problems (suicide attempts, depression, illegal drug use, and risk for HIV and sexually transmitted diseases); see **Ryan, “Supportive Families, Health Children,” at 5 (2009).**

*So, the risk is significant that the LGBTQ status of a young client may be a substantial, relevant factor in your representation – and one that you cannot ignore.*

#### How to be a Zealous Advocate for an LGBTQ Youth

There are, of course, several key steps a lawyer can take to represent LGBTQ youth more effectively.

Most significantly, you need to develop basic cultural competence about LGBTQ youth. Unlike other demographic characteristics such as race or age, LGBTQ status may not be readily recognizable. You need to set the stage for a client to feel that it is safe to tell you that he or she is LGBTQ. You also need to be prepared to deduce for yourself if these issues are at play by considering the question as you review the facts and circumstances of the case. On the other hand, forcing the issue could damage your attorney-client relationship and it may not be necessary for effective representation as long as you are aware of the issue. If, for example, your client is an effeminate boy, you do not need to know if he is gay, bisexual, or transgender to get a safety plan in place at school. You should go a step further though and determine if the school climate is LGBTQ positive or not. If it is not, you are more likely to need to monitor compliance and enforce the safety plan. If you cannot identify any LGBTQ clients on your roster, chances are you are missing what is in plain sight and you should re-evaluate.

Here are some additional things you, as a lawyer, can do:

- Familiarize yourself with LGBTQ terminology.
- Display LGBTQ-positive signs such as rainbow stickers, posters, or books.
- Tell all clients (not just ones you perceive to be LGBTQ) that you are an ally who will work hard for your client, no matter their sexual orientation, gender identity or expression, or HIV status.
- Tell your clients that it could be helpful to their case if they are LGBTQ to tell you.
- Use open, inclusive language (e.g., instead of asking a boy if he has a girlfriend, ask: “Are you dating anyone?” or “Do you date boys, girls, or both?”).
- Make sure you know your client’s preferred pronouns (e.g., he/him/his, she/her/hers, they/them/their, or ze/hir/hirs). More young people are choosing the pronouns they wish to apply to themselves.

Here are some things to avoid:

- Don’t use the terms “homosexual,” “lifestyle,” or “choice” (some find these terms off-putting).
- Don’t assume someone’s sexual orientation or gender identity.
- Don’t “out” the youth to others.
- Don’t call someone’s romantic interest their “friend.”

## Beyond the Basics

Beyond basic cultural competence, there are still other ways better to represent an LGBTQ youth client:

**Be open to whether LGBTQ issues are at play.** In every matter, you should be mindful whether the problems that have caused your client to need services are related to the client's actual or perceived sexual orientation, gender identity or expression, or HIV status. For example, if your client is skipping school, consider the possibility that he or she is being bullied because he or she is or is perceived to be LGBTQ even if he or she does not immediately tell you that. You may need to do some sleuthing here. Review school discipline reports and comments made about your client on Facebook and other social media for anti-LGBTQ statements, including about failure to conform to sex stereotypes. Also subtly ask family and friends why they believe your client is skipping school. And, being mindful of stereotypes, consider your client's appearance and manner to assess whether others might perceive your client to be LGBTQ. This could require you to confront discrimination and institutional bias where it arises.

**Help educate family members.** You may face a situation where parents are at odds with their child because their child is LGBTQ, or parents who are at odds with each other because one is supportive of the youth and the other is not. In some cases, you can begin to educate the non-supportive parent. Resources such as the **Family Acceptance Project** offer research-based information to help parents evolve in their acceptance of their child. It also addresses religious questions, as do movies such as **"For The Bible Tells Me So."** In other cases, you may have to help the young person advocate for a supportive placement using research to show the harm of an unsupportive placement. Every case is different and needs individual consideration.

**Use evidence-based interests, not presumptions.** All of us are familiar with the legal standard that decisions are to be made in the "best interests of the child." However, best-interest lawyering should actually be evidence-based and not based on presumptions or prejudice. As an attorney, you have some latitude to present your own beliefs as to what is in the best interest of your client. Those notions, however, should be evidence-based citing statistics and social science research. Lawyering based on personal belief systems may violate your duty not to engage in conduct that manifests bias or prejudice.

**Confront your own discomfort.** You might think a young client is "flamboyant" and would "get along" better if only he or she would just tone it down. At the same time, the client likely feels he or she is simply being himself or herself. Clients get to make choices as long as they are educated about them, even if you are uncomfortable with the choice. **Care & Protection of Georgette**, 439 Mass. 28, 36-39 (2003).

**Maintain client confidences.** Your client is the gatekeeper of information about his or her sexual orientation, gender identity and expression, and HIV status. As an attorney, you are obligated to keep client confidences. **Mass. R. Prof. C. 1.6**, 426 Mass. 1322 (1998). The urgency is particularly great because family rejection can be devastating for an LGBTQ youth.

**Know how to find LGBTQ resources.** It is important to have a referral list of LGBTQ-friendly providers of services for the youth client. If you do not have one, you can develop such a list by calling GLAD's free information line: 800-455-GLAD (Mondays-Fridays, 1:30-4:30 p.m.) for help.

