Lessons from Luzerne County: Promoting Fairness, Transparency and Accountability

Recommendations to the Interbranch Commission on Juvenile Justice

Juvenile Law Center
advancing the rights and well-being of children in jeopardy

Acknowledgements

Investigating and preparing recommendations for reform in the wake of the Luzerne County scandal has been an enormous undertaking. The scandal is about more than "judicial corruption." Its unveiling has revealed layers of issues, both simple and complicated. Juvenile Law Center has learned from our investigations, and from that of the Interbranch Commission on Juvenile Justice. We have spent many months developing our recommendations, with the hope that such a scandal will never happen again. We needed help to complete this project—which we hope will not only benefit Pennsylvania children, but those whose lives are touched by the juvenile justice system across the country. Fortunately, help was available from many sources.

We thank the many volunteer lawyers and law students who provided invaluable assistance by researching and compiling information for these reports. In particular, we would like to thank Adam Brown, Lesli Esposito, Kate Frenzinger, Richard Gruenberger, Peter Lindau and John Huh of DLA Piper; Christopher Burdett, Mark DiPerna, France Jaffe, Alice Jensen, and Suzanne Turner of Dechert LLP; Amanda Harber of Rutgers School of Law – Camden; and David Lapp of Education Law Center-PA.

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Interbranch Commission on Juvenile Justice

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Executive Summary

Pennsylvania's juvenile justice system protects the public by providing for the supervision, care, and rehabilitation of children who commit delinquent acts through a system of balanced and restorative justice. The system is designed to meet those goals in the least restrictive way, disrupting the child's life no more than necessary in order to effectively intervene. It is expected to operate in a fair and unbiased manner. In most Pennsylvania counties, these purposes are achieved. In Luzerne County, however, the system worked not for the benefit of the children or community, but for the financial gain of two judges.

State records show that between 2003 and 2008, approximately 50 percent of juveniles appeared in Luzerne County Juvenile Court without benefit of counsel – nearly ten times the state average. Virtually all of these unrepresented juveniles were adjudicated delinquent, many for acts so minor and trivial that in most counties these charges would never have even made it to juvenile court. Of those youth without counsel who were adjudicated delinquent, nearly 60 percent were sent to out-of-home placements. The state data show that former judge Mark Ciavarella presided over more than 6,500 cases, leaving thousands of children and parents feeling bewildered, violated and traumatized. Luzerne County was a toxic combination of for-profit facilities, corrupt judges, and professional indifference.

In October 2009, in an unprecedented opinion, the Pennsylvania Supreme Court vacated Ciavarella's adjudications of delinquency made between 2003 and May 2008. Just three months later, Special Master Arthur Grim ordered that all cases heard by former Judge Ciavarella were to be dismissed. In providing relief, the Supreme Court restored integrity to Pennsylvania's juvenile justice system and gave hope to youth who suffered enormous harm at the hands of corrupt judges. However, it was not just the judges who failed these youth; the system failed at

numerous levels. District attorneys, public defenders, juvenile probation officers, the state Judicial Conduct Board, private attorneys and other court personnel—everyone connected to the juvenile justice system in Luzerne County failed these children. What safeguards, policies and methods of accountability permitted this toxic environment to flourish? How can we prevent another Luzerne tragedy? How can we make sure that Pennsylvania's juvenile justice system dispenses justice equally and with the same high standards in every county? This report aims to answer these questions.

The Luzerne County juvenile court showed that Pennsylvania's current mandates alone are insufficient to ensure that youth are treated fairly and that the law is followed. Reforms must begin with the right mandates, but they must also be accompanied by accountability and transparency. The rule of law is meaningful only when it is enforced, obeyed and documented so that it is evident to all citizens.

Juvenile Law Center has worked diligently to help restore justice to the families of Luzerne County and is in a unique position to provide perspective and recommendations to the Interbranch Commission so that we never again find ourselves asking how this could have happened. The recommendations we propose are organized under six topic areas, each representing a chapter:

- Ensuring Access to Counsel
- Instituting Meaningful Appellate Review
- Increasing Transparency and Accountability in the Juvenile Justice System
- Reducing Referrals to the Juvenile Justice System
- Ensuring Respectful and Appropriate Treatment of Youth in Detention or Placement and in Court
- Reducing the Consequences of Juvenile Records

Each chapter addresses a broad reform goal within the juvenile justice system. Within each chapter, Juvenile Law Center has identified key next steps to implement the recommendation. While no single recommendation will prevent future scandals or miscarriages of justice like those that occurred in Luzerne, Juvenile Law Center's recommendations together will ensure that the Commonwealth's children will benefit from the rule of law. We hope that leaders in the legislature, judiciary, and Governor's office will recognize the systemic failures that were brought to light by the Luzerne judicial corruption scandal and enact measures to guarantee the rights of all children in Pennsylvania's juvenile justice system.

Recommendations

Chapter One

Ensuring Access to Counsel

Juveniles need the guidance of a lawyer to ensure that they are afforded their constitutional rights during trial and are not unnecessarily incarcerated or improperly transferred to adult criminal court. The following recommendations will ensure that Pennsylvania youth are given effective representation.

1.1 Establish an unwaivable right to counsel for juveniles.

Next step: The General Assembly should amend the Juvenile Act to prohibit the waiver of counsel.

Next step: The Pennsylvania Supreme Court should modify Rule of Juvenile Court Procedure 152 to prohibit juvenile waiver of counsel.

1.2 Establish a state-based funding stream for juvenile indigent defense.

Next step: The General Assembly should establish a dedicated funding stream for indigent juvenile defense that does not depend on counties' willingness to support this constitutionally mandated right to counsel.

1.3 Assume all juveniles are indigent for the purpose of appointing counsel.

Next step: The General Assembly should amend the Juvenile Act to provide that the right to court-appointed counsel shall not depend on parents' income.

Next step: The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 151 to instruct courts to presume indigence of juveniles for the purpose of appointment of counsel.

1.4 Implement an appointment system for counsel that avoids the appearance of impropriety.

Next step: The Pennsylvania Supreme Court should work with the Juvenile Defender Association of Pennsylvania to reduce judges' appointments of counsel who appear before them.

Chapter Two

Instituting Meaningful Appellate Review

Juveniles who wish to challenge their juvenile court orders as unlawful or unjust or otherwise inappropriate need opportunities to appeal what happened in juvenile court. In the adult system, this would be done through: 1) motions to the trial court to reconsider a verdict or sentence; 2) direct appeal, that can challenge the verdict or sentence; or 3) post-conviction proceedings, which can be made after the time for direct appeals has lapsed. The following combination of recommendations will provide meaningful opportunities for youth, through counsel, to challenge verdicts (adjudications) or sentences (dispositions) before taking an appeal, on appeal, and after the time for direct appeal has lapsed.

2.1 Require juvenile court judges to state reasons for disposition on the record.

Next step: The General Assembly should amend the Juvenile Act to require juvenile court judges to state on the record how the disposition ordered furthers the goals of the Juvenile Act and the principles of balanced and restorative justice; and if the disposition is an out-of-home placement, why there is a "clear necessity" to remove the child from the home.

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to require Juvenile Court judges to state on the record how the disposition ordered furthers the goals of the Juvenile Act and the principles of balanced and restorative justice; and if the disposition is an out-of-home placement, why there is a "clear necessity" to separate the child from the home.

2.2 Enact robust post-dispositional relief mechanisms to provide relief to juveniles before and after appeal.

Next step: The General Assembly should amend the Juvenile Act to create meaningful avenues of post-dispositional relief for juveniles adjudicated delinquent similar to adult post-conviction remedies.

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to describe the process for seeking pre-appeal post-dispositional relief for juveniles adjudicated delinquent by adopting proposed Pa.R.J.C.P. 616 Post-Dispositional Procedures (reserved).

2.3 Implement mechanisms to ensure juveniles know of and can take advantage of their rights to appeal.

Next step: The Pennsylvania Supreme Court should promulgate Rule of Juvenile Court Procedure 616 to include a form entitled "Notice of Right to Seek Post-Dispositional Relief," similar to Wisconsin's Form JD-1757, "Notice of Right to Seek Post-Judgment Relief."

2.4 Provide for a system of trained counsel available to represent juveniles in appeals.

Next step: The General Assembly should provide funding to both create new positions for juvenile public defenders specializing in appellate advocacy, and for the proper initial and ongoing training of these attorneys.

2.5 Allow stays of disposition in appropriate cases.

Next step: The General Assembly should amend the Juvenile Act to provide for stays of disposition in appropriate situations.

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rule of Juvenile Court Procedure 617 to delineate the standard that courts should use for determining when a stay of disposition is appropriate.

2.6 Expedite appeals from delinquency proceedings.

Next step: The General Assembly should amend the Juvenile Act to declare that appeals for juveniles adjudicated delinquent take no longer than 90 days to complete from the time of filing the initial notice of appeal, through briefing, argument and decision.

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to delineate the timeline for each step of the appeals process (not to exceed 90 days in total).

Chapter Three

Increasing Transparency and Accountability in the Juvenile Justice System

Juvenile courts have traditionally been closed to the public to protect privacy – unfortunately, that provision offers little or no outside monitoring to ensure that youths' rights were not violated. These recommendations will provide for more transparency and accountability within the walls of the juvenile court.

3.1 Make juvenile courts presumptively open to the public.

Next step: The General Assembly should amend the Juvenile Act to provide that delinquency proceedings shall be open to the public, with a right of the juvenile or any party to petition the court to close the proceedings for good cause.

Next step: The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 129 governing open proceedings to provide that delinquency proceedings shall be open to the public and to set forth the procedures whereby the juvenile or any other party to the proceeding may petition the court to close the proceedings.

3.2 Ensure accountability through an ombudsman to monitor the court system and provide for adequate data collection and reporting.

Next step: The Judicial or Executive Branch should establish an ombudsman office at the state level to monitor and investigate juvenile court practices.

Next step: The newly-established ombudsman office should develop a data analysis protocol that detects and flags unusual trends in county juvenile court data.

Next step: Local courts and community groups should be encouraged to develop their own 'court watch' programs or designate local ombudsman.

3.3 Amend the Pennsylvania Constitution to enhance investigatory procedures and public reporting requirements for the Judicial Conduct Board.

Chapter Four

Reducing Referrals to the Juvenile Justice System

Schools are routinely using the juvenile justice system to discipline their students by referring youth to law enforcement. This results in more youth entering the juvenile justice system and fewer youth benefiting from diversion programs. The following recommendations will propose strategies to reduce the number of youth referred to juvenile court from schools.

4.1 The Pennsylvania House of Representatives should adopt the proposed resolution requiring the Legislative Budget and Finance Committee to study the use of school-wide positive behavioral supports in public schools.

4.2 The Governor should provide funding for the Juvenile Court Judges' Commission to establish standards tied to a grant-in-aid program to enable juvenile courts to establish collaborative programs to limit school-based referrals.

Next step: The Juvenile Court Judges' Commission should develop standards and create a grant-in-aid program that will encourage juvenile court judges to create collaborative committees to support at-risk students, end unnecessary and inappropriate school referrals and expand the available range of diversion programs.

4.3 The General Assembly should enact legislation to minimize the effects of school-based zero tolerance policies and oppose legislation that would unnecessarily increase school referrals to juvenile court.

Next step: The General Assembly should enact legislation to minimize the net-widening effects of zero tolerance policies.

Next step: The General Assembly should oppose legislation that promotes zero tolerance policies by requiring police notification of school-based incidents.

Chapter Five

Ensuring Respectful and Appropriate Treatment of Youth in Detention or Placement and in Court

In some counties, juveniles are routinely shackled and handcuffed while in the courtroom; and if they are found guilty they can be placed in for-profit facilities where the emphasis is on profitability. These recommendations seek to ensure youth are treated respectfully and appropriately during court and do not become commodities for trade.

5.1 Prohibit the handcuffing and shackling of youth in juvenile court.

Next step: The General Assembly should amend the Juvenile Act to prohibit the use of mechanical restraints on juveniles in court absent a clear public safety concern.

Next step: The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to prohibit the use of mechanical restraints on children during juvenile court proceedings, set forth criteria to guide judges in determining whether such restraints are necessary in the interests of public safety, and guarantee the juvenile's opportunity to contest the use of restraints at a hearing.

5.2 Prohibit the use of for-profit facilities for juvenile detention and placement.

Next step: The General Assembly should amend the Juvenile Act to expressly prohibit the use of for-profit detention centers, and the Department of Public Welfare should issue regulations to enforce the ban.

Chapter Six

Reducing the Consequences of Juvenile Records

Juvenile court records have long-lasting effects on youth and their future educational and employment goals. These recommendations seek to reduce those collateral effects of juvenile records and simplify the record expungement process.

6.1 Limit the public availability and collateral consequences of juvenile records.

Next step: The General Assembly should amend the Juvenile Act to limit the public availability of juvenile records including a provision limiting the use of juvenile records to restrict youth employment and educational opportunities.

Next step: The General Assembly should introduce legislation to limit the ability of private databases to gain access to juvenile arrest and disposition information.

6.2 Implement procedures to facilitate expungement of juvenile records.

Next step: The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to ensure that expungements occur automatically in most cases, without requiring that a petition be filed by the juvenile; the Rules should also provide sample petitions or forms for filing in those cases where automatic expungement is not available.

Next step: The General Assembly should amend the Pennsylvania Crimes Code to provide that juvenile summary offenses be automatically expunged six months after the juvenile has been discharged from court supervision.

Introduction

The behavior of the judges and juvenile court professionals in Luzerne County eroded confidence in the rule of law, undermined the goals of Pennsylvania's juvenile justice system, and harmed the very children the system was created to serve. In some ways it was an aberration; but its occurrence points to systemic failures that Pennsylvania must address.

This report has three audiences: the Interbranch Commission on Juvenile Justice; Pennsylvania's three branches of government; and the public at large.

Through its hearings, the Interbranch Commission has shed much needed light on what occurred in Luzerne County. Its members and staff have made a painstaking investigation. It must make recommendations to the three branches of government by May 31, 2010. This report, in the first instance, is in service of the Commission.

The Supreme Court, General Assembly, and Executive Branch will have to respond to the Commission. Neither our recommendations nor the Commission's will be self-executing.

Juvenile Law Center's recommendations are also directed to interested citizens, with our hope that their voices will continue to be heard by leadership. Those members of the public who have been so appalled by the "kids for cash" scandal must continue to call for reforms from Pennsylvania's leaders.

We begin with a word of caution. In our zeal to reform, we must first and foremost do no harm. Pennsylvania's system has many strengths, including many dedicated judges, lawyers, probation officers and youth service professionals who work every day to improve children's lives and expand their opportunities. While there is much work to be done to ensure that the Luzerne County scandal is never repeated, it is worth remembering that Pennsylvania's juvenile justice system is

better than most. When other states in the mid-1990's amended their juvenile codes to push their systems in a more punitive direction, Pennsylvania sought to hold youth accountable in developmentally appropriate ways. Pennsylvania adopted the balanced and restorative justice model. The state retained its goals of treatment, rehabilitation and supervision, while increasing attention to victims, to public safety, and to giving delinquent youth the skills they need to become productive citizens. Pennsylvania retained many of its core principles, including the notion that youth shouldn't be in the juvenile justice system unnecessarily. Under the Juvenile Act, many youth may be diverted from formal processing while still being held accountable for the often reckless and misguided judgments of adolescence.

Indeed, the Luzerne County scandal comes on the heels of recognition of Pennsylvania as a national leader in the way it treats its young people accused of crime. In 2004, a year after cash began changing hands in Luzerne County, the John D. and Catherine T. MacArthur Foundation selected Pennsylvania to be the first state in which it would invest millions of dollars as part of its Models for Change juvenile justice reform initiative. The Foundation felt that its investments could accelerate the state's pace of reform toward a fair, effective, rational and developmentally appropriate juvenile justice system.

Models for Change built on the work of the Pennsylvania Council of Crime and Delinquency's Juvenile Justice and Delinquency Prevention Committee, the Juvenile Court Judges' Commission, the Department of Public Welfare, and the Pennsylvania Council of Chief Juvenile Probation Officers, among others. Pennsylvania has had strong, child-centered leadership at the state level. Counties across the Commonwealth have joined in Models for Change initiatives to promote child well-being while improving public safety.

Even so, the juvenile justice system often appears to have 67 faces, with each of Pennsylvania's counties applying and enforcing the Juvenile Act on its own terms. County practices vary widely, with youth still shackled, denied counsel, or inappropriately detained every day. Of course, nowhere is the dark side of local practice more evident than in the still unfolding story in Luzerne County. As the details of the judicial corruption scandal have come to light, Juvenile Law Center has sought to identify its lessons.

Our recommendations below are organized in six chapters that reflect the abuses of power and injustices that occurred in Luzerne County. Throughout the report, we have integrated the voices of youth and parents in Luzerne County and elsewhere in the Commonwealth who have experienced firsthand the failings we identify. These stories remind us of the human toll imposed by a flawed juvenile justice system.

Our recommendations are directed at the three branches of state government, with specific steps that individual branches of government may take to further the reform goals. In some instances, we have suggested additional agencies or entities

that must participate in the reform process; elsewhere, for example, we have urged the Interbranch Commission to refer Luzerne County attorneys, who routinely turned a blind eye to the judicial malfeasance occurring before them, to the Disciplinary Board of the Supreme Court of Pennsylvania. It is up to the Board to sort out important professional responsibility issues.

This report focuses on what the state government can do to strengthen our juvenile justice system's commitment to fairness, transparency, and accountability while ensuring that it does not harm the youth it exists to serve. We are optimistic that Pennsylvania will continue to serve as a leader in juvenile justice, even as it extricates itself from this unprecedented scandal.

Chapter One

Ensuring Access to Counsel

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.

> *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]

These needs went unmet in Luzerne County juvenile court.

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

In addition, the absence of counsel enabled Judge 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.

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 Luzerne County juvenile court proved that strong mandates alone are insufficient to ensure that youth are treated fairly and that the law is followed. Indeed, Pennsylvania law guarantees the right to counsel for all children, at all stages of proceedings,[2] but this guarantee has proved fragile. Seven years ago, Juvenile Law Center, along with the American Bar Association and the National Juvenile Defender Center, did an assessment of the right to counsel in Pennsylvania. We found 'justice by geography' with high caseloads in many places and waiver of counsel and funding and other resources for children's lawyers varying wildly across the Commonwealth.[3] Juvenile Law Center affirms the recommendations it made in 2003, when we called upon each branch of government to help solve this problem.

Juvenile Law Center urges reforms that will reduce harm to children, promote fair and accurate decision-making, mitigate unnecessary expensive out-of-home placements, and instill in youth a belief in the rule of law.

Recommendation 1.1 – Establish an unwaivable right to counsel for juveniles.

Thousands of youth appeared before Judge Ciavarella after being encouraged to waive their right to counsel. None was given an opportunity

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[2] 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).

[3] *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*"].

to speak with a lawyer; none was asked questions by the judge to determine whether they understood their right; and none was presented with an alternative of representation by the Public Defender. This denial of counsel ensured that youth would be adjudicated delinquent and, in a substantial percentage of the cases, sent to placement.

The thousands of unconstitutional waivers and guilty pleas encouraged and accepted by former judge Ciavarella is tragic confirmation that Pennsylvania needs an unwaivable right to counsel for youth. In the King's Bench proceedings before the Pennsylvania Supreme Court to redress the constitutional violations in Ciavarella's courtroom, Special Master Arthur Grim found that between 2003 and 2008 a total of 1,866 youth appeared without counsel before Ciavarella for delinquency proceedings. He further found that in none of the hearing transcripts he reviewed in which youth appeared without counsel did Ciavarella or anyone else in the courtroom ask if the juvenile knew she had a right to counsel or if she wished to be represented by counsel, and that clear and convincing evidence existed that no juvenile who appeared without counsel between 2003 and May 2008 knowingly and intelligently waived his or her right to counsel.[4]

As we saw in Luzerne County, failing to provide an unwaivable right to counsel is unfair for several reasons. As a result of immaturity or anxiety, unrepresented youth may feel pressure to resolve their cases and may precipitously enter an admission without obtaining advice from counsel about possible defenses or mitigation. Youth without counsel may be influenced by prosecutors or judges, who – even in the best scenarios – are sometimes pressured to clear cases from their calendars. Youth may be further pressured by family members to waive counsel in order to avoid further delay and processing time in court.[5] Youth may not understand the possible consequences of admitting offenses, such as potential incarceration or the resulting criminal records, and their collateral consequences.

In Luzerne County, former judge Ciavarella directed Sandra Brulo, then Chief Juvenile Probation Officer, to draft a waiver form which on its face failed to advise youth or their parents of the serious consequences of giving up their right to counsel. Court personnal or juvenile probation officers, at Judge Ciavarella's direction, routinely provided this form to children and their parents prior to entering the courtroom; it expressly allowed parents to waive counsel for their children. Ciavarella continued to direct the use of this form even after the Pennsylvania Supreme Court's adoption of a rule in 2005 that parents may *not*

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[4] *In re: Expungement of Juvenile Records and Vacatur of Luzerne County Juvenile Court Consent Decrees from 2003-2008; related to In re: J.V.R.; H.T., a Minor through her Mother, L.T., on behalf of themselves and similarly situated youth*, No. 81 MM 2008, Third Interim Report and Recommendations ¶¶ 30-32 (Pa. Aug. 12, 2009).

[5] Without a presumption of indigence for all youth triggering the right to appointed counsel (see Part III), youth are further vulnerable to pressure to waive the right to an attorney by parents who do not have the ability or willingness to pay for representation by a private attorney.

waive a youth's right to counsel.[6] Pennsylvania counties have reduced waiver of counsel considerably since the 2003 Assessment. Nevertheless, waiver of counsel continues to occur. Pennsylvania should establish an unwaivable right to counsel to ensure that violations like those that occurred in Luzerne will not happen elsewhere.

Next step: The General Assembly should amend the Juvenile Act to prohibit the waiver of counsel.

Next step: The Pennsylvania Supreme Court should modify Rule of Juvenile Court Procedure 152 to prohibit juvenile waiver of counsel.

A simple prohibition of waiver is a more efficient and more effective solution than the cumbersome consultation and appointment of stand-by counsel prior to waiving counsel. After hearing an explanation from an attorney about the implications of not going forward unrepresented and the proffered legal assistance, the vast majority of youth will likely choose to avoid facing the court alone. If the youth does proceed *pro se,* someone must still pay for standby counsel. Thus, there is no cost-savings. Proceedings will be longer. The process will add more problems than solutions.

Even with standby counsel, it is hard to see any benefits from permitting youth to choose to proceed unrepresented. Standby counsel typically only act in court upon direction of the Court or of the juvenile defendant.[7] Conversely, given that no minor will know how to best present motions or evidence for the court, or preserve appeal rights, the standby counsel *should* be just as busy as if they were directly representing the child-client. This solution is neither effective protection of legal rights for children nor efficient for the court.

