

Interbranch Commission on Juvenile Justice
Testimony of Robert G. Schwartz
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Judge Cleland and Members of the Commission:

Thank you for inviting me to share Juvenile Law Center's views on the Luzerne County juvenile court scandal and its implications for Pennsylvania juvenile justice policy and practice.

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

Over the past year, many people and organizations have helped to expose the egregious conduct in Luzerne County, including Juvenile Law Center, the U.S. Attorney, this Commission, and the media. Many narratives have emerged, some more powerfully than others. This morning I will discuss Juvenile Law Center's thoughts on how to rebuild trust in the juvenile justice system and the courts. In today's testimony, I will focus on issues that must be addressed above all others, those related to *transparency* and *accountability*. Juvenile Law Center will in the coming months also share with the Commission and public our thoughts on other issues that have emerged from Luzerne, but are not unique to it.

BACKGROUND

Pennsylvania's juvenile justice system is imperfect, but in general it is better than most. When other states in the mid-1990's amended their juvenile codes in wrong-headed, punitive ways, Pennsylvania sought to hold youth accountable in developmentally appropriate ways. Pennsylvania put in place a regimen of balanced and restorative justice. The state thus 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 in the Juvenile Act many core principles, including the notion that youth shouldn't be in the juvenile justice system unnecessarily. Many youth can be diverted from it, while still being taught to take responsibility for misbehavior in which so many teens engage.

The Luzerne County scandal thus comes packaged in irony, because the Commonwealth has long been considered 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 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 towards a fair, effective, rational and developmentally appropriate juvenile justice system.

There are many reasons that Pennsylvania has been held in high regard. The state as a whole has had a relatively low rate of incarcerating youth. Our county-based system, tied to highly creative funding incentives, has encouraged local innovation. By giving broad powers to juvenile court judges, Pennsylvania created a system that is, in theory, highly accountable. Juvenile courts can order a delinquent youth to receive any service that is available to abused or neglected youth. Our laws place a premium on using the least restrictive method for achieving

their goals, and there are many opportunities to divert youth from the system, or from placement within it. Pennsylvania's Juvenile Court Judges' Commission is unique, and has been an effective voice on behalf of child well-being.

Pennsylvania has also been a strong "right to counsel" state. Indeed, the Juvenile Act, passed in 1972, and rules promulgated by the Pennsylvania Supreme Court in 2005, give children a right to counsel from the time their cases begin to the time they are closed. Pennsylvania youth also have a right to post-dispositional advocacy, which many states fail to guarantee.

All of these characteristics are assets. Luzerne County, however, has shown us just how fragile they are, and how assets can so easily turn noxious in the wrong hands:

- The strong judge model works when judges are attentive to the law. It didn't work in Luzerne.
- The right to counsel can ensure that judges get important information with which to decide cases, consistent with youths' due process rights. The right to counsel was illusory in Luzerne.
- Diversion from the system recognizes that teens make mistakes, but that public safety doesn't require every adolescent mistake to end up in court. Diversion occurred rarely in Luzerne.

Luzerne County was a toxic combination of for-profit facilities, corrupt judges, and professional indifference. It was the Love Canal of juvenile courts. It is unclear whether your recommendations will have a superfund to support them, but they should point the state to where it must invest to clean up the mess.

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. Reforms must of course 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, is obeyed, is documented and is evident to citizens everywhere.

The five areas that I will address this morning focus on linking mandates to transparency and accountability. I will discuss:

1. Making the right to counsel meaningful,
2. Ensuring a timely and effective system of appellate review,
3. Opening courtrooms and creating citizen oversight,
4. Using data to provide transparency and accountability, and
5. Requiring professionals to fulfill their ethical obligations.

In the months ahead, Juvenile Law Center will publish reports on these five areas, as well as other issues that have emerged from Luzerne County. The reports will be more comprehensive than today's testimony, and will cover how other states address these issues to ensure children's well-being as well as fidelity to constitutional principles.

RIGHT TO COUNSEL

The right to counsel is significant for a host of reasons. One of the most important is that children place great value on fairness. There is a growing body of literature on procedural justice, explaining that youth more readily accept what happens to them if they feel they are treated fairly. This is something that parents understand. So should juvenile courts.

Fairness includes giving kids and their witnesses a meaningful opportunity to be heard. It includes court orders that are proportionate to the offense. Fairness is at the heart of justice, and fairness begins with the right to counsel.

Lawyers help advance values of Pennsylvania's juvenile justice system. They help probation officers and courts identify youth who should be kept out of the system. Lawyers help make sure that adjudications, if they occur, are for offenses youth actually committed. They assist courts in fashioning dispositions that advance the goals of the Juvenile Act, are implemented in the least restrictive manner, and are individualized to meet their clients' needs. In Pennsylvania, lawyers also ensure that youth are safe when they are in placement, and that they are in placement no longer than necessary.

