SJC-12246

TIMOTHY DEAL & another[1] vs. COMMISSIONER OF CORRECTION.

Suffolk. April 3, 2017. - November 9, 2017.

Present: Gants, C.J., Lenk, Hines, Lowy, Budd, & Cypher, JJ.[2]

Commissioner of Correction. Due Process of Law, Prison classification proceedings. Imprisonment, Reclassification of prisoner. Youthful Offender Act.

Civil action commenced in the Supreme Judicial Court for the county of Suffolk on October 26, 2016.

The case was reported by Botsford, J.

Barbara Kaban for the petitioner.
Benjamin H. Keehn, Committee for Public Counsel Services (Dulcineia Goncalves, Committee for Public Counsel Services, also present) for the intervener.
Charles W. Anderson, Jr., for the respondent.
James R. Pingeon, for Prisoners' Legal Services of Massachusetts, amicus curiae, submitted a brief.

BUDD, J. The Department of Correction (department) has

[1] Jeffrey Roberio, intervener.

[2] Justice Hines participated in the deliberation on this case prior to her retirement.

adopted procedures to determine, on a periodic basis, the security classification of every inmate, including juvenile homicide offenders.[3] Approximately one year ago we examined the department's then procedure used to classify juvenile homicide offenders, and concluded that, as pertaining to that cohort, the procedure violated G. L. c. 119, § 72B, as amended by St. 2014, c. 189, § 2, which prohibits the department from categorically barring juvenile homicide offenders from being placed in minimum security facilities. See Deal v. Commissioner of Correction, 475 Mass. 307, 312 (2016) (Deal I). The department has since developed a modified process for classifying juvenile homicide offenders, which the petitioner and intervener in this case (collectively, petitioners) -- juvenile homicide offenders who also were petitioners in Deal I -- continue to challenge.

Applying our holding in Deal I to these updated procedures, we conclude that the department still falls short of the requirements of § 72B. Given that the department continues to block the majority of objectively qualifying juvenile homicide offenders from placement in a minimum security facility, its written explanations for doing so do not go far enough to ensure

[3] In this opinion, the term "juvenile homicide offender" refers to a person who has been convicted of murder in the first or second degree and was under the age of eighteen at the time that he or she committed the crime. See Diatchenko v. District Attorney for the Suffolk Dist., 471 Mass. 12, 32 (2015) (Diatchenko I), citing Commonwealth v. Okoro, 471 Mass. 51, 62 (2015).

that the classification procedure is actually individualized and that no juvenile homicide offender is categorically barred from classification to a minimum security facility. We also conclude that the department must make a recording of the initial classification hearing and make that recording (or a transcription of that recording) available at any subsequent stage of review so that the final classification decision may include the same level of individual evaluation. We reject, however, the petitioners' claim that § 72B requires broader procedural protections in the form of a right to the presence of counsel at classification hearings and seven days' notice of such hearings, rather than the forty-eight hours they currently receive.[4] 103 Code Mass. Regs. § 420.08(3)(c) (2007).

Background. In Miller v. Alabama, 567 U.S. 460, 465 (2012), the United States Supreme Court held that "mandatory life without parole for those under the age of [eighteen] at the time of their crimes violates the . . . prohibition on 'cruel and unusual punishments [under the Eighth Amendment to the United States Constitution].'" One and one-half years later, in Diatchenko v. District Attorney for the Suffolk Dist., 466 Mass. 655, 674 (2013) (Diatchenko I), we went a step further under art. 26 of the Massachusetts Declaration of Rights and

[4] We acknowledge the amicus brief of Prisoners' Legal Services of Massachusetts.

held that it was unconstitutional for juveniles convicted of murder in the first degree to be sentenced to life without parole and that they must be given a "meaningful opportunity to obtain release [on parole] based on demonstrated maturity and rehabilitation."

After our opinion in Diatchenko I, the Legislature in 2014 amended G. L. c. 119, § 72B, by adding the following language:

> "The department of correction shall not limit access to programming and treatment including, but not limited to, education, substance abuse, anger management and vocational training for youthful offenders, as defined in [§] 52, solely because of their crimes or the duration of their incarcerations. If the youthful offender qualifies for placement in a minimum security correctional facility based on objective measures determined by the department, the placement shall not be categorically barred based on a life sentence."

St. 2014 c. 189, § 2.

