

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BERKSHIRE, SS

No. SJC-12314

BERKSHIRE, SS

No. SJC-12354

THIS BRIEF CONTAINS NO IMPOUNDED MATERIAL

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellant

v.

A JUVENILE,

Defendant-Appellee

Brief of the Mental Health Legal Advisors Committee,
on Behalf of

the Center for Public Representation, Massachusetts
Advocates for Children, Strategies for Youth, Citizens for
Juvenile Justice, and the Center for Civil Rights Remedies,

Amici Curiae in Support of the Defendant-Appellee.

Corporate Disclosure Statement
Pursuant to Supreme Judicial Court Rule 1:21

Amicus curiae Mental Health Legal Advisors Committee was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. It is not a corporation and issues no stock.

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INTRODUCTION

These appeals, paired for argument, involve two young adolescents, one age 12 and the other age 14, facing delinquency charges. Each child has serious emotional problems that lay at the root of the behavior for which they were charged. In each case, the trial judge dismissed the charges prior to arraignment, which is the point at which proceedings result in a likely lifelong criminal record.¹ She apparently believed that prosecution of these youth, given the circumstances, was not in their best interests or the interests of justice, even if the facts may have technically satisfied the elements of "crimes." Essentially, the judge refused to collaborate in a disturbing trend to criminalize childhood. It is important to individual youth and society that Juvenile Court judges be permitted this discretion.

¹ "After arraignment, the juvenile's name and delinquency charge become part of the juvenile's permanent CARI [Court Activity Record Information] record, and may not be expunged, even where the charge is immediately dismissed for lack of probable cause." Commonwealth v. Humberto H., 466 Mass. 562, 572 (2013), citing Commonwealth v. Gavin G., 437 Mass. 470, 471 (2002).

INTEREST OF AMICUS CURIAE

The **Mental Health Legal Advisors Committee** (MHLAC) was established by the General Court in 1973 as an agency of the judiciary to assure representation for people with mental illness. Because of the long-term impact of mistreatment on youthful members of its client population, MHLAC assists youth in school exclusion cases and helps them gain access to appropriate mental health services in juvenile justice, inpatient, and community settings.

The **Center for Public Representation** (CPR) is a national public interest law firm with offices in Northampton, Newton and Washington, D.C. that advocates for the rights of individuals with disabilities, including youth with mental health disabilities. Through its systemic activities and policy work during the past 40 years, CPR has been a major force in protecting the rights of citizens with disabilities and has persistently argued for maximal inclusion of needy youth in mainstream settings.

Massachusetts Advocates for Children (MAC) is a statewide, not-for-profit organization that advocates for children facing significant barriers to equal

educational and life opportunities, particularly those who have disabilities, are low income and/or are racially, culturally, or linguistically diverse. MAC's School Discipline Project provides legal representation to individual students facing school exclusion and engages in systemic advocacy on the effects of punitive school discipline policies and practices, particularly on students of color and students with disabilities.

Strategies for Youth (SFY) is a national non-profit training and policy organization that is dedicated to improving police/youth interactions and reducing disproportionate minority contact. SFY's strategies include training public safety officers in the science of youth development and mental health, and supporting communities partnering to promote strong police/youth relationships. SFY believes that the manner in which children are policed has critical long-term implications for their full participation in society. To this end, SFY trains police to enhance their skills and prevent damaging unnecessary arrests and entry into the juvenile justice system.

Citizens for Juvenile Justice (CfJJ) is a policy and advocacy organization working to promote a fair and effective Massachusetts juvenile justice system. Its Board includes representatives from academia, mental health clinicians, and service providers, and its membership includes more than 20 organizations working with, and on behalf of, at-risk children. As advocates for a developmentally appropriate justice system, CfJJ has a strong interest in ensuring that Juvenile Courts promote the well-being of children.

The **Center for Civil Rights Remedies** is dedicated to improving educational opportunities and outcomes for children from subgroups who have been discriminated against historically due to their race/ethnicity, and who are frequently subjected to exclusionary practices such as disciplinary removal, over-representation in special education, and reduced access to a college-bound curriculum. The Center conducts new research to identify problems or issues with educational policy or its implementation, takes direct action to improve policy, and enhances the capacity of advocates to press for successful remedies at the local, state and federal levels.

STATEMENT OF THE ISSUE

Whether a Juvenile Court judge has discretion, when the judge believes the conduct alleged does not warrant the imposition of the serious and life-altering consequences of a CARI, to dismiss delinquency charges prior to arraignment - even in the face of probable cause - to protect the juvenile's best interests and the interests of justice.

STATEMENT OF THE CASE

Amici adopt Appellees' Statements of the Case set forth in Appellee's Brief at 1-5 (SJC-12314) and Appellee's Brief at 2-3 (SJC-12354).

STATEMENT OF FACTS

Amici rely on Appellees' statements of the facts.

SUMMARY OF ARGUMENT

The Juvenile Court judge that dismissed criminal charges in the cases before this Court prior to the youths' arraignment refused to participate in a disturbing trend to unduly criminalize children.² Given the serious long-term ramifications for both youth and society of using the juvenile justice system to address youthful misbehavior, and in light of recent

² Pages 1, 9-10.

scientific and legal insights into human brain development and culpability, judges should have discretion to dismiss delinquency charges even when there is probable cause.³

There is a high incidence of juvenile justice involvement in response to youthful misbehavior.⁴ Many students, particularly those with mental health disabilities and those of color, are arrested and charged for minor transgressions.⁵ Likewise, such children are disproportionately represented in juvenile justice facilities.⁶ Due to implicit bias, youth of color are considerably more likely than their white counterparts to be arrested for school offenses and to come into contact with every aspect of the juvenile justice system, especially when certain charges, like "disturbing a public assembly," leave room for subjective judgments.⁷

Both children and society at large are harmed by undue criminalization of misbehavior.⁸ School authorities that employ police to cope with distressed

³ Pages 1, 10-13.

⁴ Pages 14-23.

⁵ Pages 14-17.

⁶ Pages 17-18.

⁷ Pages 18-23.

⁸ Pages 23-40.

students wrongly circumvent intervention plans that are based on behavioral assessments.⁹ Youth placed in the custody of the Department of Youth Services may not receive therapeutic services and are denied access to such services in the community, where they are available and are best delivered.¹⁰ The life prospects of youth saddled with records of criminal charges, or who are arrested, become alienated from school, and fail to graduate, are greatly diminished, economically and otherwise.¹¹

Society suffers concomitantly from undue criminalization of youth.¹² This is manifest in lost tax revenues from joblessness or underemployment, increased costs arising from higher rates of imprisonment and use of public benefits, and the toll of a compromised educational experience for all students in schools with punitive climates.¹³ Additionally, the effective relegation of youth with disabilities and those of color to our nation's underclass by virtue of disproportionate punishment

⁹ Pages 23-25.

¹⁰ Pages 25-31.

¹¹ Pages 31-36.

¹² Pages 36-40.

¹³ Id.

that impedes future income and asset generation perpetuates inequities that plague our society.¹⁴

Punitive measures for dealing with most youthful misbehavior are not only counterproductive, they are unnecessary.¹⁵ Common teaching and treatment methods available for use in schools and in the mental health system are more effective in preventing negative conduct and avoiding, or minimizing, the damage to youth.¹⁶

Judges have a less partisan role in the system than prosecutors and are well-placed to exercise leadership.¹⁷ Affording them discretion to dismiss cases that are inappropriate for a juvenile justice response will enhance their ability to convene school staff and other stakeholders to devise protocols and guidelines governing juvenile justice.¹⁸ Such processes have generated excellent results in other jurisdictions.¹⁹

¹⁴ Pages 38-40.

¹⁵ Pages 40-43.

¹⁶ Id.

¹⁷ Pages 44-47.

¹⁸ Pages 47-50.

¹⁹ Id.

ARGUMENT

I. Introduction

There are two competing themes that, over time, have propelled juvenile justice policy: that children are different from adults and deserve protection and rehabilitation, and that children should be punished for breaking the law.²⁰ The question before this Court involves whether Juvenile Court judges should have a role in determining the application of these concepts in individual delinquency cases at their onset, or must merely accept the decisions of those that bring cases forward in the pursuit of punishment.