Pennsylvania guarantees the right to counsel. 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 otherwise unable to employ counsel, to have the court provide counsel for him." State law expects that attorneys will be provided to children so that counsel may advance all of the goals I have mentioned.

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 for children's lawyers varying wildly across the Commonwealth. Juvenile Law Center today affirms the recommendations it made in 2003, when we urged each branch of government to help solve this problem.

Unwaivable right to counsel

American Bar Association juvenile justice standards prohibit the waiver of counsel. Pennsylvania should follow those standards. Pennsylvania should have an *unwaivable* right to counsel.

Waiver of the right to counsel by teens is particularly problematic. The MacArthur Foundation's Research Network on Adolescent Development and Juvenile Justice examined youths' capacities. It found that youths' capacities changed through adolescence. Given their immaturity, they are much less likely to make informed decisions that consider risks and look to the future. 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."

Eligibility for court-appointed counsel

Whether a child is eligible for a public defender should not hinge on the parents' income. Every child should be deemed indigent and entitled to a court-appointed lawyer. While parents should, obviously, always be free to retain counsel for their children, youth should not have to depend upon their parents to have a lawyer.

Luzerne County is the poster child for the view that 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 had 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.

Paying for counsel

Despite Pennsylvania's obligation, through the Fourteenth Amendment, to enforce the 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 smaller share. Pennsylvania pays nothing. 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. Pennsylvania needs a dedicated funding stream.

Appointment of lawyers

Currently, in many counties judges appoint the lawyers who will appear in front of them. The Supreme Court should take away that power. It is relatively simple to have a panel of qualified attorneys, with appointments coming from a wheel. The Supreme Court should work with the Juvenile Defenders Association of Pennsylvania to create a system that won't have lawyers fretting that zealous advocacy will affect their next appointment.

Lawyers for kids are too important to leave to the vagaries of local practice and people's guesses about costs and benefits. The Commission should recommend that:

- The Juvenile Act be amended to prohibit waiver of counsel;
- The General Assembly establish a dedicated funding stream for indigent juvenile defense, while declaring in the Juvenile Act that the right to court-appointed counsel shall not depend on parents' income; and
- The Supreme Court work with the Juvenile Defenders Association of Pennsylvania on court appointments, so that judges won't be selecting the lawyers who will appear before them in particular cases.

APPEALS AND POST CONVICTION RELIEF

Providing lawyers makes appeals possible. Appeals are a part of accountability.

Appellate courts serve an important role in guiding trial courts, by interpreting the law through affirming or reversing decisions made at the trial level. It is through the appellate process that the public understands 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 justice by geography. Unfortunately, appeals routinely occur everywhere but juvenile court.

In juvenile court, there are relatively few appeals of adjudications—i.e., the findings of guilt—and no appeals of dispositions. In part this is because defenders have high case loads and lack resources for appeals and 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.

Take H.T.'s case, which started Juvenile Law Center's investigation into the Luzerne County juvenile justice system. As the press has reported, H.T. was found guilty of "harassment" for a MySpace parody. Judge Ciavarella ordered her shackled and taken to a delinquency placement. Under the facts of the case, there's an obvious question as to whether her conduct, in which she said that she hoped the object of the parody had a sense of humor, met the elements of "harassment" as defined by the Pennsylvania Crimes Code.

If H.T. had been convicted as an adult, she would have had a right to bail pending appeal. She would have had a reasonable chance of having her conviction reversed.

The Rules of Appellate Procedure must provide a fast track for delinquency cases, with a meaningful opportunity for a stay of disposition in appropriate cases. Removing children from their homes and schools is a traumatic event. It should not be difficult to fashion rules that govern when stays should be granted.

Not only did H.T. lack a meaningful opportunity to challenge her adjudication of delinquency, she had no opportunity to challenge her out-of-home placement. A system that operates under the rule of law must give children like H.T. a meaningful opportunity to challenge both.

They must also have a chance of prevailing when they challenge the disposition (i.e., sentence). Unfortunately, given current Pennsylvania law, it is unlikely that an appellate court would have reversed the order that placed H.T. in a delinquency facility. While her disposition seems harsh to us now, Pennsylvania appellate courts use an "abuse

of discretion” standard to review dispositions. Under this standard, virtually any reason Judge Ciavarella would have given would likely have been affirmed on appeal.

Even if an appellate court reversed Judge Ciavarella, saying that placement was wrong, the win would not have done H.T. any good unless she had a right to a stay pending appeal. The appellate process is so lengthy and cumbersome that H.T. would have completed her sentence and been home long before a Pennsylvania court ruled in her favor.