The last sentence of the amendment concerns the annual classification process in which the department classifies every inmate, including juvenile homicide offenders, as high, medium, or low security risks, to be placed in (or transferred to) a corresponding maximum, medium, or minimum security facility. The classification process seeks to "objectively assess the inmate's custody requirements and programmatic needs and match those to the appropriate security level in a manner that minimizes the potential for escape, prison violence and inmate misconduct," by, inter alia, "[r]ationally using a reliable,

validated set of variables to support classification decisions." 103 Code Mass. Regs. § 420.07(a) (2007).

According to the department's Male Objective Point Base Classification Manual (eff. Jan. 27, 2014) (manual), the variables are:

1. severity of current offense (possible score 1-6);

2. severity of convictions within the last four years (possible score 0-6);

3. history of escapes or attempts to escape (possible score 0-7);

4. history of prior institutional violence within the last four years (possible score 0-5);

5. number of guilty disciplinary reports within the last twelve months (possible score 0-4);

6. most severe guilty disciplinary report within the last eighteen months (possible score 0-7);

7. age (possible scores -2, 0, 1); and

8. program participation or work assignment (possible scores -2, -1, 0).

A correctional program officer (CPO) computes the total score and compares it to a set of cut-off values to determine the prisoner's preliminary custody level. 103 Code Mass. Regs. § 420.08(2) (2007). Twelve or more points qualify a prisoner for maximum security; seven to eleven points qualify the prisoner for medium security; and six or fewer points qualify the prisoner for minimum security. Deal I, 475 Mass. at 309-310.

Before the amendment to § 72B, regardless of their objective classification score, juvenile homicide offenders were ineligible for placement in minimum security prison facilities because of certain "non–discretionary minimum custody restriction codes" that the department had adopted.[5] Deal I, 475 Mass. at 312. After the amendment to § 72B, although the department discontinued its use of nondiscretionary overrides in relation to the cohort of juvenile homicide offenders, it began applying what it defines as "discretionary override codes." Id. at 313-316. Juvenile homicide offenders with objective classification scores that qualified them for transfer to minimum security facilities would nonetheless invariably be denied that transfer via the application of discretionary override codes unless and until they received a positive parole vote by the parole board. Id. at 315-316.

In 2015, the petitioners in this case, along with a third inmate, Siegfried Golston,[6] each of whom had received an objective classification score qualifying him for placement in a

[5] Before the amendment to G. L. c. 119, § 72B, in 2014, the department employed code E, which barred all those offenders convicted of murder in the first degree from being considered for minimum security; and code F, which barred, among others, those offenders who were incarcerated for a crime involving a loss of life from a minimum security classification unless a positive parole decision had been granted or they were within two years of their release date. See Deal v. Commissioner of Correction, 475 Mass. 307, 312-313 (2016).

[6] Siegfried Golston is not a party in this case.

minimum security facility but had been denied such placement due to the application of discretionary codes, brought a petition in the county court pursuant to G. L. c. 211, § 3, and G. L. c. 231A. Deal I, 475 Mass. at 313-315. The matter was reserved and reported to the full court by a single justice. Id. at 316.

As relevant to the present case, the petitioners in Deal I argued that the department's practice of using certain discretionary override codes to effectively preclude a juvenile homicide offender from being eligible for minimum security placement was a violation of § 72B, amounting to the same categorical bar to such a placement that the Legislature had sought to eliminate by amending that statute. Id. at 316. We agreed, holding that § 72B required the department to consider a juvenile homicide offender's suitability for minimum security on a case-by-case, rather than a categorical, basis. Id. at 319-320. Accordingly, and as required by the department's manual, we ordered the department to "memorialize its rationale [for the classification decision] . . . in writing." Id. at 320.

Following our decision in Deal I, the department adopted a modified process for classifying juvenile homicide offenders who objectively qualified for, but were nonetheless denied, minimum security placement, including the petitioners. The whole process can be summarized as follows. A CPO calculates a point-based score pursuant to the department's objective

classification instrument, reviews both nondiscretionary and discretionary override codes to determine if any apply, and holds an interview with the inmate to discuss classification status. 103 Code Mass. Regs. § 420.08(2). Where the objective classification score would permit a classification to a minimum security placement, the CPO's report is then provided to a three-person departmental review board (DRB), which consists of the department's deputy director of classification (serving as chair), a correctional officer having classification expertise, and a correctional officer from the inmate's correctional facility. 103 Code Mass. Regs. § 420.08(3)(e) (2007). The juvenile homicide offender is present for, and participates in, the DRB hearing, which includes a discussion of his or her crime, his or her institutional behavior, and factors that contributed to each. 103 Code Mass. Regs. § 420.08(3)(d), (e) (2007). After the hearing, the DRB votes on whether any discretionary override codes should prevent the inmate's transfer and provides a written decision recommending a classification level that includes an explanation of the recommended application of any override codes. 103 Code Mass. Regs. § 420.08(3)(f) (2007). The DRB's recommendation is provided to the inmate as well as to the Commissioner of Correction (commissioner) or the commissioner's designee. Id. The inmate may submit an appeal from an adverse DRB

