

**Police Practices Under the Massachusetts FACES Statute:  
Advancing or Obstructing the Decriminalization of Juvenile Status Offenses?**

By Lisa Lana  
December 2012

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## Introduction<sup>1</sup>

While the reform of juvenile status offender systems has received significant attention in academic literature and policy debates in recent years, the topic of police practices related to status offenders has been largely absent from the dialogue. We have seen widespread movement toward the decriminalization of status offenders and the development of innovative systems of community-based services for these youth and families, and rightly so. This is a unique population that requires unique treatment within our juvenile justice and child welfare systems. However, as one of the primary gatekeepers into these systems, the role of law enforcement in these cases is a central element that requires increased consideration.

The recently reformed Massachusetts statute that governs the treatment of status offenders makes significant changes to how the Commonwealth views, responds to, and deals with these youth.<sup>2</sup> While the law is intended to advance a vital ambition of decriminalizing, and reducing the stigma associated with, status offenses,<sup>3</sup> the legislation leaves many practical questions unanswered for key stakeholders, including courts, schools, police departments, child welfare agencies, child advocates, families, and youth.<sup>4</sup> This paper focuses on those questions related to police practices. Part I provides the context of the status offender system which is necessary to understand the extent of the reforms and current uncertainties. In Part II, I will bring

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<sup>1</sup> Special thanks to Jessica Berry, Staff Attorney, Children's Law Center of Massachusetts; Carol Fernandez, Law Offices of Carol Fernandez; Chief John Grebert, Executive Director, New York Chiefs of Police Association; Michael James, Supervising Staff Attorney, Children's Law Center of Massachusetts; Michael Kilkelly, Kilkelly Law Offices; Jay McManus, Director, Children's Law Center of Massachusetts; Chief Amy Mercer, Executive Director, Florida Chiefs of Police Association; Mary Anne Padien, Chief of Staff and General Counsel, Office of Senator Karen E. Spilka; Chief Wayne Sampson, Executive Director, Massachusetts Chiefs of Police Association; and Seth Stoughton, Climenko Fellow, Harvard Law School.

<sup>2</sup> See 2012 Mass. Acts ch. 240.

<sup>3</sup> Telephone Interview with Mary Anne Padien, Chief of Staff and General Counsel, Office of Senator Karen E. Spilka (Nov. 21, 2012).

<sup>4</sup> Telephone Interview with Michael Kilkelly, Kilkelly Law Offices (Nov. 30, 2012). Michael Kilkelly is the author of Chapter 18, "Children In Need of Services (CHINS) Proceedings." *Child Welfare Practice in Massachusetts*, ed. Amy M. Karp, MCLE, Inc. 2006 & Supp. 2012, and he will also be authoring the MCLE Practice Guide for the new FACES statute.

to light some of the pragmatic challenges law enforcement currently faces in developing procedures that adhere to the new constraints required by the law. Part III will review the status offender statutes as related to police practices in two of the states on which the Massachusetts statute was modeled, and in Part IV, I will offer some recommendations to be considered as Massachusetts police departments modify their current practices to be in compliance with the new law.

Critical and thoughtful conversations about these issues are already being held, and I am inspired by the commitment I have seen among the Commonwealth's leaders to faithfully execute these changes and carefully develop realistic practices that remain true to the intent of the legislation.<sup>5</sup> Nonetheless, this paper and these discussions are just the beginning; more research will be required on this and other topics related to the implementation of the statute.

## **I. The Juvenile Justice System and Status Offenders**

### ***Juvenile Justice System***

Juvenile courts did not begin emerging in the U.S. as separate from the adult criminal system until the late 1800s; however, from its inception, the goal of the juvenile justice system has been to rehabilitate juveniles within a framework that appreciates the vulnerability of youth and recognizes the inability of the adult system to appropriately respond to the distinctive issues presented by juvenile offenders.<sup>6</sup> Nonetheless, early juvenile proceedings generally lacked formality and due process and afforded judges broad discretion under the doctrine of *parens patriae*,<sup>7</sup> leading to significant inconsistencies in practices and outcomes.<sup>8</sup> By the 1960s and 1970s, the system caught the attention of the U.S. Supreme Court, which began imposing

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<sup>5</sup> Meeting at the Mass. State House (Dec. 18, 2012).

<sup>6</sup> JUVENILE JUSTICE: A SOCIAL, HISTORICAL, AND LEGAL PERSPECTIVE 116-22 (Preston Elrod & R. Scott Ryder eds., 3rd ed. 2011).

<sup>7</sup> The doctrine of *parens patriae* refers to the power of the state to intervene on the part of any individual in need of protection.

<sup>8</sup> JUVENILE JUSTICE, *supra* note 6.

procedural requirements on juvenile courts.<sup>9</sup> In what has come to be known as a landmark juvenile case, *In re Gault*, the Supreme Court held that like adults, juveniles must be afforded certain fundamental due process rights, including notice of charges, counsel, confrontation and cross-examination of witnesses, and privilege against self-incrimination.<sup>10</sup> While this and other reforms created necessary protections for juvenile defendants, these movements toward increasing formality and procedure also had the unintended effect of further criminalizing juvenile proceedings.<sup>11</sup>

### ***Juvenile Status Offenses***

Today, juvenile courts generally maintain jurisdiction over three types of cases: (1) child protection; (2) juvenile delinquency; and (3) status offense cases.<sup>12</sup> Status offenses are those that are considered unlawful specifically because of the offender's classification as a minor.<sup>13</sup> Common examples include running away from home, truancy, curfew violations, underage possession of alcohol, and behavior that is "incurable" or "beyond the control of the parent."<sup>14</sup> Historically, these offenses were dealt with by the juvenile justice system in the same manner as juvenile delinquency cases; however, modern approaches have involved movement away from such treatment and toward the creation of separate systems for handling these cases.<sup>15</sup> Classification and treatment still varies by jurisdiction, but the majority of states now recognize status offenses as a distinct statutory category within the juvenile system.<sup>16</sup>

In 1974, the U.S. Congress furthered the movement toward separate treatment of status offenders with the passing of the Juvenile Justice and Delinquency Prevention Act (JJDP),

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<sup>9</sup> *Id.* at 122.