If you take these basic steps, you can make the world of difference to young LGBTQ clients and even serve as a role model to your colleagues.

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# SJC Clarifies Legal Standard Used in Child Support Modification Cases

by Ruthanne Withers

## Case Focus



In its recent decision, Morales v. Morales, 464 Mass. 507 (2013), the Massachusetts Supreme Judicial Court (“SJC”) clarified the standard used in child support modification cases. Previously, a litigant had the burden of proving that a “material and substantial change in circumstances” had occurred since entry of the prior child support order. Pursuant to the SJC’s decision in Morales, which reaffirmed the relevant statutory standard, a litigant must now show that an “inconsistency” exists between the prior order and the order that would result from the application of the Child Support Guidelines (“Guidelines”).

Due to changes in federal law regarding the collection and enforcement of child support orders, Massachusetts child support statutes were amended in 1994. One of the most notable amendments was the change in the standard used to modify child support orders. Before 1994, a litigant had the burden of proving that a “material and substantial change in circumstances” had occurred since entry of the last child support judgment. See, e.g., G.L. c. 208, §28, as amended by St. 1993, c. 460, §§60 to 62. Under current law, a child support order “shall be modified if there is an inconsistency between the current order and the order that would result from application of the child support guidelines.” See, e.g., G.L. c. 208, §28.

Mr. and Mrs. Morales were divorced by order of the Probate and Family Court in May, 2008. The Judgment of Divorce Nisi (“Judgment”) ordered Mr. Morales to pay child support of \$172 weekly for the parties’ son. In May 2009, Ms. Morales filed a Complaint for Modification to modify the child support order due to her ex-husband’s increase in pay and promotion at work. After a two-day trial, the Probate and Family Court dismissed Ms. Morales’ Complaint for Modification on the grounds that she had not proven a “material and substantial change in circumstances” since entry of the May 2008 Judgment.

After the Appeals Court affirmed the lower court’s decision, Ms. Morales filed an application for Further Appellate Review, which was granted by the SJC. In March 2013, the SJC issued its decision and

clarified the standard for modification of child support orders. Morales v. Morales, supra. The SJC concluded that the “trial judge, in ruling on the mother’s modification complaint, erred by applying a standard requiring a material and substantial change in circumstances (material and substantial change standard) rather than the standard set forth in G.L. c. 208, §28...”. Morales at 508.

The SJC’s decision is significant because there has long been a conflict between the modification standard cited in court decisions and the statutory language defining the standard for modification of child support orders. The inconsistency standard will simplify the judicial process, ease congestion in the courts, and reduce the amount of litigation involved in child support modification cases. Family law practitioners handling child support modification cases should not notice much change in terms of their approach to the subject as the Guidelines are still used for litigants whose combined incomes fall below \$250,000. The most significant change will be that a client will no longer have to prove a “material change” has occurred since the last order. If the previous child support order is different from what it should be under the Guidelines, then the order shall be modified. However, it should be noted that if the original order deviated from the Guidelines, the new standard may not apply, and a client will have the burden of proving that a material change has occurred in order to modify the existing order.

Lower and moderate income litigants who are seeking to either increase or decrease a child support order, and who often do not have the financial resources to hire an attorney or engage in protracted litigation, will benefit the most from the clarified standard. Showing an objective “inconsistency” between a prior order and a proposed new order, instead of proving a subjective “material and substantial change in circumstances,” affords greater access to the courthouse because it is a simplified standard that the general public can easily grasp. In these tough economic times, when nearly 70% of litigants in some Probate and Family Courts are *pro se*, it is more important than ever to provide greater ease and access to justice for all Massachusetts litigants, especially those trying to navigate an often complex judicial system by themselves.

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# Protecting Children Online: New Compliance Obligations for Digital Marketing to Children

by Julia Jacobson and Heather Egan Sussman

## Heads Up



Parents worry not only about what their children are seeing and doing online, but also what personal information others, including businesses, are collecting about their children and what they are doing with the information collected. With or without a child's knowledge, a website, mobile app or social media platform can collect all kinds of personal information: age, sex, height, weight, locations, friends' names, favorite toys and purchasing histories. To protect the privacy of children online, the federal government enacted in 1998 the Children's Online Privacy Protection Act ("COPPA," 15 U.S.C. §§ 6501-6508). Effective July 1, 2013, new compliance obligations under COPPA will affect nearly all online service providers that collect personal information about children.

COPPA restricts how and what owners and operators of websites, social media plug-ins, mobile applications, advertising networks and other "Online Service Providers" can collect from children under age 13 without parental permission. The Federal Trade Commission (FTC) is responsible for enforcing COPPA and, in April 2000, implemented regulations known as the COPPA Rule (*16 C.F.R. Part 312*). In recognition of the increased use of mobile devices, social media and other evolving digital technologies, the FTC announced in 2010 its intent to update the COPPA Rule. After two years and several rounds of public comments, the FTC amended the COPPA Rule (available at <http://www.ftc.gov/os/2012/12/121219copparulefrn.pdf>), and those amendments take effect this July.

