

February 23, 2018

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Criminal Procedural Rules Committee
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VIA ELECTRONIC MAIL

Re: *Comments Regarding Proposed Supreme Court of Pennsylvania Criminal Procedural Rules Amendments Governing Incarceration for Failure to Pay in Summary Cases*

Dear Mr. Wasileski:

The following comments are submitted on behalf of the **Education Law Center – PA, Support Center for Child Advocates, and Public Citizens for Children and Youth** in response to the Criminal Procedural Rules Committee’s proposed amendments to the Supreme Court of Pennsylvania Rules 403 (Contents of Citation), Rule 407 (Pleas in Response to Citation), 408 (Not Guilty Pleas - Notice of Trial), 409 (Guilty Pleas), 411 (Procedures Following Filing of Citation - Issuance of Summons), 412 (Pleas in Response to Summons), 413 (Not Guilty Pleas - Notice of Trial), 414 (Guilty Pleas), 422 (Pleas in Response to Citation), 423 (Not Guilty Pleas - Notice of Trial), 424 (Guilty Pleas), 454 (Trial in Summary Cases), 456 (Default Procedures: Restitution, Fines, and Costs), 470 (Procedures Related to License Suspension after Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs) published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Who We Are

The [Education Law Center-PA \(“ELC”\)](#) is a non-profit education advocacy organization that uses legal and other strategies to advocate on behalf of Pennsylvania’s most educationally at-risk students. Over its 40-year-plus history, ELC has focused much of its attention on addressing the educational needs of children living in poverty, those in the foster care and delinquency systems, and advocating for systemic policy reforms with regard to truancy issues. Over these years, we have handled thousands of intakes and worked closely with child advocates, parent attorneys, public defenders, GALs, CASAs, Magistrate District Judges (MDJs), foster families, child welfare professionals, and juvenile probation officers to improve educational and life outcomes for Pennsylvania’s system-involved children and youth. As experts in education law, we have also trained juvenile court judges and MDJs regarding federal and state education mandates and are active participants in several committees and workgroups at the state and local level.

ELC has engaged in many statewide advocacy campaigns to improve educational outcomes for children and youth in foster care, the juvenile justice system and in truancy courts

across Pennsylvania. ELC also played a key role in the development and drafting of Pennsylvania's recently revised truancy law known as Act 138, which amended the Pennsylvania School Code (specifically including 24 P.S. §§ 13-1326, 13-1327, 13-1329, and 13-1333) with the goal of providing school-based interventions for students and families prior to court involvement.

Along with the American Bar Association Center on Children and the Law and the Juvenile Law Center, ELC also co-founded the Legal Center on Foster Care and Education, National Working Group on Foster Care and Education, and, most recently with additional partner Southern Poverty Law Center, the Legal Center for Youth Justice and Education. These national organizations identify and promote model laws, judicial practices, policies, and reforms from across the country, and provide technical assistance to state and local policymakers on how to improve educational and life outcomes for children in foster care and youth in the delinquency system.

Founded in 1977, the [Support Center for Child Advocates \(“Child Advocates”\)](#) is the nation's oldest and largest volunteer lawyer program dedicated to children and youth. We team trained volunteer attorneys with staff social workers and lawyers "to advocate for victims of child abuse and neglect, with the goal of securing safety, justice, well-being and a permanent, nurturing environment for every child." Child Advocates seeks to advance the interests of our clients by representing them in child abuse and neglect proceedings; helping them testify in criminal court proceedings that address their victimization and in civil abuse and neglect proceedings; securing social services that target client needs; and advocating for permanent homes and finalizing adoptions, when appropriate.

