An Introduction to G.L. c. 258E, Harassment Prevention Orders

Administrative Office of the Juvenile Court

Harassment Prevention Mediation Training
Friday, June 24, 2022

258E – Brief History and Legislative Intent

- Enacted in 2010 (after decade-long debate) to address absence of civil protective orders for victims of sexual assault and stalking, the violation of which would be an arrestable/criminal offense.
- Prior to 258E, a victim of sexual assault or stalking who did not date, live with and/or was not related to their attacker/stalker could not get a 209A, Abuse Prevention Order.

258E – Brief History and Legislative Intent

- Since enactment in 2010, law has faced a barrage of criticism and appeals due to plaintiffs seeking 258E orders for relief for conduct that is frivolous, or that does not meet the legal definition of 'harassment,' or that concerns constitutionally protected speech.
- The lay/colloquial definitions of the word "harassment" and "intimidation" are often much broader than the 258E definition of harassment. This is confusing for members of the public, school, police, etc.
- Other than granting jurisdiction to the Juvenile Court for any orders where the defendant is under the age of 18, the 258E law makes no special considerations for juveniles and is essentially a duplicate of the 209A, Abuse Prevention Law.

258E in General

- The Juvenile Court has jurisdiction over Harassment Prevention Order cases when the defendant is under the age of18.
- Location of plaintiff's residence controls venue.
- An order may be issued ex *parte*, without prior notice to the defendant, if there is a substantial likelihood of immediate danger of harassment.
- Defendant then entitled to notice and a hearing within 10 business days.
- A violation of an order can serve as the basis for criminal or delinquency charges.
- A judge has the authority to expunge the record of a c. 258E order only "in the rare and limited circumstance that the judge has found through clear and convincing evidence that the order was obtained through fraud on the court." *J.S.H. v. J.S.*, 91 Mass. App. Ct. 107, *review denied,* 477 Mass. 1103, (2017).

258E s1- Definitions in general

- **Harassment** is defined by statute in **one of two** ways:
- **First** (and most common type of HA request we encounter):
  - **Three or more acts**
  - of willful and malicious conduct
  - aimed at a specific person
  - committed with the intent to cause fear, intimidation, abuse or damage to property
  - **and** that does in fact cause fear, intimidation, abuse or damage to property

258E s1- Definitions in General (continued)

- **Second** type of 'harassment' is **an act** that by force, threat, or duress causes another to involuntarily engage in sexual relations ("sexual relations" is not further defined; Appeals Court notes overlap between this definition and definition below) **OR**
- **an act** that constitutes a violation of one or more of the following enumerated criminal offenses:
  - Rape (c. 265, s 22), rape of a child under 16 (force)(c. 265, s 22A), statutory rape (c. 265, s 23);
  - Assault with intent to commit rape (c. 265, s 24), assault of a child with intent to commit rape (c. 265, s 24B);
  - Kidnapping (c. 265, s 26), stalking (c. 265, s 43);
  - Criminal Harassment (c. 265, s 43A);
  - Drugging for sexual intercourse (c. 272, s 3); and/or
  - Ind. assault and battery under 14 (c. 265, s 13B), ind. assault and battery person with intellectual disability (c. 265, s13F), ind. assault and battery 14 and over (c. 265, s 13H).

258E s1- More Definitions

- "**Abuse**", as defined in c.258E s1, is attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm
- "**Malicious**", as defined in c.258E s1, is characterized by cruelty, hostility or revenge

Since 2012, many appellate cases have **<u>further defined and narrowed</u>** this first definition of harassment

Timeline of Events in a 258E Case

- Plaintiff files complaint with accompanying affidavit alleging harassment.
- The court may issue an ex parte temporary order without notice to the defendant if there is substantial likelihood of immediate danger of harassment to plaintiff. Order typically lasts for ten (10) business days.
- The defendant is entitled to notice and a full hearing within ten (10) business days.
- After hearing, the court can issue a harassment prevention order not to exceed one (1) year with conditions specially authorized by the statute.
- The court may extend the order, upon motion by the plaintiff, for such additional time as it deems necessary to protect plaintiff from harassment.
- The order can be modified or terminated at any time by the request of either party.
- The court has authority to expunge the record of the order in rare circumstances where there has been a fraud perpetrated on the court.

The 258E Hearing

- **Preponderance of the evidence** is the standard used when determining whether to issue an order
- Plaintiff bears burden of proof
- Rules of evidence do not strictly apply, nor does confrontation clause, but due process requires an opportunity to be heard, for *reasonable* questioning/cross
- An adverse inference may be drawn from a defendant's failure to testify. *Frizado*, at 596; *A.P. v. M.T.,* at 166 (2017)
- Parties are not entitled to court appointed counsel
- All hearings as well as records and documents are confidential and not open to the public.