To assist online service providers in understanding their new compliance obligations under COPPA, the FTC released "Complying With COPPA: Frequently Asked Questions" (the FAQs are available at <http://business.ftc.gov/documents/Complying-with-COPPA-Frequently-Asked-Questions>). These 93 questions and answers provide helpful guidance to attorneys representing online service providers.

Attorneys and businesses should be aware of the following notable changes to the COPPA Rule:

- The definition of “personal information” is expanded to include: geo-location information that can identify street, city and state; photo, audio and video files that contain a child’s voice or image; screen or user names (if used for user-to-user contact); and persistent identifiers (e.g., a customer information held in a cookie, an IP address, a unique mobile device ID, etc.) that can be used to identify a user over time and across different websites or online services. The FAQs warn Online Service Providers that, if they continue to collect or use these new categories of personal information or associate new information with previously-collected personal information in these categories, the parental consent requirement will be triggered;
- An Online Service Provider may be held liable for collection of personal information by a third party if the third party is acting on behalf of the Online Service Provider or if the collection of personal information otherwise benefits the Online Service Provider;
- An Online Service Provider with “actual knowledge” that it is collecting personal information from users of another website or service directed to children (e.g., a social media plug-in or an ad network) now may be held liable under COPPA;
- The factors for determining whether a website or online service is “directed to children” are clarified in Section D of the FAQs but “directed to children” remains a highly fact-specific inquiry;
- An age-screening safe harbor for websites or online services that do not target children as their primary audience is available;
- Parental notification and privacy policy/notice requirements with respect to collection of personal information from children are streamlined; and
- The acceptable methods for obtaining verified parental consent are expanded.

Unfortunately, some important issues remain unaddressed by the amended COPPA Rule and FAQs. Most glaringly, the FAQs offer no guidance on how the FTC will consider and weigh the various factors in determining whether an Online Service Provider is directed to children and subject to a strict liability standard for COPPA compliance. Another issue about which the FAQs offer little guidance is how an Online Service Provider seeking to qualify for the “age screen safe harbor” can demonstrate that children under 13 are not its primary target audience. The FAQs indicate only that an operator should carefully analyze the intended, actual and likely audience for its site and/or services and that the FTC will consider “competent and reliable empirical evidence” supporting the analysis.

Although the FTC has indicated that it will delay enforcement of the amended COPPA Rule, ignoring the changes is not advisable. In the past five years, the FTC has investigated numerous violations of COPPA and imposed million-dollar fines on COPPA violators, including a \$3M fine against Playdom (a Disney subsidiary) in 2011. To ensure compliance with the amended COPPA Rule and avoid substantial monetary penalties, Online Service Providers need to evaluate now their data collection activities with respect to children, including third-party activities on and through their website or online service as well as their activities on third-party website or online service.

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# Advocating for Children to Keep Them in School and on the Road to Success

by John R. Baraniak, Jr.

**Pro Bono**



“What were you thinking?” As adolescents, we heard this from our parents. As parents, we ask our teenagers the same thing. Whether a young person’s poor choices are rooted in the brain’s incomplete development, as some scientists believe, or are the product of peer pressure, the reality is that teenagers sometimes make bad decisions. Most of us can recall making a bad decision or two ourselves when we were young.

The difference between then and now, however, is that today the repercussions can be much more serious. In the wake of Columbine, Newtown, and similar school-related tragedies, superintendents and principals understandably are concerned about school safety and sometimes jettison students whose misbehavior in the past would have been punished much less severely. Lest they be second-guessed for not acting forcefully enough, school officials are now more likely to exclude students from school, either suspending them for long periods or expelling them. In turn, the excluded students either fall impossibly behind in their studies or are unable to obtain any education whatsoever. Their lives are permanently altered. A high school diploma and college are now beyond their reach, and prison is a distinct possibility.

The numbers are staggering. During the 2009-2010 school year in Massachusetts public schools, 34,291 students were excluded from school for at least one day, 5,200 of them for 10 days or longer, and 219 of them expelled, including many permanently denied access to a public education. According to this data, from *Keep Kids in Class: New Approaches to School Discipline*, 2012, Massachusetts Appleseed Center for Law and Justice, these excluded children were disproportionately male, poor, Black and Hispanic, and special education students. The impact of exclusion can be devastating. An excluded child is more likely to eventually drop out of school and “placed at greater risk for delinquent behavior and subsequent incarceration when placed unsupervised on the streets of the community for days or weeks at a time.”

In response to this growing crisis, the Charles Hamilton Houston Institute for Race & Justice at Harvard Law School, led by Professor Charles Ogletree; the Center for Law and Education; and Choate Hall & Stewart, LLP, formed a unique collaboration four years ago in an attempt to break this “school to prison pipeline.” Since the collaboration began, Choate attorneys – litigators and non-litigators – have represented, *pro bono*, dozens of students facing exclusion in an attempt to return them to school and in many cases, to ensure that they receive the special education services to which they are entitled under the law. Many of these cases involve students with emotional or behavioral disabilities who are grossly under-serviced and then excluded for conduct that flows directly from their disabilities.

