



THE COMMONWEALTH OF MASSACHUSETTS COMMISSION ON LGBTQ YOUTH

July 17, 2020

Dear Chair Cronin, Chair Michlewitz, Vice Chair Day, Vice Chair Garlick, and Members of the House Ways and Means and Judiciary Committees:

The Massachusetts Commission on LGBTQ Youth writes to provide our perspective on LGBTQ youth and the juvenile justice system as the Joint Committees considers S.2820 to address racial justice and police accountability. The Commission on LGBTQ Youth is an independent state agency tasked by the Legislature with providing expert advice and policy recommendations to the Commonwealth of Massachusetts on how to improve services and decrease inequities facing LGBTQ Youth.

There is overwhelming evidence that over-policing of predominantly Black and Latinx communities and schools has led to devastating outcomes for these youth, from their educational outcomes to their trajectory towards involvement in the justice system. This over-policing has also led to stark disparities facing LGBTQ youth with respect to their involvement in the justice system, particularly LGBTQ youth of color. This is because—as discussed in detail below—LGBTQ youth in Massachusetts face many increased risk factors for involvement of the justice system, including roughly three times the rate of experiencing homelessness, up to four times the rate of having serious mental health issues, two times the rate of being involved in violence at school, and over three times the rate of truancy.

As the House begins deliberation on its version of a police reform bill, we ask that you also consider additional policies for inclusion, many of which directly impact LGBTQ youth and would help lessen the disparities faced by this population with respect to justice system involvement:

- **Expand the use of force protections by imposing limits on police use of force with children and by school police officers;**
- **Abolish qualified immunity;**
- **Data transparency in the juvenile justice system;**
- **End the automatic prosecution of older teenagers as adults;**
- **Expand eligibility for expungement to rectify the over-criminalization of Black and Latinx youth.**

Disparities Facing LGBTQ Youth in the Juvenile Justice System

For a variety of reasons—including higher rates of homelessness and foster care involvement—LGBTQ youth are twice as likely to enter the juvenile justice system as their non-LGBTQ peers.¹ A survey of seven juvenile justice facilities nationwide showed that 20% of youth in these facilities identified as LGBTQ, which makes these youth doubly represented in the criminal justice system given that they comprise only about 10% of the general population.²

Further research shows that 50% of LGBTQ youth are at risk of entering the juvenile justice system due to the risk factors they face.³ Over two-thirds of justice-involved youth have histories of adversity related to interpersonal trauma and most are disproportionately burdened by discrimination on several levels of social identity: race, ethnicity, gender identity, sexual orientation, disability status, etc.⁴ These disparities transfer to adulthood, with 58% of respondents in a 2015 survey of incarcerated LGBTQ adults reporting that their first experience in a justice facility had been before the age of 18.⁵ In total, LGB people nationally are three times more likely to be incarcerated than the general population.⁶

The overrepresentation of LGBTQ youth of color in the juvenile and criminal justice systems also reflects the racial disparities faced by all people, regardless of LGBTQ identity, involved in these systems. One national study found that as compared to white youth, Black youth are four times more likely to be incarcerated, Native American youth nearly three times as likely, and Latinx youth 1.5 times as likely.⁷ It is therefore deeply troubling, though not surprising, that an estimated 85% of LGBTQ youth in the justice system are youth of color.⁸ Experiences of discrimination that disproportionately affect and result in justice involvement for LGBTQ youth, particularly LGBTQ youth of color, parallel vulnerabilities that result in victimization, abuse, and further trauma within the justice system.⁹ Transgender and gender-nonconforming youth face even starker disparities within the juvenile justice system. A recent study found that transgender and gender-nonconforming individuals are nearly twice as likely to have been

¹ Vallas, R., & Dietrich, S. (2014). One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Juvenile Records. *Center for American Progress*.

² Mallory, C., et al. (2014). Ensuring Access to Mentoring Programs for LGBTQ Youth. *The Williams Institute*. Retrieved from <http://www.nwnetwork.org/wp-content/uploads/2014/04/TWI-Access-toMentoring-Programs.pdf>

³ Wilson, B. D. M., et al. (2017). "Disproportionality and Disparities among Sexual Minority Youth in Custody," *Journal of Youth & Adolescence*, 46(7): 1547–1561.