<sup>10</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>11</sup> BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL* 20-23 (2nd ed. 2009).

<sup>12</sup> *Id.* at 24-28.

<sup>13</sup> *Id.* at 26-27.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 27.

<sup>16</sup> *Id.*

which seeks to prevent youth from entering juvenile and criminal justice systems.<sup>17</sup> The JJDPDA provides federal funding to states that comply with the following core requirements, all of which are subject to only limited exceptions: (1) status offenders may not be held in secure detention or confinement; (2) youth may not be detained in adult jails and lock-ups; (3) when children are placed in an adult facility under appropriate exceptions, “sight and sound” contact with adult is prohibited; and (4) states must assess and address the disproportionate contact of youth of color at all points in the juvenile justice system.<sup>18</sup> The Senate Report accompanying the JJDPDA explains:

These juveniles [sic] status offenders generally are inappropriate clients for the formal police, courts and corrections process of the juvenile justice system. These children and youth should be channeled to those agencies and professions which are mandated and in fact purport to deal with the substantive human and social issues involved in these areas.<sup>19</sup>

Through the JJDPDA, the federal government has laid a foundation for separate and more treatment-focused systems of dealing with juvenile status offenders. Many states have responded with the creation of specific classifications for status offenders, often called “Persons in Need of Services” (PINS) or “Children in Need of Services” (CHINS), which are intended to offer non-punitive treatment mechanisms for responding to non-criminal but risky adolescent behavior.<sup>20</sup>

Due to the unique nature of this class of offenders, courts and policy-makers have the difficult challenge of developing a system that will provide sufficient structure and state response to unsafe adolescent conduct without criminalizing this behavior and while responding to the complex treatment needs that these youth present. “These are youth who often fall between the

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<sup>17</sup> *The Juvenile Justice and Delinquency Prevention Act: A Fact Book*, The Act 4 Juvenile Justice Working Group, (2007) [http://www.act4jj.org/media/factsheets/factsheet\\_27.pdf](http://www.act4jj.org/media/factsheets/factsheet_27.pdf).

<sup>18</sup> *Id* at 10-11. Subsequent amendments have generally reinforced and expanded the separation requirements, with the exception of the 1980 Valid Court Order amendment, which allows courts to place juvenile status offenders in locked facilities for violation of a court order. D'Lorah L. Hughes, *An Overview of the Juvenile Justice and Delinquency Prevention Act and the Valid Court Order Exception*, 2011 ARK. L. NOTES 29, 30-32 (2011).

<sup>19</sup> S. Rep. No. 1011, 1974 U.S.C.C.A.N. 5283, 5287-88.

<sup>20</sup> FELD, *supra* note 11.

‘cracks’ of two bureaucratic legal systems – one designed to respond to maltreatment of young children and the other focused on youthful offenders who present a risk to society.”<sup>21</sup> Juvenile status offenders tend to be children facing a number of risk factors, often including family chaos; child abuse and/or neglect; negative peer influences; exposure to violence; involvement with substance abuse; untreated mental health needs; and educational delays.<sup>22</sup> Because of these complicated issues, there is considerable debate within the juvenile justice field about how, or even if, juvenile courts should deal with status offenders.<sup>23</sup> A common argument against juvenile courts having jurisdiction over status offenses is that statutes addressing status offenders are often vague which leads to inappropriate punishment and failure to provide equal protection under the law.<sup>24</sup> Alternatively, proponents argue that court involvement is essential in order to provide necessary but otherwise unavailable services to children with complex needs.<sup>25</sup>

### ***Recent CHINS Reform in Massachusetts***

The Massachusetts Children in Need of Services, or “CHINS,” system, which has been in place in various forms since 1973, is grounded in principles of decriminalization and rehabilitation but has been widely criticized as ineffective in deterring delinquency and diverting children from the court system.<sup>26</sup> On August 7, 2012, following approximately seven years of fruitless reform efforts,<sup>27</sup> Governor Deval Patrick signed into law, “An Act Regarding Families and Children Engaged in Services” (FACES), which is intended to improve the existing system by decriminalizing associated behaviors and expanding children and families’ access to

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<sup>21</sup> Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, in TECHNICAL ASSISTANCE BULLETIN, at 9 (A.B.A., Division for Public Educ., No. 29, 2007).

<sup>22</sup> *Id.* at 3.

<sup>23</sup> JUVENILE JUSTICE, *supra* note 6 at 362-65.

<sup>24</sup> *Id.* at 364.

<sup>25</sup> *Id.* at 363.