recommendation to the commissioner or his designee -- in the case of both petitioners, the director of the department's classification division (director) -- who makes the final classification determination. See 103 Code Mass. Regs. § 420.08(3)(h), (i) (2007).

1. Timothy Deal. Deal was convicted of murder in the second degree for an offense committed in 2002, when he was seventeen. Deal I, 475 Mass. at 313. Currently incarcerated in a medium security facility, id. at 314, Deal was brought before the DRB in the fall of 2016 for reclassification. The hearing, which was not recorded, lasted for approximately one hour, during which time Deal testified before the DRB, and the board explored with him his offense and disciplinary history.

Despite an objective classification score of four, which qualified him for placement in a minimum security facility, the DRB voted unanimously to recommend that discretionary override codes R, T, and U should block his transfer to such a facility. According to the manual, discretionary code R allows an override where "[t]he facts or notoriety of the offense presents a seriousness that cannot be captured in the score." Discretionary code T allows an override where "[t]he [inmate's] institutional adjustment presents a seriousness that cannot be captured in the score." Discretionary code U allows an override where an "inmate['s] behavior, while not always negative enough

to warrant disciplinary action, may serve to threaten security or undermine the exercise of proper control and maintenance of order within the institution."

The DRB wrote that its recommendation was based on the "serious, violent, and retaliatory nature of [Deal's] offense," and his "receipt of significant disciplinary reports" during his incarceration. Further, "[d]espite the absence of discipline for several years and a vast amount of program participation," the DRB found that Deal's presentation "minimized the significance of this noncompliant behavior . . . [and] present[ed] a series of excuses that involved others being at fault for his actions as well as outright denial of his actions."

Deal appealed from the DRB's recommendation, asserting that the board mischaracterized the tenor of his presentation at the hearing and that, overall, its conclusions lacked reasonable support based on his institutional record. The director, considering both the DRB's recommended decision and Deal's appeal, denied the appeal, deciding that discretionary override codes R and U applied in Deal's case. In her written explanation, the director specifically cited the DRB's description of Deal's "minimizing" and failure to take responsibility for his crime, "coupled with [his] presentation to the [DRB]," and his persistent "criminal thinking."

About one month after receiving notice that the department was denying his transfer to minimum security prison, Deal appeared before the parole board for his scheduled initial parole hearing. Board member Dr. Charlene Bonner questioned Deal about the DRB's written assessment of his hearing performance.[7]

2. Jeffrey Roberio. Roberio was convicted of murder in the first degree for an offense committed in 1987, when he was seventeen. Deal I, 475 Mass. at 314. Roberio was denied parole in 2015 and is currently housed in a medium security facility. Id. at 314-315.

Roberio states in an affidavit that during his most recent classification hearing he was asked "why [he] did it, what led up to it, [and] did [he] take responsibility for it." He was also asked why he "refused" to participate in a particular rehabilitative program. Roberio responded that he did not refuse to participate; to the contrary, he said, he had asked to enroll but was told that he could not do so due to prison logistics.

[7] For instance, Deal was asked by parole board member Dr. Charlene Bonner, "Why do you think [the departmental review board (DRB) is] portraying you as someone . . . who minimizes?" Deal responded that he "really [did not] know how to answer that" and suggested that there must have been a "misunderstanding." As of the time of briefing in this case, the parole board had not yet reached a decision on Deal's parole petition.

Despite an objective classification score of three, qualifying him for minimum security, the DRB voted to deny Roberio's transfer to minimum security, citing override codes R and U in its recommendation. The DRB explained that its decision was warranted in part by Roberio's extensive disciplinary history and the brutal nature of his crime, coupled with his lack of participation in substance abuse programming.