The cases can be emotionally challenging. The clients, young kids, are particularly vulnerable, and their parents are often without the financial means or experience to effectively advocate for their children. These parents often are unable to miss work to meet with school officials, face language barriers, and struggle under the weight of their child’s complex diagnosis. It’s easy to relate to their desire to want the best for their children. Will the child receive the services to which he is entitled? Will he be punished for his disability? Will he be permitted to finish high school? Go to college? Be able to support himself and live independently? The stakes could not be any higher.

One particularly memorable student was LB, an eighth grade honors student with an unblemished record who was excluded from school for an entire year because he took a pocket knife away from another student who was using it to threaten one of LB’s friends. LB’s offense? He didn’t immediately turn the knife over to school officials, but instead planned to do so at the end of his lunch period. The school cited its “zero tolerance” weapons policy as grounds for the exclusion of this model student. It made no difference that LB didn’t bring the knife to school and didn’t threaten anyone with it. In implementing a “zero-tolerance” weapons policy, it was enough for school officials that LB had “possessed” the weapon, even if only for a short time.

When I first met LB and his family, I was struck by how desperate he was to return to school. His entire family showed up at my office. His parents were from South America and spoke only limited English. Both worked long hours to support their family. LB’s older sister was in the honors program at UMass Amherst and had taken the semester off to tutor LB to make sure he did not fall behind while excluded from school. The family was committed to sending their children to college so that they could have a better life, and now this incident threatened to destroy LB’s future.

LB fought the suspension in federal court, and won. We chose federal, rather than state, court because federal law was more fully developed in school discipline cases. Federal District Court Judge Dennis Saylor, in granting LB’s motion for a preliminary injunction, ruled that the one-year suspension was so grossly disproportionate to any wrongdoing LB committed that it was not rationally related to any legitimate state purpose and therefore offended the U.S. Constitution’s guarantee of substantive due process. LB was reinstated in school, and his record was expunged. This was one of the first decisions in the country invalidating a zero-tolerance policy on constitutional grounds. The school district agreed to

drop its inflexible zero tolerance policy and to give principals the discretion to decide future cases on their individual facts. Apart from these impacts, however, the decision was hugely important to LB and his family. He returned to school, his spotless record intact, and continued in the honors program. Their relief was palpable.

One of my partners had a similar experience, representing a 13-year-old Puerto Rican youth who had been out of public school for over five months. This client was a capable student with serious ADHD and emotional needs manifested through attention seeking behavior, panic attacks, and anxiety. Remarkably, the school did not carry over his Individualized Education Plan (IEP) from elementary to middle school and failed to provide special education programming and services to help him address his disruptive ADHD behavior for which he was routinely reprimanded. As a result, he dreaded going to school and missed a substantial number of days. He was constructively expelled from school, and he spiraled into severe depression. Choate appealed to the Bureau of Special Education Appeals the school's failure to provide this student with the services to which he was entitled. We were able to obtain a very favorable settlement, placing the student in an alternative, therapeutic school and on an IEP that provided the special services he needs. The student thrived at his new school, and his demeanor entirely changed. Formerly a withdrawn, sullen boy reluctant to leave his house, he has transformed into an engaging teenager who is happy to go to school and participate in activities.

In another example, Choate represented a high school senior in an appeal to the superintendent of schools of his expulsion. The student had been accused of inadvertently bringing an unloaded pellet gun to school. According to the school's allegations, the student was returning the pellet gun to a friend and had placed it in his coat pocket and forgotten about it when wearing the coat to school. At school, the pellet gun allegedly fell out of the student's coat pocket and was discovered by a teacher. The student was expelled. At the appeal hearing, the firm successfully argued that the facts alleged, even if true, did not warrant the severe sanction of expulsion and pointed out various laws and policies school officials arguably had violated in handling the matter, including publicizing the student's name. My colleagues were able to convince the superintendent to vacate the expulsion and permit the student to graduate with his class and to participate in the graduation ceremony. The student's future college plans, temporarily derailed, are back on track.

In these cases, the children's future prospects were vastly improved by zealous advocacy on their behalf. I've witnessed first-hand the difference merely having legal representation makes for these students – formerly dismissive and seemingly autocratic school officials, faced with the prospect of procedural and substantive due process and statutory challenges to their exclusion decisions, become much more amenable to finding a way to get the student back into school and back on course.

Principals and superintendents have a tough job safeguarding our children and our schools. But they also have an obligation to help all students, not just the well-behaved ones. Often it is the problem student who needs the school's help the most. Teenagers will continue to make bad decisions. The

response, however, cannot be simply to exclude them from school, sacrificing educational opportunity and young lives in the name of school safety. The student, his or her family, and society as a whole will be better off if everyone works together to ensure that students are excluded only as a last resort out of a genuine safety concern and not out of blind adherence to rigid school policy.