<sup>26</sup> See e.g., David Aaron Michel, *The Chins Don't Stand A Chance: The Dubious Achievements of Child in Need of Services ("Chins") Jurisdiction in Massachusetts & A New Approach to Juvenile Status Offenses*, 20 B.U. PUB. INT. L.J. 321 (2011).

<sup>27</sup> Padien, *supra* note 3.

necessary services outside of the court system.<sup>28</sup> Senator Karen Spilka, the lead Senate sponsor of the bill has stated that:

For several decades, the CHINS system has not kept children out of the juvenile justice system as the legislature intended. This [reform] will give thousands of children and families who need assistance each year a clearer path to accessing the services and support they need without exacerbating their situation and before it becomes dire.<sup>29</sup>

The legislation eliminates the term “Child in Need of Services” in favor of the new labels “Child Requiring Assistance” or “Family Requiring Assistance,” but like the CHINS statute before it, applications for children requiring assistance may be filed for children in the four<sup>30</sup> traditional categories of runaway, stubborn, school offender, and truant.<sup>31</sup> The law made substantial procedural changes to the system’s treatment of status offenses, which went into effect as of November 5, 2012, including: (1) raising the age that an application for assistance can be filed from the child’s 17<sup>th</sup> birthday to the child’s 18<sup>th</sup> birthday; (2) accelerating the procedural process and reducing the amount of time children and families can be involved in the court system; (3) increasing the potential for parent involvement in proceedings; (4) providing for appointment of counsel for both the child and the parents in related court proceedings; (5) providing families with information about available services and explaining their rights in the

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<sup>28</sup> Press Release, MA Gov. Deval Patrick, Governor Patrick Signs Legislation to Reform Children in Need of Services System (August 7, 2012) *available at* <http://www.mass.gov/governor/pressoffice/pressreleases/2012/2012807-governor-signs-reform-for-children-services.html>.

<sup>29</sup> *Id.*

<sup>30</sup> A fifth category of child requiring assistance petitions, a “sexually exploited child,” was inadvertently deleted from the subsection of the FACES statute defining children requiring assistance, although the term is still defined elsewhere in the section. This category, which was added to the CHINS law via a sexual trafficking law contained in chapter 178 of the acts of 2011, is expected to be returned to the statute. Memorandum from Michael Kilkelly, Kilkelly Law Offices. (2012).

<sup>31</sup> The statute defines a child requiring assistance as:

a child between the ages of 6 and 18 who: (i) repeatedly runs away from the home of the child's parent, legal guardian or custodian; (ii) repeatedly fails to obey the lawful and reasonable commands of the child's parent, legal guardian or custodian, thereby interfering with their ability to adequately care for and protect the child; (iii) repeatedly fails to obey the lawful and reasonable regulations of the child's school; or (iv) is habitually truant.

Mass. Gen. Laws ch. 119, § 21 (2012).

court intervention process; and (6) requiring school districts to establish truancy prevention programs that will be offered to students before referring them to court.<sup>32</sup> It also seeks to establish a much needed extensive statewide network of community-based services designed to bolster available interventions outside of the court system; however this portion of the statute has a three-year phase in period.<sup>33</sup>

While clear on its intent, the new legislation is complex and largely silent as to certain aspects of implementation, leaving professionals across the state to fill in the gaps. While there are a number of areas that will require further research and discussion, the next section of this paper will focus on some of the challenges posed by, and potential implications of, the legislation's requirements for changes in police procedures. Furthermore, as the group of children requiring assistance most implicated by the changes in police practices, this section will focus largely on police dealing with runaways in the community.

## **II. Police Practices**

### ***Restrictions on Police Procedures***

The major relevant differences between the CHINS and FACES statutes are as follows: (1) a police officer may no longer file an application except for a child who is stated to be sexually exploited;<sup>34</sup> (2) records of children requiring assistance cases may no longer be kept in any criminal record information system;<sup>35</sup> (3) records may no longer be maintained or remain

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<sup>32</sup> Kilkelley, *supra* note 30.

<sup>33</sup> *Id.*

<sup>34</sup> See Mass. Gen. Laws ch. 119, § 39E (2012).

<sup>35</sup> The following language was added to section 39E of chapter 119:

Any record of these proceedings, including the filing of an application for assistance and creation of a docket, shall not be entered in the criminal offender record information system. Notwithstanding any general or special law to the contrary, no record pertaining to the child involved in the proceedings shall be maintained or remain active after the application for assistance is dismissed. The identity and record of any child for which an application for assistance is filed shall not be submitted to the department of criminal justice information services, criminal offender record information system, court activity record index or any other criminal

active after the application for assistance is dismissed;<sup>36</sup> (4) warrants of protective custody, but not arrest warrants, may be issued for a child who does not respond to a summons to appear in court;<sup>37</sup> (5) a child requiring assistance now may not be arrested, confined in shackles, or placed in a secured facility;<sup>38</sup> and (6) police officers now may not take children requiring assistance to the police station,<sup>39</sup> but if transporting children requiring assistance, must take them directly to the parent or guardian, an approved temporary shelter facility, or the juvenile court.<sup>40</sup>

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record information system. Proceedings under sections 39E to 39I, inclusive, shall be confidential and not open to the public.

Mass. Gen. Laws ch. 119, § 39E (2012).

<sup>36</sup> *Id.*

<sup>37</sup> Mass. Gen. Laws ch. 119, § 39H (2012).

