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LEGAL ADVISORY

New Laws and Decisions Affecting Juveniles and Student Discipline

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A. Introduction

This memorandum discusses new developments in Massachusetts laws defining criminal activity of juveniles and a related topic – search and seizure issues in schools. School Administrators should work closely with local school counsel on cases presenting these issues as there is a high cost for mishandling these matters.

The first section, "B," discusses the new amendments to Massachusetts juvenile laws. The second section, "C," surveys recent Massachusetts search and seizure law in schools.

B. New Delinquency Rules for Juveniles

1. Background

Over the past few years the Massachusetts legislature has adopted many laws intended to improve school safety and increase educators' capacity to identify and provide assistance to students' for behavioral and mental health needs. See, e.g., C. 284, Acts of 2014. The range of

new requirements runs from developing a "safe and supportive school environment" to a major new program for school resource officers ("SRO's")", see M.G.L. c. 71, §37P, annual training for written emergency medical plans, see M.G.L. c. 69, §8A(a), suicide prevention training, see M.G.L. c. 71, §95(a), and requires provision to first responders of "as built" drawings for school construction detailing routes for ingress, egress, hydrants, and utility access ports. Many of those statutory changes were unfunded, so some district obligations are contingent on local appropriations.

Historically, in a criminal case prosecutors must demonstrate two things: the defendant committed the act (*actus reus*) and the act was carried out with a wrongful intent (*mens rea*). These principles also applied to children. More recently, the laws controlling juvenile court proceedings have been amended in recognition of juveniles' inability to form the necessary criminal intent, or *mens rea*, to support a prosecution for the illegal or dysregulated behavior and misconduct often seen in schools. See, generally, C. 69, Acts of 2018.

2. Chapter 69, Acts of 2018 – New Juvenile Rules Impact Schools

Chapter 69 was a comprehensive overhaul of the Commonwealth's criminal justice system, including juvenile laws and procedures. Juveniles subject to criminal process are identified as being between the ages of 12 and 18, and juvenile courts can retain jurisdiction over a youthful offender until age 22. See, C. 69 Acts of 2018, §§72 and 80.

The new law contains several provisions affecting law enforcement in schools. For example, the provisions of Section 27 of Chapter 69 rewrote the SRO law such that a Superintendent and a Police Chief now must enter into a written memorandum of understanding

(MOU) detailing the scope and extent of authority to be exercised by SROs in school.[1] This change undoubtedly resulted from years of confusion about the extent of SROs responsibility for de-escalating student imbroglios and the SRO's responsibility for conducting searches of students suspected of carrying contraband. A 2017 Supreme Judicial Court case, Commonwealth v. Villagran,[2] 477 Mass. 711 (2017). reiterated the difference between the broad authority of school officials to conduct student searches and the narrow authority of law enforcement to conduct in-school searches under 4th Amendment rules.

3. What We Knew about Kids All Along!

In addition to formalizing the rules of engagement for SROs, c. 69 of the Acts of 2018 raised the minimum age of children subject to jurisdiction of the juvenile court from 7 to 12 years. Since before the time of William Blackstone (1723-1780), the famous author of a treatise on English common law widely used in colonial America, in Anglo-Saxon and American law children generally have been assumed to be criminally responsible for their willful actions if more than 14 years of age. Although Blackstone records cases of capital punishment imposed on 9 and 10 year olds who committed homicide, this occurred only when the child was perceived by the courts to have the ability to form a specific intent to kill as an accompaniment to the act.

The historical reluctance to criminally charge minors stems from two observations. First, many young offenders were determined to have a "deficit of will" or medical impediment to their

[1] A model MOU was published by the Attorney General and DESE on September 5, 2018. It is available at: www.mass.gov/news/state-agencies-release-model-memorandum-of-understanding-for-massachusetts-school-resource.

[2] A complete discussion of Villagran and other relevant precedent is attached as Section C.

ability to form a criminal intent. According to Blackstone, "[w]hen there is no discernment, there is no choice; [and therefore] there can be no act of will" Second, other juveniles, typically under the age 7 were identified as "infants" and were presumed to have a "defect of understanding."[3] In the Roman or "civil" law, and in the Anglo-Saxon tradition, Blackstone related that children between 7 and 10½ were considered to be lacking in criminal responsibility. Children between 10½ and 14, on the other hand, were believed in the Anglo-Saxon tradition to be "*doli capaces,*" or "capable of mischief," and therefore subject to criminal process. See, *William Blackstone, Commentaries on the Laws of England,* Volume 4, Page 22-24. (1769, Clarendon Press, Oxford). Under Saxon law, children were presumed to be of "the age of possible discretion" at 12 years but even then, a youth "according to his mature capacity or incapacity" might not be criminally responsible until age 14. Historically, once the age of 14 was reached, children were treated as adults for purposes of the criminal law.