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# The Top Ten Questions to Ask your Juvenile Client about School

by Bryna G. Williams

## Practice Tips



Representing juveniles in court cases, whether in Child Requiring Assistance (“CRA”), Care and Protection or Delinquency, is important and challenging work. The quality of representation for a young client can mean the difference between a single interaction with the court system and a lifetime of court involvement. As in all areas of practice, broad experience in the field, effective mentoring, and specialized knowledge are essential for effective representation.

Perhaps the most critical area of specialized knowledge required of attorneys working with juveniles is in the area of education. Children and youth spend (or should be spending) a majority of their waking hours in a school setting. As such, it is critical for attorneys to develop best practices for learning more about their clients’ educational situation. Information regarding school will provide invaluable insight into the client, offer context for specific situations, assist in developing a theory for a court case and, in some instances, can lead to opportunities for school-based advocacy that can strengthen an underlying case. Certainly, probation officers for delinquency and CRA clients and case workers from the Department of Children and Families will be actively seeking information from and about school regarding their clients. Attorneys representing juveniles must avoid any situation where other players know more about their client’s education than they know.

Of course, requesting documents through the school can be a relatively simple way to gather information and is a critical step to take at the beginning of the representation. Still, the client interview is the most effective way to learn more about a client’s school experience. The following outline of questions and sub-questions is recommended for attorneys to adapt into their client interviewing protocol. Ten main questions fall into two broad categories of school-based information and community-based information, all of which shed light on a student and his or her experience in school. Follow-up inquiries under each main question allow an interviewer to deepen the investigation and expand on each issue.

The obvious place to start a conversation about school is to ask **“Where do you currently attend school?”** and then follow up by asking **“How long have you attended this school?”**. This should be



the start of creating a timeline of schools attended since entry into the public school system (which can be as early as age 3), learning whether the student has experienced more than the typical number of school transitions and documenting the reasons for such transitions (geographical move, discipline, special education, etc.). If the student has attended many different schools, ask how the current one compares to the others. What does he or she like or dislike about this school when compared to others? Finally, asking with which adults the client has good relationships or whom he/she trusts can give you an idea of the type of environment the student experiences in school. Additionally, this person can be a potential source of more information for your investigation and representation.

Critical to your assessment of a client's education is to know the answer to **"How are you doing in your classes?"** Since students, especially teenagers, tend to answer briefly and obliquely, follow up questions are vital. Directly and succinctly ask clients what their grades were on their last report card and whether they have repeated any grades in the past. Follow up the reports of any poor grades (Ds or Fs) by asking clients why they are struggling in certain classes and whether they get along with their teachers in those classes or whether they struggle with any school personnel.

Attendance in school has a huge impact on a student's success. Supplement the question **"How is your attendance?"** with probing questions asking: how many days he or she thinks she has missed in the last month, how many days a week the student does not make it to school, and if he or she is ever late to school or certain classes and the reasons for each. Take note of circumstances involving transportation problems or safety concerns. Reconcile student reports of attendance with the official school-based and class-based attendance records.

A disproportionate number of court-involved youth receive special education services, so attorneys are advised to ask **"Do you have an Individualized Education Plan or IEP?"** Because involvement with special education can be stigmatizing for students, follow up with less pointed questions about class size (small class size can indicate special services) and any instances when the student is pulled out of the main classroom setting. Request special education documents (IEP, evaluations, and progress reports) for any student who is currently in special education or reports receiving services in the past. The IEPs themselves should contain information about specific placement and services, status of review meetings (which are required to occur annually) and progress reports (which should be issued as frequently as reports cards). Additionally, if the student is frequently excluded from school under the auspices of discipline, ask whether the student or the student's parents have ever attended a manifestation determination meeting, which can indicate a pattern of exclusion as well as trigger the need for educational services such as tutoring or functional behavior assessments.

The disciplinary climate in school is much different than even ten years ago. Discipline practices are often inflexible, impersonal and, too often, punitive. Incidents in school can lead to school exclusion *and* court involvement (delinquency or CRA). Ask your client **"Have you ever been suspended or expelled from school?"** Do not limit this question to incidents in the last year as a history

of disciplinary exclusions can be related to school failure and indicate unmet educational needs. Determine whether a specific pattern of behavior has led to repeated exclusions (always during a specific class or during transition). Track the number of days that your client has been out of school during the present school year and reconcile that with the official attendance records. Include days when your client was sent home for more than half of the school day as that should count as a day of suspension. Of note, most districts will count suspension days as being constructively present. If the client has already been excluded, it is important to probe further into the procedure or lack thereof that occurred prior to the exclusion. Any exclusion longer than ten days should be preceded by a hearing with the principal of the school or school committee, and a student should be afforded the right of an appeal to the district superintendent following such a decision. Finally, determine whether your client's district provides alternative placement, tutoring, or the opportunity to keep up with schoolwork during the expulsion and whether your client has been afforded such opportunity.