<sup>38</sup> In relevant parts, section 39G of chapter 119 now provides that:

A child who is the subject of an application for assistance may not be confined in shackles or similar restraints or in a court lockup facility in connection with any proceedings under sections 39E to 39I, inclusive. A child who is the subject of an application for assistance shall not be placed in a locked facility or any facility designated or operated for juveniles who are alleged to be delinquent or who have been adjudicated delinquent. Such child may, however, be placed in a facility which operates as a group home to provide therapeutic care for juveniles, regardless of whether juveniles adjudicated delinquent are also provided care in such facility.

Mass. Gen. Laws ch. 119, § 39G (2012).

<sup>39</sup> Although the restriction on taking children requiring assistance to the police station is only specifically listed in section 39H, subsection ii, as related to children being delivered to an approved facility, the restriction has been generally interpreted within the juvenile justice community to apply to transporting children requiring assistance under any circumstances. Mass. State House *supra* note 5. This seems to be the clearest and most consistent reading of the statute and is the interpretation that is relied on in this paper. However, if it is determined that the restriction on taking children requiring assistance only applies in instances where they will subsequently be taken to a shelter, and not when they will be taken to a family member or to the juvenile court, the following discussion on this topic would change.

<sup>40</sup> In relevant parts, section 39H of chapter 119 now provides that:

A child may be taken into custodial protection for engaging in the behavior described in the definition of "Child requiring assistance" in section 21, only if such child has failed to obey a summons issued pursuant to section thirty-nine E, or if the law enforcement officer initiating such custodial protection has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

After a law enforcement officer has taken a child into custodial protection, the officer shall immediately notify the parent, other person legally responsible for the child's care or the person with whom the child is domiciled, that such child is under the custodial protection of the officer and a representative of the department of children and families, if the law enforcement officer has reason to believe that the child is or has been in the care or custody of such department, and shall inquire into the case.

The law enforcement officer, in consultation with the probation officer, shall then immediately make all reasonable diversion efforts so that such child is delivered to the following types of placements, and in the following order of preference:

(i) to one of the child's parents, or to the child's guardian or other responsible person known to the child, or to the child's legal custodian including the department of children and families or the child's foster home upon the written promise, without surety, of the person to

Under the CHINS statute, police could take runaway youth into custody involuntarily if the officer had reason to believe the child would not appear in court, as is generally the case in runaway situations.<sup>41</sup> Furthermore, police could handcuff these juveniles during transport for safety purposes.<sup>42</sup> Officers were permitted to take youth they picked up in the community into the police station in order to contact and wait for parents to arrive or alternative arrangements to be made; however, per protocol, they would not be booked or held in secure lockup during this time.<sup>43</sup> In certain instances in particularly rural communities, youth would sometimes even spend the night on a couch in a station recreation room, which provided a safe place for the child to wait when family could not get to them or a shelter was not available.<sup>44</sup>

### ***Why are the New Restrictions Potentially Problematic?***

Common sense tells us that youth who are struggling with high-risk behaviors but have not committed a crime need intervention but should not be treated like criminal offenders. This proposition is clearly supported in social science research.<sup>45</sup> Youth who are demonstrating the types of behaviors covered by the FACES system are at-risk for future child welfare concerns or

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whose custody the child is released that such parent, guardian, person or custodian will bring the child to the court on the next court date;

(ii) forthwith and with all reasonable speed take the child directly and without first being taken to the police station house, to a temporary shelter facility licensed or approved by the department of early education and care, a shelter home approved by a temporary shelter facility licensed or approved by said department of early education and care or a family foster care home approved by a placement agency licensed or approved by said department of early education and care; or

(iii) take the child directly to the juvenile court in which the act providing the reason to take the child into custodial protection occurred if the officer affirms on the record that the officer attempted to exercise the options identified in clauses (i) and (ii), was unable to exercise these options and the reasons for such inability.

Mass. Gen. Laws ch. 119, § 39H (2012).

<sup>41</sup> Interview with Chief Wayne Sampson, Exec. Dir., Mass. Chiefs of Police Ass'n, in Boston, Mass. (Dec. 18, 2012).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Mass. State House *supra* note 5.

<sup>45</sup> See e.g., Claire Shubik, *What Social Science Tells Us About Youth Who Commit Status Offenses: Practical Advice for Attorneys*, in REPRESENTING JUVENILE STATUS OFFENDERS 15 (Sally Small Inada and Claire S. Chiamulera eds., 2010).

more severe delinquent behavior.<sup>46</sup> Furthermore, these behaviors are unsafe and potentially life threatening so cannot be ignored.<sup>47</sup> However, research also shows that institutionalization and detention of status offenders actually increases risk for future delinquency.<sup>48</sup> While juvenile justice systems are clearly more rehabilitative and treatment-focused than adult systems, they still maintain a punitive function and are designed to respond to criminal behaviors. Status offenders often have complex clinical needs stemming from dysfunctional families, mental illness, and educational difficulties that require more intensive and specialized treatment than is generally available within the traditional juvenile justice system.<sup>49</sup>

Given what we know about the profile of juvenile status offenders, the move away from criminalization is a necessary one. Furthermore, the Massachusetts system reform was targeted to remedy clear problems within the CHINS system, including kids too often being unnecessarily referred to and then spending years navigating the court process; youth and families being stigmatized by involvement in the court system;<sup>50</sup> and information from the court activity record information (CARI) for juvenile status offenders being turned over into delinquency cases.<sup>51</sup>

Nonetheless, this reform, while critical, must be implemented in a way that is realistic and functional for the various systems involved. A number of practical implications are raised for how police will actually deal with juvenile status offenders under the new statute, particularly the more difficult and complex runaway cases:

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<sup>46</sup> *Id.*

<sup>47</sup> See Kendall, *supra* note 21

<sup>48</sup> Shay Bilchik and Erika Pinheiro, *What the JJDPA Means for Lawyers Representing Juvenile Status Offenders*, in AMERICAN BAR ASSOCIATION, REPRESENTING JUVENILE STATUS OFFENDERS 1, 5 (Sally Small Inada and Claire S. Chiamulera eds., 2010).