Finally, some have suggested that an unwaivable right to counsel could result in a financial burden to taxpayers. This criticism is flawed. Statewide, over 95

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[6] *See* Pa. R. Juv. Ct. P. 152. The Comments to Rule 152 state: It is recommended that, at a minimum, the court ask questions to elicit the following information in determining a knowing, intelligent, and voluntary waiver of counsel: 1) Whether the juvenile understands the right to be represented by counsel; 2) Whether the juvenile understands the nature of the allegations and the elements of each of those allegations; 3) Whether the juvenile is aware of the dispositions, community service, or fines that may be imposed by the court; 4) Whether the juvenile understands that if he or she waives the right to counsel, he or she will still be bound by all the normal rules of procedure and that counsel would be familiar with these rules; 5) Whether the juvenile understands that there are possible defenses to these allegations that counsel might be aware of, and if these defenses are not raised at the adjudicatory hearing, they may be lost permanently; 6) Whether the juvenile understands that, in addition to defenses, the juvenile has many rights that, if not timely asserted, may be lost permanently; and if errors occur and are not timely objected to, or otherwise timely raised by the juvenile, these errors may be lost permanently; 7) Whether the juvenile knows the whereabouts of absent guardians and if they understand they should be present; and 8) Whether the juvenile has had the opportunity to consult with his or her guardian about this decision.

[7] *See* American Bar Association, Criminal Justice Standards: Special Functions of the Trial Judge, 6-3.7 (2000).

percent of youth already appear with counsel, many of whom are court-appointed. Providing counsel to the remaining few who lack counsel should not be a financial burden.

Legal Support

The U.S. Supreme Court and the Pennsylvania Supreme Court have held that the right to counsel may be waived only upon a showing that the waiver is knowing, intelligent, and voluntary.[8] A prohibition of children waiving counsel errs on the side of research that shows how difficult it is for teens to make a knowing, intelligent and voluntary waiver. They are unlikely to properly comprehend the immediate and potential future consequences of waiving counsel. Youth need more support than adults to withstand pressure to waive counsel. And, as one scholar has written, "The problem becomes more acute when judges who advise youths about their right to an attorney seek a predetermined result, waiver of counsel, which influences both the information they convey and their interpretation of the juvenile's response."[9]

Currently three states prohibit a child from waiving his or her right to counsel. Texas law provides that the right to representation by an attorney cannot be waived at any transfer hearing, adjudicatory hearing, disposition hearing, detention hearing, or mental health commitment hearing.[10] Iowa has a similar statutory provision that prohibits a child of any age from waiving his or her right to counsel at a detention hearing, waiver hearing, adjudicatory hearing, disposition hearing, or hearings to review or modify dispositional orders.[11] The Illinois Juvenile Code provides that a minor of any age may not waive his or her representation by counsel in any delinquency proceeding.[12]

American Bar Association Standards prohibit waiver of counsel, declaring that the "court should not begin adjudication proceedings unless the respondent is represented by an attorney who is present in court." Commentary explains that this means "that the right to counsel [is] unwaivable."[13] The Standards state that "a juvenile's right to counsel may not be waived," even though other rights may be

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[8] *See Von Moltke v. Gillies*, 332 U.S. 708, 723-24 (1948) (holding that defendant's constitutional right to counsel in a criminal prosecution in federal court was violated where trial court failed to obtain a knowing and intelligent waiver from defendant, who appeared without counsel) (citations and internal quotations omitted); *Commonwealth v. Monica*, 597 A.2d 600, 603 (1991) (holding that trial court committed reversible error when it allowed defendant to represent himself at trial where court failed to conduct an on-the-record inquiry to determine whether defendant appreciated that he had the right to counsel and the risks of proceeding without counsel).

[9] Barry C. Feld, *The Right to Counsel in Juvenile Court: Law Reform to Deliver Legal Services and Reduce Justice by Geography* (Criminology & Public Policy, forthcoming May 2010).

[10] Tex. Fam. Code. § 51.10(b).

[11] Iowa Code. Ann. § 232.11(2).

[12] 705 ILCS 405/5-170(b); 705 ILCS 405/5-115.5.

[13] Robert E. Shepard, Jr., Institute for Judicial Administration and American Bar Association, Juvenile Justice Standards Annotated IJA-ABA Standards 1.2, 6.1.A (1996), [hereinafter "*IJA-ABA Standards*"].

waived under certain circumstances. The Ten Core Principles for Providing Quality Delinquency Representation, adopted by the National Juvenile Defender Center and the National Legal Aid and Defender Association, includes an admonition to ensure that children do not waive appointment of counsel.[14] Pennsylvania should follow these standards and provide an unwaivable right to counsel.

Recommendation 1.2 – Establish a state-based funding stream for juvenile indigent defense.

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

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 a mere handful of states that provides no state money for indigent juvenile defense. Other states range from paying 100 percent of the cost of counsel to a variety of other formulas. Pennsylvania pays nothing.[15] 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 cover all expenses for both adult and juvenile indigent defense – including public defender ("PD") and court-appointed counsel for the accused, court support staff, and building and operation costs.

Support services, including investigators, expert witnesses, social workers, and paralegals, are essential to quality representation. They are uniquely important in juvenile delinquency proceedings to 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.[16]

Without funding from the state, Pennsylvania's counties have been unable to ensure adequate resources for quality indigent defense. Nearly 60% of juvenile

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[14] NJDC, Ten Core Principles, *available at* http://www.njdc.info/pdf/10_Core_Principles_2008.pdf.
[15] There was a brief period in recent years when the Department of Public Welfare permitted counties to use Act 148 dollars to pay for defense counsel, in a cost sharing arrangement with the state. This turned out to be ineffective because it depended upon a) DPW's interpretation of the Public Welfare Code, and b) a county's willingness to pay its share to trigger the state match.
[16] *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.

defenders in Pennsylvania reported in 2003 that the lack of support services limited their ability to effectively represent their clients.[17]

Next step: The General Assembly should establish a dedicated funding stream for indigent juvenile defense that does not depend on counties' willingness to support this constitutionally mandated right to counsel.

The state's delegation to the counties of its obligation to secure a child's right to counsel has not only failed the children of this Commonwealth, it also fails to meet the constitutional guarantee of counsel. The Legislature should provide a funding stream for indigent juvenile defense.

Legal Support

The Sixth Amendment right to counsel and Fourteenth Amendment right to due process for youth was established in 1967 in the landmark Supreme Court case *In re Gault*.[18] Pennsylvania incorporates these constitutional requirements of due process and the right to counsel for juveniles in its Juvenile Act. The Juvenile Act states "a party is entitled to representation by legal counsel at all stages of 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."[19]

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.[20] 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.[21] Twenty-four of those states provide 100% of the funding for indigent defense services.[22] Pennsylvania, one of a mere handful 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

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[17] *See 2003 Assessment*, at 3.
[18] *In re Gault*, 387 U.S. 1 (1967).
[19] 42 Pa.C.S. § 6337.
[20] *See* 16 P.S. § 9960.1 *et seq*.; *see e.g*., 323 Pa. Code § 1.4-424 (providing for Delaware County public defender).
[21] *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*"].
[22] This count includes New York, which provides 100% of indigent defense services for juveniles, but not for adults. *See Indigent Defense Services*.

that indigent defense funds come from the general revenue.[23] 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; counties then determine the improvements that are most needed with those state funds.[24]

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 defense application fees or reimbursement of counsel fees.[25] Georgia, for example, in 2004 established a special funding mechanism for its new system of indigent defense.[26] 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.[27] In 2007, Georgia collected $43.3 million through the fines and fees enacted pursuant to this legislation.[28] New York law provides for indigent defense funding through four revenue sources including fees from criminal history checks and attorney registration and parking violations.[29] 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.[30]

Recommendation 1.3 – Assume all juveniles are indigent for the purposes of appointing counsel.

In Luzerne County, as in other Pennsylvania counties, in order to be eligible for representation by a public defender, the youth's family income is considered. Even if youth in Luzerne County routinely sought

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[23] *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.
[24] Wash. Rev. Stat. § 10.101.030.
[25] *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).
[26] *See* H.B. 1EX (Ga. 2005); H.B. 240 (Ga. 2004).
[27] 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.
[28] *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.
[29] *Indigent Defense Services*, at 22-23.
[30] *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.

representation from the PD's office, many would have been ineligible because of their parents' income.

In counties across the Commonwealth, children are routinely denied court-appointed counsel because their parents' financial resources exceed whatever guidelines for indigence that the county has established. If a lawyer is not appointed, the exercise of a child's constitutional right to counsel will turn on whether a parent is able - or willing - to pay for private counsel. Because the threshold income level that triggers appointed counsel varies by county, this is another example of "justice by geography."

Luzerne County demonstrates why we shouldn't have to rely on parents to ensure that their children have counsel. In Luzerne County, many parents were told by lawyers, court personnel or law enforcement that a lawyer wouldn't make a difference, even if the charges suggested risk of placement. Many parents weren't told about the availability of a public defender, even if they were income-eligible. Others were told that charges were so trivial that nothing bad could happen to their son or daughter. Under such circumstances, why waste money on an attorney? Still other parents brought the petitions that led to the court hearings—creating an inherent conflict of interest; and others were angry with their children for being arrested, and wanted to teach them a lesson.

Next step: The General Assembly should amend The Juvenile Act to provide that the right to court-appointed counsel shall not depend on parents' income.

Next step: The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 151 to instruct courts to presume indigence of juveniles for the purpose of appointment of counsel.

Juvenile Law Center joins in the recommendation of the Juvenile Court Judges' Commission that Pa.R.J.C.P. 151 (relating to assignment of counsel) be modified to provide that courts should presume indigence of juveniles for the purpose of appointment of counsel. The counties that presume indigence for youth recognize that forcing parents of any socio-economic status to retain counsel for their children in a delinquency matter forces a conflict in the representation. Financial pressures may lead parents to encourage their children to ignore their right to counsel in an effort to seek a low cost resolution.

An automatic presumption of indigence is the most efficient solution because it avoids the necessity of inquiring into a private and often contentious family discussion of whether a parent intends to hire private counsel, or thinks the cost and effort is "worth it" or the offense is "serious enough" to need legal representation. Under a system that presumes all youth to be indigent, the appointing authority need only confirm whether a child has already retained private counsel or plans to—if not, the public defender should be automatically appointed. In cases of conflict of interest for the public defender, a court-appointed attorney from a panel list should be provided.

Legal Support

Currently Pennsylvania law requires the court to assign counsel for a child if the "juvenile is without financial resources or otherwise unable to employ counsel."[31] Interpreting whose 'financial resources' are to be assessed has been left to the counties. Yet rules adopted by the Supreme Court make clear that the right to counsel belongs to the child, not to the parent or family.[32] Accordingly, a presumption of indigence for all alleged delinquent youth is appropriate as it would be a very rare instance in which a minor under eighteen years old had the resources to hire an attorney for herself.

Five states presume indigence for children and appoint counsel at the state's expense without requiring any inquiry into the financial status of the family.[33] Montana law mandates "[i]f counsel is not retained or if it appears that counsel will not be retained for the youth, the court shall order the office of state public defender . . . to assign counsel for the youth pursuant to the Montana Public Defender Act, unless the right to counsel is waived."[34] New York law provides "family court shall appoint a law guardian to represent a minor who is the subject of the proceeding . . . if independent legal representation is not available to such minor."[35] In Wisconsin, "[i]n any situation . . . in which a child has a right to be represented by counsel or is provided counsel at the discretion of the court and counsel is not knowingly and voluntarily waived, the court shall refer the child to the state public defender and counsel shall be appointed by the state public defender . . . without a determination of indigency."[36]

Presuming indigence for accused youth may appear to be costly to counties who are required to finance their public defender systems, but in fact, many counties in Pennsylvania presume indigence for juveniles and immediately assign them counsel without requesting any family financial information. Juvenile Law Center surveyed public defenders throughout the Commonwealth and received responses from nearly twenty county public defenders who indicated that they automatically assign a public defender to any juvenile regardless of financial background.[37] Most counties indicated that unless the child appears with private counsel, they are automatically assumed indigent and provided with appointed counsel. Given that about 95 percent of youth in Pennsylvania already appear with counsel, many who

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[31] 42 Pa.C.S. § 6337; Pa.R.J.C.P. 151.
[32] *See e.g.*, Pa.R.J.C.P. 152 Comment (providing parent cannot waive a child's right to counsel –only a child can).
[33] *See* Cal. Welf. Inst. Code 634; Mont. Code. Ann. § 41.5.1413; N.Y. Fam. Ct. Act. 249; Wis. Stat. § 48.23(4).
[34] Mont. Code. Ann. § 41.5.1413.
[35] N.Y. Fam. Ct. Act. 249.
[36] Wis. Stat. § 48.23(4).
[37] Research was conducted in response to a request from Pennsylvania State Senator Lisa Baker in 2009 regarding proposed legislation that would prohibit waiver of counsel under the Juvenile Act. The *2003 Assessment* also reported the practice of assuming indigence for children in several counties.

are court-appointed counsel, the concern that it would be a significant financial burden to assume indigence and appoint counsel to all youth who appeared in juvenile court seems misplaced.

Furthermore, cost alone cannot justify the denial of a constitutional right. Young people who are alleged delinquent have a constitutional right to counsel that should not be denied them because of the financial resources of their parents.

Recommendation 1.4 – Implement an appointment system for counsel that avoids the appearance of impropriety.

> *Many judges in Pennsylvania appoint the lawyers who appear before them. In conflict cases, Ciavarella himself appointed the conflict counsel who appeared before him. This appointment system creates a situation in which some lawyers may feel that their continued appointment depends on the limited vigor of their advocacy. At best, there was the appearance of a conflict of interest.*

Former Judge Ciavarella made his expectations about lawyers in the courtroom very clear – attorneys, if they must be present, should say as little as possible. Defense attorneys in Luzerne County understood that zealous advocacy was unwelcome – and would be unrewarded – in Ciavarella's courtroom. Ciavarella may be a corrupt aberration but the subtle pressures of the court appointment system exist across the Commonwealth.

Attorneys for children, no less than attorneys for adults, must be independent advocates for their clients. Yet many attorneys depend on court-appointments for their income. If appointments are issued directly from a judge or his court staff, attorneys may find it prudent to trim their sails in order to avoid losing appointments. Clients in turn may lose their faith in the independence of counsel. There are better systems.

> ***Next step:*** The Supreme Court should work with the Juvenile Defenders Association of Pennsylvania to reduce judges' appointments of counsel who appear before them.

Each county or regional district should establish a judicially-independent body to maintain a panel of qualified attorneys. Appointments can then be made from the panel of qualified attorneys free from judicial influence or conflict. In the alternative, the public defender's office in each county may make appointments to its office for representation, and in cases where the PD has a conflict of interest, can refer clients to a qualified lawyer from the panel.

Legal Support

A majority of states provide by statute that an entity independent from the court set and approve compensation rates for court-appointed counsel. In fifteen states, a public defender provides representation for indigent juveniles, and sets the rate of

compensation for court-appointed counsel in cases of conflict.[38] In some of these jurisdictions, the public defender also manages the panel or list of counsel available and actually makes the appointment after a request from the court. In Louisiana, for example, in the counties that do not have a public defender office, the district or regional public defender makes the appointment from a panel of attorneys.[39]

In sixteen states, a commission independent of the court – either a county board of supervisors, or an indigent defense commission – sets rates of compensation for court appointed counsel.[40] For example, in Kentucky, the Department of Public Advocacy has final approval of the compensation authorized by a judge for court appointed counsel.[41] In some cases, the commission actually appoints the counsel in addition to setting compensation rates. Following 2009 legislation in Maine for example, assigned and contract counsel must submit their vouchers for reimbursement to an independent commission, not a judge.[42]

[38] *See* Colo. Rev. Stat. §§ 21-1-101, 21-2-2-103; 29 Del. Code Ann. §§ 4601, 4605; Ga. Code Ann. §§ 17-13-23, 17-12-22; Haw. Rev. Stat. §§ 802.1, 571-11; Iowa Code § 13B.4; La. R.S. §§ 15:165, 15:164; R.S. Mo. §§ 600.019, 600.021; Mont. Code Ann. §§ 47-1-215, 47-1-201; N.Y. Fam. Ct. Act 245; Tenn. Code § 8-14-202; Wis. Stat. § 977.05; Wyo.Stat. Ann. § 7-6-104; NJDC, *Juvenile Indigent Defense Delivery and Oversight* Systems (2005) (listing Alaska; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Iowa; Louisiana; Missouri; Montana; New York; Tennessee; Wisconsin; Wyoming).

[39] La. R.S. § 15:165.

[40] See Ariz. Rev. Stat. § 8-221; Ark. Code Ann. § 16-87-211; K.R.S. § 31.235; Md. Ann. Code § 16-207; Minn. Stat. § 611.215; R.S. Mo. § 600.021; N.H.Rev. Stat. § 604-B:1 et. seq.; N.J. Stat. § 2A:158A-6; N.M. Stat. Ann. §§ 31-15-7(11), 31-16-8; N.C. Gen. Stat. Ann. § 7A-498.5; N.D. Cent. Code § 54-61-02; O.H. Admin. Code § 120-1-15; 22 Okla. Stat. § 1355.4; O.R.S. § 151.216; Wash. Rev. Stat. § 10.101.030; *see also* M.E. S.B. 423 (enacted Jun. 17, 2009); Okla. H.B. 2028 (2009).

[41] Ky. Rev. Stat. § 31.235.

[42] M.E. S.B. 423 (enacted Jun. 17, 2009).

Chapter Two

Instituting Meaningful Appellate Review

Providing lawyers at trial makes appeals possible. Appeals are a part of accountability. Accountability is important not only to the parties who appear in juvenile court, but to all stakeholders in the juvenile justice system and the public at large.

Appellate courts serve an important public purpose. They give meaning to imprecise words in statutes and constitutions. They guide trial courts, by interpreting the law through affirming or reversing decisions made at the trial level. The appellate process helps legal and lay persons understand what statutes mean, and how they are appropriately implemented. The appellate process furthers fidelity to the law, and promotes uniformity across the Commonwealth. Appellate case law reduces some of the effects of justice by geography. Unfortunately, appeals are routinely taken from all civil and criminal proceedings except juvenile court.

In juvenile court, there are relatively few appeals of adjudications and no appeals of dispositions. In part this is because defenders and other court-

appointed counsel high case loads and lack resources for appeals and in part because so many cases involve guilty pleas. Even so, it is surprising that there are so few challenges to findings of guilt, because there are many circumstances in which juveniles' records can be used against them. It is less surprising but equally harmful that so few challenges are made to dispositions. To illustrate this point, consider the principles of Balanced and Restorative Justice (BARJ), which were incorporated into the Juvenile Act in 1995. In the 14 years since BARJ became law, there have been virtually no appellate cases to guide trial judges in implementing BARJ principles. Every juvenile court judge is left to his or her own interpretation of language that transformed juvenile justice in Pennsylvania.

Luzerne County also showed the importance of appeals to individual youth. The lack of a meaningful appellate process undoubtedly allowed the scandal to endure for so many years.

Because appellate courts can affirm or reverse decisions the trial court made, they act as an important check on abuses of power and misinterpretation of the law. An effective appellate process is particularly important in juvenile court. H.T.'s case, which started Juvenile Law Center's investigation into the Luzerne County juvenile justice system, illustrates the importance of an appeals system that allows a challenge to both the adjudication (the finding of guilt) and disposition (the sentence). Judge Ciavarella found H.T. guilty of "harassment" for a MySpace page parody. He then ordered her to spend three months in a juvenile treatment facility. Because H.T.'s act likely did not meet the elements of "harassment" under the Pennsylvania Crimes Code, H.T. would have had a reasonable chance of having her adjudication reversed if she could have taken advantage of a meaningful appellate process. Furthermore, if H.T. had an avenue to challenge her disposition, there is a good chance she could have shown that as a first time offender, it was not necessary for her to spend three months in a treatment facility to achieve the Juvenile Act's BARJ goals.

Appeals must have a chance of being effective. Today juvenile court appeals are largely exercises in futility because appellate courts, in the rare juvenile court appeal, give enormous latitude to the trial judge. While appellate courts will occasionally reverse adjudications of delinquency because of an error of law, they will only overturn dispositions when a "manifest abuse of discretion" [43] has occurred. The "abuse of discretion" standard sets such a high bar that although H.T.'s disposition seems harsh today, it is likely that almost any reason Judge Ciavarella would have given to support it would have been affirmed on appeal.

At the time he ordered H.T. into placement, Ciavarella gave no reason for his decision. There is nothing in the law that requires the juvenile court to provide a contemporaneous statement of reasons. There is nothing in the law that commands courts to explain how their dispositions are consistent with BARJ principles. In

[43] 42 Pa.C.S. § 6352; *In re J.D.*, 798 A.2d 210, 213 (Pa. Super. 2002).

addition, there is no requirement in the law for juvenile court judges to justify removing youth from their homes at disposition. Appellate courts that have reviewed dependency (child abuse and neglect) cases have since the mid-1970's interpreted the "purpose clause" of the Juvenile Act[44] to require "clear necessity"[45] before removing a child from the home. There has been no similar interpretation in delinquency cases, even though the Act governs both dependent and delinquent children.

Appeals in juvenile court must also be concluded in a timely manner. Too often juvenile appeals are meaningless because the process itself is so lengthy and cumbersome. H.T. would have completed her three month disposition and been home long before an appellate court could have ruled in her favor. As York County juvenile public defender Barbara Krier testified before the Interbranch Commission, it is possible for a juvenile delinquency appeal to take over two years to be resolved. Because juveniles do not have unequivocal rights to seek a stay of disposition, a juvenile could spend months or years in placement, even if the appellate court ultimately reversed the juvenile court's order of disposition on appeal.

Finally, while Judge Ciavarella vacated H.T.'s adjudication himself after Juvenile Law Center filed a Writ of Habeas Corpus, other Luzerne County youth had no redress, even if they had attorneys at trial, because many were out of the system when the corruption came to light. There is a 30-day time limit for filing appeals in Pennsylvania, and juveniles lack any post-conviction remedy based on newly-discovered evidence or other statutory grounds. Thus thousands of juveniles had no legal recourse, which is why Juvenile Law Center had to take the extraordinary step of asking the Pennsylvania Supreme Court to exercise its King's Bench jurisdiction.

Recommendation 2.1 – Require juvenile court judges to state reasons for disposition on the record.

> ***Next step:*** The General Assembly should amend the Juvenile Act to require juvenile court judges to state on the record how the disposition ordered furthers the goals of the Juvenile Act and the principles of balanced and restorative justice; and if the disposition is an out-of-home placement, why there is a "clear necessity" to remove the child from the home.

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[44] The Juvenile Act's purposes include implementing dispositions "in a family environment whenever possible and separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." 42 Pa.C.S. § 6301. Section 6351 has been amended over the years to require juvenile court judges ordering out-of-home placement in dependency cases to "enter findings on the record or in the order of court as follows: (1) that continuation of the child in his home would be contrary to the welfare, safety or health of the child …" There is no similar language in Section 6352 (disposition of delinquent child).

[45] *See e.g. In re Y.P.*, 509 A.2d 397, 399 (Pa. Super. 1986) ("A child who has been adjudged dependent may not be removed from parental custody unless such separation is clearly necessary. Clear necessity is established when the court determines that alternatives to separation are unfeasible.")

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to require Juvenile Court judges to state on the record how the disposition ordered furthers the goals of the Juvenile Act and the principles of balanced and restorative justice; and if the disposition is an out-of-home placement, why there is a "clear necessity" to separate the child from the home.