Court cases, whether they are directly related to school or not, may have an impact (potentially severe) on a student's education. If a client has pending delinquency charges ask, "**Does anyone at the school know about your case?**" Determine whether the underlying incident leading to the charges occurred in school. If it did, it can or may have already triggered a suspension or expulsion. Felony charges, even if they did not originate in school or were not school-related can still lead to indefinite suspension or even expulsion. See MGL c. 70 § 37 H ½. Discern whether the alleged crime involves a victim, witness, or co-defendant attending the same school as your client. Take note of whether your client **has any other matters pending in juvenile court**. Due to the court structure in the Commonwealth juveniles commonly have different attorneys for different matters pending in court. Take note of the different types of cases, whether they are school based, the attorney representing your client on each matter, and any assigned probation officer.

Finally, consider this trio of questions regarding life beyond school: "**Are you or have you ever been on medication?**" This will shed light on present or past medical or psychiatric diagnoses. Follow this up with questions about compliance and whether the school knows about the diagnosis and/or medication. Schools, at times, attempt to circumvent their responsibility for special education by recommending medical evaluations or additional medication. Determine whether this is the case with your client and also determine the family's attitude about medication and other treatments. For example ask, "**Do you receive any counseling?**" If your client receives counseling, determine whether her or she receives it inside or outside of school. School-based counseling can be a service on an IEP, through a guidance counselor, adjustment counselor, or social worker or from a community based, fee-for-service individual. Long-term therapists, whether community-based or school based, can be invaluable sources of support for court cases. Finally, verify "**Are you involved with a state agency?**" (Department of Children and Families, Department of Mental Health and or the Department of Development Disabilities) and determine the extent of the services the client receives.

Amassing a rich file of background information for your juvenile client is fundamental to effective representation. Information from and about school is an essential and large portion of any juvenile's background. Requesting the student's entire school record is an appropriate way to start, but integrating the Top Ten Questions into your client interview protocol will allow you to compile a more complete picture of your client's educational experience and present you with opportunities to advocate on behalf of your client both inside and outside the classroom. The EdLaw Project aims to support and equip attorneys representing clients in juvenile court and EdLaw staff attorneys are obliged to provide technical assistance to attorneys on how to incorporate these questions into their practice and to address other concerns regarding the educational situation of juvenile clients. EdLaw's offices are located on the second floor of the CPCS administrative building at 44 Bromfield Street in Boston, and its helpline number is 617-988-8460.

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# Not Just the Facts: Commonwealth v. Walczak Tells Prosecutors When to Instruct Grand Juries on the Law in Juvenile Murder Cases

by Alex Philipson

## Case Focus



In the mid-1920's, in one of America's most sensational cases of juvenile homicide, teenagers Nathan Leopold and Richard Loeb bludgeoned a neighbor to death in Chicago. At about the same time, a thousand miles away in Boston, the Supreme Judicial Court declared that a prosecutor seeking an indictment should, in appropriate instances, do more than present evidence to the grand jury; he should also give advice on the law. See *Attorney Gen. v. Pelletier*, 240 Mass. 264, 307 (1922). Nearly a century later, the concerns of these seemingly unrelated cases—juvenile murder and grand jury instructions—came together in ways never before seen in Massachusetts.

In **Commonwealth v. Walczak, 463 Mass. 808 (2012)**, in a plurality opinion, the SJC held that a prosecutor must instruct the grand jury on the law in any case where he or she seeks to indict a juvenile for murder, and where there is substantial evidence of mitigating circumstances or defenses other than lack of criminal responsibility. Specifically, the prosecutor has a duty to inform the grand jury of the elements of murder and the significance of mitigating circumstances or defenses for reducing or eliminating the juvenile's criminal liability—using the model homicide instructions, modified for grand jury proceedings. In no other case had the SJC ever held that a prosecutor was required to instruct the grand jury on the law absent a request from the grand jury. See *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999).

Unlike Leopold and Loeb, who set out to commit a thrill killing, Walczak had no intention of killing anyone when, embroiled in a fight with two other teenagers, he allegedly stabbed one of them to death. One night in August, 2010, Walczak, then sixteen years old, agreed to meet the victim and another youth on a street corner to sell them marijuana. The purported buyers had actually planned to rob Walczak of his drugs. When the three met, the victim and his friend told Walczak they were going to take his marijuana, and

one poked him in the head. Punches were thrown and Walczak stabbed the victim several times in the neck and torso with a knife, killing him.

The Commonwealth sought and obtained an indictment for murder in the second degree. Walczak moved successfully to dismiss the indictment on grounds of insufficient evidence. See *Commonwealth v. McCarthy*, 385 Mass. 160 (1982). The judge ruled that the Commonwealth had failed to disprove that Walczak acted on reasonable provocation or sudden combat—mitigating circumstances that negate malice and reduce a homicide from murder to voluntary manslaughter—and that, as a matter of law, the evidence supported at most an indictment for manslaughter.

On appeal by the Commonwealth, the SJC unanimously held that the judge erred: the evidence was sufficient to show probable cause for murder in the second degree; the Commonwealth bore no burden to disprove mitigation in the circumstances; and the grand jury was free to believe or disbelieve the evidence of mitigation. Nothing about those conclusions was particularly surprising. The excitement began when the justices considered an alternative ground for affirming the dismissal of the indictment: the Commonwealth's failure to instruct the grand jury on the legal significance of the evidence of mitigation—i.e., that if someone kills another based on reasonable provocation or during sudden combat the offense would be manslaughter rather than murder. On the need for these instructions the justices differed markedly, but a plurality concluded that the Commonwealth should have given the instructions.