If juvenile courts are to be truly accountable, there must be a fast track for appeals, a qualified right to a stay pending appeal, and a standard of review that provides meaningful oversight of juvenile court dispositions. In addition, of course, there also must be knowledgeable lawyers available to work on appeals.

Furthermore, while H.T.’s adjudication was vacated by Judge Ciavarella himself after Juvenile Law Center filed a Writ of Habeas Corpus, other Luzerne County youth had no redress, even if they had had lawyers at trial. Many were already out of the system when the corruption was unearthed. If they had been adults, they would have had access to a post-conviction procedure based on newly discovered evidence or other statutory grounds. As juveniles, they had no legal recourse once the 30-day time limit for appeals had expired, which is why Juvenile Law Center had to take the extraordinary step of asking the Supreme Court to exercise its King’s Bench jurisdiction.

This Commission must address the futility of appeals in juvenile court, and the absence of alternative post-adjudication relief. The Commission should recommend that:

- There be a fast track for juvenile appeals, not only for briefing, but with a requirement that appellate courts decide cases swiftly;

- There be juvenile and appellate rules that allow for stays of disposition in specified circumstances;
- Juvenile court judges state on the record how their orders of disposition further the balanced and restorative justice goals of the Juvenile Act, while advancing as well the goals of treatment, rehabilitation or supervision, thereby permitting meaningful appellate review;
- Appellate courts adopt a standard of review for dispositions that is stricter than “abuse of discretion”;
- The legislature create a post-conviction avenue of relief for youth; and
- The Supreme Court work with the Juvenile Defenders Association of Pennsylvania to ensure that lawyers are available who can take appeals.

OPENING COURTROOMS

There’s a reason that the Bill of Rights includes a right to a public trial. Over a century before the U.S. Constitution was adopted, the West New Jersey Charter nicely said that public courts of justice are designed to ensure “that justice may not be done in a corner nor in any covert manner ...” Citizens have an interest in how justice is dispensed. Defendants don’t fare well in a star chamber.

On the other hand, there is also a reason that juvenile courts have generally been closed. The court has historically been therapeutic, and its currency is often highly sensitive information about a child. In Luzerne County, however, privacy served the interests of the judges, not the children.

How then, should these competing interests be resolved?

The trend is make juvenile courts presumptively open. Pennsylvania should follow the trend. Juvenile courts should be presumptively open for all children, regardless of offense or age. As with older youth charged with serious offenses, the law should allow for circumstances when prosecutors and defense attorneys agree that the proceedings be closed; and the juvenile court itself shall maintain confidentiality of sensitive records or reports.

Opening juvenile courts is important, but it may be inadequate to curb abuses of power. Indeed, Pennsylvania opened courtrooms to the public in 1996 in cases of older youth charged with serious offenses. Juvenile courts prepared themselves for hordes of press and public. No one showed up. It seems that the quotidian business of juvenile court is just not that interesting.

There are additional ways to ensure that there are eyes on the court. Local court watch programs have introduced courts, and the problems of children and families, to citizen observers. Ombudsmen could observe juvenile courts, and respond to citizen concerns.

The Commission should recommend that:

- The General Assembly amend the Juvenile Act to make juvenile courts presumptively open.
- The Pennsylvania Supreme Court direct each county juvenile court to establish a local court watch program or appoint an ombudsman that can respond to citizen complaints about court processes, manners, or other issues that would not be addressed by appeals.

USING DATA TO PROMOTE TRANSPARENCY AND ACCOUNTABILITY

This Commission's recommendations should be accompanied by a data reporting requirement.

When we at Juvenile Law Center suspected that large numbers of youth in Luzerne County were waiving their right to counsel, we turned to the Juvenile Court Judges' Commission. JCJC collects enormous amounts of data from counties, and annually publishes a report that is a mix of county-specific and aggregate statewide data. Juvenile Law Center asked for waiver-of-counsel data from Luzerne, and JCJC unflinchingly provided it. When we were concerned about high rates of placement in Luzerne County, we looked to DPW. Each agency was supportive and worked hard to retrieve data that was useful to our case. But it should have been easier.

Last year was the 50th anniversary of JCJC's creation as an advisory body that sets standards, collects and publishes data and administers a small grant-in-aid program. JCJC has a tiny staff—it is severely underfunded—but it has enormous influence because of its knowledge, integrity and skills. JCJC clearly should have more capacity and power to analyze and publish more data like those that helped Juvenile Law Center uncover the Luzerne County scandal.

The public will benefit from having real-time data provided by DPW about placement rates, too. The current Luzerne County Commissioners no doubt are thrilled to discover that they are saving millions of dollars each year now that children aren't being fast-tracked to oblivion.

Having county data in real time will also enable JCJC and DPW to flag trouble spots in the state, much like local jurisdictions are able to do with data-based reviews of child abuse cases or crimes.