⁴ Lyndon, J., Carington, K., Low, H., Miller, R., & Yazdy, M. (2015). Coming out of Concrete Closets: A Report on Black & Pink's National LGBTQ Prisoner Survey. Black and Pink. Retrieved from <http://www.blackandpink.org/wp-content/uploads/Coming-Out-of-Concrete-Closets.-Black-and-Pink.-October-21-2015.pdf>

⁵ *Ibid.*

⁶ Meyer, I.H., Flores, A.R., Stemple, L., Romero, A.P., et al. (2017). Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012. *Am J Public Health*, 107: 234-240.

⁷ Stemming the Rising Tide: Racial & Ethnic Disparities in Youth Incarceration & Strategies for Change. (2016). The W. Haywood Burns Institute. Retrieved from http://www.burnsinstitute.org/wp-content/uploads/2016/05/Stemming-the-Rising-Tide_FINAL.pdf

⁸ Wilson, B. D. M., et al. (2017).

⁹ Brockman, B., Cahill S., Henry, V., & Wang, T (2018). Emerging Best Practices for the Management and Treatment of Lesbian, Gay, Bisexual, Transgender, Questioning, and Intersex Youth in Juvenile Justice Settings. The Fenway Institute and The Center for Prisoner Health and Human Rights. Retrieved from: https://fenwayhealth.org/wp-content/uploads/TFIP-21_BestPracticesForLGBTYOUTHInJuvenileJustice_Brief_web.pdf

incarcerated as other LGBQ people, with transgender people of color reporting a rate of past incarceration four times higher than other LGBQ people.¹⁰

While the disparities facing LGBTQ youth explain why the Commission is itself involved in this issue, it also shines light at how factors beyond youths' control—such as getting kicked out of their homes or not coming to school because they feel unsafe—end up entrapping youth in a system that too often operates based on underlying biases and serves only to further isolate rather than rehabilitate the youth involved.

Pathways to Involvement in the Justice System for LGBTQ Youth

Various forces contribute to the overrepresentation of LGBTQ youth in the juvenile justice system. One perspective is that discrimination and stigma increase the number of incidents of harassment and violence against LGBTQ youth. LGBTQ youth may cope with these traumatic experiences by engaging in criminalize compensatory behaviors and survival economies. Discrimination and stigma may also result in policies and policing strategies that disproportionately target LGBTQ youth, especially youth of color. Traumatic experiences such as interactions with the criminal justice system can have lifelong repercussions, particularly when they occur during adolescence, a critical period of brain development.¹¹

A major pathway through which LGBTQ youth enter the juvenile and criminal justice systems is homelessness and compensatory behaviors originating from abuse and rejection in their home and social environments. Various factors may contribute to increased family instability and rejection of LGBTQ youth, including poverty. According to 2015 U.S. Census data, more than 1 in 5 American children (21.1%) live in poverty, and multiple studies indicate that LGBTQ people experience higher rates of poverty than the general population.¹² Many LGBTQ youth also end up in the foster care system or homeless due to unsafe conditions at home. Youth in foster homes or who have aged out of the foster care system have been shown to have higher criminal justice involvement than others.¹³ The situation is no better for youth who experience homelessness, of whom one study found 78% had at least one prior police interaction; 62% had been arrested or detained; and 44% had been in a juvenile detention center, jail, or prison.¹⁴

The climate that many LGBTQ students face in school also contributes to their overrepresentation in the juvenile justice system. More than two in five (42%) of LGBTQ high school students in Massachusetts experienced discrimination of some form in their school, according to the 2015 National School Climate Survey.¹⁵ According to the latest Massachusetts Youth Risk Behavior Survey (MYRBS), LGBTQ were more likely to experience bullying, be involved in fights, skip school due to feeling unsafe, or be threatened or injured with a weapon at

¹⁰ Lambda Legal. (2016). Protected and Served? Jails and Prisons.