In dissent, Justice Spina, joined by Chief Justice Ireland and Justice Cordy, argued that, regardless whether mitigating circumstances surround a homicide, the Commonwealth has no obligation to instruct on mitigation absent a request from the grand jury. But according to the plurality opinion, at least where there is "substantial" evidence of mitigation—evidence "so strong" that "concealing it would impair the integrity of the grand jury" because the evidence concealed probably would have influenced the grand jury's decision about what charge, if any, to indict—the legal significance of that mitigating evidence must be explained. Presumably a reviewing court would examine the facts *de novo* to decide whether the evidence of mitigation was substantial enough to require the instructions, but *Walczak* is silent on this point.

Justice Gants, in his concurrence, joined by Justices Botsford and Duffly, thought the instructions should be given in all murder cases, juvenile and adult. For him, what made the instructions necessary were "due process" interests not limited to juveniles.

By contrast, Justice Lenk, who wrote her own concurrence, did not speak in terms of due process. Rather, she thought that what necessitated the instructions were "prudential" concerns arising from the special status of adolescents. For example, unlike an adult, a juvenile indicted for manslaughter rather than murder faces trial in Juvenile Court, which affords special protections for adolescents. That difference, and the generally reduced culpability of minors as compared to adults, were the reasons Justice Lenk thought the instructions were required in juvenile murder cases. But the instructions that

Justice Lenk thought essential were those concerning such traditional mitigating circumstances as reasonable provocation and sudden combat; she did not say that a grand jury should also be instructed that a juvenile's youth itself constitutes a mitigating circumstance. (She did think that, in addition to instructions on mitigating circumstances, the grand jury should be told that a juvenile indicted for murder would be tried in Superior Court, but she was alone in that view.) For purposes of resolving Walczak's case, Justice Lenk, unlike Justice Gants, thought it unnecessary to go so far as to require mitigation instructions (on reasonable provocation and sudden combat) not only for juveniles but for adults too. As the narrower view—requiring the instructions only in juvenile cases—hers prevailed in the plurality opinion.

But this reader, at least, sees no reason why the instructions should not be given in both juvenile and adult cases, as Justice Gants suggested. Although Justice Lenk wanted to ensure that a grand jury would take into account a juvenile's *youth*, mitigation and self-defense are not concepts unique to adolescents. Adults can act out of reasonable provocation, sudden combat, or self-defense just as much as adolescents can. Thus, regardless whether the subject of a murder charge is a juvenile or an adult, it would seem fair in either case for the grand jury to be instructed on mitigating circumstances and self-defense, where the evidence warrants it. But the plurality concluded that the instructions are needed only in juvenile cases.

Besides instructions on mitigation and self-defense, Justice Gants suggested that the grand jury "may even be instructed that the prosecution is entitled to an indictment of the crime charged if it is supported by probable cause based on the credible evidence." *Walczak*, 463 Mass. at 841. In this way, he agreed with Justice Spina that the grand jury is not permitted simply to choose between murder and manslaughter if credible evidence of the greater offense has been presented. But, as Justice Gants explained, even if the evidence of malice is legally sufficient, the grand jury is still free to decide that the evidence of mitigation is more reliable and return an indictment for the lesser offense.

Questioning the wisdom of the plurality's view, Justice Spina pointed out that the decision did not address how one may pursue judicial review of a grand jury's "gatekeeper" decision (i.e., whether the juvenile will be tried in Superior or Juvenile Court) or the applicable standard of review. More fundamentally, Justice Spina saw the plurality's position as an "improper judicial exercise of the legislative function." He believed that where the Legislature, in the 1996 Youthful Offender Act, removed power from Juvenile Court judges to determine in which court a juvenile would be tried, it was not up to the SJC to give similar power to the grand jury. Any legislative response to *Walczak* remains to be seen.

A postscript to this story is worth telling. After the SJC affirmed the dismissal of Walczak's murder indictment, the Commonwealth returned to the grand jury to present the case again. This time, with the benefit of instructions on the legal significance of the mitigating circumstances, the grand jury indicted Walczak for voluntary manslaughter. As a result, Walczak will be treated as the juvenile he was in August, 2010, when that botched robbery turned tragically into a fatal fight.

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# Time To Raise The Bar: Pending Legislation to Raise the Age Limit for Juvenile Cases from 17 to 18

by Naoka Carey

## Vantage Point



Every year, Massachusetts sends thousands of high-school-aged kids into our adult criminal justice system. In contrast to most other laws about children in the Commonwealth, Massachusetts automatically treats all 17 year-olds accused of a crime as “adults.” Our outdated law – a relic of the Victorian era – is the subject of multiple bills before the Massachusetts legislature this session, each of which raises the upper age limit of juvenile court jurisdiction from 17 to 18 to allow the vast majority of cases involving 17 year-olds to be addressed in our juvenile system. In May, the House unanimously voted in favor of H.1432 (now joined with H.3229); the Senate is expected to vote on the bill soon. The proposal has broad support, including the Juvenile Courts, the Massachusetts Sheriffs’ Association, the Massachusetts Bar Association, and many other organizations and individuals; indeed, there has been no formal opposition to the reform to date.

