

December 5, 2022

Via email

Hon. Kendra M. Radle, Council Chair
Luzerne County Council Members
200 N River Street
Wilkes-Barre, PA 18711



Re: Addressing Luzerne’s Indigent Defense Funding Crisis

Dear Chair Radle and Council Members:

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We write to express our grave concern with the ongoing deterioration of indigent defense services in Luzerne County. The situation is reminiscent of a decade ago. The failure to adequately resource the Office of Public Defender (the “OPD”) in the late 2000’s contributed to the “Kids for Cash” scandal and led directly to an ACLU of Pennsylvania lawsuit that forced changes to the OPD at significant cost to the County. Council’s failure to adequately fund the OPD in the County’s 2023 budget could invite a reprise.

Luzerne has a constitutional and statutory duty to fund its OPD at a level that ensures that indigent people accused of crimes in the County receive effective representation at all critical stages of their criminal cases. Yet, Council has failed to fund the OPD over the last several years at a level that permits full staffing, leaving the OPD understaffed. Without the requisite funding or staffing, the dedicated OPD attorneys that remain are facing overwhelming caseloads that prevent them from providing consistently effective representation. Overworked OPD attorneys are struggling to find the time to communicate with their clients, prepare their cases, or advocate for their clients. The OPD is so understaffed that it has been forced to turn away hundreds of indigent people seeking representation who are charged with lower-level offenses. Recent Court of Common Pleas’ decisions refusing to allow the OPD to withdraw from cases is pushing the County’s indigent defense system to a breaking point. The OPD simply does not have sufficient personnel to attend all proceedings, resulting in an unconstitutional denial of representation.

Underfunding of the OPD is not a new problem. From the “Kids for Cash” scandal in the early 2000s to the *Flora/Kuren*

litigation¹ in the 2010s, Council’s consistent failure to adequately fund its OPD over the last two decades has had disastrous consequences for low-income children and adults accused of crimes in the County and for Luzerne taxpayers, who have had to pay to clean up Council’s messes.

Council can resolve the present crisis by passing a 2023 budget that provides the OPD with increased funding, sufficient to raise attorney salaries to competitive levels. The County must also immediately allocate funds to ensure that the hundreds of indigent defendants whose cases the OPD has been unable to handle due to understaffing are provided with competent counsel. Council also must provide additional funding to enable the courts to appoint private counsel should the OPD’s caseloads remain unmanageable going forward. Failure to immediately address these issues puts the County at risk of costly litigation.²

I. Luzerne is Denying Indigent People Their Right to Counsel Because of Council’s Failure to Fund the OPD

By failing to adequately fund the OPD, Council is denying indigent people accused of crimes in the County their constitutional and statutory right to counsel. The County has a Constitutional duty to allocate enough funding to its OPD to ensure that indigent criminal defendants receive effective representation.³ The Sixth Amendment to the United States Constitution⁴ and Article I, Section 9, of the Pennsylvania Constitution⁵ require that the Commonwealth of Pennsylvania provide counsel to indigent people charged with crimes by the Commonwealth. The Commonwealth has delegated these responsibilities to individual counties through The Public Defender Act.⁶

Council is in dereliction of its duties to fund indigent defense services in the County. Over the past several years, Council has failed to pass a budget with enough funding to allow the OPD to attract and hire the number of attorneys it needs to provide effective representation to its clients. As chief public defender Steven Greenwald highlighted in his November 15, 2022, budget presentation to Council, the OPD is unable to fill eight of its 28 budgeted attorney spots because the starting salary for new attorneys is simply not competitive in the Wilkes-Barre legal market—and has not been competitive for a number of years, resulting in long-term understaffing at the OPD. Council has been aware of the mounting crisis in the OPD but has refused to address the problem.

¹ *Kuren v. Luzerne Cnty.*, 146 A.3d 715 (Pa. 2016).

² *Id.* at 717 (holding that a County can be sued by indigent defendants for its failure to sufficiently fund its public defender’s office).

³ *Id.*

⁴ U.S. Const., Amend. VI (“[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the right to counsel under the Sixth Amendment extended to state court prosecutions).

⁵ Pa. Const., Art. I, § 9 (“[i]n all criminal prosecutions the accused hath a right to be heard by himself and his counsel ...”).

⁶ 16 P.S. §§ 9960.1-9960.13.