¹¹ Steinberg, L. (2015). *Age of Opportunity: Lessons from the New Science of Adolescence*. New York: An Eamon Dolan Book.

¹² DeNavas-Walt, C., & Proctor, B. D. (2015). Income and Poverty in the United States: 2014. Retrieved from <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>

¹³ Cusick, G. R., Courtney, M. E., Havlicek, J. & Hess, N. (2010). Crime during the Transition to Adulthood: How Youth Fare as They Leave Out-of-Home Care. Research report submitted to the U.S. Department of Justice. Retrieved from <https://www.ncjrs.gov/pdffiles1/nij/grants/229666.pdf>

¹⁴ Pilnik L., Maury, M., Sickmund, M., Smoot, N., & Szanyi, J. (2017). Addressing the Intersection of Juvenile Justice Involvement and Youth Homelessness: Principles for Change. *Coalition for Juvenile Justice*. Retrieved from http://www.csh.org/wp-content/uploads/2017/03/Principles_FINAL.pdf

¹⁵ GLSEN. (2015). "School Climates in Massachusetts." 2015 National School Climate Survey. <https://www.glsen.org/sites/default/files/Massachusetts%20State%20Snapshot%20-%20NSCS.pdf>

school—all indicators for being disciplined within school or via the juvenile or criminal justice system.¹⁶ Given the high rates of abuse and harassment, and the lack of social support, it is no surprise that LGBTQ students in Massachusetts, compared to their non-LGBTQ peers, were twice as likely to engage in fights at school in the past year (9.4% vs. 5.1%), three times as likely to carry a weapon to school (6.1% vs. 2.8%), and six times as likely to have used heroin in their lifetime (6.7% vs. 1.0%).¹⁷ All of these behaviors can lead to arrest, especially considering that LGBTQ youth nationally are three times as likely to experience harsh discipline at school when compared to their non-LGBTQ peers.¹⁸

Use of Force Standards

Massachusetts must establish strong standards limiting excessive force by police. When police interact with civilians, they should only use force when it is absolutely necessary, after attempting to de-escalate, when all other options have been exhausted. Police must use force that is proportional to the situation, and the minimum amount required to accomplish a lawful purpose. And several tactics commonly associated with death or serious injury, including the use of chokeholds, tear gas, rubber bullets, and no-knock warrants should be outlawed entirely. We further urge that this legislation include protections for children during interactions with law enforcement. These protections should include a prohibition on restraining minor children in a prone or hog-tie position, a mandate that developmentally appropriate de-escalation techniques be utilized, and a requirement that law enforcement be trained in these techniques. This legislation should also include school resource officers, constables, and special service officers in the definition of law enforcement officers subject to these use of force standards.

Qualified Immunity

Massachusetts must abolish the dangerous doctrine of qualified immunity, which shields police from being held accountable to their victims. Limits on use of force are meaningless unless they are enforceable. Yet today, qualified immunity protects police even when they blatantly and seriously violate people’s civil rights, including by excessive use of force resulting in permanent injury or even death. It denies victims of police violence their day in court. Ending or reforming qualified immunity is the most important police accountability measure in S2820. Maintaining Qualified Immunity ensures that Black Lives Don’t Matter. We urge you to end immunity in order to end impunity.

Data Transparency

Massachusetts has one of the worst racial disparities for youth incarceration in the country and lacks transparency on how our legal system responds to children and youth once they are arrested and how they move through the system. Legislation to shed light on racial inequity in our juvenile justice system was stripped from the 2018 criminal justice reform legislation due to opposition to any transparency that would reveal the disparate treatment of Black and Brown youth by our legal system. Data collection and reporting on sexual orientation and gender

¹⁶ Massachusetts Commission on Lesbian, Gay, Bisexual, Transgender, Queer, and Questioning Youth. (2019). *Massachusetts Commission on LGBTQ Youth: 2020 Report and Recommendations*, 20. Retrieved from <https://www.mass.gov/annual-recommendations>

¹⁷ *Ibid.*

¹⁸ Himmelstein, K. E. W., & Brückner, H. (2011). Criminal-Justice and School Sanctions Against Non-heterosexual Youth: A National Longitudinal Study. *Pediatrics*, 127(1): 49-57.

identity and expression (SOGIE) data is also severely lacking in the juvenile and adult justice systems in Massachusetts. While the Commission has begun collaborating with the Juvenile Justice Policy and Data Board to inform them of best and promising practices around SOGIE data collection and reporting, much work remains to be done, particularly in the adult system. This legislation should include data transparency measures that gather key demographic data at major decision points in the justice system.