For practitioners, the proposed changes are straightforward. The bills amend sections of Chapter 119 pertaining to delinquency and youthful offender cases to give the juvenile court jurisdiction over youth who commit their offenses before their 18<sup>th</sup> birthdays. Other than raising the upper age limit, the bills do not alter existing provisions for more serious “youthful offender” cases, meaning that judges will still have discretion in those cases to impose an adult sentence. The bills also leave intact provisions requiring murder cases involving persons 14 and over to be heard in adult court (other bills this session address this issue in response to the U.S. Supreme Court’s decision in *Miller v. Alabama* (567 U.S. \_\_\_\_\_ (2012), which held that statutes that mandate life without parole sentences for youth under 18, such as the current law in Massachusetts, violate the 8<sup>th</sup> Amendment). The bills make minor changes to other provisions of the General Laws consistent with the changes to Chapter 119 by, for example, amending adult criminal history reporting provisions to reflect the fact that 17 year-olds will no longer be treated as adults in most cases.



The reasons to change the law now are plentiful:

**Keep Kids Safe and Save Money:** Although the vast majority of 17 year-olds are charged with minor, non-violent offenses, they are held with older criminal offenders in adult jails and prisons. According to the Department of Justice, inmates under 18 were eight times more likely to be victims of sexual assault than adult inmates. Research has also found that teens held in adult facilities are 36 times more likely to commit suicide than those held in juvenile facilities.

As a result of these disturbing statistics, the Department of Justice recently issued new regulations under the Prison Rape Elimination Act (PREA) for youth under 18 held in adult facilities. Under these requirements, “youthful inmates” in prisons, jails and Houses of Corrections must be housed separately from adults, and separated by sight and sound or directly supervised by staff when they are mixed with adults in other settings. Facilities are generally prohibited from using isolation, or “protective custody,” to achieve compliance. “Youthful detainees” in court and police lock-ups also need to be separated from adults. Because a separate federal law, the Juvenile Justice and Delinquency Prevention Act (JJJPA), prohibits intermingling individuals who are defined under state law as “adults” with “juveniles,” Massachusetts cannot simply place 17 year-olds in the juvenile system in order to comply with PREA. The only way to comply with both PREA and JJJPA without incurring substantial costs to reconfigure facilities and hire new staff is to raise the age of juvenile court jurisdiction. The PREA regulations become fully operational in August, adding extra urgency to the need to address this issue.

**Lower Recidivism and Increase Public Safety:** Studies conducted at Northeastern University and elsewhere have shown that when youth are sent to the adult system they are more likely to reoffend, to reoffend more quickly and to escalate into committing serious and violent crimes. This is true even when comparing youth who are the same age, and who have the same offense and offense history.

**Ensure that Youth Receive Educational and other Age-Appropriate Services:** The juvenile system is designed to rehabilitate and, unlike the adult system, requires children to attend school and ensures that they receive special educational or other needed services, including age-appropriate substance abuse and behavioral health treatment.

**Preserve and Support Family Involvement in Kids’ Lives:** Because current law treats 17 year-olds as adults, parents need not be notified of their arrest, may not be present at interrogations and have no role in court proceedings, including plea bargains. By contrast, the juvenile system requires that parents be notified when their child is arrested and involved in the investigation and court process and sentencing.

**Bring Our Criminal Law into Alignment with Our Other Laws About Children:** The age of adult jurisdiction is inconsistent with other Massachusetts laws, laws in other states, international law and recent Supreme Court rulings. The federal government and 39 states use 18 as the age of adult criminal jurisdiction; nearly every other state with a lower age is considering a change to their statute as well (Illinois changed its law in May of this year). The current age of adult criminal jurisdiction is also

inconsistent with most of our other laws about children, which set 18 as the minimum age for such matters as voting, entering into a contract and serving on a jury.

For Juvenile Court practitioners, particularly those who handle both delinquency and care and protection cases, these reforms should allow for a more coordinated, rational approach to cases. For example, child welfare clients who are under 18 but commit an offense will no longer be pulled into adult court proceedings and adult jails or prisons which effectively terminate the ability of the child welfare system to serve them.

Given the dramatic reductions in juvenile court caseloads over the last decade (50% in the last five years), the system has the capacity to handle these cases. At the same time, the short- and long-term savings that will be realized by reducing future crime and improving the educational and employment prospects for youth are significant.

Massachusetts established the age of adult criminal jurisdiction at 17 in 1846, back when children could legally toil in mills all day. It is time to bring our law into the 21<sup>st</sup> century and align it with what most state, federal and other laws and our common sense tell us is true: 17-year-olds are not adults.

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