Juvenile court judges should state on the record how the ordered disposition in a delinquency case will further BARJ goals of the Juvenile Act while advancing the goals of treatment, rehabilitation or supervision. In cases where the juvenile court judge orders a child placed in a facility, the court must state on the record why there is "clear necessity" to remove the child from the home. Given that appellate judges review trial court judgments for merely "abuse of discretion," appellate courts must be able to review the reasons for the juvenile court's decision if appeals are to provide a meaningful avenue of redress. While trial judges must eventually file an opinion in conjunction with an appeal, there should be a requirement that the opinion, or statement of reasons, be contemporaneous with the order of disposition.

Legal Support

The Juvenile Act states that courts must make orders of disposition "consistent with the protection of the public interest and best suited to the child's treatment, supervision, rehabilitation, and welfare and. . .provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable the child to become a responsible and productive member of the community."[46] Juvenile court judges should be required to state on the record how their orders of disposition further the balanced and restorative justice goals of the Juvenile Act, while also advancing the goals of treatment, rehabilitation or supervision. As an example, the Michigan Court of Appeals has created a specific standard of review in appeals from adult proceedings and juvenile delinquency proceedings. The court found that in order to facilitate meaningful appellate review, trial courts must articulate on the record the reasons for their disposition.[47]

Furthermore, before the juvenile court can order an abused, abandoned, or neglected child placed in an out-of-home setting, the judge should state on the record why there is a "clear necessity" to remove the child from the home setting. The purposes of the Juvenile Act are overlapping for dependency and delinquency cases—there is a presumption of promoting public safety while keeping youth in their homes and communities. Indeed, this is done in most delinquency cases, as many youth are placed on probation. Luzerne County, however, where the placement rate was far higher than that of any other county in the Commonwealth,

[46] 42 Pa.C.S. § 6352.
[47] *See In re Chapel*, 350 N.W.2d 871, 874 (Mich. Ct. App. 1984) (citing *People v. Coles*, 339 N.W.2d (Mich. 1983).

shows the importance of a "clear necessity" standard that is capable of appellate review.

Recommendation 2.2 – Enact robust post-dispositional relief mechanisms to provide relief to juveniles before and after appeal.

Post-dispositional relief options should be available. A quick vehicle for seeking relief from the trial court might obviate the need for an appeal. Thus, filing a timely post-disposition motion for relief should toll the time in which to appeal. Juveniles should be able to appeal both the original adjudication and disposition, as well as any result, in a post-dispositional relief action.

If the time for appeal has lapsed, post-conviction remedies will enable a youth to raise newly discovered evidence or other statutory grounds.

> ***Next step:*** The General Assembly should amend the Juvenile Act to create meaningful avenues of post-dispositional relief for juveniles adjudicated delinquent similar to adult post-conviction remedies.
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> ***Next step:*** The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to describe the process for seeking pre-appeal post-dispositional relief for juveniles adjudicated delinquent by adopting proposed Pa.R.J.P. 616 Post-Dispositional Procedures (reserved).

Legal Support

The Post-Conviction Relief Act (PCRA) allows adults convicted of crimes in Pennsylvania to seek collateral relief if the conviction or sentence resulted from:

- A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
- Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place;
- A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused the petitioner to plead guilty and the petitioner is innocent;
- The improper obstruction by government officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court;
- The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced;

- The imposition of a sentence greater than the lawful maximum; or
- A proceeding in a tribunal without jurisdiction.[48]

However, the PCRA does not apply to juveniles in Pennsylvania.[49] The General Assembly should create a juvenile equivalent.

Adults also have options under the Rules of Criminal Procedure to seek withdrawal of a plea of guilty or *nolo contendere,* a motion for a judgment of acquittal, a motion in arrest of judgment, a motion for a new trial, and/or a motion to modify a sentence.[50] The Juvenile Court Procedural Rules sets out the procedure for juveniles' "right to make a post-dispositional motion," but does not define what types of post-dispositional motions a juvenile can actually bring.[51] While some juveniles can seek post-dispositional relief by filing a writ of habeas corpus, this option only applies to those in detention or other placement and is therefore not a comprehensive mechanism for review of unlawful decisions.[52]

Several states afford juveniles the right to some type of post-dispositional relief. Tennessee has the most detailed code pertaining to post-commitment relief for juveniles. There is no time limit for seeking this relief as long as the juvenile is still in custody and has exhausted administrative remedies. Tennessee authorizes relief from juvenile orders when the commitment is void, or voidable, due to a violation of any right guaranteed by the state or federal laws or Constitution, or if a right is later recognized and determined to apply retroactively.[53]

Wisconsin also has a strong post-dispositional relief system. In some cases, juveniles can move post-dispositional relief before beginning a traditional appeal.[54] If the result in the post-disposition relief proceeding is unfavorable to the juvenile, he or she can then appeal the original order or the decision in the post-disposition relief proceeding.[55] Many of Wisconsin's appellate and post-dispositional procedures are set forth in Appendix B.

Recommendation 2.3 – Implement mechanisms to ensure juveniles know of and can take advantage of their rights to appeal.

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[48] 42 Pa.C.S. § 9543(2).
[49] *J.P.*, 543 A.2d 1057 (Pa. Super. 1990).
[50] Pa. R. Crim. P. 720(B)(1).
[51] Pa. R.J.P. 520.
[52] *See* Pa.C.S. § 6503.
[53] Tenn. Code Ann. §§ 37-1-301-322.
[54] Post-dispositional relief can be sought for the discovery of new evidence, Wis. Stat. § 938.46, plea withdrawal, or even a new dispositional hearing.
[55] Wis. Stat. Ann. §§ 938.47, 938.46 (providing Rule 809.30 applies to motions for post-dispositional relief brought by juveniles); Telephone interview with Eileen Hirsch, Assistant State Public Defender in the Wisconsin State Public Defender's Madison Appellate Office, Feb. 11, 2010.

Next step: The Pennsylvania Supreme Court should promulgate Rule of Juvenile Court Procedure 616 to include a form entitled "Notice of Right to Seek Post-Dispositional Relief," similar to Wisconsin's Form JD-1757, "Notice of Right to Seek Post-Judgment Relief."

Attorneys who represent the juvenile at trial should continue representation until conferring with the juvenile to explain appellate rights and filing with the court a notice of the right to post-dispositional relief. If the juvenile chooses to appeal, the attorney should also file notice of the juvenile's intent to pursue post-dispositional relief signed by the juvenile. Once the juvenile's trial attorney has filed these notices, the juvenile court clerk must send all relevant records to the appropriate attorney's office so that appellate counsel may be promptly assigned and the post-dispositional relief process begun.

Legal Support

The Pennsylvania Constitution gives juveniles the right to appeal[56] and the Juvenile Court Procedural Rules require that at the dispositional hearing, the court state on the record that the juvenile has been informed of the right to file a post-dispositional motion and the right to appeal, the timelines for doing so, and the right to counsel on appeal.[57] Pennsylvania should institute additional procedures to ensure juveniles understand these rights, and are able to take advantage of the right to appeal.

In Wisconsin, the courts use a form entitled "Notice of Right to Seek Post-Judgment Relief." All attorneys who represent juveniles before the trial court are required to continue to represent the juvenile until this form is signed and filed. The form discusses the right to appeal and requires the juvenile to check one of three boxes: "I plan to seek post-judgment relief," "I do not plan to seek post-judgment relief" or "I am undecided about seeking post-judgment relief and I know I need to tell my lawyer within 20 days." The attorney must also certify that he or she has counseled the client about the right to seek post-judgment relief and that the client must decide within 20 days.[58] Once the form is filed (within 20 days of the trial court judgment), if the juvenile wants to pursue post-judgment relief, the clerk has five days to send the form to the statewide appellate office. This office then appoints specialized appellate counsel.[59]

Recommendation 2.4 – Provide for a system of trained counsel available to represent juveniles in appeals.

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[56] Pa. Const. Art. 5 § 9. *In re Thomas*, 625 A.2d 150, 153 (Pa. 1990).
[57] Pa. R.J.C.P. 512(C).
[58] State of Wisconsin Circuit Court form JD-1757, "Notice of Right to Seek Post-Judgment Relief," *available at* Appendix B.
[59] Wis. Stat. § 809.30(2).

Whether Pennsylvania chooses to create a statewide juvenile appeals office, or designate attorneys in each county to handle this caseload, these specialized juvenile appellate attorneys should be:

- trained in juvenile defense and appellate practice and required to attend juvenile-specific representation training and continuing education courses;
- compensated fairly-- specifically, we recommend that their pay, and that of any private bar attorney hired to cover appeals where there is a conflict of interest, is tied to the pay of attorneys in the county district attorney's office or the Pennsylvania Attorney General's office;
- required to provide technical assistance to and lead training sessions for trial attorneys; and
- tied into a network of juvenile appellate attorneys to discuss complex cases and brainstorm litigation strategies (similar to, or a part of, the existing Pennsylvania Juvenile Defender Association).

Next step: The General Assembly should provide funding to both create new positions for juvenile public defenders specializing in appellate advocacy, and for the proper initial and ongoing training of these attorneys.

Legal Support

As discussed in the previous chapter, all states guarantee juveniles a right to counsel during delinquency proceedings. Pennsylvania's Juvenile Act states that juveniles have a right to counsel at all stages of the proceeding.[60] At the appellate level, the promise of counsel will be empty if attorneys are not specially trained and paid adequately to do their jobs.

Wisconsin has two state appellate offices; the attorneys' salaries are linked to that of attorneys working in the state attorney general's office, to ensure fair compensation and thus high-quality representation of juveniles on appeal.[61]

Pennsylvania could adopt a hybrid model, in which counties such as Philadelphia would maintain their juvenile appellate units while creating a state appellate office to serve counties without appellate resources.

Recommendation 2.5 – Allow stays of disposition in appropriate cases.

Juvenile court is unique. Juveniles may need prompt treatment, or need to be separated temporarily from their communities because of the public safety risks they present. At the same time, the juvenile justice system is an involuntary one—

[60] 42 Pa.C.S. § 6337.

[61] Telephone interview with Eileen Hirsch, Assistant State Public Defender in the Wisconsin State Public Defender's Madison Appellate Office, Feb. 11, 2010.

it can compel treatment or placement only when it has a right to do so. This occurs after an adjudication based on proof beyond a reasonable doubt, and a showing that the disposition is the least restrictive alternative to advance the goals of the Juvenile Act. As Luzerne demonstrates, juvenile court involvement can be traumatic. Out-of-home placement under any circumstance is disruptive to a child's schooling, family life and normal developmental trajectory.

> ***Next step:*** The General Assembly should amend the Juvenile Act to provide for stays of disposition in appropriate situations.
>
> ***Next step:*** The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rule of Juvenile Court Procedure 617 to delineate the standard that courts should use for determining when a stay of disposition is appropriate.

A system of post-disposition relief that includes the recommendations above must be finely balanced. Some youth will surely need prompt, involuntary services; others will have been inappropriately adjudicated delinquent or will have received an inappropriate disposition. In the first case, a stay of disposition will be problematic; in the latter, the absence of a stay will promote injustice and may cause great harm. Fortunately, in most areas of the law, trial and appellate courts have learned how to accommodate competing interests when deciding whether to grant a stay.

In an effort to balance these interests, Juvenile Law Center recommends that the trial court grant a stay if the juvenile shows that:

(1) the juvenile is not a danger to self or others;

(2) the juvenile is likely to prevail on the merits; and

(3) there is no clear necessity for immediate placement.

The application for a stay should be presented to the trial court in the first instance, with reasons why it should be granted. If the trial court denies the stay, appellate courts should use the same three-part test in considering a request for relief at the appellate level.

Legal Support

Adults convicted of crimes and sentenced to imprisonment of fewer than two years have a qualified right to be released on bail pending appeal.[62] This operates as a stay of a sentence of confinement. Stays pending appeal are also routinely allowed in civil cases.[63] Yet, juveniles adjudicated delinquent are caught in the middle with no option of a stay. To balance the competing interests discussed above, Juvenile Law Center proposes a heightened standard adapted from Pennsylvania's standard for granting a preliminary injunction, the standard for release on bail of an adult convicted of a crime, and the standard for removing a

[62] Pa. R. Crim. P. 521(B)(1).
[63] *See* Pa.R.A.P. 1732.

child from the home in the dependency context.[64] Finally, the application for a stay pending appeal should reflect the requirements for a stay in the civil context, including a statement of the reasons for the relief requested and the facts relied upon.[65]

Many states provide for stays of juvenile delinquency dispositions in some cases.[66] Most of these states have either a presumption in favor of or against the stay, and allow the court to order a stay in its discretion, but do not provide any standards to guide the judge in making this determination. North Carolina has a heavy presumption in favor of releasing the juvenile pending appeal, with or without conditions, unless the court orders otherwise. If the court does not want to release the juvenile, it must state in writing "compelling reasons" why the state should not release the juvenile, and enter a temporary order for the placement of the juvenile as the court finds to be in the best interests of the juvenile or the state.[67] Virginia provides for automatic stays in many types of juvenile delinquency dispositions, including some involving placement in a secure facility.[68]

Recommendation 2.6 – Expedite appeals from delinquency proceedings.

Next step: The General Assembly should amend the Juvenile Act to declare that appeals for juveniles adjudicated delinquent take no longer than 90 days to complete from the time of filing the initial notice of appeal, through briefing, argument and decision.

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[64] Pa. R. Crim. P. 521(A)(2); *Warehime v. Warehime*, 860 A.2d 41 (2004). "There are six essential prerequisites that require a party must establish prior to obtaining preliminary injunctive relief. The party must show: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable, its right to relief is clear and the wrong is manifest, or, in other words, that it is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest."

[65] *See* P.R.A.P. 1732.

[66] *See e.g.* Ala. R. Juvenile P. 28(E); Alaska Delinquency R. 26(b); Ariz. Rev. Stat. Ann. § 28-235(B); Conn. Gen. Stat. § 54-95(b); Haw. Rev. Stat. § 571-54 (effective until June 30, 2010); Iowa Code § 232.133(3); La. Child. Code Ann. art. 336(A); Miss. Code Ann. § 43-21-651(2); Mont. Code Ann. § 41-5-1423(2); N.H. Rev. Stat. Ann. § 169-B:29; N.C. Gen. Stat. Ann. § 7B-2605; N.D. Cent. Code § 27-20-56(2); N.M. Stat. Ann. § 32A-1-17(B); Ohio R. App. 7(C). Okla. Stat. Ann. tit. 10A §2-2-601(C); Or. Rev. Stat. Ann. § 419A.200(7)(a); R.I. Gen. Laws Ann. § 14-1-53; Tex. Code Ann. § 56.01(g); Utah Code Ann. § 78A-6-1109(8); Va. Code Ann. § 16.1-298(B); Wash. Rev. Code Ann. § 13.04.033(1); W. Va. Code R. § 49-5-13(d); Wyo. Stat. Ann. § 14-3-433(A).

[67] N.C. Gen. Stat. Ann. § 7B-2605.

[68] Va. Code Ann. § 16.1-298(B).

Next step: The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to delineate the timeline for each step of the appeals process (not to exceed 90 days in total).

Juveniles have little reason to appeal an order of disposition when they rightfully expect to fulfill the requirements of their disposition long before the appeal is resolved. Juvenile Law Center supports the recommendation of the Juvenile Court Judges' Commission that the appeals process, including the time the appellate court takes to render an opinion, take no longer than 90 days to conclude.

Legal Support

Pennsylvania already "fast-tracks" appeals in certain serious cases involving children, including dependency and termination of parental rights cases.[69] As the Juvenile Court Judges' Commission has suggested, the same reasons Pennsylvania expedites those cases apply in the delinquency context. The National Council of Juvenile and Family Court Judges recommends timeliness throughout the juvenile justice process, including expediting appeals. It observes that "one purpose of the juvenile justice process is to teach offenders that illegal behavior has consequences and that anyone who violates the law will be held accountable." Therefore, the Council contends, when there is a delay between the offense and the consequence, "the intended lesson of consequences and accountability is lost and the consequences will not likely change future behavior." Furthermore, the Council explains that an untimely juvenile justice process will promote uncertainty, which in turn creates anxiety in the juvenile. This has negative policy consequences because anxiety may lead to decreased trust in the system. "If a youth does not perceive the juvenile justice system to be predictable and fair, then the system's goal of changing behavior is less likely to be achieved."[70]

Over a dozen states already fast-track at least some appeals in juvenile delinquency cases.[71] Research showed, however, that none of these states provide a specific timeline in which the appeal should be decided. Rather, they typically declare that such cases should be given "priority" or "preference."[72] Juvenile defenders in these states complain that without a set timeline, the mandate to "expedite" or "give preference" to the appeal has little meaning. This is particularly true when there is no deadline by which the court must render a decision.

Some states do provide a specific timeframe for appeals taken by juveniles in confinement. In Florida, for example, a juvenile may not be held in a detention

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[69] *See e.g.* Pa. R.A.P. 102 (defining "Children's fast track appeals").
[70] Nat'l Council of Juvenile and Family Ct. Judges, Juvenile Delinquency Guidelines 159-164, *available at* www.ncjfcj.org.
[71] *See e.g.* Alaska R.A.P. 219(g); Ariz. Rev. Stat. Ann. § 28-235(C); Fla. Stat. Ann. § 985.26(1); Idaho Code Ann. § 20-528; Kan. Stat. Ann. § 38-2380(c); Ky. Rev. Stat. Ann. § 610.130; Me. Rev. Stat. Ann. tit. 15 § 3405(3)(D); Minn. Stat. Ann. § 260B.415(c); Miss. Code Ann. § 43-21-651(3); Neb. Rev. Stat. § 43-287.01; Ohio R. App. 11.2(D); Va. Code Ann. § 16.1-296(C2).
[72] *See e.g.* Ariz. Rev. Stat. Ann. § 28-235(c); Ala. Code § 12-15-20.

center for longer than 24 hours unless the court has ordered the detention, and the order includes specific instructions that direct the release of the child from that facility.[73] Virginia provides the strongest protections for juveniles in secure facilities pending appeal. If the juvenile is in the secure facility as a disposition of a delinquency adjudication, the court must hold a hearing on the merits of the appeal within forty-five days of its filing or the juvenile must be released.[74]

[73] Fla. Stat. Ann. § 985.26(1).

[74] Va. Code Ann. § 16.1-298(C2). The circuit court can extend this timeframe only for a reasonable period and only for good cause shown, and must record the reason for the extension in writing in the case file.

Chapter Three

Increasing Transparency and Accountability in the Juvenile Justice System

In Luzerne County, over 4,500 children over a period of half a decade were adjudicated delinquent; hundreds each year were sent to placement facilities without due process.[75] Judge Ciavarella could succeed because neither the public nor the media were witness to his abuses. He knew that parents and families, ignorant of their rights and intimidated by his authority, would be unlikely to raise

[75] See generally, Third Interim Report of the Special Master Arthur Grim (August 12, 2009), *available at* http://www.jlc.org/news/35/expungement-rec/; Terrie Morgan-Besecker, "Public still waiting for ex-county judges' court date" The Times Leader (Wilkes-Barre PA) (Jan. 24, 2010); William Ecenbarger, "Luzerne Officials Deny Knowing of Abuse" Philadelphia Inquirer (Nov. 11, 2009), *available at* http://www.philly.com/philly/news/homepage/69737072.html.

their voices in the face of his misconduct. Although what happened in Luzerne County was extreme, irregularities have occurred in other counties.

Such widespread, systemic violations over such a long period of time could not have been accomplished but for the willful blindness of the legal community and other public officers involved in the juvenile justice system. Luzerne County prosecutors, defense attorneys, and probation officers were witnesses to the abuses over this five-year period. Given the magnitude of the abuses, they should not have the benefit of hindsight.[76]

In addition, many of the practices in Luzerne County juvenile court could not be appealed. Shackling of youth is one example. Instituting mechanisms to ensure accountability through transparency ensures that what occurred in Luzerne County will not be replicated elsewhere.

Recommendation 3.1 – Make juvenile courts presumptively open to the public.

> *I think juveniles are intimidated and confused being in a courtroom when there's only legal staff (court staff) present. I feel juveniles think everyone is against them. The looks and attitudes of court staff may dishearten and cloud a juvenile's ability to focus on the issues at hand. The courtroom should be open to anyone who has an interest the case, be family, friends, reporters etc.* – Parent of Pennsylvania 16-year-old

The right to a public trial is guaranteed to criminal defendants by the United States Constitution. Public courts of justice are designed to ensure that "justice may not be done in a corner nor in any covert manner."[77] However, this right has not been extended to juveniles because it is often in the juvenile's interest to have the court proceedings kept confidential. There are times when highly sensitive information is shared, and it has generally been thought that closed proceedings would shield youth from unnecessary stigma. Thus, Pennsylvania juvenile court proceedings until 1996 were presumptively closed. Amendments to the Juvenile Act, effective in March 1996, provided exceptions to the rule.[78] Those amendments were designed to enable the public to see how youth charged with serious offenses

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[76] Many testified at the ICJJ hearings that they only knew procedures were wrong with the benefit of "hindsight." See Interbranch Commission Hrg. Transcr. (November 10, 2009): Judge Lupas (then DA) at 42:26, 48:8, DA Carroll at 132:8, Chief Public Defender Russin at 184:2, 198:18-20, 204:12, 208:7-8, Deputy Dir. Juv. Probation Johnson at 251:14-19. See also, Public Defender Ursiak, Interbranch Commission Hrg. Transcr. at 211:23 (December 7, 2009).

[77] West New Jersey Charter (1677).

[78] Proceedings in juvenile court in Pennsylvania are open if the petition alleges: (1) a felony offense by a child age 14 or older; or (2) murder, voluntary manslaughter, aggravated assault, arson, involuntary deviate sexual intercourse, kidnapping, rape, robbery, robbery of a motor vehicle, or attempt or conspiracy to commit one of the above offenses by a child 12 years of age or older. Otherwise, juvenile court proceedings are closed. 42 Pa. Cons. Stat. § 6336(e).

were treated in juvenile court. Ironically, many youth in Luzerne County were not charged with offenses serious enough to open the courthouse doors. Thus, in Luzerne County, a protection put in place for the benefit of youth in fact merely protected the judges.

However, in the years since 1996, despite opportunities for access by the media and public to juvenile proceedings, it is rare that they visit juvenile courts. While opening courtrooms is an important step towards transparency, there is no reason to think that opening courtrooms alone will prevent future Luzernes.

> ***Next step:*** The General Assembly should amend the Juvenile Act to provide that delinquency proceedings shall be open to the public, with a right of the juvenile or any party to petition the court to close the proceedings for good cause.

The Act should also be amended to mandate that the judge maintain confidentiality of medical, mental health, and social history information by dismissing members of the public from the courtroom during sensitive testimony at disposition and by sealing those court records from the public's view. Any order to close proceedings should, however, be with the agreement of the juvenile. Closing proceedings should never benefit the judges.

> ***Next step:*** The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 129 governing open proceedings to provide that delinquency proceedings shall be open to the public and to set forth the procedures whereby the juvenile or any other party to the proceeding may petition the court to close the proceedings.

Juvenile Law Center supports the Juvenile Court Judges' Commission's recommendation to open juvenile proceedings but giving the court broad authority to close any proceeding, or any portion of a proceeding. We also support JCJC's recommendation that identifying information, including names of parties, be prohibited from being printed by news outlets, cameras be prohibited from juvenile courtrooms and sketches of family members be prohibited from being used by the media.

However, as noted above, opening more juvenile court proceedings to the media may not have the desired effect of creating more accountability for judges. Therefore, we recommend that in tandem with opening courtrooms,Pennsylvania establish a court watch or ombudsman program and a stricter mandate on what information can be used against a minor by employers, colleges, and other future service providers. We discuss these recommendations in other parts of this Report.

