

**HOUSE CHILDREN AND YOUTH COMMITTEE
INFORMATIONAL MEETING**

**Department of Public Welfare Policies and Procedures:
Quarterly Payments to Counties for Children and Youth Services
And Payments to Counties for Juvenile Legal Services**

**Testimony of Robert G. Schwartz
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Mr. Chairman and Members of the Committee:

Thank you for the invitation to talk with you this morning about legal representation of youth alleged or found to be delinquent in Pennsylvania, and the financing of a system of legal representation.

As you know, Juvenile Law Center has been intensely involved in the events of Luzerne County, where the absence of lawyers – as well as the absence of effective lawyering -- contributed to the scandal. I have been with Juvenile Law Center since 1975, represented children in delinquency proceedings; worked with counties and the General Assembly on funding of children's services, including legal services; contributed to the 2003 study that Juvenile Law Center did with the American Bar Association, National Juvenile Defender Center and others on Pennsylvania's system of legal representation; and, of course, have been involved in shaping Juvenile Law Center's response to the shame of Luzerne.

Background: Luzerne County

Former Judge Mark Ciavarella routinely denied lawyers to children in Luzerne County. The right to counsel is more than a formality. The role of counsel in juvenile court is uniquely important. As we noted in a national assessment of indigent juvenile defense in which we

participated several years ago, representing children is challenging and requires an array of skills beyond those required of adult defense attorneys:

Young people charged with delinquency offenses need effective representation to ensure that they are not held unnecessarily in secure detention, improperly transferred to adult criminal court, or inappropriately committed to institutional confinement. They need the active assistance of counsel to properly challenge prosecution evidence and to present evidence in their behalf. If the charges against them are sustained, they need effective representation to assure that the dispositional order is fair and appropriate to their individual needs. If they are incarcerated, they need access to attorneys to help respond to a myriad of post-dispositional legal issues.¹

Those needs went unmet in Luzerne County juvenile court.

In addition, the absence of counsel enabled Ciavarella to ignore other significant rights. Ciavarella took no steps to ensure that children's guilty pleas were knowing and voluntary as required. He regularly failed to inform youth of their right to a trial, their right to confront and cross-examine witnesses, and the government's burden of proving every element of its case beyond a reasonable doubt. He also regularly failed to ask if youth understood they were giving up these rights before pleading guilty. Ciavarella did not confirm that youth understood the acts to which they were pleading guilty. In some cases, Ciavarella adjudicated youth delinquent without even inquiring as to the youth's plea of guilt or innocence, and then placed the youth in a detention or juvenile correctional facility. At other times, even if the youth pled not guilty, Ciavarella adjudicated the youth delinquent in a hearing lasting no more than a few minutes, with no trial or opportunity for the youth to speak on his or her own behalf or to present testimony or evidence.

¹ American Bar Association Juvenile Justice Center, Juvenile Law Center and Youth Law Center, *CALL FOR JUSTICE: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* at 4 (Dec. 1995).

Many of the estimated 4,500 youth who were adjudicated delinquent were charged with conduct that wasn't criminal, that was no more than trivial misbehavior, or wasn't even the offense for which they were adjudicated delinquent.

The absence of effective counsel in Luzerne County had catastrophic consequences. The rights and well-being of youth with attorneys were much better protected than those without counsel. Indeed, roughly 60 percent of unrepresented youth were committed by Ciavarella to institutions, which was about *three times* the rate of placement for youth who appeared with counsel.

Access to Quality Representation is Critical to the Success of the Juvenile Justice System

Eight years ago, Juvenile Law Center, with the American Bar Association and the National Juvenile Defender Center, did an assessment of the right to counsel in Pennsylvania.²

The assessment, which is on Juvenile Law Center's web site, and which we have made available to the Committee, does two things. First, it describes the responsibilities of juvenile defense lawyers at every stage of the juvenile court process. Second, it captures how unevenly defense services are delivered in Pennsylvania's county-based system.

The Responsibilities of Juvenile Defense Attorneys

Effective defense attorneys investigate charges against their clients; learn about their clients' backgrounds, strengths and needs; counsel their clients; fashion alternatives that courts can use to divert their clients from the system, or from inappropriate placements; test the adequacy of prosecutions' cases, and ensure that youth are only adjudicated delinquent for

² See American Bar Association Juvenile Justice Center, Juvenile Law Center and National Juvenile Defender Center, *Pennsylvania: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings* (Oct. 2003) [hereinafter "2003 Assessment"].

crimes they actually committed; help juvenile probation officers match services to youths' needs while promoting the least restrictive, and often less expensive, interventions.