The cases at bar suggest that a Juvenile Court judge should have sufficient discretion to check undue criminalization. In SJC-12354, prosecutors filed criminal charges against an obviously delusional youth,²¹ and in SJC-12314, a magistrate authorized the issuance of a civilian complaint filed by school staff

²⁰ For a historical perspective on these competing notions in the juvenile justice realm, see Soyer, *A Dream Denied: Incarceration, Recidivism, and Young Minority Men in America* (2016), at 29-30 and Underwood & Washington, *Mental Illness and Juvenile Offenders*, 13 *Int'l J. of Env'tl. Research and Pub. Health* 2 (2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4772248/>.

²¹ Appellant's Redacted Brief in SJC-12354, at 8-11.

against a traumatized student with an emotional disorder.²² These cases demonstrate a strong impetus to punish youth for perceived transgressions, notwithstanding mental illness.

Implicit in these charging decisions is a failure to account for recent learning about how young people make decisions and their culpability for misconduct. There is now a scientific consensus that there is a physiological basis for concluding that children are far less in control of how they behave than adults. The brain is still maturing in the teen years,²³ and the capacity to reason and factor consequences into decision-making continues to develop well into a person's early to mid-20s.²⁴

In recent years, when applying criminal statutes to juvenile behavior, courts have recognized and accepted this new science. In Roper v. Simmons, the Supreme Court forbade imposition of the death penalty

²² Appellee's Brief in SJC-12314, at 3-4.

²³ See Johnson, Blum & Giedd, Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy, *J. Adolescent Health* 45, 216 (2009), available at [http://www.jahonline.org/article/S1054-139X\(09\)00251-1/pdf](http://www.jahonline.org/article/S1054-139X(09)00251-1/pdf) (discrediting "longstanding assumptions that the brain was largely finished maturing by puberty") (citations omitted).

²⁴ Id.

on juveniles under age 18.²⁵ Writing for the majority, Justice Anthony Kennedy observed:

[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'²⁶

When youth experience mental health issues they are even less able to conform their actions to the expectations of adults. Behavior should be perceived as a manifestation of, or reaction to, a problem the youth is encountering.²⁷ Experts urge those working with youth to first ascertain the problem underlying the behavior and help the child cope with it in a

²⁵ 543 U.S. 551, 569 (2005).

²⁶ Id.

²⁷ It is well-documented that these problems often result from childhood trauma. 75% of youth in the juvenile justice system have experienced traumatic victimization, and 93% have reported exposure to adverse childhood experiences, including child abuse, family and community violence, and serious illness. In Massachusetts, a study of 471 juveniles referred to court clinics showed that 63% of the juveniles had experienced four or more ACEs, compared to 12.5% of youth generally. McCartin, Trauma and Delinquency, JDAI Research and Policy Series, available at <http://www.mass.gov/eohhs/docs/dys/jdai/trauma-brief.pdf> (citing Massachusetts Alliance of Juvenile Court Clinics, Vulnerabilities of Court-Involved Children and Families (2013)).

productive way.²⁸ This approach is far more effective in addressing challenging behavior; it helps both children and adults cope with what can be stressful circumstances.²⁹

Despite increased understanding of youth brain development, discipline theory, and mental illness, adults continue to charge children with delinquency at

²⁸ See Greene & Ablon, *Treating Explosive Kids: The Collaborative Problem-Solving Approach*, 19 (2006), available at https://books.google.com/books?hl=en&lr=&id=es002dle-4UC&oi=fnd&pg=PR1&dq=greene+collaborative+proactive+solutions&ots=cEXkhWirIr&sig=p2DLi2HbXnO3ylRV0LtiOR0_6Y4#v=onepage&q=greene%20collaborative%20proactive%20solutions&f=true.

²⁹ See Greene, *Collaborative & Proactive Solutions: Applications in schools and juvenile detention settings* (2016), presented at symposium, *Advances in conceptualization and treatment of youth with oppositional defiant disorder: A comparison of two major therapeutic models*, Eighth World Congress of Behavioural and Cognitive Therapies, Melbourne, Australia, available at <http://www.livesinthebalance.org/sites/default/files/CP%20Maine.pdf> (noting reduction in recidivism from 65% to 15% in Maine Juvenile Detention System after implementation of collaborative and proactive problem-solving). See also Greene, *F.A.Q., Collaborative & Proactive Solutions: The Next Generation of Solving Problems Collaboratively* (Feb. 2016), available at https://www.livesinthebalance.org/sites/default/files/FAQ%20020816_1.pdf ("challenging behavior occurs in response to highly predictable unsolved problems;" the goal is to solve those problems collaboratively "so the kid is a fully invested participant, solutions are more durable, and (over time) the kid - and often the adults as well - learn the skills they were lacking all along").

alarming rates, despite a marked downward trend in the incidence of youth crime.³⁰ Thousands of youth are arraigned and detained annually.³¹ School-based arrests have sharply spiked,³² and there is an increasing reliance on the juvenile justice system to respond to the behavior of youth with mental health conditions.³³

Juvenile Court judges are very familiar with these trends and their consequences. If afforded sufficient discretion, judges can be instrumental in stemming wrongheaded and counterproductive approaches.

³⁰ Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book (Mar. 27, 2017), <http://www.ojjdp.gov/ojstatbb/crime/JARDisplay.asp?ID=qa05201> ("Following a steady decline since 2006, the juvenile Violent Crime Index arrest rate reached a new historic low-point in 2012").

³¹ For Calendar Year 2015, there were 14,377 juvenile court applications for complaint and 1,919 detention admissions. Mass. Juvenile Detention Alternatives Initiative, Dashboard, Statewide Overview: January-March 2017 Update (data for 2015), available at <http://www.mass.gov/eohhs/docs/dys/jdai/jdai-statewide-dashboard-cy2017-q1.pdf>.

³² Blitzman, Are We Criminalizing Adolescence?, 30 Criminal Justice 1, 2 (Spring 2015).

³³ Underwood & Washington, *supra* note 20 (reviewing research showing increased use of juvenile justice filings in the last decade).

II. The Use of The Juvenile Justice System to Respond to Misbehavior of Youth, Particularly Those with Mental Health Problems and Those of Color, is Widespread.

- A. Students with mental health disabilities are much more likely than their non-disabled peers to be arrested in school or referred to law enforcement by school officials, and often for minor misconduct.

Hundreds of students across the Commonwealth are arrested or referred to law enforcement each year,³⁴ including a significant number of students younger than age 12.³⁵ In many cases, arrests or referrals are for minor misconduct, including so-called public order offenses,³⁶ such as “disturbing a school assembly.”³⁷

³⁴ See Dahlberg, Am. Civil Liberties Union, *Arrested Futures: The Criminalization of School Discipline in Massachusetts’ Three Largest School Districts*, 22-25 (2012), available at <https://www.aclu.org/report/arrested-futures-criminalization-school-discipline-massachusetts-three-largest-school> (Boston had 325, 189, and 173 arrests of students in school respectively in years 2007-08, 2008-09, and 2009-10; Springfield had 251 arrests in 2007-08 and 210 in 2009-10; and Worcester had 52, 25, and 13 arrests in 2007-08, 2008-09, and 2009-10 respectively.) While the data are now 7-10 years old, this is the only systematic study of this issue in Massachusetts. No subsequent research suggests changes in practice in these districts, and recent legislative testimony reflects continued use of arrest and prosecution as a tool of school discipline. See *infra* notes 38 and 40.

³⁵ See Dahlberg, *Arrested Futures*, *supra* note 34, at 28.

³⁶ See *id.* at 22-25. In Boston, in the years 2007-08, 2008-09, and 2009-10, the percentage of arrests that

Behavior such as cursing or walking away from a teacher can result in such charges,³⁸ which are frequently instigated by school-based police,³⁹ either upon a request from school staff or on their own initiative.⁴⁰

were for public order offenses was 38%, 26%, and 28% respectively. Id. at 22. In Springfield, 53% and 52% of arrests were for public order offenses in 2007-08 and 2009-10, respectively. Id. at 23. In Worcester, public order offenses comprised 40% of all arrests in 2007-08, while the rates in 2008-09 and 2009-2010 were 30%. Id. at 25.

³⁷ "Public order" statutes are at G.L. c. 272, § 40 and G.L. c. 272, § 53.

³⁸ Recent testimony in support of proposed legislation to limit school arrests details petty arrests of students with disabilities. See Shea, Disability Law Center, Testimony in Support of "An Act decriminalizing non-violent and verbal student misconduct" (S. 876), Addendum at 1, (July 11, 2017) (regarding arrests in the Middleborough, Nashoba Regional, Palmer, Randolph and Nantucket school districts); see also Dahlberg, Arrested Futures, supra note 34, at 24, 26, 39-40 (describing arrests, drawn from police reports, for petty misbehavior in Worcester and Springfield).