By underfunding the OPD, Council has forced OPD attorneys to take on untenable caseloads. Several OPD attorneys are handling more than 400 cases annually. Some have a caseload of more than 300 felonies per year, which is more than double the national standard of 150 felonies per attorney, per year.⁷ Additionally, OPD attorneys handling appeals and mental health matters are also shouldering caseloads considerably above national standards. Council's refusal to adequately fund the OPD has also required Mr. Greenwald to make the "heartbreaking" decision to "dismantle" its model juvenile defense unit that was created following the "Kids for Cash" scandal.⁸

Overwhelming caseloads have made it impossible for OPD attorneys to provide effective representation to all of their clients, leading to the constructive denial of counsel for many low-income people accused of crimes in the County. OPD attorneys are talented and committed lawyers who care deeply for their clients. But because of understaffing, OPD attorneys do not have the time to consistently and promptly consult with their clients, investigate and prepare their cases, or zealously advocate for clients in plea negotiations or in court. Instead, OPD attorneys are forced to triage their cases, handling only the most time-sensitive matters while neglecting clients with hearings that are a week or more in the future. This means that OPD clients, including incarcerated persons, can go months without speaking with their attorneys. Similarly, OPD attorneys' crushing caseloads make filing timely pre-trial motions difficult. People held on unaffordable cash bail that are otherwise releasable are forced to remain unnecessarily in pretrial detention until their attorney has the time to file a bail motion. OPD attorneys also lack adequate time to review discovery, conduct legal research, investigate facts and interview witnesses, or prepare case strategies. Council's underfunding coerces conscientious OPD attorneys to sacrifice their weeknights and weekends to perform unpaid work, contributing to low morale and burnout among remaining OPD attorneys. This is an untenable situation for the lawyers, but more importantly for the clients, whose right to effective legal representation is being violated.

Council's refusal to adequately fund the OPD has also meant that some indigent people are being completely denied their right to counsel. In September 2022, Mr. Greenwald announced that because of OPD understaffing, the OPD would no longer be able to represent unincarcerated indigent people charged with misdemeanors and other low-level offenses (hereafter, the "Policy").⁹ That Policy reflects Mr. Greenwald's ethical duty to take action to cap or reduce intake when excessive caseloads impair his staff's ability to provide full representation to all of their clients.¹⁰ To date, approximately 500 people have had their

⁷ National Advisory Commission on Criminal Justice Standards and Goals: Courts 276 (1973); American Council of Chief Defenders Statement on Caseloads and Workloads 1 (2007) (adopting the National Advisory Commission's caseload standards).

⁸ Jennifer Learn-Andes, [Luzerne County chief public defender begs council to provide attorney pay increases](#), Wilkes-Barre Times Leader (Nov. 15, 2022).

⁹ Jennifer Learn-Andes, [Vacant positions prompt policy change in Luzerne County Public Defender's Office](#), Wilkes-Barre Times Leader (Sep. 12, 2022).

¹⁰ American Bar Association, Formal Ethics Opinion 06-441 9 (2006) ("If a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients").

applications for representation turned away by the OPD due to the Policy, leaving many entirely without counsel.

II. Luzerne’s History of Underfunding the OPD Has Harmed Indigent Clients and Led to Costly Litigation

Council’s failure to fund the OPD is not a new problem. Over the last two decades, the County’s refusal to honor its constitutional and statutory obligations to fund the OPD has harmed low-income children and adults accused of crimes and led to protracted and costly litigation. The County’s most notorious failure to provide indigent defense services began in the early 2000s with the “Kids for Cash” scandal, where two County judges sent children to for-profit juvenile detention centers in exchange for bribes.¹¹ This tragedy was facilitated, in part, by the OPD’s “abject inability to represent accused juveniles.”¹² During this period, approximately half of the children appearing in juvenile court went unrepresented. 2,300 children were improperly convicted by the two judges throughout the scandal, and a number of these children later died from suicide or overdose.¹³

Council (then operating as the Board of County Commissioners) continued to underfund its OPD in the wake of the “Kids for Cash” scandal. In May 2010, Al Flora, Jr. was appointed chief public defender of an OPD that “already was riddled with problems stemming from understaffing and underfunding.”¹⁴ Mr. Flora made numerous pleas to the Commissioners to allocate badly-needed funding to the OPD. As the funding crisis grew, Mr. Flora was forced to begin declining applications for representation by unincarcerated indigent persons charged with lower-level offenses. Failing to grasp its duty to fund indigent defense services or the severity of the staffing crisis at the OPD, the Commissioners reduced the OPD’s funding by approximately 12% in January 2012.