Also, the desire to open proceedings to make judges more accountable must be balanced against the best interests of children. Children's interests are not served by having the details of their social and emotional history shared with the media and general public. The public may have an interest in seeing how justice is dispensed for children who commit acts of wrongdoing, but there is no equivalent need for the public to gain access to personal information regarding the child's

social, emotional or medical history. If the Juvenile Act is amended to allow for increased public and media access to proceedings, safeguards will be necessary to assure that confidential information remains confidential. For example, language should be included within the statute to mandate that the judge exclude members of the public and media not related to the case when social histories and behavioral health information are discussed. There should also be additional safeguards to assure that damaging information is not printed about a juvenile in newspapers or other media outlets. Similar to Pennsylvania's existing provisions, any minor who wishes to move for the proceedings to remain closed to the public, or for certain portions of the proceedings to remain closed to the public, should have the ability to do so. These motions should be routinely granted unless there is good cause to show why the public has a right to know the information being discussed.

Legal Support

Proceedings in juvenile court in Pennsylvania are open to the public if the petition alleges: (1) a felony offense by a child age 14 or older; or (2) murder, voluntary manslaughter, aggravated assault, arson, involuntary deviate sexual intercourse, kidnapping, rape, robbery, robbery of a motor vehicle, or attempt or conspiracy to commit one of the above offenses by a child 12 years of age or older.[79] Otherwise, juvenile court proceedings are closed. However, if the district attorney and juvenile agree to have proceedings closed, the court shall close the proceeding or a portion of the proceeding to the public.[80] The Rules of Juvenile Court Procedure remain reserved on the point of open proceedings, but provide that all court personnel are prohibited, without court authorization, from disclosing any information regarding a juvenile case that is not available to the public.[81]

Although these provisions address the potential negative effects of sharing confidential information with the public, they do not provide adequate safeguards for the juvenile. Existing Pennsylvania law provides that the court may maintain confidentiality of mental health, medical, juvenile institutional documentation, and juvenile probation reports at disposition, but is not obligated to do so.[82]

Rather than providing that the juvenile and district attorney must agree to the closing of portions of proceedings, the juvenile, or any other party, should have the option to move the court for closure, demonstrating it is in the juvenile's interests. Furthermore, the information that is prohibited from being shared by court personnel should extend to the media as it pertains to personally identifiable information.

Other state statutes or rules that provide for open proceedings allow for the court to close proceedings upon a motion of any party to protect the safety or welfare of the individuals involved in the proceedings. For example, in Michigan, juvenile

[79] 42 Pa. Cons. Stat. § 6336(e).
[80] 42 Pa. Cons. Stat. § 6336(f).
[81] Pa.R.J.C.P. 130.
[82] 42 Pa. Cons. Stat. § 6336(f).

proceedings are open to the public unless the court upon motion of a party chooses to close them for the protection of any party.[83] Virginia law, similar to Pennsylvania's, allows for the court *sua sponte* or upon motion of either party to close the proceedings. If the proceedings are then closed, the judge must make written findings stating why the proceedings were closed; those findings will become part of the court record.[84] Idaho and Louisiana have provisions that require open proceedings in serious felony cases for youth age 14 or older, but Idaho has a provision allowing for confidentiality in exigent circumstances.[85]

Presumptively open statutes across the country also provide noteworthy safeguards. In Texas, juvenile courts are presumptively open to the public unless good cause is shown as to why the public should be excluded. However, if the child is under the age of 14, the proceedings will be closed unless the court determines it is in the best interests of the parties to have the case remain open to the public.[86] Florida juvenile hearings are open to the public, but the court is given discretion to close them upon consideration of the best interests of the public and the child.[87] Tennessee explicitly states that the juvenile court proceedings shall be open unless closing them would result in particularized prejudice to the party seeking closure that would override the public's compelling interest in open proceedings.[88]

New York is the most protective of the juvenile's privacy while providing that juvenile proceedings are open to the news media and the general public.[89] Representatives of the media must submit an application to report on judicial proceedings. Prior to accepting the application, the judge conducts a review hearing and gives parties an opportunity to identify concerns or objections. Even after approval of news coverage, each witness is given the opportunity prior to testifying to raise objections to coverage and ask that his image be obscured visually. The judge may also modify or revoke the approval of media coverage during judicial proceedings. Additionally, the judge may exclude someone from the proceeding only upon a case-by-case determination based upon supporting evidence, that such exclusion is warranted.[90] The New York law appears to be the most comprehensive in outlining safeguards for juveniles who are subject to open proceedings. Although other states have statutes allowing for presumptively open proceedings, only New York directly considers press coverage of juvenile proceedings.

As described above, because juvenile proceedings are intended to be rehabilitative, information regarding a child's medical, social, and emotional history is freely discussed. In Pennsylvania, this information is generally protected under federal and state confidentiality provisions such as the Health Insurance Portability

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[83] M.C.R. Rule 3.925.
[84] Va. Code Ann. § 16.1-302.
[85] Idaho Code § 20-525; La. Ch. Code. Art. 879.
[86] Tex. Fam. Code Ann. § 54.08(a).
[87] Fla. Stat. Ann. § 985.035(1).
[88] Tenn. R. Juv. P. 27.
[89] N.Y. R. Unif. Trial Ct. § 205.4(a).
[90] N.Y. Standards & Admin. Policies § 131.4.

and Accountability Act of 1996 (HIPAA) and the Mental Health Procedures Act (MHPA).[91] HIPAA, the law governing medical health information, provides that the information only be shared with consent of the patient or in limited circumstances to obtain treatment, payment, or health care operation activities.[92] HIPAA was designed to ensure that agencies and individuals who have access to certain health information disclose that information when sharing is important and protect that information when privacy is important. However, HIPAA only applies to "covered entities," which includes health plans, health care clearinghouses, and health care providers. Neither the court nor the media is a HIPAA-covered entity. Therefore, they are permitted to share the information with any individual or the general public. While the Court is permitted to receive certain health care information about the child, pursuant to court order or written consent of the minor, sharing this information with the media and the general public may not violate HIPAA but may be contrary to the best interests of the child to whom the information pertains.[93]

The MHPA provides that generally, the individual who consented to the mental health care controls the release of the information to third parties – this includes to the minor's own parents and the Court. Most minors in the delinquency system are between the ages of 14-17 years old; the MHPA allows these minors to consent to their own inpatient and outpatient mental health treatment, and have complete access to the records of such treatment.[94] This information can, however, be shared with the delinquency court if it is not privileged, or pursuant to a court order or subpoena.[95] Again, because the MHPA only applies to mental health facilities and service providers, the court and the media are permitted to share the very sensitive information regarding a child's mental health discussed in court with any member of the public. Therefore, safeguards should be in place to ensure that information that could be damaging to the child is not shared with the public, even during an otherwise open proceeding.

Following discovery of the corrupt acts of the Luzerne County judges, Pennsylvania State Senator Lisa Baker introduced a bill to open juvenile proceedings to the media.[96] Because of the establishment of the Interbranch Commission on Juvenile Justice, legislative efforts were put on hold to await further recommendations from the Commission. Senator Baker's bill is a salutary first step toward addressing this problem. However, the Interbranch Commission should take this a step further and provide additional safeguards to ensure judicial accountability while serving the best interests of the court-involved youth.

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[91] 45 C.F.R. Part 160 et seq.; 50 Pa. Stat. § 7107 et seq.
[92] 45 C.F.R. § 164.506(c); 45 C.F.R. § 164.502(a)(1)(ii); 45 C.F.R. § 164.501.
[93] 45 C.F.R. §§ 164.506(a); 164.512(k)(5).
[94] Minor's Consent Act, 35 P.S. § 10101.2; Mental Health Procedures Act, 50 Pa. Stat. § 7204; Mental Health Manual, 55 Pa. Code § 5100.4.
[95] Mental Health Manual, 55 Pa. Code §§ 5100.31, 5100.21, 5100.35(b), 5200.2, 5200.41(c), 5221.1, 5221.52(a).
[96] Senate Bill 872 (Printers No. 1107), *available at* http://www.legis.state.pa.us.

Recommendation 3.2 – Ensure accountability through an ombudsman to monitor the court system and provide for adequate data collection and reporting.

Courts can be complex and intimidating. When members of the public come into contact with the legal system and experience perceived or actual problems, they may be unaware of their rights or may have questions about whether the actions of the judge, lawyers, or court employees were proper. They may be unaware of existing systems of oversight over judges and lawyers, or may want to speak with someone before initiating an appeal or filing a complaint with a disciplinary board. Yet our current system does not provide a forum for their questions or concerns.

In Luzerne County, thousands of youth who appeared in juvenile court were deprived of their constitutional rights to appear before an impartial tribunal, to be represented by counsel, to be protected against self-incrimination, and to be assured a knowing, intelligent, and voluntary waiver of trial rights before pleading guilty. Families watched as their children were taken away in handcuffs and shackles within minutes of their court appearances and placed in institutions for trivial infractions.

While some of these youth and families questioned the court practices, believing them to be unreasonable and unfair, nobody responded to their concerns. Attorneys, probation officers, and court staff were aware of the violations of children's rights and did nothing. Many of these youth-serving professionals testified before the Interbranch Commission on Juvenile Justice that they did not believe it was their duty to speak up, or that speaking up would compromise their ability to continue practicing in that court.

Although opening courtrooms to the public and media is important, in itself it may be inadequate to curb abuses of power. An open courtroom alone does not provide families and practitioners with an avenue to report perceived misconduct. It does not ensure that grievances or red flags captured in juvenile court statistics will be recognized and investigated, or that trends in data showing possible systemic problems will be detected.

The Commonwealth should promote accountability through independent oversight. An ombudsman is an independent watchdog and public advocate who investigates grievances regarding governmental abuses of power, illegal and inappropriate behavior by those in positions of authority, and violations of individual's rights. An ombudsman with the power to monitor juvenile courts in Pennsylvania would be accessible to youth and families with grievances, and would have an obligation to investigate and speak up on their behalf.

Child advocates in Pennsylvania have worked together to develop a proposal for a children's ombudsman office.[97] While Juvenile Law Center supports the

[97] The Protect Our Children Commission (POCC), a coalition of child advocates in Pennsylvania, developed a proposal for a Children's Ombudsman who would have the power to investigate

children's ombudsman proposal, it is not intended to provide juvenile court oversight, and for the most part would not address issues like those that arose out of Luzerne County. Taken together with Juvenile Law Center's recommendation for an ombudsman to monitor the juvenile courts, the two would provide comprehensive protection for children and families.

Effective outside oversight of the juvenile court system requires a watchdog that not only investigates non-appealable grievances made by youth and their families, but also investigates unusual trends and events detected in juvenile court data. Although statistical data is available through county juvenile probation departments and is annually compiled by the Juvenile Court Judges' Commission (JCJC), this system of data collection and reporting did not effectively draw attention to the systemic problems in Luzerne County. The existing system collects and analyzes the relevant demographic data of juveniles and their case outcomes. It is lacking, however, in several ways. The capacity of juvenile courts to provide information is not consistent across counties, and JCJC is not sufficiently funded and staffed to provide the public with real-time data analysis.[98]

The Commonwealth also does not use existing data monitoring software that has the sensitivity to detect and flag unusual trends similar to the type that occurred in Luzerne County. For example, modern data monitoring systems would have automatically flagged the unusual increase in youth waiving counsel in Luzerne County and the correlated increase in youth placement rates in the same year.

> ***Next step:*** The Judicial or Executive Branch should establish an ombudsman office at the state level to monitor and investigate juvenile court practices.

The ombudsman office should have the authority to receive and investigate complaints about issues that are not appealable. Its jurisdiction should include issues related to the actions of judges, court staff, probation officers, and the attorneys practicing in the courts. The ombudsman office should resolve matters privately and informally if possible, but should be empowered to issue annual public reports, and additional special reports if the subjects of the investigation do not comply with the office's recommendations.

The ombudsman office must work with existing defense and oversight bodies, and must have access to the subject matter of grievances. The office must have access to youth in and out of secure detention or other placement, to their families, witnesses, judges, attorneys, probation officers and court staff. It must also have access to probation and court records, relevant documents, and video recordings of

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grievances regarding services provided to children involved in the child welfare or juvenile justice systems.

[98] Notably, the Juvenile Court Judges' Commission has begun a web-based data analysis project with private funding that would enable the general public and policy makers to perform data queries and analyses of juvenile delinquency disposition and case processing information. James E. Anderson, Executive Director, Juvenile Court Judges' Commission, Testimony before the Interbranch Commission on Juvenile Justice (Jan. 21, 2010).

court proceedings. In order to be effective, the ombudsman office must also have some enforcement authority. This may include subpoena power, power to bring legal action or initiate other formal proceedings, and power to issue public reports.

The ombudsman office must be independent, accessible, and accountable. Independence requires that the courts that are the subject of ombudsman investigations not fund the office, and not be empowered to remove or replace the ombudsman. Accessibility requires a presence onsite at the courthouse or a hotline conspicuously posted in the courthouse. In order to be accessible, the office must be sufficiently funded and staffed to respond to grievances quickly and thoroughly. To be accessible, the office must also guarantee that communications with youth, families, and those assisting in investigations remain confidential, and that reports of wrongdoing from attorneys and others working in the courts will be supported by whistleblower protection against retaliation. Accountability requires consequences for failure to identify systematic problems in the courts, and the ability to be removed for ineffectiveness.

The power of ombudsman offices to monitor courts is typically limited. When an ombudsman office is established by the legislative or executive branches to monitor the actions of the judiciary, it may violate separation of powers principles if given too much authority. When it is established by the judicial branch, its authority is still limited as not to duplicate or complicate the oversight functions provided by existing systems for appellate review of decisions and discipline of judges and attorneys. For example, ombudsman offices monitoring court systems typically cannot investigate matters that are still before the court or that are the subject of an appeal.

An ombudsman office that monitors juvenile courts in Pennsylvania could be established by either the Judiciary or the Executive Branch. If the office is vested with authority to compel compliance by a court or its staff, it should be established under the auspices of the Pennsylvania Supreme Court, most likely in the Administrative Office of Pennsylvania Courts, Office of Children and Families in the Courts. If the office is not vested with authority to compel compliance, it could be established by the Governor and housed within the Juvenile Court Judges' Commission, which is located in the executive branch. Although JCJC currently receives calls about judges, it does not have broad investigatory authority or enforcement authority. Given concerns about separation of powers, an ombudsman at JCJC could have broader investigatory authority, but it would not have enforcement powers

> ***Next step:*** The newly-established ombudsman office should develop a data analysis protocol that detects and flags unusual trends in county juvenile court data.

The software application should present results in an easily understandable graphic format, and provide the ombudsman office with a reliable basis for investigating practices in particular counties. Juvenile Law Center also supports

the recommendations of the Juvenile Court Judges' Commission related to improving the timeliness and capacity of data collection and analysis efforts both in counties and in JCJC itself.

> ***Next step:*** Local courts and community groups should be encouraged to develop their own 'court watch' programs or designate local ombudsman.

Transparency and accountability in Pennsylvania juvenile courts can be improved by local court watch programs or local ombudsman programs. County commissioners could designate a local official as ombudsman for juvenile court issues. This person would not have enforcement authority, but could respond to complaints, investigate, negotiate solutions, or report to the state ombudsman. Local court watch programs involve volunteers or professionals who observe courtroom proceedings and record the demeanor and actions of judges, court staff and attorneys to ensure that the parties are being treated fairly and appropriately. Law professors and community based organizations that oversee court watch programs share data by issuing reports to state legislatures as well as to the judges and attorneys under scrutiny. These reports often provide documentation necessary to demonstrate the need for reform. Due to cost and potential difficulties in staffing and maintaining these groups, these programs should not be organized at the state level, but offer great potential in counties with active citizens' groups or law schools.

Legal Support

The Supreme Court of Pennsylvania has general supervisory authority over all courts and the power to prescribe rules governing the supervision of all officers of the judicial branch.[99] The Court has power to minister justice to all persons, and the power to issue every process necessary or suitable for the exercise of its jurisdiction.[100] The Court has the authority to create an ombudsman for the juvenile courts within the Administrative Office of Pennsylvania Courts, which is charged with disposition of the business of all courts.[101] Such an office could be funded by the Administrative Office through the budget of the Judicial Department.[102]

The Governor is authorized to appoint and determine the salaries of investigators, experts, watchmen, consultants, and other employees required to ensure that the laws of the Commonwealth are faithfully executed.[103] The Governor has the power to create an ombudsman for the juvenile court system, housed within the Juvenile Court Judges' Commission.[104] The responsibilities of the ombudsman office would be consistent with those of JCJC, which is charged with examining administrative and judicial practices and procedures in juvenile

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[99] Pa. Const. art. 5 § 10.
[100] 42 Pa. Cons. Stat. §§ 323, 502.
[101] Pa. Const. art. 5 § 10, art. 6 § 1; 42 Pa. Cons. Stat. § 1903.
[102] *See* 42 Pa. Cons. Stat. §§ 3521, 3526.
[103] Pa. Const. art. 4 §8, art. 6 § 1; 71 Pa. Stat. Ann. §§ 67.1, 71, 241.
[104] *Id.*; *see* 42 Pa. Cons. Stat. § 6372.

courts, establishing standards, making recommendations, and collecting and publishing juvenile court data.[105]

Juvenile Law Center joins other groups in its recommendation for a statewide ombudsman in Pennsylvania. Wendy Luckenbill, Child Policy Coordinator for the Mental Health Association in Pennsylvania, testified before the Interbranch Commission that the ombudsman office must be supported at the state level in order to assist with grievances, provide information, and facilitate investigations, with a duty to report to the three branches of government and the public annually.[106] Luckenbill has also supported the creation of a state-wide children's ombudsman.[107]

Public Citizens for Children and Youth (PCCY), a children's advocacy organization, also urged the State Supreme Court to create a juvenile court ombudsman program. PCCY argued that the "railroading" of youth into private institutions in Luzerne County would have been investigated and stopped much sooner had an ombudsman office been available to hear the concerns of youth and families in that county.[108]

Model programs

In the United States, ombudsman offices are currently found at both the state and local levels,[109] and are often tailored to monitor specific areas of government service such as child welfare, corrections, and workers' compensation.[110] In Pennsylvania, state-level ombudsman offices have been established to monitor the Department of Agriculture, the Office of Energy and Technology, and the Department of Aging.[111]

Ombudsman offices hold powerful governmental bodies accountable for their actions and improve the relationship between citizens and their government. For example, the Nebraska Office of Public Counsel helps citizens by investigating complaints about state employees and officials, recommending specific corrective actions to the agency involved, and highlighting needed improvements in policies and procedures. It is independent of the government offices it investigates and

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[105] 42 Pa. Cons. Stat. §§ 6372, 6373, 6375.
[106] Wendy Luckenbill, Child Policy Coordinator, Mental Health Association in Pennsylvania, Testimony Before the Interbranch Commission on Juvenile Justice (Jan. 22, 2010).
[107] Wendy Luckenbill, Letter to the Editor, *State Juvenile System Needs an Ombudsman*, The Patriot News (Harrisburg, PA), Oct. 28, 2009.
[108] Shelly Yanoff, Executive Director, Public Citizens for Children and Youth, Letter to the Editor, The Philadelphia Inquirer, Jan. 29, 2010.
[109] Jennifer Gannett, *Note, Providing Guardianship of Fundamental Rights and Essential Governmental Oversight: An Examination and Comparative Analysis of the Role of Ombudsman in Sweden and Poland*, 9 New Eng. J. Int'l & Comp. L. 519, 520 (2003).
[110] Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention (1998), *available at* http://ojjdp.ncjrs.org/pubs/walls.
[111] Wendy Luckenbill, Letter to the Editor, *State Juvenile System Needs an Ombudsman*, The Patriot News (Harrisburg, PA), Oct. 28, 2009.

offers whistleblower protection for state employees who come forward with information on official misconduct. It also initiates research studies aimed at improving agencies, and provides information about state government to the public.[112]

Models of ombudsman offices with the power to monitor courts in the United States include the Ombudsman for the Eastern District of Michigan,[113] the Alaska Office of the Ombudsman,[114] and the Office of the Ombudsman for the Maryland State Court System.[115] Models in other countries include the Chief Parliamentary Ombudsman in Sweden,[116] the Parliamentary Ombudsman of Finland,[117] and the Austrian Ombudsman Board.[118] The Model Ombudsman Act for State Governments contemplates that the power of an ombudsman to monitor a court system should be limited. It proposes that such an office have jurisdiction to investigate acts by judges, attorneys, and court employees that are not routinely resolved through the appeals process.[119] There are existing models, however, like the New Jersey Department of the Public Advocate, that have the power to participate in the appeals process as *amici curiae*.[120]

A crucial condition for the effectiveness of every ombudsman office is its independence from the agency or body that it monitors. Independence allows an ombudsman office to be impartial in disputes between government bodies and citizens. Independence also allows an ombudsman to hold government bodies accountable and resolve issues expeditiously without having to steer through several layers of internal bureaucracy.

One way to facilitate the independence of an ombudsman program is to authorize the appointment of the ombudsman by the Governor or the Supreme Court with confirmation by the Legislature. This structure provides involvement by more than one branch of government in the appointment and governance of the

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[112] Nebraska Office of Public Counsel, http://nebraskalegislature.gov/contact/ombud.php (last visited Mar. 11, 2010).
[113] *See Ombudsman for the Eastern District of Michigan*, 85 Mich. Bar J. 40 (2006), *available at* http://www.michbar.org/journal/pdf/pdf4article1017.pdf.
[114] *See* Alaska Office of the Ombudsman, News & Resources, *available at* http://www.state.ak.us/ombud.
[115] *See* Office of the Ombudsman for the Maryland State Court System, http://www.courts.state.md.us/ombudsman.html (last visited Mar. 11, 2010).
[116] *See* The Parliamentary Ombudsman (Sweden), http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en (last visited Mar. 11, 2010).
[117] *See* Parliamentary Ombudsman of Finland, http://www.oikeusasiamies.fi/Resource.phx/eoa/english/index.htx (last visited Mar. 11, 2010).
[118] *See* Michael Mauerer, *The Relationship Between the Ombudsman Institutions and the Judiciary*, Address to UNDP International Roundtable for Ombudsman Institutions in Eastern Europe and the CIS, Prague (Nov. 28, 2005).
[119] U.S. Ombudsman Association, *Model Ombudsman Act for State Governments*, § 3(a)(1) (1997), *available at* http://www.abanet.org/adminlaw/ombuds/usoamodel1.html.
[120] New Jersey Department of the Public Advocate, http://www.state.nj.us/publicadvocate/ (last visited Mar. 11, 2010).

office, while diminishing the ability of one branch to control all aspects of the program.[121]

Although the Ombudsman for the New Jersey Courts does not operate independent of the court system, it does offer a detailed model for how an ombudsman that monitors the courts might function.[122] The ombudsman office was created by the New Jersey judiciary to help court users effectively participate in the system and redress problems when they occur. It was designed to act as a link between the court and the community, providing on-site attention in the courthouse and a clear means of addressing complaints about staff and the system in general. The complaints presented to the office include concerns about judicial demeanor, inappropriate staff conduct, excessive delays in a case, misunderstandings about court procedures, and general dissatisfaction with the system.[123]

Carrying out investigations requires that the ombudsman have access to the youth as well as documents, records, and witnesses. For some ombudsman programs this includes subpoena power.[124] Once an investigation is complete, an ombudsman must have sufficient authority to deliver formal complaints, reports, and recommendations to administrators of the government entity being monitored and to the legislature, with clear guidelines in law and policy for how and when those bodies are to respond. For example, the Office of the Children's Ombudsman in Michigan, which investigates complaints concerning children under the supervision of the state's Department of Human Services, conducts investigations with access to all documents in a child's case file, as well as access to caseworkers, attorneys, and other individuals with knowledge about the child's case. If the ombudsman finds that the actions of the department were not in the best interest of the child, or otherwise did not comply with the law or agency policy, the ombudsman files a report with findings and recommendations, to which the agency has 60 days to respond. The office also reports annually to the Governor and the Legislature, making recommendations for changes in child welfare laws, rules, and policies to improve outcomes for children.[125]

For further guidance on the creation of an ombudsman office, policy makers should consult recent reports published by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) and the National Conference of State Legislatures

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[121] Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention (1998), *available at* http://ojjdp.ncjrs.org/pubs/walls.