³⁹ Police in schools are referred to as "School Resource Officers," or SROs. See G.L. c. 71, § 37P(b) (requiring at least one SRO in each school district not granted a waiver). Students also may be arrested by police summoned to school by administrators, or, as in SJC-12314, a school employee may request the issuance of a criminal complaint against the student.

⁴⁰ See Hirsch, Mass. Advocates for Children, Testimony in Support of S. 876 "An Act decriminalizing non-violent and verbal student misconduct," at 1, Addendum at 5 (July 11, 2017) (Holyoke "police called to the middle school to manage routine, non-violent student discipline matters . . .").

Students with disabilities are arrested and charged twice as often as their non-disabled peers.⁴¹ Those with mental health disabilities are even more disproportionately affected by punitive practices than those with disabilities generally.⁴² Ironically, Massachusetts schools specifically designated to educate students with emotional/behavioral disorders are often the most intolerant.⁴³ Students attending

⁴¹ See U.S. Dep't of Educ., Office for Civ. Rights, Civ. Rights Data Collection, 1 (Mar. 2014), available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>; Pacer Ctr., Students with Disabilities & the Juvenile Justice System: What Parents Need to Know, 3 (2013), available at <http://www.pacer.org/jj/pdf/JJ-8.pdf>. Massachusetts school discipline rates are even more disproportionate – students with disabilities are nearly three times as likely to be excluded from school. U.S. Dep't of Educ., *supra*, at 16.

⁴² See Colón, Not Present, Not Accounted For: School Suspensions in In Worcester, Gastón Institute, Univ. of Mass., Boston, for the Latino Education Institute, Worcester State University, slide 27 (May 8, 2013), available at <http://www.worcester.edu/LEI-Research-and-Publications/>. This research shows that 45% of Worcester students with disabilities who are suspended have intellectual and emotional disabilities, *id.* at slide 27, while, typically, only 11% of students receive special education due to such disabilities. See Nat'l Ctr. for Educ. Statistics, Children and Youth With Disabilities (May 2017), https://nces.ed.gov/programs/coe/indicator_cgg.asp.

⁴³ Dahlberg, Arrested Futures, *supra* note 34, at 29.

such schools may be arrested at a rate as much as 17 times that of the general district population.⁴⁴

B. Children with mental illness are disproportionately represented among those placed in the physical custody of the Department of Youth Services.

Youth with mental health problems are dramatically overrepresented in the juvenile justice system. Nationally, researchers estimate that 50 to 80% of the juvenile offender population can be characterized as having mental illness.⁴⁵ This compares with a percentage of diagnosable psychiatric disorders

⁴⁴ In Boston, students with disabilities at the McKinley Schools, which are intended to provide services to students with severe mental health disabilities, made up less than 1% of the student population but "accounted for 5% of all Boston public school arrests made during the 2008-09 school year, 9% of those made during the 2007-08 school year and 17% of those made during the 2009-10 school year." Id. at 30. In Springfield, students with behavioral, emotional and learning disabilities placed in nine schools making up what were then called the Springfield Academy for Excellence, or SAFE schools, "were over ten times more likely to be arrested than students at other Springfield schools." Id. at 31.

⁴⁵ See Schubert, Mulvey & Alderfer, *Serious Juvenile Offenders: Do Mental Health Problems Elevate Risk?* (Oct. 5, 2011), <http://reclaimingfutures.org/blog/2011/10/05/juvenile-justice-system-mental-health-criminogenic-risk-research-update/> (rate is between 50-70%); Underwood & Washington, supra note 20 (50 to 75% of the two million youth encountering the juvenile justice system meet criteria for a mental health disorder and approximately 40 to 80% of incarcerated juveniles have at least one diagnosable mental health disorder).

in the general adolescent population of between nine and 21.⁴⁶

Massachusetts data reveals a serious problem in the Commonwealth. In one study, researchers found that 60 to 70% of youth maintained in Massachusetts Department of Youth Services (DYS) detention and correctional facilities manifested symptoms of mental disturbance at clinically significant levels.⁴⁷

C. Youth of color are disproportionately affected by punitive school practices and the juvenile justice system generally.

Racial disparity is pronounced in juvenile justice. Both nationally and in this Commonwealth, youth of color are more often arrested in schools and are more likely to come into contact with every level of the juvenile justice system. Disproportionality can only be explained by the presence of ingrained bias that is probably unconscious.

⁴⁶ Schubert, Mulvey & Alderfer, supra note 45.

⁴⁷ Grisso, Davis & Vincent, *Mental Health and Juvenile Justice Systems: Responding to the Needs of Youth with Mental Health Conditions and Delinquency*, 1 Ctr. for Mental Health Services, U. Mass. Medical School Research Issue Brief 3 (Mar. 2004), available at <http://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1042&context=pib>.

Youth of color are considerably more likely to be arrested, charged, detained, and committed by juvenile justice authorities. Though children of all races behave badly at roughly the same rate,⁴⁸ youth of color are arrested twice as often as white counterparts.⁴⁹

And “disparities grow at every step.”⁵⁰ In

Massachusetts:

youth of color make up roughly 33% of the youth population in Massachusetts, they are just under 40% of those arrested, 60% of those arraigned, 66% of those detained pre-trial or because of a probation violation, and 68% of those committed to the Department of Youth Services (DYS).⁵¹

⁴⁸ Rovner, The Sentencing Project, Racial Disparities in Youth Commitments and Arrests (Apr. 2016), <http://webcache.googleusercontent.com/search?q=cache:LYOck4fjGw0J:www.sentencingproject.org/publications/racial-disparities-in-youth-commitments-and-arrests/+&cd=3&hl=en&ct=clnk&gl=us>, (citing Centers for Disease Control and Prevention, 2013 Youth Risk Behavior Survey; “black and white youth are roughly as likely to get into fights, carry weapons, steal property, use and sell illicit substances, and commit status offenses . . .”).

⁴⁹ The Sentencing Project, Policy Brief: Disproportionate Minority Contact in the Juvenile Justice System, 2 (May 2014), available at <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>.

⁵⁰ Rovner, *supra* note 48 (“black juveniles are more likely to be referred to a juvenile court . . . to be processed (and less likely to be diverted) . . . more likely to be sent to secure confinement”).

⁵¹ Citizens for Juvenile Justice, Toxic Racial & Ethnic Disparities, <https://www.cfjj.org/reducing-racial-and-ethnic-disparities/>.

Though youth crimes and arrest have declined in recent years, racial disparities persist.⁵²

The same pattern prevails for students of color. They are arrested, charged, and excluded from school more often than white students for the same behaviors.⁵³ In the Commonwealth's three largest

⁵² Rovner, *supra* note 48 (juvenile commitments fell by 47% from 2003 to 2013, but "the racial gap between black and white youth in secure commitment increased by 15%").

⁵³ See U.S. Dep't of Educ., Office for Civil Rights, Civil Rights Data Collection, *supra* note 41, at 1 (school exclusion data); Redfield & Nance, Am. Bar Assoc., Joint Task Force on Reversing the School-to-Prison Pipeline, Preliminary Report, 11 (arrest and charge data) (Feb. 2016), available at https://www.americanbar.org/content/dam/aba/administrative/diversity_pipeline/stp_preliminary_report_final.authcheckdam.pdf. Overrepresentation of certain groups in the education and juvenile justice systems cannot be explained by arguing that those groups are more likely to be engaged in delinquent behavior. See Redfield & Nance, *supra*, at 20); see also Rudd, Racial Disproportionality in School Discipline, 2 (Feb. 2014), available at <http://kirwaninstitute.osu.edu/wp-content/uploads/2014/02/racial-disproportionality-schools-02.pdf> (there is "no support" for the "hypothesis that African American students act out more than other students;" they are "referred to the office for less serious and more subjective reasons"); Skiba, Michael, Nardo & Peterson, The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment, 34 *The Urban Review* 4, 322 (Dec. 2002), available at <https://pdfs.semanticscholar.org/fe59/2b550df90033e49b7f7be7d0ea302dd403e27.pdf> (differential pattern of treatment for Black students explains different discipline rates).

cities, African-American students are over-represented among school arrestees.⁵⁴

The extent of disproportionality tends to be more pronounced when criminal charges, such as those for public order arrests, leave room for subjective judgment. In the Springfield schools, African-American students accounted for 29% of all arrests but 40% of public order offense arrests.⁵⁵

The fact that statistical disparities are greater when charges are based on subjective criteria suggests that bias plays a role in decision-making.⁵⁶ It is not necessary, however, to vilify school and juvenile justice authorities to reach this conclusion. It is increasingly understood that well-intentioned people

⁵⁴ Dahlberg, *Arrested Futures*, supra note 34, at 26-28. In Boston, African American students are one third of the student body but 63% of all students arrested. Id. at 26.