Conditions that can be Imposed on the Defendant when an Order is Issued

- When an order is issued, the court can require the defendant to comply with the following conditions:
  - (i) refrain from abusing or harassing the plaintiff;
  - (ii) refrain from contacting the plaintiff, unless authorized by the court;
  - (iii) remain away from the plaintiff's household or workplace; and
  - (iv) pay the plaintiff monetary compensation for the losses suffered as a direct result of the harassment; provided, however, that compensatory damages shall include, but shall not be limited to, loss of earnings, out-of-pocket losses for injuries sustained or property damaged, cost of replacement of locks, medical expenses, cost for obtaining an unlisted phone number and reasonable attorney's fees.

Motion to Modify or Terminate

- A judge may modify or terminate a 258E order at either party's request. See 258E, § 3(e)
- What is the burden of proof on the moving party?
- *MacDonald* case addressed motion to terminate permanent 209A; there the SJC held that the moving party must demonstrate by **clear and convincing** evidence that there has been "a significant change in circumstances since the entry of the order that justifies termination of the order."
- A change in circumstances "must involve more than the mere passage of time, because a judge who issues a permanent order knows that time will pass. Compliance by the defendant with the order is also not sufficient alone to constitute a significant change in circumstances, because a judge who issues a permanent order is entitled to expect that the defendant will comply with the order."
- Importantly, a "motion to terminate an order is not a motion to reconsider the entry of a final order, and does not provide an opportunity for a defendant to challenge the underlying basis for the order or to obtain relief from errors correctable on appeal."

Possible Mediator Intercept Points

- After the plaintiff's complaint has been submitted and, his/her affidavit reviewed by the court, but before a full hearing.
  - Likely the most common point for mediator intervention. Both parties, and likely family, will be present.
- Any time one party seeks to modify or terminate the order.
  - One or both parties believe that there have been some change in circumstances. May be an opportunity to reach an amicable resolution.
- At the expiration of an order where the plaintiff seeks to extend the order.
  - The natural end date for the order may be an opportunity to resolve without extending the order.

Most Common Type of HA Case in Juvenile Court

- **The First,** and most common type of HA request we encounter, and most commonly appealed, 258E defines harassment as:
  - Three or more acts
  - of willful and malicious conduct
  - aimed at a specific person
  - each act committed with the intent to cause fear, intimidation, abuse or damage to property
  - **and** that does in fact cause fear, intimidation, abuse or damage to property.

Example 1: Disgruntled Defendant & Police Officer Issue: Speech as a Predicate Act

- Some years after an arrest, defendant subjected police officer to extension of the middle finger(s) outside a bar, swear words, drove by his house (leaned on horn) and extended middle finger on two occasions
- SJC was asked to review whether 258E was unconstitutionally overbroad and regulated **protected speech** (extension of the middle finger was determined to be speech)
- SJC held that statute is not overbroad and that the only speech 258E regulates is **non-protected speech**, i.e., **true threats** and **fighting words**

O'Brien v. Borowski, 461 Mass. 415 (2012)

Example 1: Disgruntled Defendant & Police Officer
Issue: Speech as a Predicate Act

- The definition of a "**true threat**" has been adopted to help distinguish between words that literally threaten but have an expressive purpose such as political hyperbole, and words that are intended to place the target of the threat **in fear**, whether the threat is veiled or explicit."
- SJC held that "**fear**" in this context means "**fear of physical harm or fear of physical damage to property**."
- Fear of economic harm, embarrassment, or fear of other types of harm is insufficient

O'Brien v. Borowski, 461 Mass. 415 (2012)

Example 1: Disgruntled Defendant & Police Officer Issue: Speech as a Predicate Act

- A **true threat** does not require "an explicit statement of an intention to harm the victim as long as circumstances support the victim's fearful or apprehensive response." Nor need a true threat threaten imminent harm; sexually explicit or aggressive language "directed at and received by an identified victim may be threatening, notwithstanding the lack of evidence that the threat will be immediately followed by actual violence or the use of physical force." *O'Brien at 424, citing Commonwealth v. Chou,* 433 Mass. 229, 236 (2001)

Compare

- To qualify as a **true threat**, a threat must demonstrate a serious expression of an intent to commit an act of unlawful violence to a person. Threats to do other things do not qualify. (*A.R. v. L.C.*, 93 Mass. App. Ct. 758 (2018)

O'Brien v. Borowski, 461 Mass. 415 (2012)

Example 1: Disgruntled Defendant & Police Officer Issue: Speech as a Predicate Act