Roberio appealed from the DRB's recommendation to the director, arguing, inter alia, that the board ignored the circumstances of his inability to participate in the particular program at issue, and had further ignored the volume of other rehabilitative programming that he completed.[8] In her final classification decision, the director followed the DRB's recommendation, rejected Roberio's appeal, and invoked override codes R and U to prevent a transfer to a minimum security facility, citing, among other things, Roberio's failure to participate in sufficient programming to address his alcoholism. The director did not address Roberio's arguments that he "tried explaining" to the DRB that he had been told he was ineligible

[8] Roberio argued, "[S]ince my parole hearing . . . , I have completed an [eight-week] criminal addictive thinking program, an [eight-week] violence reduction program, a [six-week] mental flexibility program, and a nonviolent conflict resolution program; plus, I continue to be an active charter member of Toastmasters and a facilitator of [Alcoholics Anonymous/Narcotics Anonymous]. The [DRB's] recommendation doesn't mention any of this programming even though I told them about it . . . ."

for substance abuse programming, and instead approved the DRB's recommendation for a lateral transfer. Roberio's next hearing before the parole board is scheduled for the year 2020. Deal I, 475 Mass. at 314.

3. Aftermath. After being denied minimum security classifications for a second time, Deal and Roberio again petitioned for relief in the county court.[9] The matter is before the full court on the reservation and report of the single justice.[10]

Although Deal and Roberio bring this petition as individuals, the record before us reflects that as of the time of oral argument in this case in April, 2017, the department's new, post-Deal I classification process for juvenile homicide offenders has been used to classify forty-two juvenile homicide offenders who preliminarily qualified for transfer to minimum security with an objective score of six points or fewer. Of those forty-two offenders, thirty-two, including Deal, were recommended to remain in their current, medium security

[9] Roberio moved to intervene in Deal's petition, and the single justice allowed the motion.

[10] While this case was pending before the full court, the petitioners and the department separately moved to expand the record on appeal: the petitioners moved to permit the addition of a parole board decision and a parole board hearing transcript for Roberio and Deal, respectively; the department moved to add a second affidavit of Lori Cresey, the director of the department's classification division. Both motions are allowed.

facilities; five, including Roberio, were recommended for lateral transfers to other medium security facilities so they could pursue specific programming; and four were recommended for minimum security placement (including Golston). In her role as the commissioner's designee, the director followed the DRB's recommendation in all but one case.[11] In sum, in these post-Deal I classification proceedings, discretionary overrides have been used to block approximately ninety per cent of juvenile homicide offenders whose objective classification score qualified them for transfer to a minimum security facility from placement in such a facility. The department's regulations stipulate that the discretionary override codes should generally be employed in "5-15% of all custody level decisions." See 103 Code Mass. Regs. § 420.06 (2007).

Discussion. The petitioners do not dispute that, in response to our opinion in Deal I, the department has changed its classification procedures for juvenile homicide offenders who qualify for placement in minimum security facilities. Nor do the petitioners dispute that, under these new procedures, the initial classification hearing before the DRB is individualized. Rather, the petitioners contend that the broad or "shape-

[11] In that case, the director decided not to apply the override codes that the board had recommended, thereby allowing the inmate to transfer to a minimum security prison. This inmate had already received a positive parole vote.

shifting" nature of the discretionary override codes employed in the classification process, viewed in light of the exceedingly high rate at which the override codes have in fact been used, demonstrates that the department continues in effect to bar categorically many juveniles from a minimum security classification based on their life sentence, in violation of § 72B. In addition, the petitioners claim they have no meaningful recourse to challenge such categorical decision-making, because no recording is made of the DRB hearing on which the final classification decision-making process is largely based.

To ensure compliance with § 72B, the petitioners argue that the department must incorporate the following procedural protections in its security classification process for juvenile homicide offenders: (1) the right to written findings as to the basis of the classification decision that are sufficiently detailed that they may be refuted, if necessary, as clearly erroneous or otherwise arbitrary and capricious; (2) the right to have the hearing recorded; (3) the right to receive written notice at least seven days in advance of the classification hearing; and (4) if represented, the right to have counsel attend the hearing.

The department asserts that its newly constituted process for classifying juvenile homicide offenders fully comports with

G. L. c. 119, § 72B, and Deal I, and that if this court were to require the department to implement the petitioners' requested procedures, the court's ruling would violate art. 30 of the Massachusetts Declaration of Rights, which bars the judicial branch from invading the prerogatives of the executive branch.