⁵⁵ Id. at 27. In the Boston schools, African-American students make up 37% of the enrollment but 63% of all arrests and 70% of public order arrests, while white students comprised 13% of enrollment and only five percent of all arrests and five percent of public order arrests. Id. at 26-27.

⁵⁶ In recognition of the potential for subjectivity, Massachusetts reformers have sought to reduce room for subjective decision-making in the juvenile justice system. Devine, *New Juvenile Justice Plan Expected to Close Racial Gaps*, *Bay State Banner* (Dec. 28, 2006), available at <http://www.baystate-banner.com/archives/stories/2006/12/news12280602.htm>.

operate on bias of which they are not aware.⁵⁷ White students who misbehave are perceived as needing guidance or assistance, while Black students are seen as troublemakers who deserve punishment.⁵⁸

Given these pervasive and long-standing realities, as well as their insidiousness, there should be as many checks as reasonably possible on the potential for biased decision-making in the juvenile

⁵⁷ See Kirwan Institute for Study of Race and Ethnicity, State of the Science: Implicit Bias Review 2015, <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> ("Also known as implicit social cognition, implicit bias refers to the attitudes or stereotypes . . . activated involuntarily and without an individual's awareness or intentional control").

⁵⁸ See Ramey, The Social Control of Childhood Behavior via Criminalization or Medicalization: Why Race Matters (Ph.D. dissertation, Graduate Program in Sociology, The Ohio State Univ. (2014)), available at https://etd.ohiolink.edu/!etd.send_file?accession=osu1402929918&disposition=inline (identifying a tendency between and within school districts to "medicalize" responses to the learning needs of white students, while "criminalizing" similarly situated students of color); see also Rudd, Kirwan Institute for Study of Race and Ethnicity, The Ohio State Univ., Racial Disproportionality in School Discipline: Implicit Bias is Heavily Implicated (2015), <http://kirwaninstitute.osu.edu/racial-disproportionality-in-school-discipline-implicit-bias-is-heavily-implicated/> (disproportionately disciplined African-American boys seen as "getting what they deserve," though they act out no more often than white peers).

justice system. With sufficient authority, judges can assist in this process.⁵⁹

III. Criminalizing Youthful Misbehavior Hurts Children and Society.

Consigning youth with behavioral issues to the juvenile justice system denies them access to the supports they need to address their problems. Ultimately, society pays a steep price for failing these children.

A. Criminalizing Youthful Misbehavior Harms Children by Preventing Access to Needed Assistance and Services.

Children who become involved in the juvenile justice system are denied needed services from schools and the community at large. This has long-term negative consequences.

1. Referral to the juvenile justice system impedes access to school services to which children are entitled.

When students "act out," it may be because the student lacks skills due to trauma or mental illness.⁶⁰

⁵⁹ Massachusetts judges have undertaken training to heighten their awareness of the influence of unconscious bias on their decisions. See Metzger, Mass. Court System To Study Racial Imprisonment Disparities, State House News Service (Oct. 21, 2016), available at <http://www.wbur.org/news/2016/10/21/gants-racial-prison-disparities>.

Schools should, and in some cases are, legally obliged to⁶¹ assess what is at the root of such behaviors in emotionally troubled students and design plans for preventing or dealing with such behaviors if they arise. Using police to intervene circumvents any required, planned approach. The school's avoidance of responsibility is particularly egregious when it is staff's own failures to accommodate identified disabilities that underlie the student's misbehavior.

⁶⁰ See Rappaport & Minahan, Child Mind Institute, Breaking the Behavior Code: How teachers can read and respond more effectively to disruptive students, <https://childmind.org/article/breaking-behavior-code/> (conscious efforts to understand and plan to address the behavior of students that “. . . lack basic skills necessary to regulate their behaviors” due to trauma and mental illness can successfully address disruptive behavior and teach necessary coping skills).

⁶¹ For example, special education students faced with possible exclusion beyond ten days in a school year are entitled to an assessment and behavioral planning if the behavior triggering further exclusion is deemed a manifestation of the student's disability. 34 C.F.R. § 300.530(f). Doing the assessment and developing a behavior plan is good practice even if not required. See von Ravensberg & Blakely, When to Use Functional Behavioral Assessment? A State-by-State Analysis of the Law, Office of Special Educ. Programs, U.S. Dept. of Educ., (Oct. 2015), available at https://www.pbis.org/Common/Cms/files/pbisresources/EvalBrief_Oct2015.pdf (discussing gap between federal requirements and “best practice,” that calls for use of assessments and planning even when not specifically required).

In those cases, the student is denied both a necessary accommodation and, ultimately, an education.

This tendency is extant in SJC-12314. School staff ignored the mandates of the Juvenile's behavior intervention plan (BIP).⁶² The paraprofessional who filed an affidavit in support of the criminal complaint confronted the student in direct contravention to his BIP, barring the classroom doorway and physically restraining the juvenile when he tried to escape.⁶³ Instead of following the BIP's considered therapeutic approach, the response was to transfer responsibility to the juvenile justice system.⁶⁴ It is no surprise that the Juvenile Court judge refused to place the Court's imprimatur on this conduct.

⁶² Appellee's brief in SJC-12314 at 3-5.

⁶³ Id.

⁶⁴ In her testimony, Colleen Shea tells a similar story. See Shea, supra note 38, at 3, (when a child with PTSD from childhood abuse became excited and ignored staff instructions, staff did not follow his BIP to de-escalate the situation, but instead referred him to an SRO who charged him with assault and battery).

2. Children in DYS physical custody are harmed by the punitive nature of the experience and the potential denial of needed mental health services.

Youth who misbehave - in school or elsewhere - and who proceed beyond arrest and to confinement in juvenile justice facilities are not likely to receive assistance that compensates for the scarring impact of their loss of liberty. Even when the system aims at a rehabilitative approach, punitive elements tend to overpower benevolent intentions.⁶⁵

The nature of the secure juvenile justice setting itself undermines the potential for rehabilitation. Even Massachusetts DYS facilities referred to as "treatment centers" are hardly conducive to treatment. One observer said that a Roslindale secure DYS facility: "bore a strong resemblance to an adult penitentiary."⁶⁶ Teenagers "were locked behind heavy

⁶⁵ "Perspectives on the current state of juvenile justice mostly affirm the dominance of punitive tendencies amidst an official commitment to rehabilitation." Soyer, supra note 20, at 30-31. While staff may try to build meaningful relationships with teenagers, there remains an emphasis on "accountability and punishment." Id. at 31.

⁶⁶ Id. at 37.

metal doors in individual cells and had to wear jumpsuits that signified their inmate status.”⁶⁷

The workings of the juvenile justice system interfere with effective treatment. Many youth are held in counter-therapeutic detention facilities pending adjudication.⁶⁸ A full mental health assessment does not occur until after a commitment to DYS,⁶⁹ and

⁶⁷ Id.

⁶⁸ In 2015, about 2000 youth were held in secure detention. See Mass. Juvenile Detention Alternatives Initiative, Dashboard, Statewide Overview: January-March 2017 Update, supra note 31. Detention is a serious and predominantly negative consequence. See Holman & Ziedenberg, The Justice Policy Inst., The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities (2006), available at http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf (detailing the lack of effectiveness and far reaching negative consequences of detention of youth); Dahlberg, American Civil Liberties Union, Locking Up Our Children: The Secure Detention of Massachusetts Youth After Arraignment and Before Adjudication (May 2008), available at https://www.aclu.org/sites/default/files/field_document/locking_up_our_children_web_ma.pdf (finding that the secure detention of low and medium risk youth is rarely in anyone’s best interest). The Massachusetts Executive Office of Health and Services echoes this sentiment. Mass. Juvenile Detention Alternative Initiative, Dangers of Detention in Juvenile Justice, <http://www.mass.gov/eohhs/gov/commissions-and-initiatives/jdai/dangers-of-detention-in-juvenile-justice.html>.