- The **"fighting words"** exception to the First Amendment is limited to words that are likely to provoke a fight: **face-to-face** personal insults that are so personally abusive that they are plainly likely to provoke a violent reaction and cause a breach of the peace
- Exception for **fighting words**, allowing an instance of speech to support a harassment prevention order, is limited to face to face personal insults, **directed to the plaintiff**, and inherently likely to provoke a violent reaction. *C.E.R. v. P.C.*, 91 Mass. App. Ct. 124 (2017)(does not meet definitions where landlord *overheard* tenants talking about her, using vulgar words about her)

O'Brien v. Borowski, 461 Mass. 415 (2012)

The plaintiff must prove the following:

- The defendant was motivated by cruelty, hostility, or revenge,
- willfully committed three or more acts (which can be conduct or speech),
- aimed at the complainant,
- each act done with the intent to cause the complainant to experience fear (of physical harm or property damage), intimidation, abuse (defined as attempting to cause or causing physical harm to another or placing another in fear of imminent serious physical harm) or damage to property
- which, *considered together*, did in fact cause the complainant fear (as defined), intimidation, abuse (as defined), or damage to property.

If the plaintiff is relying on speech alone

- If the conduct is speech, only true threats or fighting words qualify.
- The plaintiff need only show that he/she *subjectively* experienced fear, intimidation, abuse, without having to satisfy a "reasonable person" test.
- In determining whether these three acts did "in fact cause fear, intimidation, abuse or damage to property," the fact finder must look to the *cumulative pattern* of harassment, and need not find that each act in fact caused fear, intimidation, abuse, or damage to property.

Example 2: Little League Coach vs. Little League Parent Issue: Conduct Directed at Others & Fear of Economic Loss

- Defendant (1) threatened on one occasion to punch/assault assistant coach, (2) sent an "unflattering email message" about assistant coach to *another* person, (3) "verbally attacked" and threatened to have him thrown off team in front of others.
- SJC found even if first incident (threat to punch) was a predicate act, the other two were insufficient.
- SJC noted to support issuance of harassment protection order, **the target of harassment must have experienced an entire course of harassment**, the whole of which caused fear or intimidation amounting to more than a fear of economic loss, of unfavorable publicity, (or in this case, to have him thrown off the team)

Seney v. Morhy, 467 Mass. 58 (2014)

Example 3: ex-boyfriend and ex-girlfriend
Issue: Veiled Threats Coupled with Conduct

- HPO appropriate where ex-boyfriend texted ex-girlfriend "she should be scared, " called her a "bitch," said he knew where to find her at yoga, showed up at yoga studio, further texted that she was "fucked," and called her a "slut" and that "this will end badly" for her, followed her to work and would not leave.

JC v. JH, 92 Mass. App. Ct. 224 (2017)

Example 3: Also ex-boyfriend and ex-girlfriend
Issue: Veiled Threats Coupled with Conduct

- Defendant made repeated unwanted calls, asking to see her, came to plaintiff's workplace twice or more, said odd things, yelled, parked next to her car, sufficient basis for HPO.

JS v. CHL, 95 Mass. App. Ct. 1104 (2019)

Example 4: Sixth Grade Female vs. Sixth Grade Male Issue: Focus Defendant's Intent

Male sixth grade student made:

(1) A sexual comment regarding female sixth grade student's breasts during video chat, which was observed and videotaped by their classmate

(2) A threat to make female student's life a "living hell" if she showed the video to anyone, and

(3) An admission to female student that he told a friend he wished to punch her in her breasts

(4) On another occasion, female student overheard male student retelling of a sexual fantasy about her in front of other students

Juvenile Court issued order based on 1st three, and defendant appealed…

A.T. v. C.R., 88 Mass. App. Ct. 532 (2015)

Example 4: Sixth Grade Female vs. Sixth Grade Male Issue: Focus Defendant's Intent

- Five Appeals Court Justices split; three upheld and two dissented
- Majority noted judge made clear in his findings he credited the plaintiff's testimony (whether the trial judge made findings and the sufficiency of them is an oft-repeated issue)
- Majority found that male's public retelling of a sexual fantasy about the female could have been a 4th predicate act
- Because it is impossible to look into someone's mind to determine his intent, fact finders are instructed to examine the defendant's actions and all of the surrounding circumstances and then to draw reasonable inferences to determine what was the defendant's intent. See, e.g., *Commonwealth v. Blake*, 409 Mass. 146, 150, 564 N.E.2d 1006 (1991).
- In this case, the defendant's repeated and escalating harassment of the plaintiff, each time involving additional classmates, and then persisting after adult intervention, would reasonably support an inference that he intended to cause the plaintiff fear and intimidation

A.T. v. C.R., 88 Mass. App. Ct. 532 (2015)

Example 4: Sixth Grade Female vs. Sixth Grade Male Issue: Focus Defendant's Intent

- In this case, the defendant's threat to make the plaintiff's life "a living hell" also falls within the court's definition of a "true threat".
- A true threat does not require 'an explicit statement of an intention to harm the victim as long as circumstances support the victim's fearful or apprehensive response.'