[Public Citizens for Children and Youth \(“PCCY”\)](#) is a Pennsylvania non-profit organization that advances child advocacy efforts to improve the lives and life chances of children in Southeastern Pennsylvania, including Philadelphia and the surrounding counties of Montgomery, Delaware, Chester, and Bucks. PCCY uses thoughtful and informed advocacy, community education, targeted service projects, and budget analysis to address areas affecting the healthy growth and development of all our region's children including: health, education, early learning, and family stability. Throughout its history, PCCY has testified at hearings, annually issued reports on the state of children in the city and region, organized communities, and families, and partnered with other organizations to advocate and focus on the needs of children and what must be done to improve their lives.

All of these experiences inform our comments and recommendations regarding the proposed amendments to the Criminal Procedural Rules.

The Impact of Fines and Imprisonment on Students & Parents: Through A Truancy Lens

Hundreds of parents, many impoverished and overwhelmed, have been jailed in Pennsylvania for failing to pay court fines that arise from truancy hearings after their children skip school. This has created what some call a “debtor’s prison” exemplified by parents like Eileen DiNino, a Pennsylvania mother of seven who died in a jail cell in 2013 where she was serving a two-day sentence for her children's truancy. At that time, Ms. DiNino, aged 55 of Reading, was halfway through a sentence to erase about \$2,000 in fines and court costs. She surrendered to serve her 48-hour sentence due to her inability to pay. That year, more than 1,600

people had been jailed in Berks County alone over truancy fines since 2000, more than two-thirds of them were mothers.

Truancy is not a one-size-fits-all problem. Successfully addressing this issue requires an understanding of the individual circumstances of each student and family. Numerous [studies](#), the experience of other states, and lessons learned from counties across Pennsylvania all support the conclusion that punitive measures, including criminalizing and imprisoning parents and students, do not reduce truancy. Such sanctions fail to re-engage students and families in school. Instead, they push families further away and increase distrust of schools -- while failing to address the underlying root causes of the child's truancy. It is because of such research and experience that only one state -- Wyoming -- still criminalizes truancy.¹ For example, a [report](#) on truancy in Texas by the National Center for School Engagement found that criminalizing conduct, including imposing hefty fines, or withholding learning only alienates families and students. A [study](#) in Los Angeles similarly disclosed that the use of punitive measures were ineffective because they failed to address the root causes of attendance problems.

In short, there is no evidence that these policies reduce truancy or curb high dropout rates. In fact, *many judges report that the threat of jail time or exorbitant fines causes families to go underground to avoid sanctions, thereby increasing truancy and absenteeism*. In addition, the immediate collateral consequences of placing mothers in jail negatively impacts families rather than supporting attendance.

Conversely, we know what *does* work to reduce truancy: clear rules that inform families and are consistently enforced and based on accurate data, and prompt school-based interventions that include individualized attendance improvement plans which address the root causes of truancy and engage families while connecting students to school-based or community services. Truancy must be recognized as a “school engagement” issue. To solve it, schools and courts must *incentivize* students to re-engage in school rather than push them further away. Truancy is often a reflection of the need for adequate resources and staff in schools, including teachers, school nurses, and guidance counselors, as well as evidence-based truancy prevention programs, expanded vocational and curriculum options for older youth, and a supportive positive school climate. We need to make our schools a place where students want to learn and are supported to do so. We also need to eliminate laws, regulations, and policies that push kids away from school -- including policies that imprison parents who are unable to pay fines.

Imposing Fines Under Act 138

Pennsylvania's recently revised truancy law, Act 138 was intended to “improve school attendance and deter truancy through a comprehensive approach to consistently identify and address attendance issues as early as possible with credible intervention techniques...” As explained in its Preamble, the law seeks to:

- Preserve the unity of the family whenever possible as the underlying issues of truancy are addressed;
- Avoid the loss of housing, the possible entry of a child to foster care and other unintended consequences of disruption of an intact family unit; and

¹ *Criminal truancy courts for students being eliminated*, Denton Record Chronicle (June 2015)
<http://www.dentonrc.com/news/state/2015/06/20/criminal-truancy-courts-for-students-being-eliminated>

- Confine a person in parental relation to a child who is habitually truant only as a last resort and for a minimum amount of time.²