⁶⁹ DYS, Clinical Services Provided by the Department of Youth Services (DYS), <http://www.mass.gov/eohhs/gov>

detained youth held pre-trial will therefore lack specialized mental health interventions for what could be sustained periods.⁷⁰

Even once committed, treatment is compromised. The development of lasting and thereby effective therapeutic alliances is difficult. Committed youth may encounter multiple providers as they move around in the system.⁷¹ And even when youth can receive an uninterrupted period of therapy, the setting in confinement limits its effectiveness. "[T]rust and caring, essential components of a therapeutic relationship, are difficult to maintain when the therapist is viewed as part of the system that restricts youth's liberty."⁷² Further, due to the

[/departments/dys/programs-and-services/department-of-youth-services-clinical-services.html](http://www.mass.gov/department-of-youth-services-clinical-services.html).

⁷⁰ For the first quarter of 2017, 25% of detentions lasted 31 to 90 days and 11% of detentions lasted more than 90. Mass. Juvenile Detention Alternatives Initiative, Dashboard, Statewide Overview: January-March 2017 Update, *supra* note 31; see Public News Service, MA Drops Number of Youth in Secure Detention (Apr. 17, 2017) <http://www.publicnewsservice.org/2017-04-17/juvenile-justice/ma-drops-number-of-youth-in-secure-detention/a57282-1>.

⁷¹ Soyer, *supra* note 20, at 79 (DYS committees in Boston encountered a new set of therapeutic personnel every time they changed placement).

⁷² Underwood & Washington, *supra* note 20; see Soyer, *supra* note 20, at 8 (in Boston juvenile justice facilities, "the interactions with ... clinicians ...

potential for incrimination, competent defense counsel will instruct clients not to discuss matters relating to pending proceedings with DYS or provider staff.⁷³

These treatment obstacles aside, DYS lacks the variety and intensity of services necessary to meet the diversity of needs of the population in its custody,⁷⁴ approximately ten percent of whom have serious chronic conditions.⁷⁵ Youth with specialized needs are therefore particularly unlikely to receive treatment while incarcerated.

Knowledgeable observers express misgivings about the care offered by DYS. The Honorable Leslie Harris, now retired Suffolk County judge, recently said: "My biggest concern is [that DYS is] not given the tools

either were fleeting or were shaped by power imbalance and mistrust").

⁷³ Not all patient-provider communications are confidential and privileged. For example, there may be exceptions even for staff that have an obligation to protect a patient's communication as privileged. See, e.g., G.L. c. 233, § 20B (psychotherapist); G.L. c. 112, § 135B (social worker).

⁷⁴ Services offered by juvenile justice systems nationwide are often inadequate or unavailable. Underwood & Washington, supra note 20, at 2 (citing U.S. Dep't of Justice, Department of Justice Activities under the Civil Rights Institutionalized Persons Act: Fiscal Year 2010 (2011), available at https://www.justice.gov/sites/default/files/crt/legacy/2011/07/12/split_cripa10.pdf.)

⁷⁵ Underwood & Washington, supra note 20.

for mental health. Without services and funds . . . you're just warehousing kids with mental health issues."⁷⁶ His view is supported by research on mental health care in juvenile correctional facilities in Boston.⁷⁷ The problem is compounded by restrictions on access to services provided by agencies that offer mental health care to youth in communities.⁷⁸

In addition to these barriers, juvenile justice confinement itself does damage to confined youth,

⁷⁶ Ransom, More Than 270 Escape DYS Facilities in 4-year Span, The Boston Globe (Jan. 18, 2016), available at <http://www.bostonglobe.com/metro/2016/01/17/suspect-killing-was-one-youths-escape-dys-facility-last-year/24Zevjwy27YTv69HeBRo4L/story.html?event=event12>.

⁷⁷ An examination of the juvenile justice systems in Boston and Chicago concluded that the "...juvenile justice system in both cities was not equipped to deal with the familial or mental health problems that co-occurred with the teenagers' criminal behavior." Soyer, *supra* note 20, at 47. This work confirmed an earlier conclusion that "[i]t is impossible for one under-funded government institution to fulfill the multifaceted welfare needs of inner-city teenagers while also controlling their behavior" *Id.* at 26 (citing Zimring, *Am. Juv. Justice* (2005)).

⁷⁸ DYS confined youth are not likely to access Department of Mental Health (DMH) services due to DMH eligibility rules. 104 Code Mass. Regs. § 29.04(3). And youth confined in DYS facilities also cannot access specialized MassHealth services through the Children's Behavioral Health Initiative until they are discharged. See DYS, Department of Youth Services Guide to New MassHealth Behavioral Health Services & Protocols, 16 (committed youth) & 24 (detained/pretrial youth) (Mar. 2011), available at <http://www.mass.gov/eohhs/docs/masshealth/cbhi/agency-protocols-dys.pdf>.

generating new mental health problems. One study found that one in three clinically depressed incarcerated youth were first taken ill after their detention.⁷⁹ The potential that a child's mental health will be worsened by incarceration strongly suggests that criminalizing behavior, with resulting DYS confinement, should be avoided whenever possible.⁸⁰

B. The lives of criminalized youth are often permanently damaged.

The impact of arrest or referral for prosecution can be far-reaching. Once arraigned, charged youth have a court record ("CARI").⁸¹ Juvenile records are retained throughout adulthood and can adversely affect lives in a variety of important ways. While juvenile court records are generally protected from public disclosure, they can be accessed by a number of

⁷⁹ Holman & Ziedenberg, supra note 68.

⁸⁰ Even if not traumatized and worsened by the experience of confinement, placement in DYS custody can harm youth by retarding the development of important life skills. Youth that learn to behave in the custodial setting do not refine skills needed for success outside that institutional setting. Researchers cite considerable evidence that the rehabilitation methods in secure settings, such as behavior modification, while effective at changing behavior within the setting, do not foster skills that transfer well to the youth's community setting. Underwood & Washington, supra note 20.

⁸¹ See Humberto H., 466 Mass. at 572.

agencies or persons.⁸² Disclosure can negatively affect employment prospects, enrollment in higher education, access to housing, and military enlistment.⁸³ Employers may not even hire youth with a CARI for a summer job, which is unfortunate since such employment greatly reduces juvenile arrests.⁸⁴

The educational impact of criminalization is profound. Students charged with felonies, such as the juvenile in SJC-12354, may be suspended indefinitely

⁸² These include police, probation, courts (G.L. c. 276, § 100D); Department of Revenue Child Support Enforcement (G.L. c. 6, § 172D); Department of Children and Families and Department of Youth Services for purposes of evaluating prospective adoptive or foster parents (G.L. c. 6, § 172B); and operators of children's summer camps (G.L. c. 6, § 172G).

⁸³ See Quirion & Thurau, Chapter 8: Sealing Juvenile Records, Mass. Criminal Offender Information (CORI) Law, Mass. Continuing Legal Educ. (2012); Abdul-Alim, Juvenile Records Often Have Lifelong Consequences: Experts Say (June 29, 2015), available at <http://jjie.org/2015/06/29/juvenile-records-often-have-lifelong-consequences-experts-say/>; Center for Community Alternatives, The Use of Criminal History Records in College Admissions Reconsidered, available at <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

⁸⁴ See Citizens for Juvenile Justice, Fact Sheet, Removing Barriers to Youth Success and Positive Development: An act relative to sealing of juvenile records and expungement of court records, available at <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5907dfd52e69cf0188cf4fa9/1493688278258/FAC+TSHEET-Expungement2017.pdf>

on a felony charge and expelled on a conviction.⁸⁵ Students arrested for minor misbehavior, even if not thereafter severely punished, learn that school is a hostile and dangerous place. Experts in psychology and child development note that "suspension, expulsion, or law enforcement referrals 'increase student shame, alienation, and feelings of rejection.'"⁸⁶ These sentiments cause students to feel disengaged from school, which correlates with poor academic performance and mistrust in the authority of teachers and administrators.⁸⁷

⁸⁵ G.L. c. 71, § 37H½.

⁸⁶ Scully, *Examining and Dismantling the School-To-Prison Pipeline: Strategies for a Better Future*, 68 *Ark. L. Rev.*, 987 (2016) (citation omitted). For students that have suffered trauma, school can be re-traumatizing and exacerbating. Psychological research shows that traumatic experiences in childhood "can diminish concentration, memory, and the organizational and language abilities children need to function well in school." Cole, Greenwald, Gadd, Ristuccia, Wallace & Gregory, *Massachusetts Advocates for Children*, 1 *Helping Traumatized Children Learn: Supportive school environments for children traumatized by family violence*, 4 (2005), available at <https://traumasensitiveschools.org/wp-content/uploads/2013/06/Helping-Traumatized-Children-Learn.pdf> (citations omitted).