Thus, through intense interaction with their clients, thorough investigation and thoughtful lawyering, juvenile defense attorneys help divert youth from the system and inappropriate placements. These results are, obviously, also cost-effective.

Juvenile defense attorneys in Pennsylvania are also required by the Juvenile Act and by procedural rules to be active in a case until it ends. Juvenile lawyers who have visited their clients in placement have helped end abusive institutional practices. They have contributed to reducing unnecessarily long lengths of stay, and helped guide juvenile courts towards effective re-entry programs. Those results, too, are cost-effective.

The *2003 Assessment* demonstrated the importance of defense attorneys. Good lawyers raise defenses, file motions and limit the life-altering collateral consequences of adjudications of delinquency. The public is better off when judges and probation officers are making decisions based on accurate information—defense lawyers provide or challenge evidence upon which decision-makers rely. And youth who have a sense of fairness—that their voices have been heard, and that they have not been railroaded—are more likely to be law-abiding and accept the rule of law, adding to public safety.³

Justice by Geography

The *2003 Assessment* also found “justice by geography,” with high caseloads in many places as well as waiver of counsel rates, funding and other resources for children’s lawyers

³ Fagan, Jeffrey, "Legal Socialization of Children and Adolescents" (2005). *Columbia Public Law & Legal Theory Working Papers*. Paper 0594. http://lsr.nellco.org/columbia_pllt/0594.

varying wildly across the Commonwealth. While Luzerne County became a poster child for waiver of counsel, the *2003 Assessment* described how Pennsylvania's county-based system created enormous variations in delivery of indigent juvenile defense.⁴ Nowhere is this more pronounced than the myriad ways counties fund indigent juvenile defense in the absence of a dedicated statewide funding stream.

Some of the problems of geographic variation have been ameliorated by the creation of the Juvenile Defenders Association of Pennsylvania. Created in the wake of the *2003 Assessment* and supported in part by the Pennsylvania Commission on Crime and Delinquency, JDAP has taken steps to standardize practice across the Commonwealth. Funding of defense lawyers, however, is beyond JDAP's reach. Funding is the state's responsibility.

A "Right to Counsel" on paper is necessary but insufficient to ensure effective lawyering for children.

Having a legal right to a lawyer is an important part of reducing harm to children, promoting fair and accurate decision-making, mitigating unnecessary expensive out-of-home placements, and instilling in youth a belief in the rule of law. Those values are embedded in the Juvenile Act's grant of a right to counsel for youth at every stage of the juvenile court process.⁵

Unfortunately, the Luzerne County juvenile court proved that strong mandates alone—like that in the Juvenile Act—are insufficient to ensure that youth are treated fairly and that the law is followed.

The first necessary reform is establishing an unwaivable right to counsel. Juvenile Law Center addressed this in testimony before the Interbranch Commission on Juvenile Justice; in our

⁴ *2003 Assessment*, pp. 35 *et seq.*

⁵ 42 Pa.C.S. § 6337. This extends to proceedings prior to adjudication as well as disposition review hearings. See *In re Davis*, 546 A.2d 1149, 1152 (Pa. Super. 1988)

2010 report to the Interbranch Commission, *Lessons from Luzerne County: Promoting Fairness, Transparency and Accountability*, which is posted on Juvenile Law Center’s web site; and in extensive comments we provided last week to the Supreme Court’s Juvenile Court Procedural Rules Committee, which are also posted on our web site. This reform is also advanced by a bill introduced by Senator Lisa Baker earlier this year.

The second important reform is to presume that all juveniles are indigent for the purposes of appointing counsel. This objective, which Juvenile Law Center discussed in *Lessons from Luzerne County*, is advancing through a rule proposed by the Procedural Rules Committee. This reform is also advanced by a bill introduced by Senator Stewart Greenleaf earlier this year.

The third critical reform is the establishment of a state-based funding stream for indigent juvenile defense.

Pennsylvania suffers from justice by geography, in part, because it is one of the only states in the country that relies exclusively on county funding for indigent juvenile defense services. A statewide funding system would ensure youth receive adequate and consistent representation regardless of the county in which they are tried.