Blackstone's survey of English legal history and his report of the widespread absolution of "infants" from criminal responsibility was the law of the Commonwealth for eons. Prior to c. 69 of the Acts of 2018, Massachusetts children younger than7 were not charged with crimes but those between the ages of 7 and 18 <u>were</u> subject to delinquency proceedings. See M.G.L. c. 119, §54 prior to the 2018 amendments. Now, Massachusetts law limits criminal responsibility for most historically juvenile offenses to children age 12 or over.

[3] It seems our ancestors had concluded, without the benefit of modern brain research on youths and adolescents suggesting a naturally slow development of the frontal brain, but with the value of centuries of observation, that pre-pubescent youths and others were incapable of considering the consequences of their actions and therefore incapable of forming the requisite specific intent to commit crimes. Some moderns have concluded that "choice" based on "discernment" is a quaint notion. These scientists argue that there is no "free will" or choice, as all decisions are the product of chemical or electrical reactions in the brain involving neurons. This research raises interesting questions about whether, if all actions and "decisions" are unconscious products of brain activity, individuals can ever be held responsible for their actions?

4. New Court Diversion Rules Limit School Action under M.G.L. c. 71, §37H ½

In addition to focusing more on those who Blackstone identified as "capable of mischief," c. 69 now requires children 12 and older to be assessed, prior to arraignment, to determine whether they would benefit from a diversion program, rather than formal delinquency proceedings. These changes will have an impact on school discipline. Generally, school officials have discretion to suspend or expel a regular education student charged with a felony or felony delinquency. *Section 72 of Chapter 69 of the Acts of 2018, however, expressly precludes use by school officials of evidence of a juvenile's entry into a diversion program as evidence of a felony or felony delinquency proceeding under M.G.L. c. 71, §37H ½.* A student in a diversion program may not be suspended or expelled, therefore, under the provisions of c. 71, §37H ½. The new changes also limit law enforcement's ability to arrest and detain children if they are less than 12 years of age. See M.G.L. c. 119, §67 as amended by Section 76 of Chapter 69 of the Acts of 2018.

5. The Rules are Still Different for Students on IEP's

The question whether and how new criminal laws apply to special education students also complicates the landscape. A recent decision from the Massachusetts Appeals Court admonishes school officials to ensure that they have informed prosecutors of a student's IEP when a young student is subject to delinquency proceedings. In Commonwealth v. Georgi, 94 Mass. App. Ct. 82 (2018), a 12 year old middle school student was charged with two counts of assault and battery and a charge of disturbing a school assembly. It was alleged that the student had pushed a teacher and "hip bumped" the middle school principal. In a scenario played out too often, the student was allegedly assaultive, oppositional/defiant, loud, and profane. The student allegedly was 12 inches away from the principal's face yelling "Are you F…ing afraid of a 12 year old?" The assistant

principal swore out civilian complaints in the local District Court against the student. The District Court dismissed the charges.[4]

The appellate decision addressed the issue of imputing criminal responsibility to the 12 year old in part by noting the school failed to provide the prosecutor with the student's IEP. Echoing, without citing, Blackstone's concern about how to assess youthful culpability, the court observed the IEP could have contained information which might have assisted the prosecutor in determining whether to file charges in the first place. Alternatively, the prosecutor may have determined that the child's special needs affected his ability to form the necessary intent required to perform a criminal act. The court cited the IDEA, at 20 U.S.C. 1415(k)(6)(B) (2012), which specifically requires school officials to deliver to the prosecutor or other "appropriate authorities" a copy of the child's IEP and discipline record if the student's misbehavior is reported to law enforcement. Georgi, at 89, citing Commonwealth v. Nathaniel N., 54 Mass. App. Ct. 200, 204-206 (2002). To use Blackstone's expression, the ability of the student to "discern" proper behavior could have been measured in part by examination of the IEP, the disability identified therein, and the services or accommodations to be provided to the student. The terms of the IEP might have been relevant to the disposition of the delinquency allegations in Georgi but, ultimately, the Appeals Court decided the failure of the school to provide IEP information was not fatal to the Commonwealth's case and then reinstated the charges dismissed by the District Court.

Districts should have a copy of the IEP and discipline record available for law enforcement when filing criminal complaints on student behavior in school.

[4] Complaints in the District Court can be filed by the police or a "civilian," typically the victim of the action.