[122] Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 Fordham Urv. L. J. 2099, 2109 (2002).

[123] Michele Bertran, *Judiciary Ombudsman: Solving Problems in the Courts*, 29 Fordham Urv. L. J. 2099, 2100, 2110 (2002).

[124] Patricia Puritz & Mary Ann Scali, *Beyond the Walls: Improving Conditions of Confinement for Youth in Custody*, Office of Juvenile Justice and Delinquency Prevention (1998), *available at* http://ojjdp.ncjrs.org/pubs/walls.

[125] Office of the Children's Ombudsman (Michigan), http://www.michigan.gov/oco (last visited Mar. 11, 2010).

(NCSL) outlining the elements of effective ombudsman programs, and highlighting examples in several states.[126]

Recommendation 3.3 – Amend the Pennsylvania Constitution to enhance investigatory procedures and public reporting requirements for the Judicial Conduct Board.

> *I also called the Judicial Conduct Board in Harrisburg right after M was locked up and gave a brief description of my concerns, without mentioning any names or where I was calling from. I remember the person I spoke with interjected to ask, "You're calling from Luzerne County, aren't you? You're talking about Judge Ciavarella, right? We've had several calls about Judge Ciavarella but you've got to understand, you've got to have a lot of ammunition against a judge. This will just be more fuel for the fire." I gave them my name and information about M's case, but never heard anything in response.*—Father of Luzerne County child

Judges Ciavarella and Conahan perpetrated their scheme for five years before being held accountable. The public apparently didn't know about the Judicial Conduct Board (JCB); the few complaints to the Board we now know were not investigated.

The Judicial Conduct Board received anonymous complaints about Judge Conahan in 2004 and 2006, and two complaints in 2008, but it "did not conduct a preliminary investigation, conduct interviews or review any documents related to the complaints."[127] None of the complaints were ever divulged to the public, which was unaware of the allegations of malfeasance in Luzerne's courts. In testimony before the Interbranch Commission, JCB members stated that the Board deferred responsibility due to awareness of ongoing criminal investigations of Conahan.

It should not be easy to put judges into disrepute—the legal system requires that judges be above reproach and that the public knows and believes that they are. Unhappy litigants should not use the Judicial Conduct Board as a substitute for appeals. The Luzerne County experience, however, suggests that there must be a more transparent way to address judicial misconduct. The Judicial Conduct Board failed to meet public expectations. It is hard to know precisely why, because the Board is veiled behind multiple curtains of the Pennsylvania Constitution. It is time to revisit the Constitution.

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[126] Office of Juvenile Justice & Delinquency Prevention, *State Ombudsman Programs* (2005), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/204607.pdf; National Conference of State Legislatures, *Children's Ombudsman Offices* (2008), *available at* http://www.ncsl.org/IssuesResearch/HumanServices/ChildrensOmbudsmanOffices/tabid/16391/Default.aspx.

[127] Leo Strupczewski & Hank Grezlak, *JCB Admits It Never Investigated Complaints Against Conahan*, The Legal Intelligencer, March 9, 2010.

Article V, Section 18 of the Pennsylvania Constitution establishes the Judicial Conduct Board. The Constitutional provisions are highly detailed, which makes it difficult to make any changes without a constitutional amendment. The General Assembly should look to propose amendments to the Constitution that will increase transparency and reduce the public perception that the JCB operates in secrecy in protection of judges.

Pennsylvania currently enforces few requirements regarding the relationships that juvenile court judges can have with private providers, such as the detention centers to which Judge Ciavarella sent Luzerne County youth. There is no mechanism requiring the JCB to inform the public of any decisions it makes. The JCB currently publishes an annual report including very bare bones summaries of some complaints it has considered that year.[128] Staffing responsibilities are opaque. There is no requirement that Board members be approved by the Senate. These and other issues should be addressed by the General Assembly as it considers amendments to the Pennsylvania Constitution.

Legal Support

The judicial accountability boards of several other states employ mechanisms that serve to improve both judicial accountability and the efficient operation of the boards themselves. These provisions offer valuable insights into and support for possible changes to the JCB.

While most states require complete confidentiality for all review board deliberations and documents prior to the filing of a formal judicial complaint, some provide for increased disclosure. New Hampshire has gone the farthest, requiring open release of "all complaints and the [c]ommittee's dispositions" upon resolution of a dispute after the judge has had an opportunity to publicly respond to allegations.[129] Arizona, Vermont, Arkansas, and the federal system all require disclosure of some redacted information upon the dismissal of a complaint. Finally, states such as Kansas and Massachusetts include brief summaries of selected complaints in their annual reports.[130]

A number of states also separate the investigatory and deliberative portions of their judicial conduct boards. For example, Maryland's Commission on Judicial Disabilities is split into the Investigative Counsel and the Judicial Inquiry Board.[131] Complaints or other information about judicial misconduct are sent directly to the Investigative Counsel, which formally opens a file for each such allegation. If the complaint or report of malfeasance is not completely spurious, the Investigative

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[128] *See, e.g.*, Joseph A. Massa, 2008 JCB Annual Report, *available at* http://judicialconductboardofpa.org/2008%20JCB%20ANNUAL%20REPORT--POSTED%20ON%20WEBSITE%2010-15-09.pdf.

[129] Cynthia Gray, *Disclosure of Dismissals to the Public*, Judicial Conduct Reporter, Summer 2009, at 3.

[130] *See* Cynthia Gray, *Disclosure of Dismissals to the Public*, Judicial Conduct Reporter, Summer 2009, at 3, 10.

[131] Md. Rules of Court 16-803 - 16-810.

Counsel conducts an investigation and presents the results to the Judicial Inquiry Board along with a recommendation for disposition. The Inquiry Board then prepares its final recommendation, which is sent to the entire Commission on Judicial Disabilities for voting. This system makes each branch's actions more visible, thus increasing the accountability of the Commission as a whole.

Many states also employ more rigorous appointment vetting processes than Pennsylvania. For example, a number of states require confirmation by the legislature or a subdivision of it before at least some judicial conduct board members can be appointed.[132]

Some states appoint a leader of their judicial accountability panels. One example is the Judicial Conduct Commission of Utah, which appoints an Executive Director who reviews each complaint before assigning it to an investigator.[133] This official is responsible for every complaint that passes through the Utah commission, thus creating an entity who takes on significant accountability to the public and whose actions are more visible to those observing the board.

[132] *See, e.g.*, Alaska Const. art. 4, § 10 (stating that six of Alaska's nine Council on Judicial Conduct members must be confirmed by the legislature).
[133] Utah Code 78A-11-103.

Chapter Four

Reducing Referrals to the Juvenile Justice System

The juvenile justice system serves an important public safety role, and there are many dedicated juvenile justice professionals who have devoted their lives to helping youth turn around their lives.

At the same time, the juvenile justice system is an involuntary system that can have lasting negative impacts on youth, including the stigma of system involvement and the long-term consequences of a juvenile record. The goals of the Pennsylvania juvenile justice system – holding youth accountable to victims, providing competency development for youth, and ensuring community safety – can often be met just as effectively by diverting certain youth out of the system entirely. Other systems or services can manage behavior and address public safety just as well. The goals of the system can also be met when the system itself diverts youth from court into community-based programs. Many juvenile courts in the state do this well.[134]

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[134] Juvenile Law Center urges counties to adopt diversion policies through its work on the *Principles of Pre-Adjudication Diversion in Pennsylvania* and the *Guide to Developing Pre-Adjudication Diversion Policy Practice* prepared by the Diversion Subcommittee of the Mental Health/Juvenile Justice state work group of the Models for Change Initiative in Pennsylvania. Juvenile Law Center

Research shows that pre-adjudication diversion programs can be more effective at reducing subsequent delinquency than formal juvenile court processing.[135] Effective diversion programs teach youth to take responsibility for their actions while also providing appropriately-tailored services and interventions to address youths' particular needs. Youth who successfully complete diversion programs walk away with services, not stigma, and without a lasting juvenile record.

Too often, however, juvenile courts allow schools to use the justice system as the school disciplinarian. This happened in Luzerne County. The result is too many youth unnecessarily entering the juvenile justice system. When Luzerne County President Judge Chester B. Muroski testified before the Interbranch Commission, he observed:

> [Judge Ciavarella's] so-called zero tolerance stance was very popular with school administrators, teachers, and many police officers. At the beginning of every school year he spoke at assemblies held in most school districts within Luzerne County, and in effect, he promised institutional placement for school-related infractions.
>
> He was true to his word and became even more popular when he followed through with placements, sometimes for minimal offenses.[136] I was concerned that school administrators were still petitioning too many juveniles with matters that quite frankly should be resolved in the school, so I directed the intake staff of Juvenile Probation to scrutinize delinquency petitions to determine whether they merited court action.[137]

Judge Muroski's views were echoed by Special Master Arthur Grim, who testified "that many school officials in Luzerne County supported Ciavarella's get tough policy without really giving thought to what it meant."[138] Former chief juvenile probation officer Sandra Brulo[139] and District Attorney Jacqueline Musto Carroll echoed Judges Muroski and Grim. DA Carroll observed, "Last couple years

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chairs this Subcommittee, which includes representatives from key juvenile justice, mental health, education, and other youth-serving agencies and organizations from throughout the state, including two members of this Commission (Valerie Bender and George D. Mosee, Jr.). The *Principles* outline the values that should underpin any pre-adjudication diversion policy or protocol adopted at the state or county level. The *Guide* was designed to assist counties in creating county-specific pre-adjudication diversion policies and protocols. The Subcommittee plans to publish the *Guide* and *Principles* in the summer of 2010.

[135] *See* Anthony Petrosino et al., *Formal System Processing of Juveniles: Effects on Delinquency*, Campbell Systemic Reviews, at 38 (Jan. 29, 2010), available at http://www.campbellcollaboration.org/news_/formal_processing_reduce_juvenile_delinquency.php.

[136] Interbranch Commission Hrg. Transcr. at pp. 77-79 (October 14, 2009).

[137] Interbranch Commission Hrg. Transcr. at pp. 94-95 (October 14 2009.

[138] Interbranch Commission Hrg. Transcr. at p. 24 (November 9, 2009).

[139] Interbranch Commission Hrg. Transcr. at p. 275 (November 9, 2009).

if you threw a spitball, they got the police, and you ended up in juvenile court and get sent away. Schools got rid of all their problems."[140]

While schools across the country were developing alternative methods of improving student behavior, schools in Luzerne County were having students arrested. For most students, alternatives are better.

Recommendation 4.1 – The Pennsylvania House of Representatives should adopt the proposed resolution requiring the Legislative Budget and Finance Committee to study the use of school-wide positive behavioral supports in public schools.

Positive school climate[141] is critical to safety, student achievement, and teacher satisfaction and retention. In the last several years, a variety of evidence-based efforts to improve school climate have proven effective, including increasing the number of adults in schools, lowering the student-counselor ratio, decreasing class size, implementing resiliency, anti-bullying and peer mediation programs. One approach in particular, adopting systems of school-wide positive behavior support (PBS), has resulted in dramatic decreases in office referrals and improvement to school climate.

Nationally-acclaimed and implemented in over 40 states, PBS is an evidence-based, highly successful, and cost effective systems approach that can help Pennsylvania schools create a school climate in which all students have the social and emotional skills needed to succeed.[142] PBS helps schools teach students expected behaviors and social skills, creates student behavioral health and academic support systems, and applies data-based decision-making to discipline, academics, and social/emotional learning.[143]

PBS is in use in more than 10,000 schools nationwide. One Pennsylvania school saw a reduction of 850 office referrals and 25 suspensions in a four year period.

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[140] Interbranch Commission Hrg. Transcr. at p. 170 (December 7, 2009).

[141] School climate is the social, emotional, ethical, and academic experiences of school life for students, school personnel, and parents. See http://www.schoolclimate.org/climate/documents/schoolClimate-researchSummary.pdf.

[142] See "School-Wide Positive Behavior Support: A Plan for Pennsylvania," at http://www.elc-pa.org/pubs/downloads/english/imp-PBSBriefingBook%2012-18-08.pdf. PBS benefits all students in a school and provides increasing levels of academic and behavioral supports and services to the children most in need. PBS requires three levels of prevention: Primary (addresses entire school and classroom levels, meeting the needs of roughly 80% of the school's students); Secondary (targeted groups, the approximately 15% of the student population who evidences some behavioral/social skill needs) and Tertiary (the remaining 5% of students with significant behavioral issues who receive specialized and individualized supports, often through targeted education and mental health care intervention).

[143] See "What is PBIS?" at http://www.pbisillinois.org/.

This saved 231 hours in administrative time and 728 hours in instructional time by allowing teachers/ administrators to focus on their primary duties rather than on disciplinary matters.[144]

The Pennsylvania House of Representatives will soon consider a resolution to require the Legislative Budget and Finance Committee to evaluate the effectiveness of PBS in states where it has been implemented, identify costs and existing funding sources, recommend how to expand the program in Pennsylvania, and compile and distribute a report for the House of Representatives.[145] We urge the House to support this resolution.

Recommendation 4.2 – The Governor should provide funding for the Juvenile Court Judges' Commission to establish standards tied to a grant-in-aid program to enable juvenile courts to establish collaborative programs to limit school-based referrals.

For the past two decades, a growing number of students have had their first contact with the juvenile justice system through referrals by school administrators or school resource officers (SROs) from incidents that took place on school grounds. School-based referrals to the juvenile justice system began to spike in the early 1990's as a result of zero tolerance policies aimed at reducing drug and weapons offenses in schools. In 1994, Congress adopted the Gun Free Schools Act, which greatly expanded zero tolerance policies by requiring school administrators to take severe disciplinary measures, including expulsions and referrals to law enforcement, for any offenses involving firearms.[146] While the Act was aimed specifically at firearms offenses, many school districts used it as a basis to expand zero tolerance to other weapons, drug offenses, or any other serious violations taking place on school grounds.[147] Despite these exacting standards, there is no evidence that zero tolerance policies decrease the incidence of weapons, drugs or any other offenses they are meant to address; instead, evidence suggests that these policies are ineffective.[148]

In Luzerne County, school referrals made under zero tolerance policies were an integral element of the overall scheme as they ensured a constant stream of children to be placed into detention. With schools and even some parents hailing

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[144] See "School-wide PBS: Building Sustainable Systems," at http://pbis.org/common/pbisresources/presentations/hornerswpbs.pdf.
[145] See letter from Representative James R. Roebuck, Chairman of the House Education Committee seeking co-sponsors for this resolution attached at Appendix C.
[146] 20 U.S.C § 70, Sec. 8921.
[147] Pennsylvania law mandates zero tolerance for the possession of all "weapons", defined broadly as any "implement capable of inflicting serious bodily injury." 24 P.S. § 13-1317.2. Under this definition, Pennsylvania schools have expelled students, who had no violent intentions, for the possession of "implements" such as Cub Scout pocket knives, scissors, eyebrow trimmers, and more.
[148] http://www.apa.org/pubs/info/reports/zero-tolerance.pdf; http://www.mindfully.org/Reform/2005/Schoolhouse-Jailhouse-Track24mar05.htm.

the efficacy of former judge Ciavarella's zero tolerance policies, children were shipped from schools to detention centers without any consideration as to the propriety of their adjudications. Ciavarella regularly spoke at school assemblies where he explained his zero tolerance stance on school offenses.[149] In large part, the widespread acceptance of zero tolerance policies in Luzerne County allowed Ciavarella to easily traffic children from their homes and schools to detention centers.

> ***Next step:*** The Juvenile Court Judges' Commission should develop standards and create a grant-in-aid program that will encourage juvenile court judges to create collaborative committees to support at-risk students, end unnecessary and inappropriate school referrals and expand the available range of diversion programs.

JCJC has a history of adopting state-of-the-art standards and providing grants to county courts and probation departments that apply for funding to implement them. The likelihood of schools reducing inappropriate referrals to juvenile court will increase if juvenile court judges object to inappropriate referrals, decline to accept them, and work with schools to develop alternatives. There are examples around the country of such efforts, which have not only reduced referrals of low-level "offenders" to juvenile court, but have led to marked improvements in school climate.

By supporting at-risk students before they become offenders and expanding diversion programs, collaborative committees can ensure that detention or placement is used only as a last resort. Similarly, by creating policies to allow school referrals only in extreme cases, collaborative committees can greatly reduce the caseload burden on local juvenile courts and better enforce principles of balanced and restorative justice.

As outlined below, several other states have already created such committees with great successes in improving both their school and juvenile court systems. Exemplary models are found in Clayton County, GA and Birmingham, AL, where juvenile court judges have organized these committees to operate at the county level. Schools and courts have also engineered specialized diversion programs to allow offending students to remain in school while having minimal contact with the juvenile justice system.

Model Programs

Clayton County At-Risk Children Committee (ARCC): Juvenile Court Judge Stephen Teske formed the ARCC in 2004 in direct response to dramatically increasing school referrals. In 1995, following the placement of SROs in Clayton County public schools, the number of school referrals per year increased by nearly 600% through 2000 and an additional 400% through 2003. Only a minor fraction of

[149] Transcript of Interbranch Commission on Juvenile Justice Hearing on 9/9/09, pg. 231:1-5; Transcript of Interbranch Commission on Juvenile Justice Hearing on 9/10/09, pg 100:10-25.

these referred offenses were violent in nature, with most falling under the broad category of "disruptive behavior." As a result, the juvenile justice system became overburdened by unnecessary referrals, prompting Teske to create the ARCC. The ARCC established a formal partnership between various stakeholders in the juvenile justice system, including Clayton County Juvenile Court, the Public Schools System, the Department of Family and Children Services, local mental health centers and police departments, and the Georgia Department of Juvenile Justice. To reduce the burden on the courts, the ARCC was tasked with identifying at-risk children to keep them out of the juvenile justice system and providing individualized recommendations for diversion programs following adjudication. To this end, ARCC members are permitted to share any records relevant to the case being considered.[150]

The ARCC is especially effective because, in contrast to rigid zero tolerance policies, its policies allow a great degree of flexibility. To address gratuitous referrals, the ARCC calls for a cooperative agreement for "focused acts," misdemeanor offenses that members agreed could be handled by schools without filing a complaint in court, or seeking formal treatment. Under the cooperative agreement, a three-tiered disciplinary plan was introduced that allowed different remedies depending on the child's circumstances and background.[151]

Following the introduction of these and other ARCC policies, the Clayton County juvenile justice system experienced a variety of beneficial changes. One year after the cooperative agreement was implemented, referrals had dropped by 68%.[152] Furthermore, in-school weapons offenses had drastically decreased, disproportionate minority referrals had been effectively normalized and graduation rates had increased by 20%. There were also cost savings to the county.[153]

Birmingham Agreement: Using Teske and the ARCC as a model, Judge Brian Huff, in collaboration with the Southern Poverty Law Center and the Alabama Youth Justice Coalition, enacted a collaborative agreement motivated by similar circumstances. From 2007 to 2009, misdemeanors and other minor violations accounted for 90% of all school referrals in Birmingham. Through a partnership between the Birmingham City Schools, Police Department, Family Court and District Attorney's Office, a three-tiered disciplinary plan much like Clayton County's was instituted for "minor school-based offenses." However, the Birmingham agreement states that referrals can only be made by SROs, not school

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[150] http://www.childwelfarepolicycenters.com/page/page/2260730.htm; http://www.jdaihelpdesk.org/Docs/Documents/juvenile-cooperative_agreement_070804.pdf.
[151] http://www.jdaihelpdesk.org/Docs/Documents/juvenile-cooperative_agreement_070804.pdf.
[152] While SROs were linked with increased referrals, Teske also credits them with being vital participants in the collaborative agreement. By giving SROs more discretion, Teske asserts that they are able to become less distanced from students, gain their confidence by being reasonable in disciplinary matters, and can potentially learn of more serious offenses being planned by other students. (*see* Community Involvement for Children in Juvenile Court, Judge Steven Teske *below*).
[153] "Community Involvement for Children in Juvenile Court," Judge Stephen Teske, available at http://www.law.emory.edu/centers-clinics/barton-child-law-policy-clinic/presentations.html.

administrators. Following the adoption of the cooperative agreement, school referrals dropped by 50% and graduation rates increased 12% by the end of the 2009 school year.[154]

Recommendation 4.3 – The General Assembly should enact legislation to minimize the effects of school-based zero tolerance policies and oppose legislation that would unnecessarily increase school referrals to juvenile court.

Many state legislatures have responded to zero tolerance problems by advocating for greater flexibility in disciplinary options or, in one case, by abolishing zero tolerance altogether. School districts have instituted graduated sanctions policies that not only allow balanced discipline for lesser offenses, but also provide guidelines for helping at-risk students. Through collaborative committees and an individualized approach to student offenders, Pennsylvania can abrogate zero tolerance policies and build a juvenile justice system that does not indiscriminately punish children but rather affords them meaningful rehabilitation.

> ***Next step:*** The General Assembly should enact legislation to minimize the net-widening effects of zero tolerance policies.

As discussed below, various pieces of legislation have recognized and worked to minimize the deleterious effects of zero tolerance policies on students. While only one state has abolished zero tolerance altogether, many others have worked to protect at-risk children and allow school administrators greater flexibility when determining how to discipline their students.

Rhode Island Zero Tolerance Ban: In 2007, the Rhode Island legislature enacted new public school statutes that require discipline for weapon-, drug- or alcohol-based offenses to be meted out on a case-by-case basis. Schools are also required to consider the context of the offense, and any federal laws regarding students with disabilities or mental health illnesses.[155]

Florida Zero Tolerance Restrictions: In 2009, the Florida legislature amended school discipline codes to require schools to handle minor offenses without referrals, increase the use of diversion programs, and consider the individual circumstances of each child before involving them in the juvenile justice system. Furthermore, while the amended code contains many provisions to protect student victims from offenders on school grounds, it also ensures that efforts are made to keep offenders in school rather than alternative education or detention programs.[156]

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[154] http://www.stopschoolstojails.org/content/jefferson-county-alabama; http://www.cbs42.com/content/localnews/story/Student-Discipline/1pqvYi6E4UWOJ3su388sZg.cspx?rss=1659.
[155] 16 R.I. Gen. Laws §16-21-21.1.
[156] 48 F.S.A. § 1006.13.