⁸⁷ Scully, *supra* note 86 at 987.

Students who do not feel welcome in school are much more likely to drop-out before they graduate.⁸⁸ A study of Chicago Public School students found only 26% of arrested students obtained a diploma, compared with 64% of students who had no contact with the juvenile justice system.⁸⁹ The arrest experience alone, after adjusting for other variables, caused a 22% greater likelihood of graduation failure.⁹⁰

Students who drop out of school have greatly diminished prospects.⁹¹ A high school diploma is necessary to have any reasonable chance to compete in today's job market.⁹² Without meaningful employment

⁸⁸ See Gonzalez, *Keeping Kids in School: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 *J.L. & Educ.*, 294 (Apr. 2012)

⁸⁹ Kirk & Sampson, *Juvenile Arrest and Collateral Educational Damage in Transition to Adulthood*, *American Sociological Association*, 86 *Sociology of Educ.* 1, 47 (2013), available at <http://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=00EDB435823009CCEF09086FF366C52C?doi=10.1.1.407.2835&rep=rep1&type=pdf>.

⁹⁰ *Id.* at 54.

⁹¹ Stuit & Springer, *California's High School Dropouts: Examining the Fiscal Consequences*, *The Found. for Educ. Choice*, 7 (Sept. 2010), available at <http://files.eric.ed.gov/fulltext/ED517469.pdf>

(dropouts are more likely to be unemployed or out of the labor force and twice as likely to be living in poverty).

⁹² See Carnevale, Smith & Strohl, *Recovery: Job Growth and Education Requirements Through 2020* (Executive Summary), Georgetown Public Policy Inst., Ctr. on

opportunities, youth are substantially more likely to live in poverty and depend on public benefits as adults.⁹³ This poverty can exacerbate mental health issues,⁹⁴ as well as perpetuate cycles of homelessness⁹⁵ and disability from work.⁹⁶ Further, poverty has proven to have a positive correlation with social isolation.⁹⁷

Educ. and the Workforce, 5 (June 26, 2013), <https://cew.georgetown.edu/wp-content/uploads/2014/11/Recovery2020.FR.Web.pdf> (of 55 million job openings expected between 2010 and 2020, only 7 million, or 12%, won't require a high school diploma).⁹³ See Rumberger, Poverty and high school dropouts: The impact of family and community poverty on high school dropouts, Am. Psychological Assoc. (May 2013), <http://www.apa.org/pi/ses/resources/indicator/2013/05/poverty-dropouts.aspx> (citation omitted).

⁹⁴ See Lund, Breen, Flisher, Kakuma, Corigall, Joska, Swartz & Patel, Poverty and common mental disorders in low and middle income countries: A systematic review (Author Manuscript), 16 (Aug. 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4991761/>; see also McSilver Institute for Poverty Policy and Research, Mental Health and Poverty, New York Univ., available at [http://mcsilver.nyu.edu/sites/default/files/reports/Mental Health and Poverty one-sheet.pdf](http://mcsilver.nyu.edu/sites/default/files/reports/Mental%20Health%20and%20Poverty%20one-sheet.pdf).

⁹⁵ See, e.g., Aurand, Emmanuel, Yentel, Errico & Pang, Nat'l Low Income Housing Coalition, Out of Reach 2017: The High Cost of Housing, 116 (2017), available at http://nlihc.org/sites/default/files/oor/OOR_2017.pdf (The Fair Market Rent for a two bedroom apartment in Massachusetts is unaffordable for minimum wage, full time employees.)

⁹⁶ Wohl, Poverty, Employment, and Disability: The Next Great Civil Rights Battle, 40 Am. Bar Assoc. Human Rights Magazine 3 (2014), available at https://www.americanbar.org/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_3_poverty/poverty

Students who drop out also report physical and mental disabilities at more than twice the rate of high school graduates.⁹⁸ Dropouts – particularly Black and Latino males – even have shorter life expectancies than more formally educated persons.⁹⁹

C. Criminalizing youth harms society.

Criminalized youth do not suffer alone. Society at large is also affected in a host of negative ways. Arresting students and confining them to settings that reduce the likelihood that they will get well is expensive. They are much more likely to ultimately be

[employment disability.html](#) (“...people with disabilities participate in the workforce at a rate far lower than any other group ..., and usually make far less income. This low workforce participation rate is not due to lack of desire, but a system that puts the ability to earn and save money in direct conflict with the ability to maintain health insurance or other critical supports, as well as underlying discriminatory treatment.”) (citation omitted).

⁹⁷ Stewart, Makawarimba, Reutter, Veenstra, Raphael & Love, Poverty, Sense of Belonging, and Experiences of Social Isolation, 13 Journal of Poverty 2 (2009), available at https://www.researchgate.net/publication/240235963_Poverty_Sense_of_Belonging_and_Experiences_of_Social_Isolation.

⁹⁸ Mass. Dep’t. of Elementary and Secondary Educ., The Impact of Dropping Out: Summary of Research Findings and References, 5 (May 2014), available at <http://www.doe.mass.edu/dropout/2014-05ImpactSummary.pdf> (citing Ctr. for Labor Market Studies, 2007).

⁹⁹ Id.

incarcerated as adults,¹⁰⁰ joining jail and prison populations disproportionately composed of people with mental illness.¹⁰¹ This generates enormous costs.¹⁰²

Even if they remain free from confinement, students who drop out are much more likely to drain societal resources than contribute to the greater good

¹⁰⁰ See Aizer & Doyle, Jr., Juvenile Incarceration, Human Capital and Future Crime: Evidence From Randomly-Assigned Judges, Nat'l Bur. of Economic Research Working Paper 3 (June 2013), available at http://www.mit.edu/~jjdoyle/aizer_doyle_judges_06242013.pdf (linking juvenile incarceration with graduation failure and future incarceration); see also Mass. Dep't. of Elementary and Secondary Educ., The Impact of Dropping Out, *supra* note 98, at 4 (though dropouts account for only 12% of the Commonwealth's non-elderly population, 79% of Massachusetts jail or prison inmates do not have a high school diploma or GED); Gatti, Tremblay & Vitaro, Iatrogenic effect of juvenile justice, 50 Journal of Child Psychology and Psychiatry 8 (2009), available at <https://www.acgov.org/probation/documents/EffectsofJuvJusticeonYouth.pdf>.

¹⁰¹ See James & Glaze, Bur. of Justice Statistics, Mental Health Problems of Prison and Jail Inmates (Sept. 2006), available at <https://www.bjs.gov/content/pub/pdf/mhppji.pdf> (A mid-2005 estimate found that 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates had a mental health problem.)

¹⁰² See McLaughlin, Pettus-Davis, Veeh, Brown & Renn, The Economic Burden of Incarceration in the U.S., Inst. for Advancing Justice Research and Innovation, Working Paper #AJI072016 (Oct. 2016), available at <https://advancingjustice.wustl.edu/SiteCollectionDocuments/The%20Economic%20Burden%20of%20Incarceration%20in%20the%20US.pdf>.

economically.¹⁰³ Conversely, increasing the public high school graduation rate in Massachusetts would yield enormous economic benefit.¹⁰⁴

Though the cost may be incalculable, certainly society suffers when the climate for learning in schools is poisoned by unduly punitive practices. When students witness their peers being ejected, handcuffed and arrested, the learning environment is compromised for all. Students in schools with positive climates achieve at a higher level and are emotionally and physically safer.¹⁰⁵

¹⁰³ Twenty-seven percent of Massachusetts dropouts depend on public cash assistance, compared with 6.8% of those who earned Bachelor's degrees. Mass. Dep't of Elementary and Secondary Educ., *The Impact of Dropping Out*, *supra* note 98, at 3.

¹⁰⁴ Increasing the graduation rate to 90% (from the actual rate of 79% for the class of 2012) would mean: an increase of 6,400 graduates; 450 new jobs; \$84 million in increased annual earnings; \$56 million in increased annual individual spending; \$15 million in increased annual federal tax revenue; \$13 million in increased annual state and local revenue; and \$303 million in increased home sales. Alliance for Excellent Educ., *The Economic Benefits of Increasing the High School Graduation Rate for Public School Students in Massachusetts* (2014), available at https://www.all4ed.org/wp-content/uploads/2014/01/Massachusetts_econ.pdf.

¹⁰⁵ See Thapa, Cohen, Higgins-D'Alessandro & Guffey, Nat'l School Climate Ctr., *School Climate Research Summary: August 2012* (2012), available at <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>.