As a result of the Commissioners’ dereliction of their duties to fund the OPD, the ACLU of Pennsylvania represented Mr. Flora and several indigent defendants in a suit against the County in April 2012 on behalf of a class of indigent defendants seeking to compel the County to adequately fund its OPD and to lift a hiring freeze. The suit was originally filed as *Flora, et al., v. Luzerne County*, No. 2012-04517, and was eventually captioned as *Kuren v. Luzerne County*. The litigation resulted in a decision by the Supreme Court of Pennsylvania, which ruled in 2016 that the class had “demonstrated that the system-wide deficiencies have created circumstances in which the constructive denial of counsel is imminent and likely, if not all but certain.”¹⁵ The Court held that indigent defendants in the County (and across the Commonwealth) could bring lawsuits “to prove that the level of funding provided by a county to operate a public defender’s office has left that office incapable of complying with the U.S. Supreme Court’s [seminal right-to-counsel] decision in *Gideon* [*v. Wainwright*]¹⁶], creating the likelihood of a systematic,

¹¹ Nick Vadala, [The Pennsylvania ‘kids-for-cash’ judicial scandal, explained](#), Inquirer (Aug. 18, 2022).

¹² *Kuren*, 146 A.3d at 718.

¹³ Vadala, *supra* note 11.

¹⁴ *Kuren*, 146 A.3d at 718.

¹⁵ *Id.* at 748-49.

¹⁶ 372 U.S. 335 (1963).

widespread constructive denial of counsel in contravention of the Sixth Amendment to the United States Constitution.”¹⁷

By shirking its duty to ensure that the OPD had enough funding to provide effective representation to its indigent clients, Council not only harmed thousands of low-income residents by providing them with ineffective representation, Council also cost County taxpayers hundreds of thousands of dollars in legal fees. To defend its unconstitutional practices, the County employed lawyers to unsuccessfully litigate the *Kuren* case for over four years. And when Council fired Mr. Flora in April 2013 in retaliation for his efforts to secure funding for the OPD, the ACLU again sued the County on behalf of Mr. Flora, leading to a \$250,000 settlement.¹⁸

III. Council Must Act Now to Ensure Compliance with Its Constitutional Duty to Provide All Indigent People Accused of Crimes in the County with Effective Representation

Just six years after the Supreme Court of Pennsylvania admonished Council for failing to adequately fund its OPD, Council has again pushed the OPD to the brink of collapse by failing to budget the funds the OPD needs to provide effective representation. Council can, and must, act immediately to prevent further violations of indigent persons’ right to effective counsel by passing a 2023 County budget that includes adequate funding for the OPD. The 2023 budget must allow the OPD to raise salaries for OPD attorneys to levels that make OPD attorney jobs competitive in the region. Such action will allow the OPD to hire the attorneys it needs to be fully staffed and to provide effective representation.

In addition to properly funding the OPD, Council must separately take action to ensure that indigent people who have gone entirely unrepresented due to the OPD’s Policy are provided with private counsel. Prompt action is of vital importance because these individuals are being harmed each day that they remain unrepresented. Council must also allocate funds to ensure that the courts are able to pay private attorneys to take cases the OPD cannot handle effectively in the future due to caseload constraints.

More often than not over the past two decades, Council has failed to provide the OPD with the funding it needs to provide effective representation. The effect has been cumulative, and the situation has now reached crisis. Having previously filed successful litigation against the County for its past failure to fund indigent defense services, we return to Council to express our alarm over the present funding and staffing crisis at the OPD, which impacts thousands of low-income people, most of whom are Luzerne County residents. These people may be your family, neighbors, friends, and co-workers. Most are also your constituents. We acknowledge that financial constraints are real for Luzerne and most governmental bodies, but while many items the County funds are legally discretionary, funding the *constitutional* right to effective counsel is mandatory and non-negotiable. We would welcome further discussion on this matter. If you have any interest in such discussion, please contact Mr. Shapell at ashapell@aclupa.org or at (856) 946-7120.

¹⁷ *Kuren*, 146 A.3d at 751.

¹⁸ Jennifer Learn-Andes, [Al Flora Weighs in on Litigation Resulting in His \\$250,000 Settlement](#), Wilkes-Barre Times Leader (Aug. 29, 2018).

Respectfully,



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cc: Honorable Michael T. Vough, President Judge, Luzerne County Court of Common Pleas
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