Delaware House Resolution #22 and Bill #120: The Delaware House of Representatives recently approved two measures dealing with extant zero tolerance policies and resultant problems in both schools and the state juvenile justice system. House Resolution #22 was adopted on May 14, 2009 and called for the establishment of a School Discipline Task Force to study current state laws regarding school-based offenses and discipline, and to make recommendations on how they might be improved to better account for the age and developmental levels of younger students. The task force comprised a wide range of members from the judicial and legislative branches: two state representatives, the state attorney general, the state public defender, the chief judge of Delaware family Court, two employees of the Department of Education (one having prior experience working in public schools and one having prior experience working with disabled youth), the Secretary of the Department of Health and Social Services, the Secretary of the Department of Children, Youth and Families, School District Superintendents from each County, a member of the Delaware State Education Association, a member of the Delaware Association of School Administrators, SROs from each County, and a member of the Delaware Center for Justice. In a report submitted on January 15, 2010 to the Speaker of the House, the Director of the Division of Research of Legislative Council and the Delaware Public Archives, the task force found that:

> Although the intent was laudable, the legislation established a one-size-fits-all disciplinary system that allowed little to no discretion for school officials and the justice system. After years of putting the legislation into practice, the negative impacts on the educational system became apparent. Students have been expelled from school and criminally charged for infractions that upon closer review did not merit such punishments. However, the law provided no ability for administrators or justice officials to address these situations on an individual basis. These unforeseen consequences took a toll on the school environment, education of the youth and the demand placed on the juvenile justice system.

The taskforce therefore recommended that the state should amend the school code to raise the age from 9 to 12 for mandatory police reporting of misdemeanors offenses and create a three-step process that applies to all misdemeanor offenses except sex crimes and weapons offenses – first, a written warning, second, school mediation, and finally arrest – prior to invoking criminal violation reporting.[157]

House Bill #120 was adopted on June 29, 2009 and amends Title 11 of the Delaware Code, which holds that any student in possession of a gun or other deadly weapon on school grounds must be expelled for at least 180 days. The amendment permits school boards or directors to alter the terms of expulsion or find expulsion unnecessary on a case-by-case basis.[158]

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[157] The full report is available at http://www.whyy.org/podcast/news/delaware/100127meschool.pdf.
[158] 11 Del. C. §1457(j)(4).

Texas House Bill 603 (H.B. 603) was signed into law in May of 2005, giving greater latitude to school administrators in determining how to enforce zero tolerance policies. Specifically, H.B. 603 permits school administrators to consider the student's disciplinary history and disabilities, as well as issues of self-defense and intent in the context of the offenses.[159]

> ***Next step:*** The General Assembly should oppose legislation that promotes zero tolerance policies by requiring police notification of school-based incidents.

We commend efforts to make our schools safer for all children and to hold school districts accountable to report the extent of violent activities in their schools so that violence can be addressed and prevented. We support bill provisions that direct schools to report such activities to the Pennsylvania Department of Education. However, the General Assembly should reject bills that would result in greater use of police to handle school discipline. Senate Bill 56[160] is the latest example of such bill.

SB 56 would amend Pennsylvania's school safety reporting laws to require schools to notify police in every instance when children commit certain enumerated offenses on school grounds, without regard to the intention or understanding of the child involved.[161] This would dramatically increase the number of school based arrests and police contacts with students and disproportionately increase the number of referrals of children with developmental disabilities and mental health disorders, as well as young children, to the juvenile justice system.

The lesson from Delaware, which has mandated reporting of numerous other crimes beyond weapons since 1993,[162] is particularly instructive. Recently, this inappropriate police involvement in Delaware schools has received significant attention.[163] The recommendations of the School Discipline Task Force, discussed above, demonstrate a shift away from polices which promote zero tolerance at the expense of positive school climate and opportunities to learn.

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[159] 2 TX Educ. Code §37.007.

[160] SB 56 is available at http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2009&sind=0&body=S&type=B&BN=0056.

[161] SB 56 was written in response to the Steelton-Highspire School District report which showed that the school district had only reported to the Office of Safe Schools a small fraction of the offenses it had reported to the police in the 2002-2003 school year. SB 56 goes beyond what would be required to fix the potential for underreporting, and it does so at the expense of students entering the school to prison pipeline.

[162] 14 Del. C. §4112. A summary and link the full law is available at http://attorneygeneral.delaware.gov/schools/schcrim.shtml.

[163] For example see, Urbina, Ian, "It's a Fork, It's a Spoon, It's a …Weapon?" New York Times, Oct. 11, 2009. Available at, http://www.nytimes.com/2009/10/12/education/12discipline.html.

Chapter Five

Ensuring Respectful and Appropriate Treatment of Youth in Detention or Placement and in Court

Although Pennsylvania is a leader among states in many aspects of juvenile justice reform, youth in state care are still subjected to mistreatment. Youth are routinely shackled without reason in courtrooms across the Commonwealth. Children are placed in for-profit detention facilities whose primary goal is the bottom line.

Recommendation 5.1 – Prohibit the handcuffing and shackling of youth in juvenile court.

> *Seeing my 13 year old son handcuffed and shackled was horrifying, devastating. He was 4ft 11inches and weighed approximately 80 lbs, he was just a little guy. My heart was breaking in two as I watched him walking shackled and cuffed, crying that the cuffs and shackles were hurting him. It was a VERY traumatic incident for both of us. I also can't even imagine what people thought as he walked through the courthouse to the juvenile probation office, seeing such a little guy handcuffed and shackled. I'm sure they viewed him in a very negative way and thought he was a violent person.* – Parent of a Pennsylvania 13-year-old

In Judge Ciavarella's courtroom, and elsewhere across the state, youth are routinely shackled, even when obviously inappropriate. In H.T.'s case, Judge Ciavarella ordered H.T. to be shackled based on the charge of "harassment" for a MySpace parody.[164] Luzerne County parents were forced to watch their children undergo inhumane, degrading and often hurtful treatment.[165] Shackles prevented children from being able to embrace and interact with their families. H.T.'s mother watched in horror as her daughter was led away in chains.

Another youth, A.A., had an impeccable record; she was on the Honor Roll, never had a school detention, was a Girl Scout, attended bible school, was a member of the YMCA, and in addition to all that joined every club at school from ecology to yearbook.[166] At A.A.'s first hearing in Luzerne County she was immediately shackled.

One parent, M.G., described a grotesque scene of a courtroom so packed with children standing around in orange jumpsuits, cuffed and shackled, that it appeared to be a "marketplace."[167]

A.L. described having to wait in a holding area for three hours in a belt, cuffs, and shackles before being transported to the detention facility.[168]

The policy of indiscriminate shackling led children and parents to lose their faith in the rule of law. In Luzerne County, children and parents came to expect degrading behavior and injustice.

Ironically, adult criminal defendants are not customarily shackled in courtrooms, but are treated with the dignity and respect the judicial process demands.[169]

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[164] Testimony of Robert Schwartz before the Interbranch Commission, 9 (January 21, 2010)
[165] Interbranch Commission Hrg. Transcr. 384: 6-15 (December 7, 2009).
[166] Interbranch Commission Hrg. Transcr. 413: 3-13 (December 7, 2009).
[167] Interbranch Commission Hrg. Transcr. 384: 6-15 (December 7, 2009).
[168] Interbranch Commission Hrg. Transcr. 429: 15-18 (December 7, 2009).

Next step: The General Assembly should amend the Juvenile Act to prohibit the use of mechanical restraints on juveniles in court absent a clear public safety concern.

Next step: The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to prohibit the use of mechanical restraints on children during juvenile court proceedings, set forth criteria to guide judges in determining whether such restraints are necessary in the interests of public safety, and guarantee the juvenile's opportunity to contest the use of restraints at a hearing.

Judges should not defer to sheriffs or law enforcement—restraints in courtrooms should be used only as a last resort and be deemed a drastic measure that can only be ordered by a court. Children should only be placed in shackles when there is an essential state interest, such as a flight risk, public safety threat, or a disruption to the courtroom that cannot be managed in other ways. Indeed, countless Pennsylvania courts do *not* use shackles or cuffs. They find that sheriffs, police, probation officers or court personnel can easily manage risk 99 percent of the time.

The Commonwealth should bear the burden of presenting evidence that shackling is necessary. Defense counsel should have an opportunity to rebut the evidence and make a case against shackling. The court should put on the record its rationale for shackling a juvenile. The shackling decision should be subject to appellate review.

Legal Support

For criminal defendants, the right to a fair trial incorporates a Constitutional right to be free of shackles.[170] Adults may only be restrained when "justified by an essential state interest." This due process right ensures the integrity of the criminal hearing. First the jury grasps an adult is presumed innocent until proven guilty. Second, an adult's ability and mental facility to communicate with his attorney will be unencumbered. Last, in criminal proceedings shackles are deemed to be an affront to the dignity and decorum of judicial process.[171] For adults this right is revoked by a judge only after a determination that there is either a risk of escape, courtroom disruption, or harm to the public. Ironically, although sheriffs and law enforcement seem quite capable of ensuring safety in adult criminal courts, many seem unable to manage children.

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[169] *See Illinois v. Allen*, 397 U.S. 337 (1970); *Deck v. Missouri*, 544 U.S. 622 (2005); Sheldon Shapiro, *Propriety and prejudicial effect of gagging, shackling, or otherwise physically restraining accused during course of state criminal trial*, 90 A.L.R. 3d 17.

[170] *Comm. v. Pezzeca*, 749 A. 2d. 968, 970 (Pa. Super. Ct. 2000).

[171] *Deck v. Missouri*, 544 U.S. 622, 630 (2005); *Comm. v. Pezzeca*, 749 A. 2d. 968, 970 (Pa. Super. Ct. 2000).

Neither the Juvenile Act nor the Pennsylvania Rules of Juvenile Court Procedure provide procedural protections pertaining to shackling within in the courthouse.[172]

Within the past three years there has been a national movement to provide procedural protections against arbitrary shackling to juveniles in courtrooms. These reform efforts have come about both through court and legislative reform efforts based on the absence of procedural protections. A 2007 study by USA Today found juvenile courts in 28 states systematically placed children in shackles during their hearings.[173] All of the jurisdictions that have reformed their shackling policies adopted a presumptive policy against shackling juveniles. Most of these jurisdictions modeled the juvenile procedural protections on the rationale for and due process rights accorded to adult defendants.[174]

In at least five jurisdictions courts guarantee juveniles the right to a hearing to ensure there is an essential state interest in having the juvenile shackled. The Illinois Supreme Court has ruled that a trial court's failure to remove shackles without conducting a thorough hearing resulted in reversible error. The Court further affirmed that a "proper trial" requires a juvenile be unshackled absent a clear necessity; such as an escape risk, threat to safety of others, or to maintain the order of the courtroom. The court also rejected generalized arguments concerning courtroom security and required less restrictive measures be explored.[175] Similarly, Oregon,[176] California,[177] North Dakota[178] and New York[179] require a risk assessment and justification for shackling juveniles in court. The North Dakota Supreme Court found the decision to shackle a child may not be left to law enforcement officials.[180] The California Court of Appeals articulates the rationale for such procedural protections as necessary to vouchsafe the rehabilitative nature of juvenile justice proceedings:

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[172] Shackling is addressed in other settings. The Pennsylvania Administrative Code, for example, limits the use of "mechanical restraints" (cuffs, cuff-belts, and leg irons) for juveniles placed in secure and non-secure facilities and in transport to and from. 55 Pa. Code § 3800.210 (prohibition of restraints in non-secure facilities); 55 Pa. Code § 3800.171 (prohibition of restraints in transport to/from non-secure); 55 Pa. Code § 3800.274 (criteria for secure facilities/transport). Children in secure placements are protected against the uninterrupted use of mechanical restraints for periods longer than 2 hours. 55 Pa. Code § 3800.274(16)(iv),(vii) (exception for transportation). Additionally children may not be held in mechanical restraints for a total of more than 4 hours in any 48-hour period. 55 Pa. Code § 3800.274(16)(ix) (exception for transportation).

[173] Martha Moore, "Should Kids Go To Court in Chains?" USA Today (June 6, 2007), *available at* http://www.usatoday.com/news/nation/2007-06-17-shackles_N.htm.

[174] *See Illinois v. Allen*, 397 U.S. 337 (1970); *Deck v. Missouri*, 544 U.S. 622 (2005).

[175] *In re Staley*, 67 Ill. 2d 33 (1977).

[176] *State ex rel. Juv. Dept. v. Millican*, 906 P.2d 857, 147 (Or. App. 1995).

[177] *Tiffany A. v. Super. Ct.*, 59 Cal. Rptr. 3d 363 (App. 2d Dist. 2007).

[178] *In re R.W.S.*, 728 N.W.2d 326 (N.D. 2007) (applying the due process analysis of *Deck v. Missouri*, 544 U.S. 622, 630 (2005)).

[179] *John F. et al. v. Carrión*, 407117/07 (Sup. Ct. N.Y. Co. 2010).

[180] *In re R.W.S.*, 728 N.W.2d 326, 331 (N.D. 2007).

> In our view, the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14. Moreover, the rationale of the California cases—that the Constitution does not require juveniles to have the full complement of rights afforded adult defendants because to do so would introduce a tone of criminality into juvenile proceedings—would not be served by requiring all juveniles, irrespective of the charges against them, or their conduct in custody, to wear shackles during all court proceedings. The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid.[181]

The Supreme Court of New York County found that the regulations governing the use and length of time physical restraints could be used on children also applied to children while in state court buildings, whether in the courtroom or in waiting areas.[182] The court affirmed the half-hour time-limit of physical restraints absent an assessment demonstrating a compelling need.[183] This decision went further than any other court or legislative action in guaranteeing protections to juveniles not just in the courtroom but in the courthouse generally.

North Carolina[184] recently adopted a statute and Florida[185] a procedural rule to prohibit the indiscriminate use of restraints in courtrooms. For both states the prohibition may only be lifted upon an assessment that there is: 1) a risk to the maintenance of courtroom order, 2) a risk the juvenile may escape, or 3) necessary for the safety of the courtroom.[186] The North Carolina statute includes the added procedural protections of: a right to contest the use of shackles and a requirement that the judge make findings of fact in support of the use of shackles. The Florida rule adds a requirement that the judge find there are no less restrictive alternatives to restraints.[187] The Florida State Supreme Court, in relying upon recommendations from the National Juvenile Defender Center,[188] found the indiscriminate shackling of children to be "repugnant, degrading, humiliating, and contrary to the stated primary purpose of the juvenile justice system and to the principles of

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[181] *Tiffany A. v. Superior Court,* 59 Cal. Rptr. 3d 363, 375 (App. 2d Dist. 2007).
[182] *John F. et al. v. Carrión*, 407117/07 (Sup. Ct. N.Y. Co. 2010), *discussing* 9 N.Y.C.R.R. § 168.3. (John F. had been shackled for a 15 hour period).
[183] *John F. et al. v. Carrión*, 407117/07 (Sup. Ct. N.Y. Co. 2010).
[184] N.C. Gen. Stat. § 7B-2402.1.
[185] Fla.R.Juv.P. Rule § 8.100.
[186] Fla.R.Juv.P. Rule § 8.100(b)(1) and N.C. Gen. Stat. § 7B-2402.1.
[187] Fla.R.Juv.P. Rule § 8.100(b)(2).
[188] *In re Amendments to the Fla. R.Juv.P. Rules*, 2009 WL 4841088, 1 (Dec. 17, 2009).

therapeutic justice."[189] The North Carolina statute and the Florida rule can be found at Appendix B.

Recommendation 5.2 – Prohibit the use of for-profit facilities for juvenile detention and placement.

> *I was in both (I realize now) for profit and non profit residential facilities as a youth. I must say I had a MUCH better experience at the non profit agency I was in compared to the two for profit agencies. At the non profit the people were nicer, the facilities were nicer, the food was better, and I made progress there. I may not be here if not for the good people at that last residential home.* – 14-year old Pennsylvania youth

In Pennsylvania, the Department of Public Welfare's Bureau of Juvenile Justice Services oversees a network of public programs for delinquent youth. These include Youth Development Centers, Youth Forestry Camps, and Secure Treatment Units. If delinquent youth are placed outside their homes, however, most go to private facilities. DPW also licenses, regulates and partially funds private programs, including residential treatment facilities, shelter care programs, and group homes.[190] The vast majority of these programs are non-profit, and they are the backbone of the service delivery system. They provide specialized services. They are cost effective because they enable the state to draw down federal funding.

Out of 20 secure detention facilities in the state, two are for-profit, private facilities. One of the 17 public facilities is staffed with county employees but is managed by a for-profit private provider.

It is axiomatic that for-profit programs are in the business of making money. While detention centers provide some short-term services to youth, their primary mission is control. At their core, detention centers ensure that a youth will show up at trial and not commit a crime prior to trial. For-profit detention centers make their profit based on a head-count. While public detention centers will stay in business even if their populations are low, for-profit detention centers cannot afford low populations.

Across the country, justice system officials and detention center operators have been developing ways to reduce referrals to secure detention centers and to reduce the length of stay of youth who are detained. Funded by the Annie E. Casey Foundation, the Juvenile Detention Alternatives Initiative (JDAI) has had an impressive 20-year history of reducing secure detention with no negative impact on

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[189] *In re Amendments to the Fla. R.Juv.P. Rules*, 2009 WL 4841088, 3 (Dec. 17, 2009).
[190] Pennsylvania Juvenile Court Judges' Commission. (2006). Pennsylvania Juvenile Delinquency Benchbook. Harrisburg, PA: Pennsylvania Juvenile Court Judges' Commission. Available at http://www.oijj.es/doc/agenda/agenda_2938.pdf.

public safety.[191] The imperatives of the free-enterprise market make it less likely that for-profit detention centers will be part of a reform initiative like JDAI.

Next step: The General Assembly should amend the Juvenile Act to expressly prohibit the use of for-profit detention centers, and the Department of Public Welfare should issue regulations to enforce the ban.

Legal Support

In Pennsylvania, the Juvenile Act permits a child to be placed in a detention home, camp, center or other facility for delinquent children under the direction or supervision of the court or other public authority or private agency, and is approved by the Department of Public Welfare.[192]

Although many states do not expressly prohibit the use of for-profit facilities, others are moving away from the trend of using for-profit facilities in favor of private nonprofit facilities. In Massachusetts, the Code of Regulations provides in part that the Department of Youth Services was created to provide services to committed youth through the purchase of services from private nonprofit agencies.[193] By putting this language in the purpose clause of DYS, Massachusetts has taken a strong stance against the use of for-profit facilities. Even for the placement of juveniles pre-adjudication, its enabling legislation authorizes the Department to contract only with nonprofit vendors.[194] Similarly, New York State provides for the use of public or nonprofit agencies as detention service providers. New York City and each county must designate an agency responsible for juvenile detention and inform the New York State Division for Youth of the designation. The designated agency is authorized to establish and operate the detention facilities or to contract with public or non-profit child caring agencies to operate the facilities.[195]

Florida is also instructive in that although it allows for post-adjudicatory services to be administered by private agencies, there is a specific requirement that any pre-adjudicatory placement must be in a state facility.[196] Similarly, Kentucky,

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[191] *Two Decades of JDAI: A Progress Report, From Demonstration Project to National Standard*, Annie E. Casey Foundation 2009. Any effort to reduce unnecessary detention must involve all the key juvenile justice stakeholders. The JDAI report and other Annie E. Casey Foundation publications show how this can be done effectively through reform of *the detention system*. Here, however, we focus on how hard it is to reduce unnecessary detention in the context of a for-profit detention center.

[192] 42 Pa.C.S. § 6327.

[193] 109 Mass. Code Regs. 2.01.

[194] *See* http://www.mass.gov/dys.

[195] N.Y. Comp. Codes R. & Regs. tit. 9 § 180.5(3) ("Agencies responsible for administering detention may contract with public or nonprofit child caring agencies to operate detention facilities, pursuant to applicable statutes and regulations, and upon certification by the division.").

[196] Fla. Stat §§ 985.601, 985.686.

although all juvenile detention services are run by the State, specifically provides that pre-adjudication services must be in state facilities.[197]

Illinois statutorily prohibits the use of for-profit detention centers. Illinois' county-based juvenile justice system is similar to Pennsylvania's. Yet all juvenile detention centers in Illinois are run by counties, removing the for-profit motive that occurred in Luzerne County.[198] Arising out of a similar legal corruption scandal in the early 1980s, Illinois has a statutory "moratorium" on the use of private correctional facilities for incarceration.[199]

[197] Ky. Rev. State. § 15A.305.

[198] *See Juvenile justice for sale: Illinois is a poster child, but not the way you think*, Liz Hoffman, Feb. 24, 2009 *available at* http://news.medill.northwestern.edu/chicago/news.aspx?id=118129&print=1.

[199] *See* 730 Ill. Comp. Stats. 140/2, 140/3. "The General Assembly hereby finds and declares that the management and operation of a correctional facility or institution involves functions that are inherently governmental. The imposition of punishment on errant citizens through incarceration requires the State to exercise its coercive police powers over individuals and is thus distinguishable from privatization in other areas of government. It is further found that issues of liability, accountability and cost warrant a prohibition of the ownership, operation or management of correctional facilities by for-profit private contractors."

Chapter Six

Reducing the Consequences of Juvenile Records

Even though the Pennsylvania Supreme Court's Special Master, Judge Arthur Grim, vacated the adjudications of juveniles in Luzerne County, their records have already negatively affected them. Elsewhere in Pennsylvania, juveniles have had difficulty enlisting in the military or getting jobs because of their juvenile records. These youth were either discouraged by the procedural obstacles to petitioning the court for expungement or didn't even know of its availability.

Many of the thousands of youth who were adjudicated delinquent by Judge Ciavarella have said that their juvenile records were barriers to their successful entry into education programs, the military, and employment opportunities. Although Special Master Grim eventually vacated all these adjudications and ordered their records expunged, many youth were already suffering under the weight of their records. Indeed, Luzerne County youth might still find themselves in jeopardy even with expungment, because even if public records are destroyed, it is unclear whether Pennsylvania law governs expungement of records of arrest or adjudication contained in private databases.

Many people have the false impression that juvenile offenses are immediately erased from one's record at the age of majority. Records of juvenile crime—regardless of how minor or severe—can follow an individual throughout adulthood. They can have far-reaching consequences for a youth's ability to join the military, pursue higher education, or obtain employment.

Too many people also equate juvenile misbehavior with adult criminal behavior—they fail to appreciate that adolescence is a volatile stage of life through which the vast majority of teens pass without additional contact with the law.[200] Unfortunately, even though adolescents are generally less culpable and more capable of change than adults, their records can be just as damaging to them later in life as records of adult criminal behavior. One method of assuring these records are not harmful to youth is through a process called "expungement."[201]

The practice of expungement of juvenile records in Pennsylvania varies from county to county. Juveniles rarely know of its availability, and—because expungement can only occur after months or years have elapsed—youth are rarely advised when they become eligible to have their records expunged. There is no state law, practice or policy that requires public defenders, probation officers, or court clerks to file expungement petitions on behalf of youth. Thus, the burden to understand the process, determine eligibility, and file the motion rests solely on the juvenile. Each county has its own procedure and forms required for petitioning the Court for an expungement. Youth who were adjudicated delinquent in more than one Pennsylvania county must file multiple forms. Since the Pennsylvania Supreme Court first promulgated the Rules of Juvenile Court Procedure (Pa.R.J.C.P.) in 2005, there has been a movement to standardize processes and practices across Pennsylvania. The Juvenile Defenders Association of Pennsylvania and the Interbranch Commission on Gender, Racial and Ethnic Fairness have also promoted initiatives to streamline expungements and make them more available to youth.

