

## **An Act Promoting Diversion of Juveniles to Community Supervision and Services (HD.3409/SD.1907)**

*(Lead Sponsors: Senator Creem and Representative Fluker-Oakley)*

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Judicial pre-arraignment diversion, passed in 2018, allows judges to divert young people to community-based interventions prior to arraignment at which time a juvenile record is created. Judicial diversion allows for a neutral party to decide if both the youth and public safety are better served through alternatives to the juvenile justice system.

Despite progress since 2018, Black and Latinx youth are still over-represented at every decision point of the juvenile justice system. More troubling, **children in DCF custody (care and protection and CRA) make up 0.6% of the Massachusetts child population, but represent over 50% of youth detained by DYS and 30% of youth committed to DYS. Girls in DYS are twice as likely as boys to be DCF-involved.**

The law currently excludes several offenses, including low-level conduct as ineligible for diversion. Allowing judges the discretion to divert cases to community-based alternatives allows the courts to hold young people accountable in through interventions that are more effective in reducing future offending. The collateral consequences of court processing are harsh and long term. Through diversion the courts can still hold young people accountable without the risk of detention or an adjudication.

Expanding list of offenses that are eligible for judicial consideration allows an individualized hearing, while maintaining the discretion of a judge to allow or reject diversion for a youth. The law allows victims and prosecutors a chance at rebuttal in the 14 days of the hearing prior to a judge moving forward with diversion. Examples of cases ineligible for judicial diversion:

*A foster youth placed in group home who had a history of trauma from placement in multiple non-LGBTQ affirming foster and congregate care, and DCF not being thoughtful about identifying affirming homes for LGBTQ youth. While in crisis, her placement called 911 rather than a mental health crisis team. She was restrained and ambulance driver was taunting her on her learning disability, and she spit at the driver and was charged with assault and battery on a public servant.*

*Objects from Massachusetts cases qualifying as a "dangerous weapon" and ineligible for judicial diversion: lotion, cell phone, eggs, sneakers, slurpy, backpack, soda can, snow ball, food, water balloon, plastic water bottle, spraying fire extinguisher foam on another child's boots.*

According to a Harvard Law study of racial disparities in Massachusetts' courts, "[one factor—racial and ethnic differences in the type and severity of initial charge—accounts for over 70 percent of the disparities in sentence length.](#)" These charging disparities also impact Black and Latinx youth's access to judicial diversion.

Additionally, the law prohibits judicial diversion for offenses, for which adults would be subject to a mandatory incarceration of five years or more. Some of these offenses have concurrent district and superior court jurisdiction, where the same offense tried in a district court would not be subject to the five year or more mandatory minimum sentence. However, in the juvenile court, if a youth is not indicted for these offenses, they would still be ineligible for diversion. The statute already excludes Youthful Offender indictments from diversion, which meets the legislative intent of this exclusion.

## Bill Summary

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Judicial Diversion is statutorily prohibited if a youth is (1) indicted as a youthful offender; (2) charged with an offense that an adult would be sentenced to a greater than five-year state prison sentence; (3) charged with an offense ineligible for a Continued Without a Finding disposition; and (4) an offense ineligible for conversion to a civil infraction.

- Certain offenses in the (adult) criminal justice system have concurrent District and Superior Court jurisdiction. In those cases there is discretion if the same charge will have a state prison sentence or a county house of correction sentence of less than 2½ years. The Youthful Offender statute in the juvenile court operates similarly to this discretion in the adult system. This bill allows cases with concurrent jurisdiction to be eligible for diversion unless the youth is indicted on those charges.
- Certain offenses that are ineligible for civil infraction diversion, may still be considered low-level offenses where a community-based intervention would be more effective in addressing the behavior than court processing, particularly those that involve a wide range of severity:
  - Assault (& battery) with a dangerous weapon (Ch. 265 §15A(b) and §15B(b)): These tend to be cases where the “dangerous weapon” technically meets the requirements under the law but do not involve injury or are just plain ridiculous (such as chips, dirt from a flower pot, etc.).
  - Assault and battery on a public servant (Ch. 265 §13D): That is the most prevalent charge tacked onto charges, particularly with youth of color.
  - First offense of assault on a family/household member (Ch. 265 §13M (a))
  - Negligent Operation of a MV and use without authority (Ch. 90 §24(2)(a))
  - The 2018 law already allows violations of Ch.268 §13A and §13C to be eligible for judicial diversion