The Commission should recommend that:

- Juvenile Court Judges' Commission have the resources it needs to collect, analyze and publish real-time data that would expose future Luzerne Counties.
- DPW have the resources it needs to collect, analyze and publish real-time data about placement rates.

OTHER PROFESSIONALS

Children in Luzerne County were treated as commodities, with a for-profit provider as purchaser, and the juvenile court as supplier. The Luzerne County juvenile court was in the business of inventory control. This was done publicly and without comment from other professionals in the room. This is hard to believe, and it is one of the sadder threads of this sordid story.

Imagine if judges were openly selling stolen goods in the courtroom—you can bet that professionals in the room would have blown the whistle in a second. But summarily moving shackled kids from the courtroom to the cell room didn't bother anyone. This is one of the great tragedies of Luzerne County. This is not merely a failure of legislatures to fund counsel, or judges to appoint them. It is not just about the absence of fast-track appeals, or the lack of data. It takes a community to hurt a child.

Many people have asked us, how could so many professionals allow Luzerne County's judicial abuses to continue? Prosecutors, defenders, other lawyers, probation staff—all claimed to be at the unlit periphery of this scandal. Sometimes, though, what happens at the periphery is the heart of the matter. It took an unprecedented breadth and depth of indifference by all of these individuals to allow the Luzerne County scandal to occur. As author Amy Bach has written in

her recent book about systemic failures in America's criminal courts, "Ordinary injustice results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them."

If these professionals were in the dark, it was because they chose to be there.

Pennsylvania has Rules of Professional Conduct for lawyers. Rule 3.8 could not be clearer governing the obligations of prosecutors to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for, obtaining counsel and has been given reasonable opportunity to obtain counsel." Rule 8.3 declares that "a lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority."

It may be hard for a defense attorney or prosecutor to spot an isolated case of judicial misconduct. Luzerne County involved half a decade's worth of abuse, however, and if there was ever a situation in which lawyers fell short of their professional obligations, this was it.

For reporting to be meaningful, the Judicial Conduct Board (JCB) must operate quickly, especially when there is an allegation of criminal activity by a judge. Given the JCB's responses to this Commission, it is hard for an outsider to know what the JCB knew about Judge Ciavarella, or to come forward now with proposals that will make a difference. It is clear, however, that if attorneys had done their jobs and reported their suspicions, the JCB would have fewer excuses to hide behind. The JCB's shortcomings mirror those of the attorneys in the courtroom. I anticipate that we will have more to say on this topic when we issue more complete reports—it is troubling, however, that judges who controlled children's lives were allowed to stay on the bench while they were targets of a serious criminal investigation.

Juvenile probation officers could have raised their voices, too. They are in a difficult position, because they work for judges. But probation officers in Pennsylvania have enormous authority. They must have not only permission to report their bosses, but a requirement that they do so, with whistleblower protection.

The Commission should:

- Refer attorneys who were regularly in Judge Ciavarella’s courtroom, and who failed to report Judge Ciavarella to the JCB, to the Disciplinary Board of the Supreme Court of Pennsylvania, which should address the individual and collective responsibility of those attorneys under Rules of Professional Conduct 3.8 and 8.3.
- Recommend that the Pennsylvania Council of Chief Juvenile Probation Officers establish enforceable standards for probation officers regarding reporting of judicial misconduct, and that the Supreme Court and General Assembly provide whistleblower protection.

CONCLUSION

The hearings of this Commission have gripped the public. You have made an impressive start. Juvenile Law Center staff looks forward to working with you, and is preparing reports on the issues about which I spoke today, and on issues that time didn’t permit me to address. These include the need to ban for-profit detention centers in Pennsylvania, to eliminate shackling of children in court, to revisit our laws on the use and expungement of juvenile records, and to end inappropriate referral of school children to juvenile court for typical, minor misbehavior.

Some of our recommendations will involve money. Many costs can be avoided by the reduction of unnecessary referrals to juvenile court, and by reducing unnecessary institutional placements. Ironically, Luzerne County is also the poster child for how to avoid unnecessary costs: the County has saved millions of dollars in placement costs since Judge Ciavarella stepped down. Surely some of those dollars can pay for quality counsel for kids.

In the course of making its recommendations, this Commission will have some difficult choices. You will have to accommodate or choose between competing values, as you strive to improve the system without undermining its strengths.

No single recommendation will prevent future Luzernes. The recommendations that Juvenile Law Center advance this morning must work together to ensure that the Commonwealth's children will benefit from the rule of law.

Many of our clients and their parents are looking forward to testifying before you in February in Wilkes-Barre. It is fitting that you finish your public hearing phase by hearing again from those who were hurt the most. They, and we, wish you well as you help youth heal, and bring a generally solid Pennsylvania juvenile justice system to new heights of effectiveness, fairness and accountability.