Recommendation 6.1 – Limit the public availability and collateral consequences of juvenile records.

Next step: The General Assembly should amend the Juvenile Act to limit the public availability of juvenile records including a provision limiting the

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[200] *See* Thomas Grisso & Robert G. Schwartz, *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000).

[201] For a thorough discussion of expungement and juvenile records in Pennsylvania, see two Juvenile Law Center publications at www.jlc.org: Riya S. Shah, *JUVENILE RECORDS EXPUNGEMENT: A Guide for Defense Attorneys* (2007) at http://www.jlc.org/publications/1/juvenile-records-expungement/; and Riya S. Shah and Joanna K. Darcus, *JUVENILE RECORDS: A Know Your Rights Guide for Youth in Pennsylvania* (2008), at http://www.jlc.org/publications/11/juvenile-records/.

use of juvenile records to restrict youth employment and educational opportunities.

Next step: The General Assembly should introduce legislation to limit the ability of private databases to gain access to juvenile arrest and disposition information.

Expungement is available for juvenile offenses because of the well-established view that juveniles deserve second chances and often learn from their involvement in the justice system. When youth seek to become productive members of society, pursuing employment or education opportunities, their juvenile records should not impede them. The American Bar Association recently adopted a policy on Collateral Consequences recommending that juvenile offenses cease to serve as barriers to education and vocational opportunities.[202]

Legal Support

The Juvenile Act provides that records of juvenile offenses that would be felonies if committed by an adult will be publicly available if the juvenile was 14 years old or older at the time of the offense. This provision further provides that the records of serious enumerated offenses will be publicly available for juveniles who are between the ages of 12 and 13.[203] Juveniles covered by those two provisions receive some protection from the narrow definition of public availability. For a record to be publicly available, the court creates a cover sheet that gives the juvenile's name, age, charges, and disposition. When a record is requested, only this information is provided.[204] The full juvenile file, including social history, school, medical and mental health information, is never available to the public. It is inevitable, with the trend towards more open courtrooms, that information regarding juvenile offenses will become more publicly available. Nevertheless, entire records should never be made fully public.

Regardless of the public availability of juvenile records, adjudications of delinquency can have long-lasting consequences – for employment, education, current livelihood, including driving privileges, housing, and public benefits, and in subsequent interactions with the law. Even though juvenile adjudications of delinquency are not the same as criminal convictions,[205] employers, with little understanding of the difference, frequently treat them as such. Current law provides that an employer may conduct a background search of a juvenile and consider any delinquent behavior in making employment decisions. Although employers are only supposed to use information regarding a juvenile's delinquent behavior to deny employment when the offense is related to the applicant's

[202] Standards Relating to Juvenile Records and Information Services, Part XV: Access to Juvenile Records; ABA Report to House of Delegates 102A (2010).
[203] 42 Pa.C.S. § 6307.
[204] Pa.R.J.C.P. 330.
[205] 42 Pa.C.S. § 6354(a).

qualifications for the listed job,[206] employers have broad discretion to make employment decisions based on whatever information they deem pertinent. An adjudication of delinquency is also considered a conviction of a criminal offense under Army regulations, thereby operating as a barrier to successful enlistment in the military.[207] And juveniles who are later involved in the criminal justice system may also have their juvenile records considered in calculating their "prior record score" under the sentencing guidelines.[208]

Most states keep records of juvenile delinquency confidential in a majority of circumstances. Some states go even further to require that juvenile records are not used against the juvenile when seeking educational and employment opportunities. The newly adopted ABA Policy on Collateral Consequences supports this view.[209] Heightened security concerns have prompted employers and educational institutions to make a more thorough inquiry into a youth's juvenile history. Even when there is no legal bar to employment or education, the social stigma of a juvenile delinquency offense can be limiting. Applications increasingly ask about juvenile adjudications, involvement with the system that results in diversion from it, and school disciplinary records. Furthermore, state licensing requirements consider past criminal and juvenile conduct as a bar to certain jobs and professions. Accordingly, some states are enacting provisions to prohibit employment discrimination based on juvenile or criminal history.[210]

Many states specifically prohibit the inspection of juvenile records, including records of arrest.[211] Some states go even further to disallow the public from any access to court proceedings or records.[212] States typically have internet databases of criminal offenders, but many specifically prohibit juvenile offenders being listed on any public database.[213] By limiting distribution of juvenile records in

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[206] 42 Pa.C.S. § 6301(a)(7); 18 Pa.C.S. § 9125.
[207] Army Regulation 601-210, ch. 4, available at http://www.apd.army.mil/pdffiles/r601_210.pdf. Note that the Air Force, Navy and Marines examine juvenile adjudications of delinquency on a case-by-case basis. See Air Force Instruction 36-2002, at 31 attachment 4 (1999), available at http://www.e-publishing.af.mil/shared/media/ epubs/AFI36-2002.pdf; Navy Recruiting Manual-Enlisted 2-95-2-98 (2002), available at http://usmilitary.about.com/library/pdf/navrecruit.pdf; 2 Military Personnel Procurement Manual, MCO P1100, 72C 3-95-3-105 (2004), available at http://www.marines.mil/new/publications/Documents/MCO%20P110.72C%20W%20ERRATUM.pdf.
[208] See 42 Pa. C.S. § 2154(2); 42 Pa.C.S. §§303.6, 303.7.
[209] *See* Standards Relating to Juvenile Records and Information Services, Part XV: Access to Juvenile Records; ABA Report to House of Delegates 102A (2010).
[210] District of Columbia City Council Bill (amending *Human Rights Act of 1977* prohibiting employment and educational discrimination based on arrest/conviction records unless there is a rational relationship between the record and the position sought); Wisconsin Assembly Bill 22 (2009); Massachusetts Senate Bill 1135 (2005).
[211] Arkansas and Alaska for example only allow inspection of juvenile records with permission of the court upon a showing of legitimate interest. *See* A.C.A. §§ 9-27-309, 9-28-217, 16-90-903; Alaska Stat. § 40.25.120.
[212] Ky. Rev. Stat. Ann. § 610.340; Hawaii Rev. Stat.§ 846D-4 (limiting dissemination of juvenile justice information to directly related parties for investigatory, statistical, or detention purposes).
[213] N.M. Stat. §32A-2-32.1.

conjunction with anti-discrimination laws, juveniles will be further protected from misinterpretation of their records and the lasting effect of past delinquent activity on their future success.

Recommendation 6.2 – Implement procedures to facilitate expungement of juvenile records.

> *We initially thought that the expungement process was automatic...this was not made clear to us at the time of adjudication. We have tried repeatedly to have our son's record expunged for 3 years...all to no avail. Our son has not been in any trouble since and does not drink or do drugs. He has a clean record and is trying to get hired by a major health firm that has offered him a job. We need his record expunged before he can move forward. It has been sitting on the judge's desk since the end of 2008.* – Parent of 16-year-old Pennsylvania boy

> ***Next step:*** The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to ensure that expungements occur automatically in most cases, without requiring that a petition be filed by the juvenile; the Rules should also provide sample petitions or forms for filing in those cases where automatic expungement is not available.

Placing the burden of filing a petition on the juvenile ensures that expungements will occur rarely. The system should be streamlined so that expungements occur smoothly. Too often, the process is cumbersome, especially for juveniles who are adjudicated delinquent in more than one county. Because so few juveniles are aware of the availability of expungement and even fewer take advantage of expungement by filing petitions, Juvenile Law Center recommends that local counties designate one unit of government – whether the court clerk, juvenile probation office, or public defender office – to take responsibility for notifying juveniles of their expungement rights and eligibility and assisting in filing petitions.

> ***Next step:*** The General Assembly should amend the Pennsylvania Crimes Code to provide that juvenile summary offenses be automatically expunged six months after the juvenile has been discharged from court supervision.

Many juveniles are charged and convicted of summary offenses – such as underage drinking, curfew violations, and disorderly conduct. These summary offenses are not expungeable for five years. Furthermore, as summary offenses are adult criminal convictions and not juvenile adjudications, their records are fully available to the public, including to employers.

Legal Support

Expungements occur rarely. In 2007, there were 45,573 delinquency-related dispositions in Pennsylvania.[214] Of this number, 21,399, or 47% would have been eligible for what could statutorily be called "automatic expungement." The criminal code provides that expungement shall occur within 30 days absent cause shown when the juvenile's charges have been dismissed or six months after discharge from a consent decree.[215] In 2007, the following categories of cases would have been automatically considered: Consent Decrees 8,399 (18.4%), Informal Adjustments 6,516 (14.3%), Complaints Withdrawn 3,580 (7.9%) and Warned/Counseled/Case Closed 2,904 (6.4%). Notwithstanding the high number of delinquency dispositions that could result in automatic expungement, very few people filed to have their records expunged. In 2006, there were only 662 expungement orders reported to the Juvenile Court Judges' Commission.

Under current law, a person may file for expungement of his or her juvenile records if the charges against him or her were dismissed, if it has been more than six months since a discharge from supervision, more than five years since an adjudication of delinquency or if the juvenile is over the age of eighteen.[216]

While the Juvenile Act governs the determination of eligibility for expungement, the process for petitioning the court for an expungement is governed by the Rules of Juvenile Court Procedure. Rule 170 says that in order for a juvenile's record to be expunged, any party or the court on its own motion, may file a motion with the Court.[217] This motion must contain specific information regarding the charges for which the juvenile was adjudicated delinquent and delineate all agencies and offices *to which the expungement order must be sent.*[218] The burden is typically on the juvenile to file the expungement petition regardless of whether the juvenile fits into one of the "automatic" categories of eligibility. Although some Pennsylvania counties waive the filing fee for juveniles upon a determination of indigence, many counties require a filing fee between $15-100. No statutory authority requires the youth's counsel, the public defender's office, the court clerk, or the juvenile probation office to file petitions on behalf of juveniles or notify youth of their eligibility for expungement.

While some states provide for expungement upon motion as in Pennsylvania, a growing number of states expunge juvenile records automatically upon the juvenile reaching a certain age, or for certain categories of offenses and dispositions. For example, at least four states statutorily provide for automatic expungements in

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[214] Pennsylvania Juvenile Court Dispositions Report 2007, Juvenile Court Judges' Commission (2007).
[215] 18 Pa.C.S. § 9123 (2005).
[216] 18 Pa.C.S. § 9123 (2005).
[217] Pa.R.J.C.P. 170.
[218] Pa.R.J.C.P. 170.

some circumstances. Iowa, for example, expunges juvenile records for most nonserious offenses when the juvenile reaches age 21.[219]

Most other states provide that the juvenile must file a petition in order to seek expungement or destruction of their juvenile records. However, states vary in requiring the court to hold a hearing to determine whether the expungement should be granted. At least six states mandate a hearing on the expungement. The hearing assures that the prosecuting attorney does not have overbroad discretion to deny an expungement, affords the juvenile opportunities to present evidence, and puts the burden on the court to make specific findings as to why the expungement should or should not be granted.

Although some youth maintain contact with their probation officers or attorneys beyond discharge, many youth have no connection to the juvenile justice system once they are discharged from it. Thus, youth whose records may become eligible for expungement may not be aware that they are indeed eligible, or that they even have the option of expunging their record. Some counties automatically expunge some records, such as those of consent decrees. In Pennsylvania, the Allegheny and Cumberland County court systems have notification systems in place that alert youth when their records may be eligible to be expunged. In Northumberland County, youth who are charged as first time offenders have their petitions completed by juvenile probation and sent to them for signature. This automatic notification process allows the youth to apply for expungement without initiating the petition process himself. However, there are many counties where these notification systems are not in place. And when juvenile defenders or other court-appointed counsel do not have the resources or capability to file petitions for expungement on behalf of former clients, best practices indicate they should, at a minimum, inform their clients of the availability of expungement prior to or following their adjudication.

[219] Iowa Code § 692.17.

Appendix A

Proposed Changes

The Juvenile Act

Recommendation 5.2 – Prohibit the use of for-profit facilities for juvenile detention and placement.

Next step: The General Assembly should amend the Juvenile Act to expressly prohibit the use of for-profit detention centers, and the Department of Public Welfare should issue regulations to enforce the ban.

42 Pa.C.S. § 6327. Place of detention.

(a) General rule. – A child alleged to be delinquent may be detained only in:

(1) a licensed foster home or a home approved by the court.

(2) a facility operated by a licensed child welfare agency or one approved by the court.

(3) a detention home, camp, center or other facility for delinquent children which is under the direction or supervision of the court or other public authority or private nonprofit agency, and is approved by the Department of Public Welfare.

(4) any other suitable place or nonprofit facility, designated or operated by the court and approved by the Department of Public Welfare.

Recommendation 3.1 – Make juvenile courts presumptively open to the public.

Next step: The General Assembly should amend the Juvenile Act to provide that delinquency proceedings shall be open to the public, with a right of the juvenile or any party to petition the court to close the proceedings for good cause.

42 Pa.C.S. § 6336. Conduct of hearings.

The general public shall not be excluded from any hearings under this chapter. Upon motion by any party, or on its own motion, the Court shall close the proceedings to the media and general public to serve the juvenile interests.

~~(1) Pursuant to a petition alleging delinquency where the child was 14 years of age or older at the time of the alleged conduct and the alleged conduct would be considered a felony if committed by an adult.~~

~~(2) Pursuant to a petition alleging delinquency where the child was 12 years of age or older at the time of the alleged conduct and where the alleged conduct would have constituted one or more of the following offenses if committed by an adult:~~

~~(i) Murder.~~

~~(ii) Voluntary manslaughter.~~

~~(iii) Aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault).~~

~~(iv) Arson as defined in 18 Pa.C.S. § 3301(a)(1) (relating to arson and related offenses).~~

~~(v) Involuntary deviate sexual intercourse.~~

~~(vi) Kidnapping.~~

~~(vii) Rape.~~

~~(viii) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).~~

~~(ix) Robbery of motor vehicle.~~

~~(x) Attempt or conspiracy to commit any of the offenses in this paragraph.~~

~~Notwithstanding anything in this subsection, the proceedings shall be closed upon and to the extent of any agreement between the child and the attorney for the Commonwealth.~~

(f) Discretion of court.--The court at any disposition proceeding under subsection (e) shall ~~have discretion to~~ maintain the confidentiality of mental health, medical or juvenile institutional documents or juvenile probation reports by dismissing nonessential individuals from the courtroom and ensuring records are sealed to the public.

Recommendation 1.1 – Establish an unwaivable right to counsel for juveniles.

Next step: The General Assembly should amend the Juvenile Act to prohibit the waiver of counsel.

Recommendation 1.3 – Assume all juveniles are indigent for the purpose of appointing counsel.

Next step: The General Assembly should amend the Juvenile Act to provide that the right to court-appointed counsel shall not depend on parents' income.

42 Pa.C.S. § 6337. Right to counsel.

Except as provided in section 6311 (relating to guardian *ad litem* for child in court proceedings), a party is entitled to representation by legal counsel at all stages of any proceedings under this chapter without a determination of indigence ~~and if he is without financial resources or otherwise unable to employ counsel, to have the court provide counsel for him~~. If a party appears without counsel the court shall ascertain whether he knows of his right thereto and to be provided with counsel by the court if he does not retain counsel of his choice at his own expense ~~applicable~~.

The court may continue the proceeding to enable a party to obtain counsel. Counsel must be provided for a child and counsel for the child cannot be waived at any stage of the proceeding under this Act. ~~unless his parent, guardian, or custodian is present in court and affirmatively waive it. However, the parent, guardian, or custodian may not waive counsel for a child when their interest may be in conflict with the interest or interests of the child~~. If the interests of two or more parties may conflict, separate counsel shall be provided for each of them.

Pennsylvania Rules of Juvenile Court Procedure

Recommendation 3.1 – Make juvenile courts presumptively open to the public.

> ***Next step:*** The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 129 governing open proceedings to provide that delinquency proceedings shall be open to the public and to set forth the procedures whereby the juvenile or any other party to the proceeding may petition the court to close the proceedings.

Rule 129 Open Proceedings (reserved).

(a) Juvenile Proceedings shall be open to the public, including to news media.

(b) Motion to Close Proceeding – Pursuant to 42 Pa.C.S. § 6336, any party may file a motion with the Court to close a juvenile proceeding in part or whole. Except upon good cause shown as to why the public has an interest in the proceedings, motions shall be routinely granted with the consent of the juvenile and juvenile's counsel. Motions shall indicate specifically what portion of the proceeding is being requested confidential and the reasons the juvenile's interests require closing the proceedings to the public.

Recommendation 1.3 – Assume all juveniles are indigent for the purpose of appointing counsel.

> ***Next step:*** The Pennsylvania Supreme Court should amend Rule of Juvenile Court Procedure 151 to instruct courts to presume indigence of juveniles for the purpose of appointment of counsel.

Rule 151. Assignment of Counsel.

A. General. If counsel does not enter an appearance for the juvenile, the court shall inform the juvenile of the right to counsel prior to any proceeding. In any case, the court shall assign counsel for the juvenile without a determination of indigence if he does not retain counsel of his

choice at his own expense ~~if the juvenile is without financial resources or otherwise unable to employ counsel~~.

B. Time.

1. If the juvenile is detained and is without counsel and the requirements of paragraph (A) are met, the court shall assign counsel prior to the detention hearing.
2. If the juvenile is not detained and is without counsel and the requirements of paragraph (A) are met, the court shall assign counsel prior to the adjudicatory hearing.

Recommendation 1.1 – Establish an unwaivable right to counsel for juveniles.

Next step: The Pennsylvania Supreme Court should modify Rule of Juvenile Court Procedure 152 to prohibit juvenile waiver of counsel.

Rule 152. Waiver of Counsel.

A. **Waiver ~~Requirements~~ Prohibited.** A juvenile may not waive the right to counsel at any stage of the proceeding. ~~unless:~~

~~**1.** the waiver is knowingly, intelligently, and voluntarily made; and~~

~~**2.** the court conducts a colloquy with the juvenile on the record.~~

B. ~~**Stand-by counsel.** The court may assign stand-by counsel if the juvenile waives counsel at any proceeding or stage of a proceeding.~~

C. ~~**Notice and revocation of waiver.** If a juvenile waives counsel for any proceeding, the waiver only applies to that proceeding, and the juvenile may revoke the waiver of counsel at any time. At any subsequent proceeding, the juvenile shall be informed of the right to counsel.~~

Comment: This rule is based on a finding that counsel is often indispensable to due process of law and may be helpful in making determinations of fact and proper orders of disposition. Minors require the assistance of counsel to protect their interests and to help them communicate with the court.

Recommendation 6.2 – Implement procedures to facilitate expungement of juvenile records.

Next step: The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to ensure that expungements occur automatically in most cases, without requiring that a petition be filed by the juvenile; the Rules should also provide sample petitions or forms for filing in those cases where automatic expungement is not available.

Rule 170. Expunging or Destroying Juvenile Court Records

A. Motion. Juvenile records may be expunged automatically by court order or upon motion of the juvenile, age 18 or older, or any party, including upon motion of the court.

B. Contents of Motion. A motion, which shall take the form of a proposed court order, shall contain the following information:

(1) The name of the juvenile;

(2) the date of birth of the juvenile, if known;

(3) the juvenile's case docket number, if any;

(4) the allegations to which the order pertains;

(5) the law enforcement agency that initiated the allegations;

(6) the reference number of the police report or written allegation to be expunged or destroyed;

(7) the date of arrest;

(8) the disposition of the written allegation or petition;

(9) the reasons and statutory authority for expunging or destroying the document; and

(10) the agencies upon which certified copies of the court order shall be served.

C. Service of Motion. In addition to the service required by Rule 345, the movant shall serve the motion on the chief juvenile probation officer.

D. Answer. The attorney for the Commonwealth, and any other person upon whom the motion was served, may file an answer to the motion.

E. Hearing. Unless the attorney for the Commonwealth consents to expunging the records, the court shall schedule and conduct a hearing, and thereafter grant or deny the motion. At the hearing, the attorney for the Commonwealth must demonstrate good cause to deny the expungement. The Court shall have the authority to override the attorney for the Commonwealth's consent and order the expungement.

Comment: See 18 Pa.C.S. § 9123 for records that may be expunged and 42 Pa.C.S. § 6341(a) for destruction of fingerprints and photographs.

Under paragraph (B)(6), any number assigned to police papers helpful in tracking the police report or written allegation that would assist the law enforcement agency in expunging or destroying the document is to be listed. A reference number could be an offense tracking number, district control number, crime control number, incident number, Philadelphia identification number, or another number assigned by the law enforcement agency to track the document.

Recommendation 2.2 – Enact robust post-dispositional relief mechanisms to provide relief to juveniles before and after appeal.

> ***Next step:*** The Pennsylvania Supreme Court should promulgate changes to Rules of Appellate Procedure and Rules of Juvenile Court Procedure to describe the process for seeking pre-appeal post-dispositional relief for juveniles adjudicated delinquent by adopting proposed Pa.R.J.P. 616 Post-Dispositional Procedures (reserved).

Recommendation 2.3 – Implement mechanisms to ensure juveniles know of and can take advantage of their rights to appeal.

> ***Next step:*** The Pennsylvania Supreme Court should promulgate Rule of Juvenile Court Procedure 616 to include a form entitled "Notice of Right to Seek Post-Dispositional Relief," similar to Wisconsin's Form JD-1757, "Notice of Right to Seek Post-Judgment Relief."

Rule 616 Post-Dispositional Procedures; Appeal (reserved).

(a) Counsel to continue. Counsel representing the juvenile during a dispositional hearing held pursuant to Rule 512 shall continue representation until filing a notice of right to seek post-dispositional relief pursuant to paragraph (b) of this Rule, and filing a notice of intent to pursue post-dispositional relief pursuant to paragraph (c) of this Rule.

(b) Notice of right to seek post-dispositional relief. Immediately after the Court enters a dispositional order pursuant to Rule 515, Counsel who represented the juvenile during the dispositional hearing shall file with the Juvenile Court and serve on the prosecutor and any other party a notice of the right to seek post-dispositional relief. The notice shall include all of the following:

1) Signed statement by the juvenile that he or she

i) has discussed with Counsel the right to seek post-dispositional relief; and

ii) understands that if he or she intends to seek post-dispositional relief, he or she must timely inform his or her Counsel of that intent in order that Counsel may timely file a notice of intent to pursue post-dispositional relief in the Juvenile Court pursuant to paragraph (d) of this Rule.

2) Signed statement by Counsel that he or she:

i) has counseled the juvenile about the decision to seek post-dispositional relief;

ii) has informed the juvenile that he or she must communicate his or her decision whether or not to pursue post-dispositional relief within 30 days;

iii) believes the juvenile understands the right to post-dispositional relief and the 30 day time limit; and

iv) understands that it is the duty of Counsel to file the notice of intent to pursue post-dispositional relief pursuant to paragraph (c) of this Rule if the juvenile timely indicates his or her intent to pursue post-dispositional relief.