A.T. v. C.R., 88 Mass. App. Ct. 532 (2015)

Example 4: Sixth Grade Female vs. Sixth Grade Male Issue: Focus Defendant's Intent

- Decision stated that the threat to make the plaintiff's life a "living hell" also constituted "intimidation."
- "Intimidation" has a meaning other than "fear" and should be separately addressed. In so doing, the definitions supplied by the courts in other contexts are useful. See *Commonwealth v. Gordon,* 44 Mass. App. Ct. 233, 235, 694 N.E.2d 2 (1998) (*Gordon*) ("Webster's Third New International Dictionary 1184 [3d ed. 1993] defines intimidate as 'to make timid or fearful: inspire or affect with fear).
- The decision noted that the Supreme Judicial Court had similarly defined the concept of intimidation as 'putting in fear for the purpose of compelling or deterring conduct.' ... Neither definition includes the requirement that to intimidate another, an individual must somehow place that person in fear or apprehension of actual harm."

A.T. v. C.R., 88 Mass. App. Ct. 532 (2015)

Example 5: The Rap Song
Issue: Three or More Acts

- Two high school seniors sought harassment protections orders against male student after male student created rap song, which was posted on social media, that referenced acts of violence and sexual violence he wanted to inflict upon students. The District Court issued harassment protection orders. Male student appealed.
- **Holding:** The Supreme Judicial Court held that male student's act of performing a rap song and posting it on the internet did not constitute three or more acts of harassment aimed at a specific person.
- One continuous act cannot be parsed into its constituent parts.

F.K. v S.C, 481 Mass 325 (2019)

Example 6: Fight at the Mall
Issue: Three or More Acts

- The defendant and two other girls confronted the plaintiff at a shopping mall, told her to go to the parking lot because they wanted to fight her. They followed her into a nearby bathroom, pushed her back inside when she tried to leave, locked the door, and then punched, kicked, and otherwise physically harmed her. The defendant smashed the plaintiff's head into the wall causing her to bleed and continued to punch her. When security intervened, and while the other girls were being removed from the bathroom, the defendant "threatened to stab the plaintiff if she told anyone what had happened".
- Where the defendant engaged in one continuous event over a very brief period (10 minute period) the HPO should not have issued. One continuous act cannot be divided into multiple discrete acts in order to satisfy the requirements. Harassing conduct that occurs within a very short period of time has been held to constitute one continuous act of harassment in certain circumstances.

Example 7: Peanut Allergy Harassment
Issue: Three or More Acts

- The then ten-year-old plaintiff and twelve-year-old defendant were classmates in a combined fifth and sixth grade classroom. The plaintiff's affidavit accompanying his complaint for protection alleged three acts of harassment as follows:
  - (1)Outside at recess, the defendant asked the plaintiff if he was allergic to nuts, and when the plaintiff said he was, the defendant blew nut dust in the plaintiff's face.
  - (2)The plaintiff went inside to use the bathroom, and when he exited, the defendant again asked the plaintiff if he was allergic and blew nut dust in the plaintiff's face.
  - (3)When the plaintiff then went into the classroom and sat down at his desk, the defendant threw nuts at him.
- These three acts would have qualified EXCEPT there was insufficient evidence to support that the third act occurred.

Important Issues Specific to Juvenile Court for Mediators to Know

- Many HA cases in Juvenile Court involve incidents and behaviors that occur at school. The court cannot order that the defendant stay away from school or even that the defendant be moved to another class.
- Cases may involve victims under the age of 10 or those with a mental or learning disability who may have difficulty articulating what has happened to them. The court may still require testimony from the victim to determine whether an order shall issue.
- The issuance of harassment order, even an ex parte one, will result in creating a domestic violence record against the defendant even though they are a juvenile. It can only be expunged upon a determination that a fraud has been perpetrated upon the court.
- A harassment order can be issued against a defendant under the age of 12 however, in the event of a violation, no delinquency charges can be brought because the defendant is not old enough to be charged as a delinquent. You must be 12 and over to be charged with a delinquency.
- If no delinquency charges can be brought in the event of a violation, the mediator can bring this to the attention of the parties. It may affect how the parties intend to proceed or could help facilitate a resolution short of proceeding with the hearing or the issuance of an order.

Thank you!

If you have any questions regarding 258E orders, please contact:

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