But perhaps the most serious cost from criminalizing youth is the perpetuation of societal inequities that are corrosive and damaging beyond measure. Both persons with disabilities and of color are disadvantaged relative to the general population in terms of economic criterion bearing heavily on quality of life, including income¹⁰⁶ and wealth accumulation.¹⁰⁷

¹⁰⁶ In 2015, an estimated 28.1% of non-institutionalized Massachusetts residents with disabilities, between ages 21 and 64, lived below the poverty line, compared with 8.6% of non-disabled persons. See Cornell Univ., Disability Statistics, <http://www.disabilitystatistics.org/reports/acs.cfm?statistic=7>. Workforce participation rates are also quite disparate (20.1% to 68.6%). Am. Psychological Assoc., Disability & Socioeconomic Status, <http://www.apa.org/pi/ses/resources/publications/disability.aspx> (citing U.S. Census Bureau, 2015). Poverty rates for people of color are similarly disparate. Poverty Solutions, Univ. of Michigan, Poverty in the U.S., <http://poverty.umich.edu/about/poverty-facts/us-poverty/> (select fourth subheading for 2015 data: 24.1% of Blacks and 21.4% of Hispanics poor, compared to 9.1% of non-Hispanic whites).

¹⁰⁷ People of color and whites accrue wealth at unequal rates. White Boston area households "have a median wealth of \$247,500, Dominican and U.S. blacks have a median wealth of close to zero." Munoz, Kim, Chang, Jackson, Hamilton & Darity, Fed. Reserve Bank of Boston with Duke Univ. and The New School, The Color of Wealth in Boston 2 (2015), available at <http://www.mariko-chang.com/color-of-wealth-2015.pdf>. Further, nearly "half of Puerto Rican and a quarter of U.S. blacks do not have bank accounts compared with only seven percent of whites." *Id.* at 1. People of

Impeding youth of color from graduating high school by punishing them severely for minor offenses and treating youth with disabilities as criminals instead of as those in need of services, effectively relegates them to the nation's underclass. Because children treated in this fashion are disproportionately members of already disadvantaged groups, the effect is to perpetuate these inequities and prolong the divisions that plague us as a society.

IV. Services and Supports For Youth That Need Treatment Are Available and Effective.

In the cases at bar, the Juvenile Court judge wisely determined that the juveniles in question did not belong in the criminal justice system.¹⁰⁸ If her judgment relied on the perception that there are better ways to deal with troubled youth, she is correct.

color are less likely to own homes than whites and more likely to be saddled with debt. Id.

¹⁰⁸ Ironically, sanctions may be imposed by virtue of the juvenile court process when, if the misconduct is deemed a manifestation of the child's disability, federal law forbids school suspension. 34 C.F.R. § 300.530 (f) (2).

It is not necessary to undermine children's lives to keep order in schools.¹⁰⁹ There are numerous non-punitive approaches that improve school climate and student engagement and are also effective in improving the behavior of individual students. For example, trauma sensitive schools are designed to be safe and supportive environments where all students can learn.¹¹⁰ Restorative justice practices that seek to repair relationships and encourage reconciliation have been implemented in more and more schools.¹¹¹ New

¹⁰⁹ There are a number of urban school districts in the Commonwealth that eschew punitive approaches to school discipline. For example, Chelsea suspended 3.3% of students in 2015-16, compared to 8% of Springfield students. See Mass. Dep't of Elementary and Secondary Educ. 2015-16 Student Discipline Data Report (DISTRICT), http://profiles.doe.mass.edu/state_report/ssdr.aspx.

¹¹⁰ Trauma & Learning Policy Initiative, Trauma-sensitive schools help children feel safe to learn, <https://traumasensitiveschools.org/trauma-and-learning/the-solution-trauma-sensitive-schools/>.

¹¹¹ See Fronius, Persson, Guckenburg, Hurley & Petrosino, Restorative Justice in U.S. Schools: A Research Review (Feb. 2016), available at https://jprc.wested.org/wp-content/uploads/2016/02/RJ_Literature-Review_20160217.pdf; Smith, Fisher & Frey, Punitive or Restorative: The Choice Is Yours, in Better than Carrots or Sticks (Aug. 2015), available at <http://www.ascd.org/publications/books/116005/chapters/Punitive-or-Restorative@-The-Choice-Is-Yours.aspx>.

techniques for creating teacher empathy for students are showing promising results.¹¹²

It is also counterproductive to punish youth with behavioral problems when those problems stem from mental health disorders. These youth, and the rest of us, are better served by addressing problems by offering treatment in the community, where an array of services designed to “wrap around” children and families can be delivered. Such services, which are readily available in Massachusetts,¹¹³ decrease re-offending, even for youth who commit serious and

¹¹² Kirp, Don't Suspend Students. Empathize, The New York Times (Sept. 2, 2017), available at <https://www.nytimes.com/2017/09/02/opinion/sunday/dont-suspend-students-empathize.html?mcubz=3>.

¹¹³ See Children's Behavioral Health Initiative, <http://www.mass.gov/eohhs/consumer/insurance/cbhi/> and Children's Behavioral Health Initiative, Outpatient Therapy as a CBHI Clinical Hub: Practice Guidelines, 6 (Dec. 2016), available at <http://www.mass.gov/eohhs/docs/masshealth/cbhi/practice-guidelines-outpatient.doc> for a description of community based services for children with emotional and mental health needs and governing program guidelines. See also DMH, Annual Report, Fiscal Year 2015, 6-7, available at <http://www.mass.gov/eohhs/docs/dmh/publications/annual-report-fiscalyear2015.pdf> (DMH community-based services include residential care, case management, emergency services, homeless services, forensic services, day/therapeutic after-school programs, and individual and family flexible supports).

violent crimes.¹¹⁴ For youth whose mental health needs cannot be met in the community, however, in-patient care is available.¹¹⁵

Limiting punishment and DYS placement and relying as much as possible on community-based treatment alternatives is in everyone's interest.¹¹⁶ Preventing

¹¹⁴ See Underwood & Washington, *supra* note 20; see also Mulvey, Schubert & Piquero, MacArthur Found., Pathways to Desistance: Final Technical Report (2014), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/244689.pdf> (in study of juvenile offenders, re-entry services from the community reduce the chance of re-arrest or return to institutional setting in 6 month after care period); see also Underwood & Washington, *supra* note 20 The authors cite Duchnowski, Kutash & Friedman, Community-Based Interventions in a System of Care and Outcomes Framework, in Burns & Hoagwood, eds., Community Treatment for Youth (2002) (initial research documents the benefits of community systems of care with regard to both economic and child welfare outcomes, as well as reductions in recidivism).

¹¹⁵ See DMH, DMH Licensing Divisions, <https://www.mass.gov/departments-of-mental-health-licensing-divisions>; see also 104 Code Mass. Regs. § 27.02.

¹¹⁶ DYS confinement cuts off access to community treatment resources. Research shows these resources are most effective, and without cost to public safety. Inst. of Medicine and Nat'l Research Council, Ch. 5: The Juvenile Justice System, in Juvenile Crime, Juvenile Justice, 224 (2001), available at <https://www.nap.edu/read/9747/chapter/7#224>.

juveniles from entering the adult justice system is both a moral and practical imperative.¹¹⁷

V. Judicial Involvement in Fashioning Responses to Youthful Misconduct has Great Potential to Achieve Positive Impact for Youth and Society.

The problem of unduly punitive responses to youthful misconduct is serious. Juvenile Court judges should not be consigned merely to carry out the decisions of those that have a prosecutorial role in an adversary system. Turning around ingrained counterproductive practices that harm children and society will require the participation of all major stakeholders working together. Allowing discretion to dismiss cases pre-arraignment will not only avoid bad outcomes in individual cases, it will enhance judges' ability to inspire efforts at reform.

The decision to go forward in a prosecution with long-term negative ramifications for youth and society is a weighty one. Prosecutors have the difficult task of balancing their duties in an adversarial system to be both an "administrator of justice" and a "zealous

¹¹⁷ Underwood & Washington, supra note 20, (citing Greenwood, Prevention and Intervention Programs for Juvenile Offenders, 18 Future Child (2008)).

advocate.”¹¹⁸ They can be more focused on obtaining convictions than on fairness and justice. A former Suffolk County Assistant District Attorney states that prosecutors are “unaware and untrained of the grave consequences” of their discretionary decisions:¹¹⁹ “We are judged internally and externally on our convictions and our trial wins.”¹²⁰ Prosecutors “learn to avoid risks at all costs,” which hamstringing discretion to keep societal needs in mind and renders their discretion “basically useless.”¹²¹

¹¹⁸ See Am. Bar Assoc., Criminal Justice Standards for the Prosecution Function (4th ed.), Standard 3-1.2, Functions and Duties of the Prosecutor, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.