<sup>49</sup> *Id.* While this is also true for juveniles who have actually been adjudicated delinquent, the ability of juvenile justice systems to adequately respond to the treatment needs of juvenile delinquents generally is beyond the scope of this paper.

<sup>50</sup> Padien, *supra* note 3.

<sup>51</sup> Telephone Interview with Carol Fernandez, Law Offices of Carol Fernandez (Dec. 14, 2012). Carol Fernandez is a Children and Family Bar Advocate and sat on the committee that drafted the FACES legislation.

### Record-Keeping

If warrants of custodial protection cannot be entered into state search databases such as Warrant Management System (WMS) how do police know about warrants of custodial protection? Are police departments expected to keep track of these warrants in a separate tracking system? If runaway reports also cannot be entered into state and national search databases such as WMS or the National Crime Information Center (NCIC), how will children who have travelled into other jurisdictions or across state lines be identified as runaways and be returned home?

### Fact-Finding

Once police come into contact with a suspected runaway in the community, what is the officer's authority to hold the youth while figuring out what to do with him/where to take him? What level of proof does the officer need to hold him while investigating the situation? If officers cannot take these youth to the police station at all, how do they logistically investigate where the child needs to go? Are they expected to make fact-finding calls from the side of the road or in the patrol car while the youth stands by waiting?

### Refusal to Comply

How much authority does the officer have to take a suspected runaway into protective custody if she refuses to comply with questioning? What happens if the child does not voluntarily allow the officer to take her home or to a statutorily provided location?

### Officer Safety

For officer safety purposes (and the safety of the youth or shelter personnel as relevant), do police have the authority to search and/or handcuff children requiring assistance before/while transporting them? Are they to be transported in the back of the car?

### Getting the Child Home

Is there a preference for having parents pick up the child or for the officer to take him home, particularly if the child is located outside of his home jurisdiction? If parents are picking him up, can the officer take him somewhere safe like the police station to wait or is he expected to suspend other duties as he stays with the child in the community?

### Incident Reports

What type of police report is appropriate following a contact with a runaway or juvenile with a warrant of custodial protection, and what information should be included (i.e. observations about appearance, injuries, etc.)? What happens to these reports?<sup>52</sup>

In an ideal situation, these issues would not even arise. Officers would approach a youth suspected to be a runaway or subject to a warrant of custodial protection in a supportive rather than confrontational manner; the youth would appropriately engage in necessary fact-finding questioning with the officer; the youth would voluntarily agree to be transported home, to a shelter, or to the court, as appropriate; the youth would stay home, at the shelter, or at court, in order for the matter to be resolved; and the youth would engage in subsequent services.

However, in the majority of cases, interactions do not transpire so smoothly; youth often give false names, phone numbers, and addresses; argue with officers; or even become violent.<sup>53</sup>

Almost by definition, juvenile status offenders are particularly unlikely to comply with voluntary police questioning into non-criminal behavior. It is doubtful at best that youth will freely choose to be taken by police to homes they have run away from or to sit in a juvenile court clerk's office while waiting for child requiring assistance applications to be filed. Juvenile status offenders lack

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<sup>52</sup> These issues were identified during individual conversations with various professionals. See E-mail from Jessica Berry, Staff Attorney, Children's Law Center of Mass. (Dec. 4, 2012) (on file with author); Kilkelly, *supra* note 4; Sampson, *supra* note 41; and Interview with Seth Stoughton, Climenko Fellow, Harvard Law School, in Cambridge, Mass., (December 13, 2012). Seth Stoughton was a police officer/state investigator in Florida for approximately seven years and is now a legal scholar focusing on law enforcement practices.

<sup>53</sup> Sampson, *supra* note 41.

future orientation, have a propensity for reckless behavior,<sup>54</sup> and probably do not want the “help” of the police or juvenile courts in the way the system is able to provide it. Yet, “status offenses...do not sufficiently raise societal protection concerns that would warrant typical arrest procedures.”<sup>55</sup> This system is designed to help a class of juveniles who are so often resistant to intervention, and police officers need safe and practical protocols available to them in order to make appropriate use of this system. This tension gives rise to a challenging dilemma for policy-makers attempting to both decriminalize and provide sufficiently robust responses to risky adolescent behavior.

Finally, a primary function of the police on the front lines of the child requiring assistance system is to keep these children safe by getting them off the streets, yet the new statute has the potential to severely restrict law enforcement’s ability to do just that.<sup>56</sup> Under the plain reading of the statute, a police officer dealing with a suspected runaway who refuses to voluntarily participate in statutorily provided procedures is faced with only undesirable options: (1) let the child go and remain on the run, likely in high-risk conditions; (2) violate the letter of the statute by taking him involuntarily to the police station for fact-finding and facilitation of contacting parents and/or a shelter; or (3) initiate relevant charges, such as trespass or disorderly conduct, and arrest the youth, thereby actually facilitating his entry into the criminal side of the juvenile justice system.<sup>57</sup> Particularly when a youth’s safety is implicated, an officer may likely consider the third option to be the best in the moment, even if he would not typically file charges for the behavior at hand under ordinary circumstances.<sup>58</sup>

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<sup>54</sup> Shubik, *supra* note 45 at 19-21.