CONCLUSION

All of this demonstrates a shift in the manner in which courts and law enforcement treat youthful offenders. The age old concern about the point at which children are deemed criminally responsible is not just an interesting jump-off to a philosophical discussion. It is clear the court system expects educators to address in-school the problems and occasional violence of students younger than 12 years of age. The law no longer subjects children of tender years to juvenile delinquency proceedings, except for the most heinous offenses, at least in part due to their presumed inability to formulate a criminal intent. Administrators are reminded that they have the authority under 603 CMR 53.07 to remove a student for up to 2 days on an emergency basis for conduct which is dangerous to themselves or to others, or behavior which is materially and substantially disruptive to the school environment. This regulation applies to actions under c. 71, §37H ¾: typically "handbook" violations, but does not apply to weapons/drugs/staff assaults under §37H ½. The message to staff and administrators may be as simple as "wear your shin guards and plug your ears." In any case involving violence or disruption consult with counsel regarding options.

Finally, administrators and staff should be reminded that so-called "civilian" complaints in the District Court cannot be dismissed by a judge. See Commonwealth v. Orbin, 478 Mass. 759 (2018). Thus, school officials intent on seeking judicial intervention for disruptive or dangerous behavior of very young students and their families should consider whether they want to delegate to law enforcement the discretion to file a complaint. Police complaints might subsequently be dismissed by the court, whereas such a complaint filed by "civilian" victims cannot be dismissed without the victim's consent.

C. Improper Search Procedures Result in Reversal of Convictions for Possession of Gun, and other Charges, on School Property

1. INTRODUCTION

In Commonwealth v. Villagran, 477 Mass. 711 (2017), a divided Supreme Judicial Court of Massachusetts vacated convictions on drug and fire arm charges arising out of a search conducted on school property. The case illustrates, once again, the distinction between searches on school property conducted by law enforcement officials and searches by school officials. Searches conducted on school grounds by law enforcement officials must adhere to higher Fourth Amendment standards than those conducted by school officials.

2. FACTS

At about 2:00 on March 25, 2015, Milton High School officials observed the Defendant on school grounds. He was not known to school administrators. He entered the high school, telling administrators he was a student and he needed to get back in the building. It turns out he was not a student. He said he was waiting for a student to meet him at school. School officials determined that he emitted a strong odor of marijuana. Administrators directed the Defendant into an office conference room. A Milton Police Department officer was called. On arrival she smelled marijuana on the Defendant. Mr. Villagran was acting strangely, and his apparent lying about his identification suggested to school officials and the police that he was in possession of contraband.

The principal told the police officer: "Something is wrong, something is not right with this kid. Something is not right. He has something on him, I know he has something on him." The police Sergeant then conducted a pat-frisk of the Defendant, locating marijuana in his T-shirt and almost $3,000.00 in cash. The sergeant also pat-frisked the Defendant's backpack, over the objections of the Defendant, and felt a hard object. When the bag was opened the police discovered

a bottle of alcohol, another bag of marijuana, a scale, and a loaded handgun. The Defendant was arrested, read his rights and the school was placed on lockdown. As frequently happens in cases involving the pat-frisk and search of a defendant, defense counsel filed a Motion to Suppress, arguing that Mr. Villagran's rights under the Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights were violated by the police officer's search.

The police testified at the suppression hearing that the vice principal of the school "was excited" and that both administrators "appeared to be rattled." At the hearing, the police officer also testified that she was aware that the male student was attempting to enter the high school and that he was not a student. A judge in the district court denied the Motion to Suppress and the case proceeded to trial by jury. The Defendant was convicted on three firearms charges, a drug charge and the charge of disturbing a school.

According to the Supreme Judicial Court decision, the police officer was not advised by school officials that the student had used a fictitious name, and the officer did not testify that the hard object she felt while conducting a pat-frisk of the exterior of the backpack was a gun. Additionally, the principal did not "explain [to the police] the basis for his hunch that the Defendant had contraband in his possession or express a concern that the contraband might be a firearm." The officer did not delve more deeply into the principal's basis for suspicion and was not told of the conversations between school administrators and the Defendant "or the substance of his lies to gain entry" into the building before she commenced the pat frisk that resulted in the search of the backpack.

3. THE SUPREME JUDICIAL COURT DECISION – SEPTEMBER 2018

a) Overview – Different Search Rules for Schools and Police

The Supreme Judicial Court took the somewhat unusual step of transferring this case directly from the District Court to its docket. In so doing the court said it wanted to "take this opportunity to reaffirm the distinction between the traditional standard applicable to a police officer's conduct implicated the Fourth Amendment and the less stringent standard applicable to a school official" conducting a search. In order to conduct a pat-frisk, police must be able to articulate a reasonable suspicion that wrongdoing has occurred. Terry v. Ohio, 392 U.S. 1, 27 (1968). A search of an individual, as distinguished from a less intrusive pat-frisk, typically requires that the police obtain a warrant based on probable cause unless there is immediate probable cause "and an exception to the warrant requirement." There are several exceptions to Fourth Amendment warrant requirements not relevant there. Although the Supreme Judicial Court stated that it had previously assumed the rules regarding searches in schools conducted by police would incorporate traditional Fourth Amendment standards, see Commonwealth v. Carey, 407 Mass. 528, 535 n.4 (1990), this case presented a clear opportunity to review the matter. As the court noted, the distinction is that "when a school official conducts a search, it is constitutionally permissible… as long as it is reasonable under all the circumstances." Villigran, citing New Jersey v. TLO, 469 U.S. 325, 341 (1985).