Practices Elsewhere

In 1967, in the landmark Supreme Court case *In re Gault*,⁶ the United States Supreme Court held that children have a Constitutional right to counsel in delinquency proceedings. The Court’s decision was grounded in the due process clause of the Fourteenth Amendment. Pennsylvania incorporates this constitutional requirement of counsel for juveniles in its Juvenile Act. The Juvenile Act states “a party is entitled to representation by legal counsel at all stages of

⁶ *In re Gault*, 387 U.S. 1 (1967).

any proceedings under this chapter and if he is without financial resources or is otherwise unable to employ counsel, to have the court provide counsel for him.”⁷

To provide for the right to counsel, Pennsylvania law currently requires by statute that each county appoint a public defender but provides very little guidance about how to structure indigent defense.⁸ Indigent defendants may also be represented by court-appointed counsel if the public defender has a conflict of interest.

In a majority of states nationwide, the state provides 50% or more of the entire indigent defense expenditures for the state.⁹ Twenty-four of those states provide 100% of the funding for indigent defense services.¹⁰ Pennsylvania, one of only a couple of states that provides zero financial support for indigent juvenile defense, leaves the financial weight of a constitutional right on county budgets. State statutory funding sources vary across the country. Some states specify by statute that indigent defense funds come from the general revenue.¹¹ Other states distribute state funds to counties based on a statutory formula. For example, Washington considers population and adult felony filings to pro-rate state funding.¹²

Several states allocate funding for indigent defense from court-related revenue like Department of Motor Vehicle fees, criminal history check fees, parking violation fees, indigent

⁷ 42 Pa.C.S. § 6337.

⁸ See 16 P.S. § 9960.1 *et seq.*; see e.g., 323 Pa. Code § 1.4-424 (providing for Delaware County public defender).

⁹ See America Bar Association, Spangenburg Group, *50 State and County Expenditures for Indigent Defense Services: Fiscal Year 2005* (2006), available at www.abanet.org (reporting the following 29 states provide at least 50% of indigent defense expenditures for their state: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin, Wyoming) [hereinafter “*Indigent Defense Services*”].

¹⁰ This count includes New York, which provides 100% of indigent defense services for juveniles, but not for adults. See *Indigent Defense Services*.

¹¹ See e.g., Md. Code Ann. § 16-402; O.R.S. § 151.225; R.I. Gen. Laws § 12-15-7; S.C. Ann. §§ 17-3-380, 17-3-590; Wyo. Stat. Ann. § 7-6-113.

¹² Wash. Rev. Stat. § 10.101.030.

defense application fees or reimbursement of counsel fees.¹³ Georgia, for example, in 2004 established a special funding mechanism for its new system of indigent defense.¹⁴ Under this system, indigent defense is funded not through taxpayer general revenue, but through fines and fees created with the express intent of paying for indigent defense.¹⁵ In 2007, Georgia collected \$43.3 million through the fines and fees enacted pursuant to this legislation.¹⁶ New York law provides for indigent defense funding through four revenue sources including fees from criminal history checks and attorney registration and parking violations.¹⁷ The Law Guardian Program in New York, which provides counsel to all youth in delinquency proceedings, receives a statutorily mandated \$25 million off the top of any revenue generated from these sources. Some states offset state costs for indigent defense by requiring counties to provide in-kind support by supplying public defender offices with office space, equipment, supplies, and utility services.¹⁸

Despite Pennsylvania's obligation, through the Fourteenth Amendment, to enforce a child's constitutionally guaranteed right to counsel in delinquency proceedings, ours is one of only a couple of states that provides no state money for indigent juvenile defense.

Consequently, the quality and consistency of counsel available to alleged delinquent youth in Pennsylvania varies widely according to that child's county of residence. County budgets must

¹³ See *Indigent Defense Services*, at 10, 13, 22-23 (describing revenue collected from various court-related fees for indigent defense in Georgia, Kentucky, New York).

¹⁴ See H.B. 1EX (Ga. 2005); H.B. 240 (Ga. 2004).

¹⁵ Collection included an increase of \$15 in the filing fee in all civil actions, a 10% surcharge on criminal fines, a 10% surcharge on bails or bonds with a \$50 cap, and a newly created \$50 waivable application fee for indigent defendants. See *Indigent Defense Services* at 10.

¹⁶ See Georgia Bar Association, Indigent Defense Committee Proposed Principles, *available at* www.gabar.org. Notably, in 2007, the State collected \$43.3 million through the fines and fees enacted pursuant to H.B. 240 but allocated only \$36.3 million to indigent defense. Similarly, in 2008, Georgia anticipates collecting \$45 million, but has allocated only \$35.4 million of that amount to indigent defense, plus a later supplement of \$2.7 million. In each year, the unallocated funds have flowed into the General Revenue fund to be used for purposes other than indigent defense. Consequently, while new funds and fees were imposed for the express purpose of funding indigent defense, some of these funds are being used for other purposes.