<sup>55</sup> Kendall, *supra* note 21 at 5.

<sup>56</sup> Mass. State House, *supra* note 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

### III. Police Procedures in Florida and New York

In considering the extent of the reform necessary, the committee that drafted the bill looked to best practices in other states and ultimately modeled the FACES statute on legislation from Florida, Illinois, New Jersey, and, particularly, New York.<sup>59</sup> However, as police procedure information is not readily available and practices vary significantly by department and jurisdiction, the day-to-day practices of law enforcement agencies in these states were not reviewed in the process of developing the new law.<sup>60</sup> The following is a discussion of relevant portions of law and standard police procedures in dealing with juvenile status offenders in Florida and New York.<sup>61</sup>

#### *Florida*

Florida has a non-punitive, serviced-based system of dealing with “families and children in need of services.”<sup>62</sup> Nonetheless, children in need of services may be “taken into custody”<sup>63</sup>

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<sup>59</sup> Padien, *supra* note 3.

<sup>60</sup> Fernandez, *supra* note 51.

<sup>61</sup> Florida and New York were chosen for this paper because they were the two states most looked to in the development of the FACES statute and also are well-regarded as having “promising practices” in the area of juvenile status offenders generally. *See* Kendall, *supra* note 21 at 5-7.

<sup>62</sup> *See* Fla. Stat. § 984.04 (2012). A “child in need of services is defined as:

[A] child for whom there is no pending investigation into an allegation or suspicion of abuse, neglect, or abandonment; no pending referral alleging the child is delinquent; or no current supervision by the Department of Juvenile Justice or the Department of Children and Family Services for an adjudication of dependency or delinquency. The child must also, pursuant to this chapter, be found by the court:

(a) To have persistently run away from the child’s parents or legal custodians despite reasonable efforts of the child, the parents or legal custodians, and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts shall include voluntary participation by the child’s parents or legal custodians and the child in family mediation, services, and treatment offered by the Department of Juvenile Justice or the Department of Children and Family Services;

(b) To be habitually truant from school, while subject to compulsory school attendance, despite reasonable efforts to remedy the situation pursuant to ss. 1003.26 and 1003.27 and through voluntary participation by the child’s parents or legal custodians and by the child in family mediation, services, and treatment offered by the Department of Juvenile Justice or the Department of Children and Family Services; or

(c) To have persistently disobeyed the reasonable and lawful demands of the child’s parents or legal custodians, and to be beyond their control despite efforts by the child’s parents or legal custodians and appropriate agencies to remedy the conditions contributing to the behavior. Reasonable efforts may include such things as good faith participation in family or individual counseling.

“by a law enforcement officer when the officer has reasonable grounds to believe that the child has run away” or “is absent from school without authorization.”<sup>64</sup> Similar to the Massachusetts FACES statute, the Florida law requires officers who take children into custody under this provision take the child to the appropriate parent or guardian or to an approved facility; however the language imposes no restrictions on the officer’s ability to first take the child by the police station.<sup>65</sup> In fact, the provision also allows for the officer to take the child to the Department of Juvenile Justice, where the child can be held as deemed appropriate by the department representative.<sup>66</sup> Furthermore, a child who has been taken into custody in Florida may even be held involuntarily in a shelter setting, albeit under narrow circumstances.<sup>67</sup>

According to the Executive Director of the Florida Chiefs of Police Association, all “juvenile custody orders,” which apply to dependent children, children in need of services, and delinquent children are entered into the Florida warrant management system, Florida Crime Information Center (FCIC), as well as NCIC, which are restricted for law-enforcement purposes only.<sup>68</sup> Entries in these databases are easily confirmed by officers in the field via radio.<sup>69</sup> In addition, because of the availability of records, officers are generally able to easily determine where a child’s home is via radio; however state policy allows officers to take the child in need of services to the police station if necessary, but they are not booked or subject to criminal

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Fla. Stat. § 984.03 (2012).

<sup>63</sup> For the purposes of this provision, “[t]aken into custody” means the status of a child immediately when temporary physical control over the child is attained by a person authorized by law, pending the child’s release, detention, placement, or other disposition as authorized by law.” *Id.*

<sup>64</sup> Fla. Stat. § 984.13 (2012).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Fla. Stat. § 984.14 (2012).

<sup>68</sup> Email from Chief Amy Mercer, Exec. Dir., Fla. Chiefs of Police Ass’n, to Chief Wayne Sampson, Exec. Dir., Mass. Chiefs of Police Ass’n, (Dec. 19, 2012, 11:57 EST) (on file with author).