In a sharply divided opinion the majority concluded that the Milton police "lacked reasonable articulable suspicion that the Defendant had committed a crime" and that there were insufficient facts to support a reasonable belief that he was armed and dangerous. Further, the backpack search was not permitted by any previously identified exceptions to the warrant

requirement. As a result, the Supreme Judicial Court said the District Court judge erred when she denied the Motion to Suppress. The court therefore vacated the convictions on the firearms and drug charges and remanded the conviction for disturbing a school for a new trial as the conviction on that charge was based, at least in part, on the possession of a firearm. Because Milton Police, rather than school officials, conducted the search after the pat-frisk the search could only be justified by establishing a reasonable and articulable suspicion that the Defendant was engaged in criminal behavior.

b) Frisk Issues

Specifically with regard to the police frisk of the Defendant, the officer testified at the Motion to Suppress that she "knew only that school officials had a male, non-student, detained in the conference room" and that there had been a call placed to the police station. The facts were that the Defendant lied to obtain access to the building and strongly smelled of marijuana. The case law is clear that the odor of marijuana "is not sufficient to support reasonable suspicion of criminal activity." The odor might support a conclusion that a civil offense related to possession of marijuana has occurred, but that is not of sufficient criminality to support a reasonable suspicion of illegal behavior. Even though the Defendant's presence on school property could constitute a trespass under M.G.L. c. 266, §120, the Defendant had not been instructed to leave the premises as would be required to sustain a conviction under the criminal trespass law. Thus, according to the court, neither school administrator reported any conduct which suggested criminal activity. The police had no information to the effect that the Defendant was armed and the principal's "unsubstantiated hunch" that the Defendant had something on him "was insufficient for a reasonable belief that the Defendant was armed and dangerous." The police officer also did not testify that she suspected the Defendant was armed or that she was in fear for her safety, or the

safety of the others, in school. Thus, the court concluded there were insufficient grounds to uphold the frisk.

c) Backpack Search

The search of the interior of the backpack was also improper. The court wrote "[t]he search of the backpack must be justified by probable cause and an exception to the warrant requirement." The pat frisk was not justified and as a result, the police observation that there was a hard object in the backpack "cannot be considered a probable cause analysis."

The backpack ultimately was shown to contain a bottle of liquor and the gun. It is not clear whether the officer's observation that she felt something hard in the backpack referred to the bottle of liquor or the weapon. While one of the exceptions to the warrant requirement authorizes a search incident to a lawful arrest, the court reminded readers that there were no grounds on which to arrest the Defendant, thus that exception was inapplicable.

d) Squabbling Justices

Perhaps sensing that its decision would be perceived by school administrators, the public, and others as an overly academic discussion of the significant issue of school safety, the Supreme Judicial Court majority launched into a self-serving defense of its rationale by attacking the dissenting Justices. The dissent argued that a person entering on school property (where access is restricted) has a lesser expectation of privacy in the public place and, as a result, the typical pat-frisk rules requiring reasonable articulable suspicion or probable cause are inapplicable. Backfilling, the majority wrote that the court acknowledged prior decisions "have taken judicial notice of the actual and potential violence in a public school" but heightened sensitivity alone was not sufficient to overcome the Defendant's civil rights. The majority also challenged the dissent's

conclusion that the Defendant had a diminished expectation of privacy in the public place. Typically an expectation of privacy must be reasonable, meaning that an inquiry examines whether there is a subjective expectation and an objective expectation as to "whether society is willing to recognize that expectation of privacy as reasonable." The majority rejected the minority's "diminished expectation of privacy" argument, suggesting that nothing under federal or state constitutional law supports "such limitations on a person's reasonable expectation of privacy." Despite TLO's conclusion that student privacy interests and schools interest in maintaining an orderly educational program could be accomplished without offending Fourth Amendment reasonableness standards, the court rejected the holding here.

CONCLUSION

Administrators need to provide police with all information available to them to help police establish grounds for frisks and searches. While school officials, rather than police, might have properly conducted this search, on these facts who would seriously argue a school principal is better positioned than a police officer to search for drugs, weapons, and cash. The Administrator made the correct decision to involve the police and simply needed to provide more information.