¹⁷ *Indigent Defense Services*, at 22-23.

¹⁸ See *e.g.* R.S.Mo. § 600.040; S.C. Ann. § 17-3-590; Tenn. Code § 8-14-203; Wyo. Stat. Ann. § 7-6-111.

cover all expenses for both adult and juvenile indigent defense – including public defender and court-appointed counsel for the accused, court support staff, and building and operation costs. This delegation of the State’s constitutional obligation—with such obviously inadequate support or uniformity at the county level—places the state on a collision course with the Fourteenth Amendment.

Support services, including investigators, expert witnesses, social workers, and paralegals, are essential to quality representation. They are uniquely important in juvenile delinquency proceedings, so that defense counsel can provide the court with information that will further the Juvenile Act’s goals of individualized treatment and services in a regime of balanced and restorative justice. Attorneys for youth must have the resources to present juvenile courts with evidence of the particular youth’s maturity, mental health, and behavioral needs as they relate to normal adolescent development. Effective counsel must have information about treatment, education, social services, and alternatives to incarceration so they can recommend effective options to judges.¹⁹

Without funding from the state, Pennsylvania’s counties have been unable to ensure adequate resources for quality indigent defense. Nearly 60% of juvenile defenders in Pennsylvania reported in 2003 that the lack of support services limited their ability to effectively represent their clients.²⁰

The state’s abdication of its obligation to secure a child’s right to counsel by pushing it off to the counties has not only failed the children of this Commonwealth, it also fails to meet the

¹⁹ See Judith B. Jones, Office of Juvenile Justice and Delinquency Prevention, *Access to Counsel*, Juvenile Justice Bulletin (Jun. 2004), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/204063.pdf>.

²⁰ See *2003 Assessment*, at 3.

constitutional guarantee of counsel. This obligation rests squarely on the State. The Legislature should provide a funding stream for indigent juvenile defense.

Funding Options

There are two ways to provide such funding. The best way is to have a state appropriation that supports indigent juvenile defense in every county. The General Assembly could phase in state support for these services, to increase the state's share over time. The current absence of dedicated state funding, however, is unconscionable.

The second way to support indigent defense can supplement the first (these methods are not mutually exclusive). That is, use the Public Welfare Code's Needs Based Budget Process and Act 148 to supplement a dedicated state appropriation.

The Public Welfare Code,²¹ and the Department of Public Welfare's implementing regulations²² provide that the Commonwealth shall reimburse counties 50 percent of the cost of *guardians pendente lite*. For most of its history, this provision of the Public Welfare Code has been interpreted as a reference to lawyers for dependent children. There was a brief period in recent years—before the economic downturn reduced available funds--when the Department of Public Welfare applied this provision to representation of delinquent children. DPW permitted counties to use Act 148 dollars to pay for defense counsel, in a cost sharing arrangement with the state. DPW ended the practice last year.

Using Act 148 dollars as the sole state source of indigent juvenile defense was, at the end of the day, ineffective because it depended upon a) DPW's interpretation of the Public Welfare Code, and b) each county's willingness to pay its share to trigger the state match. When DPW

²¹ 62 P.S. § 704.1(a)(5).

²² 55 Pa. Code § 3140.23.

changed its interpretation in response to economic circumstances, counties were once again left with the challenge of paying for defense services.

While Act 148 cannot cure the state's unique failure to fund indigent juvenile defense, amending Act 148 to make it clear that defense counsel is a reimburseable expense may be useful as a) a stop-gap measure, until the state adds a dedicated line of funding; and b) a supplement to such a line of funding.

Conclusion

An unjust system begets troubles. The children of Luzerne County are still paying for the failure to provide them with lawyers. We've seen youth and parents with mental health issues; domestic violence; academic failure; alcoholism and other problems.

A dedicated state funding stream for juvenile indigent defense will fulfill the State's Constitutional obligation, established by the United States Supreme Court nearly 45 years ago, to ensure that children are represented by counsel in delinquency proceedings. Counsel for children reduce harm to children, increase opportunities for youth involved with the justice system, promote fair and accurate decision-making, reduce expensive out-of-home placements, and instill in youth a belief in the rule of law. These values are well worth funding.