<sup>69</sup> *Id.*

investigations.<sup>70</sup> If possible and appropriate, law enforcement prefers for parents to pick up the child, in which case, release is arranged at a mutually convenient location such as the Juvenile Assessment Center.<sup>71</sup> This may occasionally require having the youth wait at the police station, especially when an officer's duties require that she return to service before the parent can arrive for pickup.<sup>72</sup>

When a child in need of services is taken into custody by police in Florida, the officer must write an incident report which includes information such as attempts made to contact parents and the probation officer and observations about appearance or injuries.<sup>73</sup> These reports are filed in central secure police records, "and are exempt from public records in most instances."<sup>74</sup> Records are also routed to juvenile authorities such as the Department of Juvenile Justice and/or court, as required.<sup>75</sup>

Finally, law enforcement officers in Florida are permitted to search children in need of services within the boundaries of established Fourth Amendment law before transporting them, but as a general practice, they do not handcuff youth who are being taken into custody on a child in need of services custody order.<sup>76</sup> These juveniles are, however, transported in the back of the vehicle "for their safety and the safety of the officer."<sup>77</sup> If a suspected child in need of services resists, obstructs, or opposes a police officer who is lawfully attempting to take the child into

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

custody, the child is subject to criminal charges.<sup>78</sup> Police departments do not track how often charges are actually under these circumstances.<sup>79</sup>

### ***New York***

New York was one of the first states to establish a separate statutory classification for juvenile status offenses, called “Persons in Need of Supervision” (PINS), under Article 7 of the Family Court Act.<sup>80</sup> The law provides that, when an officer “reasonably conclude[s]” that a youth is a runaway, the officer is to take the child home or to an appropriate facility, but no restrictions are made under this section as to police authority to first take the youth by the police station to contact parents or make arrangements for placement in a shelter.<sup>81</sup> However, in similar language to relevant portions of the Massachusetts FACES statute, a subsequent provision does stipulate that after taking a PINS youth into custody, an officer must take the child home or “directly, and without first being taken to the police station house,” to the designated facility; although the subsection goes on to detail an exception by which the officer may take the youth to a designated location for questioning as necessary.<sup>82</sup> The distinction is not entirely clear but seems to be related to whether the officer is simply transporting a suspected runaway or whether the youth is considered to be “in custody.”

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> A person in need of supervision is a:

person less than eighteen years of age who does not attend school in accordance with the provisions of part one of article sixty-five of the education law or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care, or other lawful authority, or who violates the provisions of section 221.05, 230.00, or 240.37 of the penal law.

N.Y. Fam. Ct. Act § 712 (2012).

<sup>81</sup> *See* N.Y. Fam. Ct. Act § 718 (2012).

<sup>82</sup> N.Y. Fam. Ct. Act § 724 (2012).

New York law does also prohibit the detention of a person in need of supervision in a secure facility,<sup>83</sup> but it allows police to “apprehend, restrain, and return” PINS youth who run away from placement in a facility.<sup>84</sup> The statute also allows for arrest warrants to be issued in certain circumstances.<sup>85</sup> Finally, the New York Family Court Act has a separate provision outlining the maintenance of police records for persons in need of supervision, which provides in relevant part that separate records must be maintained and withheld from public inspection.<sup>86</sup>

Despite its focuses on decriminalization and service provision, the New York PINS system is identified as being “quasi-criminal in nature.”<sup>87</sup> Per reports from the Executive Director of the New York Chiefs of Police Association, New York officers “absolutely do [hand]cuff any runaway brought in” for officer safety purposes.<sup>88</sup> He further noted that if a suspected runaway is under 16, it is common practice for the officer to take the youth back to the station to contact the parents, but the child would not be booked or held in a locked area of the station.<sup>89</sup> Interestingly, at age 16, youth fall under the adult standards of New York law, so police take no action on runaway complaints for youth 16 or older,<sup>90</sup> despite the PINS system’s continued jurisdiction over youth with open cases until the age of 18.<sup>91</sup> Moreover, the relevant overview section of the New York Civil Practice Guide recognizes that the PINS statute has a twofold purpose of (1) addressing quasi-criminal behavior which “can result in a child’s placement away from home, stigmatization, and other deprivations of liberty” and (2) providing

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<sup>83</sup> N.Y. Fam. Ct. Act § 720 (2012).

<sup>84</sup> N.Y. Fam. Ct. Act § 718 (2012).

<sup>85</sup> See N.Y. Fam. Ct. Act § 725 (2012) and N.Y. Fam. Ct. Act § 738 (2012). These provisions even allow for warrants to be issued for the person who is legally responsible for the PINS youth’s care in these situations. *Id.*

<sup>86</sup> N.Y. Fam. Ct. Act § 784 (2012).

<sup>87</sup> See N.Y. Civil Practice: Fam. Ct. Proceedings § 25.01[4][b] (2012).

<sup>88</sup> Telephone Interview by Chief Wayne Sampson with Chief John Grebert, Exec. Dir., N.Y. Chiefs of Police Ass’n (Dec. 20, 2012).

<sup>89</sup> *Id.* Additional clarification is needed on this topic as related to the statutory provision prohibiting youth in custody from being taken to the station. See N.Y. Fam. Ct. Act § 724 (2012).

<sup>90</sup> Grebert, *supra* note 88.

<sup>91</sup> N.Y. Fam. Ct. Act § 712 (2012).

“appropriate supervision or services” for adolescents whose behavior has not yet risen to the criminal level.<sup>92</sup> This discussion reaches the heart of the dilemma faced by policy-makers and suggests that sacrifices must be made on both sides in order to maintain a balanced and operational system.<sup>93</sup>

#### **IV. Recommendations**

Unfortunately, the questions raised in Part II of this paper are not easily answered in full, even after an initial review of other states’ procedures. The development of optimal police processes under the new law will require further examination of these practices in states with similar restrictions. However, there are certain guidelines that Massachusetts should consider as it implements and potentially amends the FACES statute.