In applying this law and adjudicating petitions, MDJs must be mindful of these overarching purposes. In imposing fines and punishments, MDJs should consider whether the fines will disrupt the family unit, cause or contribute to the loss of housing, or push the child into foster care. The new law provides local judges with considerable discretion to impose fines or other penalties in individual cases. For instance, judges now have discretion on whether to forward a student’s conviction for truancy to the Department of Transportation (DOT) for automatic license suspension. However, the new law significantly increased the amount of money a judge may fine a student or parent for habitual truancy. The law states that a person convicted of habitual truancy may be fined: (1) up to \$300 per offense, with court costs, for the first offense; (2) up to \$500 for the second offense; and (3) up to \$750 for a third and any and all subsequent offenses.³ In addition, jail time was reduced from five days to three days. However, a judge may jail a parent only if (1) the court makes specific findings that the parent had the ability to pay the fine or complete the community-service and (2) the court finds that parent’s non-compliance was willful.

Under Act 138, fines are discretionary, not mandatory, and courts are strictly prohibited from jailing parents and students who are unable to pay.⁴ Moreover, before jailing parents for their children’s truancy, MDJs must consider whether all other solutions and strategies to address the child’s truancy have been exhausted. If not, MDJs should not jail parents, even when they are able to pay. MDJs must consider a parent or student’s present ability to pay when imposing any fine for truancy and cannot subject a defendant to a fine if he is unable to pay. (See discussion below)

Accordingly, a court can impose the fines only if the “defendant is or will be able to pay the fine.” In setting any fine, the court **must** consider “the financial resources of the defendant and the nature of the burden that its payment will impose.”⁵ It also must hold an ability-to-pay hearing at sentencing to affirmatively inquire into the defendant’s financial circumstances.⁶ Without holding such a hearing and gathering information about the defendant’s finances, the court cannot impose a fine (even if the defendant pleads guilty).⁷ Among the information the court must consider is the defendant’s current income, indebtedness, and living situation.⁸

It is against this backdrop that we provide the following specific recommendations to the Criminal Procedural Rules Committee’s proposed amendments with the objective of ensuring

² 24 P.S. §§ 13-1325(1)-(3).

³ The new law defines “offense” as “each citation filed under Section 1333.1 for a violation of the requirement for compulsory school attendance . . . regardless of the number of unexcused absences averred in the citation.” 24 P.S. § 13-1326.

⁴ See Pa.R.Crim.P. 456; 42 Pa. Cons. Stat. § 9730(b).

⁵ 42 Pa. Cons. Stat. § 9726(c), (d). See also *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc). (defendant’s “ability to pay a fine in the immediate future was seriously curtailed by the imposition of a prison term,” which counseled against imposing a fine).

⁶ *Commonwealth v. Schwartz*, 418 A.2d 637, 639-40 (Pa. Super. Ct. 1980).

⁷ *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005); *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157 (Pa. Super. Ct. 1984).

⁸ *Commonwealth v. Mead*, 446 A.2d 971, 973-74 (Pa. Super. Ct. 1982); *Commonwealth v. Fusco*, 594 A.2d 373, 355-56 (Pa. Super. Ct. 1991).

that MDJs do not unlawfully incarcerate and punish indigent parents and youth for failure to pay court fines, costs, and/or restitution (collectively “legal financial obligations,” or “LFOs”).

I. The Rules Should Adopt a Presumption of Indigence for Juvenile Defendants to Protect Children from Further Criminal Prosecution Based on their Inability to Pay

For juvenile defendants, the MDJs should adopt the presumption, applied in delinquency cases, that all children are indigent.⁹ Such a presumption would align court procedure with the reality that children generally are not financially independent. It also minimizes the likelihood that children will be funneled into the juvenile justice system, or even, the adult criminal justice system based on their inability to pay punitive fines. Should the Committee choose not to adopt a presumption of childhood indigence, at a minimum, the Rules should ensure that children deemed truant by the court are not subject to further prosecution for failure to pay their truancy fines.