We agree with the petitioners that the department's new classification procedure falls short of the requirements of § 72B in some respects. As mentioned above, in Deal I, 475 Mass. at 320, we declared that the department's use of discretionary override codes against objectively qualifying juvenile homicide offenders violated § 72B, which prohibits categorically barring such offenders from placement in minimum security "based on a life sentence." We therefore required the department to "individually consider each [juvenile homicide offender's] suitability for classification in minimum security and provide a written explanation for its decision." Id. In this subsequent case, the record before us illustrates the risk that, despite the individualized nature of the DRB hearing, true individual consideration will not be achieved if the youthful offender's life sentence alone may effectively be deemed an adequate ground for a discretionary override. See Longval v. Commissioner of Correction, 448 Mass. 412, 420 (2007) ("the department and the commissioner may not sidestep statutory and regulatory provisions stating the rights of an inmate . . . by

assigning as a pretext another name" to forbidden practice [citation omitted]).

This risk is realized where code R is used as the discretionary override. Where a youthful offender has been convicted of murder, he or she has killed a human being either with malice, or during the commission of a felony. See G. L. c. 265, § 1; Commonwealth v. Brown, 477 Mass. 805, 807-808 (2017) (prospectively requiring actual malice for conviction of felony-murder). The use of code R where "[t]he facts or notoriety of the offense presents a seriousness that cannot be captured in the [objective] score" poses the risk of potentially including every juvenile homicide offender.[12] Therefore, to ensure true individualized consideration, we now declare that, whenever code R is used as a discretionary override, the written explanation for the decision must explain in detail why this youthful offender's conduct in committing the murder is so

[12] The amicus states, based on information obtained from the department in a public records request, that, among the juvenile homicide offender cases where override codes were employed, the department has used code R in over sixty per cent of cases.

Moreover, because code R does not distinguish between adult and juvenile offenders, the application of code R to a juvenile homicide offender might not take into account that, as recognized by the United States Supreme Court and this court, the adolescent brain is not fully developed, and therefore in all but a very few cases, the juvenile homicide offender represents an individual who, at the time he or she committed the homicide, had "diminished culpability and greater prospects for reform." Diatchenko I, 466 Mass. at 659-660, quoting Miller v. Alabama, 567 U.S. 460, 471 (2012).

significantly different in its seriousness as to reasonably distinguish it from the conduct of others and, in particular, other juveniles who committed murder.

The department argues that code R does not effectuate a blanket policy prohibiting juvenile homicide offenders' placement in minimum security facilities because code R is often coupled with code U. But code U is also suspect as a basis for a discretionary override. The objective classification score, which is based on validated empirical evidence of risk, does not consider any disciplinary report that is more than eighteen months old and does not even consider any institutional act of violence that is more than four years old. Yet code U, which permits an override where an "inmate['s] behavior, while not always negative enough to warrant disciplinary action, may serve to threaten security or undermine the exercise of proper control and maintenance of order within the institution," has no time limit and appears to cover the inmate's entire term of incarceration. Therefore, if an inmate's misconduct is so severe that it results in disciplinary action, it is not considered in the validated objective classification score if it is more than eighteen months old, but if it is not so serious as to warrant such action, it may override that score without time limitation through discretionary override code U. The absence of any time limitation is especially detrimental to inmates who

have served longer sentences.[13] Moreover, like code R, code U's criteria are so broad that they could conceivably apply to any juvenile homicide offender without the need for individualized justification.[14] Because the use of code U is so inconsistent with the objective classification score's reliance on recent disciplinary reports and acts of violence, and because it is so broad in its scope and duration and conclusory in its language, we now declare that, whenever code U is used as a discretionary override, the written explanation for the decision must explain in detail the specific conduct that justifies its application.

The risk that the department's practices may result in categorical denials is not mitigated by the design of its administrative appeal process. Where the DRB applies an override code and recommends that the inmate be denied transfer to a minimum security facility, the inmate has an opportunity to appeal from that recommendation before the director makes the

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[13] In the case of juvenile homicide offenders, negative institutional behavior during the early years of their incarceration might also reflect, at least in part, the immaturity and recklessness characteristic of their age at the time. Cf. Diatchenko I, 466 Mass. at 660, quoting Miller, 567 U.S. at 472.

[14] The record demonstrates that the department applied code U to Roberio despite the fact that "housing unit officers identif[ied] him as a quiet inmate who keeps to himself and is not a management concern." And, according to the amicus, the department has applied code U approximately eighty per cent of the time in classification hearings for juvenile homicide offenders, compared to just one per cent of the time in classification hearings generally.

final decision. See 103 Code Mass. Regs. § 420.8(3)(h), (i). But the failure of the department to make any recording of the DRB classification hearing severely limits the director's ability to make an individualized evaluation of the inmate's challenge. At oral argument, the department conceded that the director typically relies on the written findings of the DRB when considering an inmate's appeal, and it is clear from the record that the director rarely departs from the DRB recommendation.