##### ***Reduce Criminal Connotations in Language Used in Police Training and Communications***

A simple yet potentially meaningful step available to policy-makers and police departments would be to change the language associated with the custodial protection of juvenile status offenders to have a less criminal implication. The word “warrant” itself connotes “arrest.”<sup>94</sup> Utilizing more neutral or even more supportive sounding terms will remind officers that these are not criminal offenders and that they are operating in a separate system with these youth. While Florida’s use of the label “juvenile custody orders” is not specific to status offenses, it nonetheless emphasizes that juveniles generally are different and sets a more rehabilitative baseline for how officers should think about these cases.

##### ***Develop Clear Guidelines for Searches and Transporting Procedures***

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<sup>92</sup> N.Y. Civil Practice *supra* note 87.

<sup>93</sup> *See Id.*

<sup>94</sup> Stoughton, *supra* note 52.

The FACES statute states that a child requiring assistance or a child in custodial protection “may not be confined in shackles or similar restraints.”<sup>95</sup> Additional language is clear that these juveniles may not be “arrested,” and the intent behind this is unambiguous; however, the statute does not explicitly address whether these restrictions include handcuffing youth for safety purposes.<sup>96</sup> Furthermore, the statute is entirely silent as to searches.<sup>97</sup> In order to avoid confusion and reduce the risk for potential liabilities, the state should develop a uniform protocol outlining what level of searches and what transporting procedures are constitutionally permitted and fit within the spirit of the statute but maximize safety precautions. This should include discussion of conditions in which handcuffing children requiring assistance may be appropriate during transport (i.e. if the child appears to be a danger to himself, the officer, or awaiting placement staff; or if the patrol car has no internal safety barrier).

***Allow Officers to Take Children Requiring Assistance to Police Stations in Select Circumstances***

The FACES statute should be amended to permit officers to take runaways or youth who are in custodial protection to police stations under narrow circumstances as is allowed by Florida and New York law. Both systems, but particularly that of New York, should be further investigated in order to understand the situations in which these states have determined transport to the stations to be appropriate and constitutional. Furthermore, protocols should plainly state that anytime a child requiring assistance is taken to a police station, he should be taken voluntarily; should never be booked; and should remain in unsecured parts of the facility, potentially in an area designated for such purposes and set-up to invoke less of a criminal feeling.

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<sup>95</sup> Mass. Gen. Laws ch. 119, § 39G-39H (2012).

<sup>96</sup> See Mass. Gen. Laws ch. 119, § 39E-39I (2012).

<sup>97</sup> See *Id.*

***Maintain a Statewide Law Enforcement Database for Keeping Track of Warrants of Custodial Protection and Include Runaway Reports in NCIC***

In order for law enforcement to carry out their duties, officers must have easy access to a workable information tracking system. This is particularly relevant in smaller and more rural communities that do not have the personnel backup available in larger police departments.<sup>98</sup> Primary concerns behind the restrictions in the legislation is the potential stigma and future implications associated with a youth's status offenses being maintained in databases that are publicly available<sup>99</sup> or information from child requiring assistance cases being inappropriately introduced into juvenile delinquency cases.<sup>100</sup> However, these concerns can be mitigated while still meeting the practical needs of the police by either (1) creating a separate tracking system for warrants of custodial protections that is only accessible by law enforcement; or (2) developing a process to automatically expunge non-criminal records from WMS upon the satisfaction of the warrant of custodial protection or the termination of the child requiring assistance proceedings. In addition, the NCIC is highly restrictive, and inputting runaway records into NCIC would not give rise to the types of concerns mentioned above,<sup>101</sup> yet the use of the system is critical for locating runaway youth who have travelled, or been taken, across state lines.

***Acknowledge the Potential for Increased Criminalization Related to These Restrictions and Develop Guidelines for Officer Consideration in Challenging Cases***

It may not be appropriate for police departments to develop universal protocols detailing specific procedures to be utilized if a runaway refuses to be transported voluntarily by an officer. However, Massachusetts should develop a set of standards to which officers can refer when making in-the-moment decisions about how to deal with a youth in potentially unsafe

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<sup>98</sup> Mass. State House, *supra* note 5.

<sup>99</sup> *Id.*

<sup>100</sup> Fernandez, *supra* note 51.

<sup>101</sup> See NATIONAL CRIME INFORMATION CENTER (NCIC), <http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm> (last visited Dec. 20, 2012).

circumstances who is engaging in borderline or low-level criminal behavior that would generally not require arrest. These guidelines should list factors to consider, if known, including level of criminal behavior; severity of safety concerns; risk of re-offense; potential to appear in court on a summons; number of previous contacts with the police department; and officer's ability to contact parents regardless of the youth's compliance.

### **Conclusion**

In conclusion, the Massachusetts CHINS system was in severe need of reform, particularly as to the availability of services both through and outside of the court system. The new FACES statute is largely true to the drafters' vision of decriminalization and eliminating barriers between families and necessary treatment. However, within this supportive framework, a number of unanswered questions remain as well as the possibility for concerning practical implications, principally as related to police procedures in dealing with runaway youth. Police departments and policy-makers must be mindful of these potential consequences as they seek to modify law enforcement protocols and even amend the statute in order to most fully strike a balance between efforts to decriminalize these adolescent behaviors and realistic practices for dealing with this unique and complex population.