II. The Committee Should Provide Clear and Mandatory Directives to Ensure Courts Perform their Affirmative Obligation to Inquire into a Parent’s Ability to Pay in Accordance with Established Case Law

We support the addition of proposed Rule 454(E) stating that courts must consider defendants’ ability to pay before imposing any discretionary fines and costs at sentencing. This change reflects an existing statutory requirement regarding fines and will help limit the amount of LFOs assessed in cases such as truancy, where all fines are discretionary.¹⁰ The proposal should, however, go further to harmonize with Rule 706, which governs criminal cases and permits a sentencing court to reduce even “mandatory” costs based on a defendant’s financial resources. MDJs should have the same authority.

For parent defendants, the rules should clarify the court’s obligation to affirmatively inquire into a defendant’s ability to pay before imposing any sanction or finding that a defendant willfully refused to pay. Case law establishes that the Due Process and Equal Protection clauses of the 14th Amendment require such an inquiry.¹¹ Pennsylvania’s Rules of Criminal Procedure should articulate this requirement with equal clarity. The rules should state explicitly that the obligation is on the court, not the defendant, to ensure that evidence is presented at trial for a proper review of the defendant’s entire financial picture.

We applaud the effort to give MDJs direction, as articulated in comments to Rule 456, on relevant considerations in an ability-to-pay determination and urges the Committee to make the instruction rule-based, mandatory, and more specific. The Committee’s decision to include the relevant language in the comment to a rule rather than the text of the rule itself limits the impact of the proposed amendment by making it non-binding. The use of “should” rather than “shall” also weakens this necessary guidance. To further strengthen the proposed guidance to MDJs, we urge the Committee to include a more specific, comprehensive list of considerations in Rule 456 and related provisions that reflect and build upon the presumptions that are in governing case law

⁹ 42 Pa. Cons. Stat. § 6337.1(b),

¹⁰ 42. PA. CONS. STAT. § 9726(c), (d). See also *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc). (defendant’s “ability to pay a fine in the immediate future was seriously curtailed by the imposition of a prison term,” which counseled against imposing a fine).

¹¹ *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

and require courts to consider and assess a defendant's entire financial context. Pennsylvania's case law already states that receiving the services of the public defender or means-based public assistance (e.g., Medicaid, food stamps, Supplemental Security Income) creates a presumption of indigence, and a court cannot compel a defendant to pay if that defendant would suffer hardship.¹² The appropriate way to determine hardship is to look at whether a defendant can afford to meet his or her basic life needs—the test used by the civil *in forma pauperis* line of cases and incorporated into criminal law through case law as the “established process[] for assessing indigency.”¹³ At a minimum, the rules should reflect these precedents; to do otherwise is to invite error.

The rules should go further and expressly delineate clear presumptions based on the federal poverty level—a person who makes 125% of the federal poverty level generally cannot afford to make ends meet. As with every presumption, the court can overcome it by making findings on the record based on the evidence before it. The rules also should require courts to have defendants complete a standardized income and expense form, like that used in the child support and *in forma pauperis* context. This is the easiest way to ensure that courts are considering uniform information, and the forms should be made part of the record.

III. The Rules Should Abolish the “Collateral” Requirement

Currently, to plead not-guilty to a summary offense, defendants must pay the total amount of the fines and costs as “collateral.” The draft amendments (“Draft”) allow defendants to certify in writing that they cannot afford the collateral, relieving them of that obligation (Rule 403 and others). We support this change. However, Pennsylvania is one of only a handful of states that require that defendants pay any “collateral” to plead not guilty, and we urge the Committee to abolish its use altogether.