The department's updated procedures fall short of the requirements of § 72B because, without a recording of the DRB hearing, it is impossible for an inmate who appeals from a recommendation applying broadly sweeping override codes to obtain an individualized evaluation of the merits of the DRB's decision. See Deal I, 475 Mass. at 319 (noting that "department may consider the criteria embodied in discretionary override codes" but may not use such codes to effectuate categorical policy). The obligation in § 72B that the department individually consider each juvenile homicide offender's suitability for classification in minimum security applies to the director's final classification decision as much as to the DRB's written recommendation to the director. The director is not present at the DRB hearing; without a recording of the hearing (or a transcript of the hearing), the director cannot

meaningfully evaluate whether the DRB's written findings accurately reflect the information that was presented at the hearing.[15] The fact that in a small number of instances this process has yielded a favorable outcome for juvenile homicide offenders does not alter our conclusion that, in practice, the process still largely deprives the inmate of individualized review.

Therefore, we now require that the department make a recording of the initial classification hearing and make that recording (or a transcription of that recording) available at any subsequent stage of review. Cf. Covell v. Department of Social Servs., 439 Mass. 766, 782 (2003) ("That a transcript must be submitted to support a claim that the evidence was insufficient is not some hypertechnical requirement, but a reflection of the fact that resolution of such a claim requires

[15] Further support for recording the DRB classification hearings comes from the department's own regulations, which provide inmates with the right to appeal from the classification recommendation, 103 Code Mass. Regs. § 420.8(3)(h), (i), and mandate "quality assurance" of the DRB classification hearings, 103 Code Mass. Regs. § 420.8(3)(g) (2007). Without a recording of the initial classification hearing, it is difficult to envision how the department can administer a "quality assurance process" that examines the "completeness and accuracy" of classification hearings as required under its regulations. 103 Code Mass. Regs. § 420.8(3)(g). And without a recording, the right to appeal to the Commissioner of Correction or his or her designee is hollow, because this final decision maker will not have access to the information presented by the prisoner at the DRB hearing or the opportunity to independently evaluate that information.

the reviewing court to see the entirety of the evidence that was presented"); New Bedford Gas & Edison Light Co. v. Assessors of Dartmouth, 368 Mass. 745, 751 (1975) ("summary of evidence . . . is no substitute for a transcript"). The obligation to record the DRB hearing does not pose a significant burden on the department, which acknowledges that it already has the equipment necessary to record classification hearings.

Contrary to the petitioners' arguments regarding the written rationale for the classification recommendation and the recording of classification hearings, we do not interpret § 72B as granting a right for the prisoner's counsel to attend the classification hearings. We do not understand, however, why the department bars the presence of counsel at classification proceedings for juvenile homicide offenders who qualify for placement in minimum security facilities. The department's regulations already allow for representation at such hearings whenever an inmate is considered for a transfer to a higher security facility. See 103 Code Mass. Regs. § 420.08(3)(b). There is certainly nothing in the department's regulations that prohibits the presence of counsel. But, in the absence of constitutional, statutory, or regulatory mandate, it is not appropriate for us to require an agency to provide additional procedural rights simply because we think it would be sensible to do so. See American Family Life Assur. Co. v. Commissioner

of Ins., 388 Mass. 468, 477-478, cert. denied, 464 U.S. 850 (1983). Although the Legislature, of course, may afford the right to counsel or the right of counsel to attend a hearing when it so desires, see Poe v. Sex Offender Registry Bd., 456 Mass. 801, 811 & n.11 (2010) (discussing statutory right to counsel in sex offender classification hearings under G. L. c. 6, § 178L), nothing in the language of § 72B compels the conclusion that the Legislature intended to afford a right to have counsel present.

Similarly, we are not persuaded that § 72B requires that the youthful offender receive at least seven days' notice in advance of the classification hearing, rather than the notice of not less than forty-eight hours currently provided by regulation. 103 Code Mass. Regs. § 420.08(3)(c). We understand why additional notice would make it easier for the youthful offender to confer with counsel and prepare to submit information at the classification hearing, but we cannot say that the additional notice is so essential to an individualized hearing that it is part and parcel of the entitlements afforded by § 72B.

Conclusion. For the reasons discussed herein, the case is remanded to the county court for entry of a judgment consistent with this opinion.

So ordered.