¹¹⁹ Foss, A prosecutor's vision for a better justice system, TED, at 9:32 (2016), available at <https://www.youtube.com/watch?v=H1fvr9rGgSg>.

¹²⁰ *Id.* at 7:20.

¹²¹ *Id.* at 7:02. Foss further states that prosecutors are conditioned to “believe that somehow the criminal justice system brings about accountability and improves public safety despite evidence to the contrary,” *id.* at 7:12, and thus “stick to an outdated method, counterproductive, to achieving the very goal that we all want, and that’s safer communities.” *Id.* at 7:30. See Willis, Utilizing Prosecutorial Discretion to Reduce the Number of Juveniles with Disabilities in the Juvenile Justice System, B.Y.U. Educ. & L.J., 193 (2016), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1383&context=elj> (prosecutorial guidelines are needed discouraging prosecution when, as here, a student’s misbehavior can be linked to a school’s failure “to meet their legal obligations under the

A judge's role is neutral. She is obliged to be fair and impartial. Juvenile Court judges may utilize "broad discretion to protect the best interests of children consistent with the interests of justice."¹²² Particularly in light of the current trend to criminalize youth, it is unwise to exclude judges from a say in which cases merit criminal justice treatment, whether or not the technical elements of a crime are presented in a given case.

There is growing sentiment that judges are propitiously placed to, and indeed *should*, assume a leadership role in preventing the undue criminalization of youthful misconduct. The National Council of Juvenile and Family Court Judges believes that "judges have a distinct responsibility to bring

IDEA," since "behavioral problems are a likely result" of such failures); see also Guzman, Nat'l Ctr. for Youth Law, *Unfettered Discretion, Negative Outcomes, and No Oversight: California's Need for Data Collection on Juveniles Prosecuted as Adults* (Mar. 2015), available at <https://youthlaw.org/publication/unfettered-discretion-negative-outcomes-and-no-oversight-californias-need-for-data-collection-on-juveniles-prosecuted-as-adults> (California law permitting prosecution of youth as adults "was contemplated for the most serious cases" but it is nonetheless "common for prosecutors to direct file mid-level felony cases against teenagers who have had no previous experience locked up in the juvenile system").

¹²² Humberto H., 466 Mass. at 576.

together community stakeholders to address issues that affect the community, the court, and the youth and families they serve," and are in an "ideal position" to do this.¹²³

A number of judges around the nation have experienced success convening and encouraging cooperation between key stakeholders in fashioning changes in the procedures around court referrals.¹²⁴ Reforms have achieved remarkable results.

¹²³ See Deal, Ely, Hall, Marsh, Schiller & Yelderman, School Pathways to the Juvenile Justice System Project: A Practice Guide, Nat'l Council of Juvenile and Family Court Judges, 5 (2014), available at https://www.ncjfcj.org/sites/default/files/NCJFCJ_SchoolPathwaysGuide_Final2.pdf (urging juvenile court judges to exert leadership and encourage collaboration in developing juvenile justice system improvements). See also Howard, Juvenile Judge Pleads With Police to Stop Arresting Children Under 13 Years Old, Fox 59 News (Aug. 25, 2015), <http://fox59.com/2015/08/25/juvenile-judge-pleads-with-police-to-stop-arresting-children-under-13-years-old/>.

¹²⁴ See PEW Charitable Trusts, Judging for Juvenile Justice: Judges Share Lessons of Juvenile Justice Reform (Nov. 2014), available at http://www.pewtrusts.org/~media/assets/2014/11/pspp_juvenilejudges_qa_brief_web.pdf (juvenile court judges from Georgia, Kentucky, and Hawaii discuss their role in convening stakeholders, presenting data, assessing problems, devising remedies, and achieving results); see also Teske, Blame Game - The Winner Loses and The Kids are Hurt, Juvenile Justice Information Exchange (Dec. 9, 2010) available at <http://www.njjn.org/uploads/digital->

In Clayton County, Georgia and Jefferson County, Alabama, Judges Steven C. Teske and J. Brian Huff convened local stakeholders who collaborated to address concerns over "significant increases in minor school arrests when police began to be placed on campuses in the early 1990s" as well as falling graduation rates.¹²⁵ The process resulted in the development of a protocol for school to court referrals involving a three-tier graduated response process that focused on certain misdemeanor offenses.¹²⁶ Following implementation of the protocol, court referrals were reduced by 67.4% in Clayton County and 50% in Jefferson County.¹²⁷ The use of these protocols also prompted "a decrease in racial and

[library/resource 1709.pdf](#) (on last page of text, citing efforts of juvenile court judges in seven states).

¹²⁵ Teske & Huff, *The Court's Role in Dismantling the School to Jail Pipeline*, *Juvenile and Family Justice Today*, 14 (Winter 2011), available at [http://www.ncjfcj.org/sites/default/files/Today%20Winter%202011Feature%20\(2\).pdf](http://www.ncjfcj.org/sites/default/files/Today%20Winter%202011Feature%20(2).pdf).

¹²⁶ *Id.* at 17. The protocols were modeled on guidelines developed by Juvenile Detention Alternative Initiative and the National Council of Juvenile and Family Court Judges. *Id.* at 14. In Clayton County, the protocol was expanded to include "alternatives to suspension and arrests such as functional family therapy, multi-systemic therapy, wrap-around services, peer court, and in-school responses." *Id.* at 14-15.

¹²⁷ *Id.* at 17; see PEW Charitable Trusts, *supra* note 124.

ethnic disparity by as much as 58% and a decrease in the detention rate of youth of color by 38%.”¹²⁸

Analogous results have been replicated in other jurisdictions by virtue of the collaborative process employed by Huff and Teske.¹²⁹

The reduction of court referrals had a strong and positive ripple effect. School suspensions dropped eight percent in middle schools and graduation rates increased by 24%.¹³⁰ The reform also had a remarkable and unexpected positive impact on school and community safety. Police able to reserve interventions for serious misconduct developed better relations with students. When students stopped seeing classmates arrested for minor indiscretions, they began to disclose information about serious safety threats to

¹²⁸ Teske & Huff, *supra*, note 125, at 17.

¹²⁹ See Teske, Huff & Graves, Collaborative Role of Courts in Promoting Outcomes for Students: The Relationship Between Arrests, Graduation Rates, and School Safety, *Family Court Review*, 138-139 (2013), available at [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/articles/05-2-Teske Collaborative%20Role%20of%20Courts 1.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/articles/05-2-Teske%20Collaborative%20Role%20of%20Courts%201.pdf) (describing similar results from collaborative processes in Birmingham, Alabama (75% referral reduction; 72% drop in detentions) and Wichita, Kansas (50% decrease in school arrests)).

¹³⁰ *Id.* at 138.

school police,¹³¹ resulting in a 73% decrease in weapons possession.¹³² Felony rates also fell 51% in the community, which Teske and Huff attribute to increased school attendance.¹³³

Juvenile Court judges can play a key role in prompting similar results in the Commonwealth. Increased authority over the cases that come before the court will not only dissuade police and prosecutors from the pursuit of inappropriate criminal charges in individual cases, it could prompt stakeholder discussion around guidelines for court referrals that have occurred to such positive effect in other jurisdictions.

CONCLUSION

It is in the best interest of the Commonwealth's children and justice that the decisions of the juvenile court judge in the cases at bar be upheld. Amici respectfully request that the Court affirm the trial court in this matter.

¹³¹ Id. at 138.

¹³² Id. at 137.

¹³³ Id. at 138.

Respectfully submitted for amici by:

Miriam H. Ruttenberg
BBO # 642277
mruttenberg@mhlac.org
Jennifer Honig
BBO # 559251
jhonig@mhlac.org
Phillip Kassel
BBO # 555845
pkassel@mhlac.org
Mental Health Legal Advisors
Committee
24 School Street, Suite 804
Boston, MA 02108
(617) 338-2345

Date: October 23, 2017

**CERTIFICATE OF COMPLIANCE WITH RULES OF COURT PURSUANT
TO RULE 16(K)**

I, Miriam H. Ruttenberg, certify that the brief of the amicus curiae complies with the rules of the Court that pertain to the filing of briefs including but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of brief), and 20 (form of brief and other papers).

Miriam H. Ruttenberg