IV. MDJs Must Explain Their Decision to Incarcerate for Nonpayment.

The proposed amendment to Rule 456 requiring MDJs to put in writing the reasons why imprisonment is appropriate and “the facts that support” its finding that the defendant is able to pay is a helpful step towards ensuring that poor families are not exposed to excessive fines and jail. Unfortunately, it is the primary change in the Draft aimed at directly addressing why MDJs incarcerate defendants for failure to pay LFOs. The rules lack language explicitly stating that Pennsylvania law prohibits incarcerating indigent defendants for nonpayment. And the included language regarding incarceration is not specific enough: it does not tell the court *how* to assess the evidence to determine whether a defendant is able to pay. As is discussed in more detail in Section I above, additional explicit language is sorely needed to address this problem.

V. Rule 470 Should Align with Statutory Provisions Regarding Driver's License Suspension for Nonpayment.

Rule 470 should specify that MDJs can send notice to the Pennsylvania Department of Transportation (“PennDOT”) to suspend a defendant's driver's license for nonpayment only *after* holding an ability-to-pay hearing pursuant to Rule 456 and only if the MDJ finds that the

¹² *Commonwealth v. Eggers*, 742 A.2d 174, 176 n.1 (Pa. Super. Ct. 1999); *Commonwealth v. Hernandez*, 917 A.2d 332, 337 (Pa. Super. Ct. 2007).

¹³ *Commonwealth v. Cannon*, 954 A.2d 1222, 1226 (Pa. Super. Ct. 2008).

defendant is able to pay and willfully refusing to do so. Act 138 explicitly states that MDJs may, but do not have to, refer the conviction of a child to PennDOT, “only if the child fails to comply with a lawful sentence entered for the violation and is not subject to an exception to compulsory attendance.”¹⁴ The mandatory language of Rule 470 directly conflicts with the plain language of Act 138. MDJs should consider the impact of referring a child’s conviction to PennDOT before doing so, as this may impact a child’s employment, attendance, and engagement in extra-curricular activities.

VI. The Rules Should Provide Clear Standards on Setting Affordable Payment Plans.

We are aware that courts set default payment plans of \$50 or \$100 per month and judges that are reticent to go below \$25 under any circumstances. Some courts even seem to require down payments in order to get on a payment plan. Such practices are illegal when they interfere with a defendant’s right to an affordable payment plan. To change these practices, the rules should provide a table that ties a defendant’s income level to a maximum monthly payment amount (a simplified version of the more complex child support formula). Linking payments to a multiple of the local minimum wage is one straightforward way to accomplish this. As with the presumptions of an inability to pay, courts would be able to overcome a presumption created by the table if the evidence on the record supports such a finding.

VII. The Rules Should Provide a Much-Needed Mechanism to Administratively Close Old Cases that Are Uncollectible Due to Defendant’s Indigence.

The rules should provide a uniform and statewide policy to dispose of the more than a million summary cases in which defendants owe balances dating back to the 1970s. Every MDJ deals with cases where the defendant cannot pay, but the only option is to keep hauling the defendant into court, interrupting the defendant’s life and wasting the resources of the court and law enforcement. Some courts have adopted explicit mechanisms to administratively close these inactive cases if the court determines the defendant will not be able to pay.

Conclusion

By amending the Criminal Procedural Rules to address these issues with greater clarity and explicit directives, the proposed Rules and other amendments can and will ensure that MDJs use their significant discretion to impose fair and equitable consequences on students and parents. Courts must ensure that parents and youth are not punished and unfairly incarcerated for being indigent. We are confident that these amendments will have a profound effect on court practice by directing MDJs to apply their discretionary authority judiciously and fairly. In the truancy context, narrowing the circumstances where fines and imprisonment are imposed also increases the likelihood that students will re-engage in school and expands educational and employment opportunities for educationally at-risk youth.

We appreciate the opportunity to comment on the proposed Rules and strongly urge the Committed to adopt the Rules with the proposed amendments outlined herein.

¹⁴ 24 P.S. § 13-1333.3(g)(1).

Sincerely,

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