End the Automatic Prosecution of Massachusetts' Oldest Teenagers as Adults

Massachusetts treats similar teenagers very differently in the justice system, which leads to different and devastating outcomes as they transition into adulthood. In 2013, Massachusetts ended the automatic prosecution of 17-year-olds as adults. Since that reform, the juvenile justice system's caseload is lower than before the introduction of 17-year-olds. While the Commission's work focuses in part on the juvenile justice system, the racial disparities in the adult system are even worse. Only 25% of Massachusetts' transition age youth population is Black or Latinx, but 70% of youth incarcerated in state prisons and 57% of youth incarcerated in county jails are people of color. Black and Latinx youth are 3.2 and 1.7 times, respectively, as likely to be imprisoned in adult correctional facilities as their White peers. This racial disparity in adult system involvement further exacerbates the disparity in long-term outcomes.

Young people in the adult system have the worst outcomes of any age group in our legal system. Recidivism among young people incarcerated in the adult corrections is more than double similar youth released from department of youth services commitment. Teenagers and young adults incarcerated in Massachusetts' adult correctional facilities have a 55%¹⁹ re-conviction rate, compared to a similar profile of teens who remained in the juvenile system whose re-conviction rate is 22%.²⁰ The Department of Youth Services has been successful in reducing its recidivism rate following almost four decades of reforms building in an emphasis on providing treatment and imposing policies whose primary goal is to ensure young people's healthy and positive development into adulthood.

The better outcomes of the juvenile justice system compared to the adult criminal legal system are tied to the former's responsiveness to older teenagers and a better understanding of how to capitalize on their developmental stage to promote better public safety and youth development outcomes. For these reasons we urge the House to include provisions in this legislation to end the automatic prosecution of older teenagers as adults.

Expand Eligibility for Expungement

Expungement is an important tool to allow individuals to completely re-integrate into society without the burden of a criminal record. Research has shown that the existence of a criminal record is not a good indicator of someone's likelihood to reoffend. The risk of re-offending for individuals whose last arrest was a youth, and who did not get re-arrested within the subsequent four years, is equal to those with no prior record at all. Importantly, expanding access to

¹⁹ Council of State Governments Justice Center, "Justice Reinvestment in Massachusetts: Policy Framework," February 21, 2017. Available at <https://csgjusticecenter.org/jr/massachusetts/publications/justice-reinvestment-in-massachusetts-policy-framework/>


²⁰ Department of Youth Services, "Juvenile Recidivism Report For Youth Discharged During 2014" November 19, 2018. Available at <https://www.mass.gov/files/documents/2018/12/17/recid2018.docx>

expungement can be an important tool to rectify the well-documented systemic racism perpetrated against Black and Latinx youth at every point in the criminal justice system.

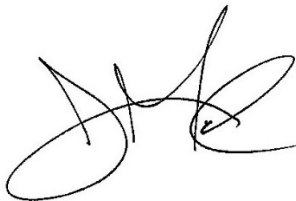
In 2018, Massachusetts passed legislation that created an opportunity to expunge juvenile and adult criminal records for individuals whose offense was charged prior to their 21st birthday. While this is a tremendous step forward, the law limited eligibility for expungement to individuals with only one charge on their record. We urge the legislature to rectify the over-policing and disparate treatment of people of color by expanding eligibility for expungement.

The Commission on LGBTQ Youth is committed to working for a Commonwealth where all youth thrive. The Commission thanks the Members of the House Ways and Means and Judiciary Committees for its consideration of this issue and urges it to consider the needs of LGBTQ youth when deliberating S.2820. The Commission would happily provide further advice to members of the Committee with respect to this issue.

Respectfully,



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