(c) Notice of intent to pursue post-dispositional relief. Within 30 days after the date the Juvenile Court enters a dispositional order pursuant to Rule 515, Counsel shall file with the Juvenile Court and serve on the prosecutor and any other party a notice of intent to pursue post-disposition relief. The notice shall include all of the following:

1) The case name and number;

2) An identification of the judgment or order from which the juvenile intends to seek post-dispositional relief and the date on which the judgment was entered;

3) The name and address of the juvenile and his or her trial counsel; and

4) Whether the juvenile requests that the public defender appoint counsel for purposes of post-dispositional relief or if the juvenile has retained private counsel. If the juvenile has retained private counsel to pursue post-dispositional relief, counsel's name and address shall be included.

(d) Clerk to send materials. Within 5 days after a notice under paragraph (b) of this Rule is filed, if the juvenile requests representation by the public defender for purposes of post-dispositional relief the clerk of the Juvenile Court shall send at no cost to the appropriate public defender intake office a copy of the notice that shows the date on which it was filed, a copy of the judgment or order specified in the notice that shows the date on which it was entered, and a list of those proceedings in which a transcript has been filed with the clerk of the Juvenile Court.

e) Appointment of Counsel for post-dispositional relief. Within 15 days after the appropriate public defender intake office receives the materials from the Juvenile Court clerk pursuant to paragraph (c) of this Rule, the public defender shall appoint counsel for the juvenile and request a copy of the Juvenile Court record.

(f) Filing and service of transcripts and circuit court case record. The Juvenile Court clerk shall serve a copy of the Juvenile Court record on the juvenile and Counsel within 10 days after the request of the Juvenile Court record.

Comments:

Pursuant to paragraph (b), at the time of a dispositional order entered pursuant to Rule 515, the juvenile court clerk shall provide to the attorneys representing the juvenile, or directly to juvenile who is not represented by counsel, Notification of Right to Seek Post-Judgment Relief Form found below. If the attorney adequately explains to the juvenile both the right to seek post-dispositional relief in general and the provisions of the form itself, and then files the completed Form with the Juvenile Court, Counsel will have fulfilled his or her responsibilities under paragraph (a) of this Rule.

In the Interest of:

Case No:

Notification of Right to Seek Post-Judgment Relief Form

TO THE JUVENILE:

You have the right to seek relief from the judgment in this case. If you were represented by a lawyer at your disposition, it is that lawyer's responsibility to assist you in deciding whether to seek post-judgment relief. If you decide to seek post-judgment relief, you or your lawyer must file a Notice of Intent to Seek Post-Judgment Relief. The Notice of Intent must be filed in the trial court within 30 days. If you had a lawyer at your disposition, and if you give your lawyer timely notice that you have decided to seek post-judgment relief, it is your lawyer's duty to see that your Notice of Intent is properly filed in this court and served on the District Attorney. After filing the Notice of Intent, your lawyer does not have to represent you further unless you hire him or her to do so. If you intend to seek post-judgment relief but cannot afford a lawyer, you have the right to request that a lawyer be appointed to assist you by the State Public Defender.

JUVENILE'S STATEMENT:

I have discussed my right to seek post-judgment relief with my lawyer, if any, who represented me at disposition. I understand that if I intend to seek post-judgment relief, I must file a Notice of Intent in the trial court within 30 days after disposition and send a copy to the District Attorney. If I want my lawyer to file the Notice of Intent for me, I must timely inform my lawyer of my decision to seek post-judgment relief. I have received a copy of this Notice.

- ❑ I plan to seek post-judgment relief.
- ❑ I do not plan to seek post-judgment relief.
- ❑ I am undecided about seeking post-judgment relief and I know I need to decide and tell my lawyer within 20 days.

Signature of Juvenile Date

ATTORNEY STATEMENT:

I have counseled the juvenile about the decision to seek post-judgment relief. I have informed the juvenile that this decision must be made and communicated to me

within 30 days of disposition. I believe the juvenile understands the right to post-judgment relief and the 30 day time limit. I understand that it is my duty to file the Notice of Intent to Pursue Post-Judgment Relief on behalf of the juvenile if that intent is timely communicated to me.

Signature of Juvenile's Attorney Date

Distribution:

1. Court - Original

2. Juvenile

3. Juvenile's Attorney

Pennsylvania Crimes Code

Recommendation 6.2 – Implement procedures to facilitate expungement of juvenile records.

Next step: The General Assembly should amend the Pennsylvania Crimes Code to provide that juvenile summary offenses be automatically expunged six months after the juvenile has been discharged from court supervision.

18 Pa.C.S. § 9123. Juvenile records

(a) Expungement of juvenile records.--Notwithstanding the provisions of section 9105 (relating to other criminal justice information) and except upon cause shown, expungement of records of juvenile delinquency cases wherever kept or retained shall occur after 30 days' notice to the district attorney if ~~whenever the court upon its motion or upon the motion of a child or the parents or guardian finds~~:

1. a complaint is filed which is not substantiated or the petition which is filed as a result of a complaint is dismissed by the court;
2. six months have elapsed since the final discharge of the person from supervision under a consent decree or diversion program and no proceeding seeking adjudication or conviction is pending;
3. five years have elapsed since the final discharge of the person from commitment, placement, probation or any other disposition and referral and since such final discharge, the person has not been convicted of a felony, misdemeanor or adjudicated delinquent and no proceeding is pending seeking such conviction or adjudication; or
4. the individual is 18 years of age or older and petitions the court for an expungement, the attorney for the Commonwealth consents to the

expungement and a court orders the expungement after giving consideration to the following factors:

(i) the type of offense;

(ii) the individual's age, history of employment, criminal activity and drug or alcohol problems;

(iii) adverse consequences that the individual may suffer if the records are not expunged; and

(iv) whether retention of the record is required for purposes of protection of the public safety.

Unless the attorney for the Commonwealth consents to expunging the records, the court shall schedule and conduct a hearing, and thereafter grant or deny the motion. At the hearing, the attorney for the Commonwealth must demonstrate good cause to deny the expungement. The Court shall have the authority to override the attorney for the Commonwealth's consent and order the expungement.

(b) Notice to prosecuting attorney.--The court shall give notice of the applications for the expungement of juvenile records to the prosecuting attorney.

(c) Dependent children.--All records of children alleged to be or adjudicated dependent may be expunged upon court order after the child is 21 years of age or older.

Comment:

Expungements under (a)(1), (a)(2), and (a)(3) shall occur automatically without the necessary filing of a petition. Each locality will determine whether the court clerk, probation office, or juvenile defender office will notify the court of the eligible individuals. The Court will then, administratively, order the expungement of such records without petition or hearing.

Appendix B

Other State Models

Recommendation 5.1 – Prohibit the handcuffing and shackling of youth in juvenile court.

> ***Next step:*** The Pennsylvania Supreme Court should amend the Rules of Juvenile Court Procedure to prohibit the use of mechanical restraints on children during juvenile court proceedings, set forth criteria to guide judges in determining whether such restraints are necessary in the interests of public safety, and guarantee the juvenile's opportunity to contest the use of restraints at a hearing.

Below is an example of a state law prohibiting the use of shackles in juvenile proceedings that the Pennsylvania General Assembly might use as a guide in drafting its own legislation.

North Carolina General Statute § 7B-2402.1:

> At any hearing authorized or required by this Subchapter, the judge may subject a juvenile to physical restraint in the courtroom only when the judge finds the restraint to be reasonably necessary to maintain order, prevent the juvenile's escape, or provide for the safety of the courtroom. Whenever practical, the judge shall provide the juvenile and the juvenile's attorney an opportunity to be heard to contest the use of restraints before the judge orders the use of restraints. If restraints are ordered, the judge shall make findings of fact in support of the order.

Below is a Rule adopted by the Florida Supreme Court to outline circumstances under which shackles may be imposed on youth in court. Juvenile Law Center recommends the Pennsylvania Supreme Court Rules Committee adopt the Florida rule below.

Florida Rule Juvenile Procedure § 8.100:

> **(b) Use of Restraints on the Child.** Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, may not be used on a child during a court proceeding and must be removed prior to the child's appearance before the court unless the court finds both that:
>
> (1) The use of restraints is necessary due to one of the following factors:
>
> (A) Instruments of restraint are necessary to prevent physical harm to the child or another person;
>
> (B) The child has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior; or

(C) There is a founded belief that the child presents a substantial risk of flight from the courtroom; and

(2) There are no less restrictive alternatives to restraints that will prevent flight or physical harm to the child or another person, including, but not limited to, the presence of court personnel, law enforcement officers, or bailiffs.

Recommendation 2.3 – Implement mechanisms to ensure juveniles know of and can take advantage of their rights to appeal.

Next step: The Pennsylvania Supreme Court should promulgate Rule of Juvenile Court Procedure 616 to include a form entitled "Notice of Right to Seek Post-Dispositional Relief," similar to Wisconsin's Form JD-1757, "Notice of Right to Seek Post-Judgment Relief."

Below is the Wisconsin Rule of Appellate Procedure adopted by the Wisconsin Supreme Court outlining the appellate process for defendants. In drafting its recommendations, Juvenile Law Center relied on the provisions contained in this model rule.

Wisconsin Statute § 809.30

(1) DEFINITIONS.

In this subchapter:(a) "Final adjudication" means the entry of a final judgment or order by the circuit court in a *s. 971.17* proceeding, in a criminal case, or in a ch. 48, 51, 55, 938, or 980 case, other than a termination of parental rights case under *s. 48.43* or a parental consent to abortion case under *s. 48.375 (7) (b)* "Person" means any of the following:

1. A defendant seeking postconviction relief in a criminal case.

2. A party, other than the state, seeking postdisposition relief in a case under ch. 48, other than a termination of parental rights case under *s. 48.43* or a parental consent to abortion case under *s. 48.375 (7)*

3. A party, other than the state, seeking postdisposition relief in a case under ch. 938

4. A subject individual or ward seeking postdisposition relief in a *s. 971.17* proceeding or a case under ch. 51, 55, or 980 4. A subject individual or ward seeking postdisposition relief in a case under ch. 51 or 55.

5. Any other person who may appeal under *ss. 51.13 (5)*, *51.20 (15)*, or *55.20 (c)* "Postconviction relief" means an appeal or a motion for postconviction relief in a criminal case, other than an appeal, motion, or

petition under *ss. 302.113 (7m)*, *302.1135*, *973.19*, *973.195*, *974.06*, or *974.07 (2)* In a ch. 980 case, the term means an appeal or a motion for postcommitment relief under *s. 980.038 (4) (d)* "Postdisposition relief" means an appeal or a motion for relief under this subchapter from a circuit courts final adjudication.(e) "Prosecutor" means a district attorney, corporation counsel, or other attorney authorized by law to represent the state in a criminal case, a proceeding under *s. 971.17*, or a case under ch. 48, 51, 55, 938, or 980 (f) "Sentencing" means the imposition of a sentence, a fine, or probation in a criminal case. In a ch. 980 case, the term means the entry of an order under *s. 980.06*

(2) APPEAL; POSTCONVICTION OR POSTDISPOSITION MOTION.

(a) Appeal procedure; counsel to continue. A person seeking postconviction relief in a criminal case; a person seeking postdisposition relief in a case under ch. 48 other than a termination of parental rights case under *s. 48.43* or a parental consent to abortion case under *s. 48.375 (7)*; or a person seeking postdisposition relief in a *s. 971.17* proceeding or in a case under ch. 51, 55, 938, or 980 shall comply with this section. Counsel representing the person at sentencing or at the time of the final adjudication shall continue representation by filing a notice under par. (b) if the person desires to pursue postconviction or postdisposition relief unless counsel is discharged by the person or allowed to withdraw by the circuit court before the notice must be filed.(b) Notice of intent to pursue postconviction or postdisposition relief. Within 20 days after the date of sentencing or final adjudication, the person shall file in circuit court and serve on the prosecutor and any other party a notice of intent to pursue postconviction or postdisposition relief. If the record discloses that sentencing or final adjudication occurred after the notice of intent was filed, the notice shall be treated as filed after sentencing or final adjudication on the day of the sentencing or final adjudication. The notice shall include all of the following:

1. The case name and number.

2. An identification of the judgment or order from which the person intends to seek postconviction or postdisposition relief and the date on which the judgment or order was entered.

3. The name and address of the person and his or her trial counsel.

4. Whether the persons trial counsel was appointed by the state public defender and, if so, whether the persons financial circumstances have materially improved since the date on which his or her indigency was determined.

5. Whether the person requests the state public defender to appoint counsel for purposes of postconviction or postdisposition relief.

6. Whether a person who does not request the state public defender to appoint counsel will represent himself or herself or will be represented by retained counsel. If the person has retained counsel to pursue postconviction or postdisposition relief, counsels name and address shall be included.(c) Clerk to send materials. Within 5 days after a notice under par. (b) is filed, the clerk of circuit court shall:

1. If the person requests representation by the state public defender for purposes of postconviction or postdisposition relief, send to the state public defenders appellate intake office a copy of the notice that shows the date on which it was filed or entered, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.

2. If the person does not request representation by the state public defender, send or furnish to the person, if appearing without counsel, or to the persons attorney if one has been retained, a copy of the judgment or order specified in the notice that shows the date on which it was filed or entered, a list of the court reporters for each proceeding in the action in which the judgment or order was entered, and a list of those proceedings in which a transcript has been filed with the clerk of circuit court.(d) Indigency redetermination. Except as provided in this paragraph, whenever a person whose trial counsel is appointed by the state public defender files a notice under par. (b) requesting public defender representation for purposes of postconviction or postdisposition relief, the prosecutor may, within 5 days after the notice is served and filed, file in the circuit court and serve upon the state public defender a request that the persons indigency be redetermined before counsel is appointed or transcripts are requested. This paragraph does not apply to a person who is entitled to be represented by counsel under *s. 48.23*, *51.60 (1)*, *55.105*, or *938.23 (e)* State public defender appointment of counsel; transcript and circuit court case record request. Within 30 days after the state public defender appellate intake office receives the materials from the clerk of circuit court under par. (c), the state public defender shall appoint counsel for the person and request a transcript of the reporters notes and a copy of the circuit court case record, except that if the persons indigency must first be determined or redetermined the state public defender shall do so, appoint counsel, and request transcripts and a copy of the circuit court case record within 50 days after the state public defender appellate intake office receives the material from the clerk of circuit court under par. (c) (f) Person not represented by public defender; transcript and circuit court case record request. A person who does not request representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the reporters notes, and may request a copy of the circuit court case record, within 30 days after filing a notice under par. (b) A person who is

denied representation by the state public defender for purposes of postconviction or postdisposition relief shall request a transcript of the reporters notes, and may request a copy of the circuit court case record, within 90 days after filing a notice under par. (b) (fm) Transcript and circuit court case record request in chs. 48 and 938 proceedings. A child or juvenile who has filed a notice of intent to pursue relief from a judgment or order entered in a ch. 48 or 938 proceeding shall be furnished at no cost a transcript of the proceedings or as much of the transcript as is requested, and may request a copy of the circuit court case record. To obtain the transcript and circuit court case record at no cost, an affidavit must be filed stating that the person who is legally responsible for the childs or juveniles care and support is financially unable or unwilling to purchase the transcript and a copy of the circuit court case record.(g) Filing and service of transcript and circuit court case record.

1. The clerk of circuit court shall serve a copy of the circuit court case record on the person within 60 days after receipt of the request for the circuit court case record.

2. The court reporter shall file the transcript with the circuit court and serve a copy of the transcript on the person within 60 days of the request for the transcript. Within 20 days after the request for a transcript of postconviction or postdisposition proceedings brought under sub. (2) (h), the court reporter shall file the original with the circuit court and serve a copy of that transcript on the person. The reporter may seek an extension under *s. 809.11 (7)* for filing and serving the transcript.(h) Notice of appeal, postconviction or postdisposition motion. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal or motion seeking postconviction or postdisposition relief within 60 days after the later of the service of the transcript or circuit court case record. The person shall file a motion for postconviction or postdisposition relief before a notice of appeal is filed unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised. A postconviction or postdisposition motion under this section may not be accompanied by a notice of motion and is made when filed. A notice of appeal filed under this section shall conform to the requirements set forth in *s. 809.10 (i)* Order determining postconviction or postdisposition motion. Unless an extension is requested by a party or the circuit court and granted by the court of appeals, the circuit court shall determine by an order the persons motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion.(j) Appeal from judgment and order. The person shall file in circuit court and serve on the prosecutor and any other party a notice of appeal from the judgment of conviction and sentence or final adjudication and, if necessary, from the order of the circuit court on the motion for postconviction or postdisposition relief within 20 days

of the entry of the order on the postconviction or postdisposition motion. A notice of appeal filed under this section shall conform to the requirements set forth in *s. 809.10* Appeals in cases under chs. 48, 51, 55, and 938 are subject to the docketing statement requirements of *s. 809.10 (1) (d)* and may be eligible for the expedited appeals program in the discretion of the court.(k) Transmittal of record. Except as otherwise provided in *ss. 809.14 (3)* and *809.15 (4) (b)* and (c), the clerk of circuit court shall transmit the record on appeal to the court of appeals as soon as prepared but in no event more than 40 days after the filing of the notice of appeal. Subsequent proceedings in the appeal are governed by the procedures for civil appeals.(L) An appeal under *s. 974.06* or *974.07* is governed by the procedures for civil appeals.

(3) APPEALS BY STATE OR OTHER PARTY; APPOINTMENT OF COUNSEL.

In a case in which the state of Wisconsin, the representative of the public, any other party, or any person who may appeal under *s. 51.13 (5)*, *51.20 (15)*, or *55.20* appeals and the person who is the subject of the case or proceeding is a child or claims to be indigent, the court shall refer the person who is the subject of the case or proceeding to the state public defender for the determination of indigency and the appointment of legal counsel under ch. 977

(4) MOTION TO WITHDRAW AS APPOINTED COUNSEL.

(a) If postconviction, postdisposition, or appellate counsel appointed for the person under ch. 977 seeks to withdraw from the case, counsel shall serve a motion to withdraw upon the person and upon the appellate division intake unit in the Madison appellate office of the state public defender. If the motion is filed before the notice of appeal is filed, the motion shall be filed in circuit court. If the motion is filed after a notice of appeal has been filed, the motion shall be filed in the court of appeals. Service of the motion to withdraw on the state public defender is not required when the motion is filed by an assistant state public defender or when a no-merit report is filed with the motion.(b) Within 20 days after receipt of the motion under par. (a), the state public defender shall determine whether successor counsel will be appointed for the person and shall notify the court in which the motion was filed of the state public defenders determination.(c) Before determining the motion to withdraw, the court shall consider the state public defenders response under par. (b) and whether the person waives the right to counsel.(d) When the motion to withdraw is filed in circuit court, appointed counsel shall prepare and serve a copy of the order determining counsels motion to withdraw upon the person and the appellate division intake unit in the Madison appellate office of the state public defender within 14 days after the courts determination.

Below is State of Wisconsin Circuit Court form JD-1757, "Notice of Right to Seek Post-Judgment Relief," which Juvenile Law Center modeled Proposed Rule 616 after. Juvenile Law Center recommends that in tandem with adopting Proposed Rule 616, the Pennsylvania Supreme Court adopt this form within the Rule Comment to provide juveniles with notice of their rights to seek Post-Judgment relief.

STATE OF WISCONSIN, CIRCUIT COURT, _____ COUNTY

For Official Use

IN THE INTEREST OF

Notice of Right to Seek Post-Judgment Relief

_____, Juvenile
Name

Case No. _____

TO THE JUVENILE:
You have the right to seek relief from the judgment in this case. If you were represented by a lawyer at your disposition, it is that lawyer's responsibility to assist you in deciding whether to seek post-judgment relief.

If you decide to seek post-judgment relief, you or your lawyer must file a Notice of Intent to Seek Post-Judgment Relief. The Notice of Intent must be filed in the trial court within 20 days. If you had a lawyer at your disposition, and if you give your lawyer timely notice that you have decided to seek post-judgment relief, it is your lawyer's duty to see that your Notice of Intent is properly filed in this court and served on the District Attorney.

After filing the Notice of Intent, your lawyer does not have to represent you further unless you hire him or her to do so. If you intend to seek post-judgment relief but cannot afford a lawyer, you have the right to request that a lawyer be appointed to assist you by the State Public Defender.

JUVENILE'S STATEMENT:
I have discussed my right to seek post-judgment relief with my lawyer, if any, who represented me at disposition. I understand that if I intend to seek post-judgment relief, I must file a Notice of Intent in the trial court within 20 days after disposition and send a copy to the District Attorney. If I want my lawyer to file the Notice of Intent for me, I must timely inform my lawyer of my decision to seek post-judgment relief. I have received a copy of this Notice.

- ☐ I plan to seek post-judgment relief.
- ☐ I do not plan to seek post-judgment relief.
- ☐ I am undecided about seeking post-judgment relief and I know I need to decide and tell my lawyer within 20 days.

_____ _____
Signature of Juvenile Date

ATTORNEY STATEMENT:
I have counseled the juvenile about the decision to seek post-judgment relief. I have informed the juvenile that this decision must be made and communicated to me within 20 days of disposition. I believe the juvenile understands the right to post-judgment relief and the 20 day time limit. I understand that it is my duty to file the Notice of Intent to Pursue Post-Judgment Relief on behalf of the juvenile if that intent is timely communicated to me.

_____ _____
Signature of Juvenile's Attorney Date

Distribution:
1. Court - Original
2. Juvenile
3. Juvenile's Attorney

Appendix C

Letter from James R. Roebuck, Chairman of House Education Committee

JAMES R. ROEBUCK, MEMBER
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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

Chairman, Education Committee
Intergovernmental Affairs Committee

Caucuses
PA Higher Education Assistance Agency, Member Board of Directors
PA Historical and Museum Commission
Black History Advisory Committee, Member
PA Legislative Black Caucus, Member

TO: All Members of the House of Representatives

FROM: Representative James R. Roebuck JRR

DATE: March 1, 2010

RE: Co-Sponsorship Memo - School-Wide Positive Behavioral Support

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In the near future, I will introduce a resolution requiring the Legislative Budget and Finance Committee to study the School-Wide Positive Behavioral Support program in public schools. Based on this report, the Committee provides recommendations for how to best expand and fund the program in Pennsylvania through appropriate legislative actions.

In response to the cited negative and disruptive behaviors in schools, School-Wide Positive Behavioral Support can help address this issue by identifying and preventing behavioral problems. With the objective of establishing a predictable and positive school environment, the program sets behavioral expectations through collective prevention and intervention, group service and support, individual social and emotional support. As similar programs in other states demonstrate, a significant reduction in disciplinary referrals has led to an increased academic performance in disciplines such as math.

The assessment of School-Wide Positive Behavioral Support is crucial to proposing a measure aimed at reducing negative behaviors because a stable school environment is directly linked to students' improved academic performance. The resolution directs the Legislative Budget and Finance Committee to evaluate the effectiveness of School-Wide Positive Behavior Support in states where it has been implemented, identify costs and existing funding sources, recommend on how to expand and fund the program in Pennsylvania and compile and distribute a report for the House of Representatives.

If you would like to co-sponsor this legislation, please contact Marlena Miller at 717-787-7044 or by email at mmmiller@pahouse.net

Thank you for your support.

JRR:mmm

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Juvenile Law Center

advancing the rights and well-being of children in jeopardy

Founded in 1975, Juvenile Law Center is the oldest multi-issue public interest law firm for children in the United States. With an approach grounded in principles of adolescent development, Juvenile Law Center uses the law on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, ensure access to appropriate services and create opportunities. Juvenile Law Center uses an array of legal and other advocacy strategies to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults.

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