May 3, 2019

Jeffrey M. Wasileski, Esq., Counsel
Supreme Court of Pennsylvania
Criminal Procedural Rules Committee
601 Commonwealth Avenue, Suite 6200
Harrisburg, PA 17106-2635
criminalrules@pacourts.us

VIA ELECTRONIC MAIL

Re: *Comments Regarding Proposed Amendment of Pa.Rs.Crim.P. 403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454, 456, and 470: Indigent Incarceration in Summaries*

Dear Mr. Wasileski:

The following comments are submitted on behalf of the **Education Law Center – PA** 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.

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. 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

[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

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. 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, policies, 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 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:

> "(1) Preserve the unity of the family whenever possible as the underlying issues of truancy are addressed.
> (2) 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.
> (3) 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

[2] 24 P.S. §§ 13-1325(1)-(3).

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 specific comments and recommendations to the Criminal Procedural Rules Committee's proposed amendments with the objective of ensuring that magisterial district judges ("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").

Current Proposed Rules Governing Incarceration for Failure to Pay in Summary Cases

Last year, the Supreme Court of Pennsylvania's Criminal Procedural Rules Committee released draft rules to address the problem of unlawfully incarcerating indigent defendants for failure to pay court fines, costs, and/or restitution. The Committee has now released a revised set of draft rules which include several important and helpful provisions which ELC supports.

I. ELC Supports Several Key Revised Provisions in 2019 Draft Rules.

Under the revised provisions, payment plans must be based on the defendant's ability to pay and cannot be arbitrarily based on a court's "minimum" payment plan (Rules 454, 456, and

---

[3] The 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. Education § 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).

others). ELC strongly supports this change, which reflects existing case law and will protect defendants from unaffordable payment plans. In addition, no defendant can be jailed for nonpayment unless represented by a lawyer (Rules 456). ELC ***strongly supports*** this change, which has been the law for decades but has never before been explicit in the text of the relevant Rule.

In comments to the rules that trigger a need to consider ability to pay, the Proposed Rule list several items the court should—***but does not have to***—consider, such as employment status, income, mortgage and other expenses, etc. (Rule 456 and others). ELC supports the effort to give MDJs direction. However, the proposed instruction is insufficient to protect indigent families because it is: 1) not binding; 2) uses duplicative and confusing categories; and 3) provides no guidance to the MDJ on how to weigh these factors and how to apply them to decide whether a defendant is able to pay, or how much. At the least, the Rules should state that a defendant who cannot afford to meet his or her basic life needs, including housing and food without public assistance, qualifies as indigent and presently unable to pay under Pennsylvania law. ELC supports the effort to have the Administrative Office of Pennsylvania Courts create a standardized income and expense form to ensure that courts are considering uniform information. The forms should be made part of the record. If a defendant still owes fines, costs, or restitution after two years, the court may put an "administrative hold" on the case indefinitely (Rule 456). ELC generally supports this addition, which gives MDJs a much-needed option in cases where the defendant simply cannot afford to pay. As drafted, however, the proposed procedure seems needlessly complicated and requires more hearings than are necessary, so the final proposal should streamline the procedure.

In addition, ELC urges the Committee to recognize the distinction between fines and restitution, which are part of the sentence, and court costs, which are not, and permit MDJs to zero out the latter where it is clear the defendant cannot pay. This will assist defendants who may be able to pay something to clear their accounts, which will allow thousands of additional defendants to receive expungements and Clean Slate sealing of their summary convictions.

While the Proposed Rules purport to protect defendants from unconstitutional driver's license suspensions, but they offer little or no practical protection to indigent defendants. (Rule 470). ELC **opposes** this change as drafted. Currently, MDJs must send notice to PennDOT to suspend a defendant's driver's license if the defendant misses payments and does not either make a new payment or enter into a new payment plan within 25 days of a notice of default. The Proposed Rules would give a defendant only *15* days to respond to such a notice, and it would prohibit suspending an indigent defendant's driver's license *only if* the defendant responds within that time. That is no improvement over the current system, which postpones any notice to PennDOT as long as a defendant at least promises to try to pay. Under the Proposed Rules, if the defendant does not respond within 15 days, the defendant's driver's license would *still* be suspended without a hearing or a determination of ability to pay. That procedure still does not meet the necessary constitutional due process requirements. What the Rules should do is permit the MDJ to send notice to PennDOT only after a Rule 456 payment determination hearing at which the defendant is present. If the defendant does not respond to the notice, the answer is for the court to schedule a hearing and potentially issue a warrant if the defendant fails to appear. MDJs cannot constitutionally impose punishment in the form of driver's license suspension without first making a finding regarding ability to pay.

II. ELC Supports Provisions Requiring Courts to Consider Ability to Pay and Document Its Reasoning For Finding Defendants Have The Ability to Pay.

Courts must consider defendants' ability to pay before imposing any discretionary fines and costs at sentencing (Rule 454). ELC supports this change, which reflects an existing statutory requirement regarding fines and will help limit the amount assessed in cases such as truancy, where all fines are discretionary. The proposal should, however, go further to harmonize with Rule 706, which governs court of common pleas cases and permits a sentencing court to reduce even "mandatory" costs based on a defendant's financial resources. MDJs should have the same authority.

Rule 456 provides that if a court decides to incarcerate a defendant for nonpayment, it must explain its reasons in writing as to why imprisonment is appropriate and "the facts that support" its finding that the defendant is able to pay. ELC supports this change. It is a helpful step. Unfortunately, it remains the primary change in the Proposed Rules aimed at directly addressing why MDJs incarcerate defendants for failure to pay, and it 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 below in more detail, additional guidance is badly needed to address this problem.

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

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

The rules should clarify that the Court that has an obligation to affirmatively inquire into a defendant's ability to pay prior to imposing imprisonment and that indigent defendants cannot be imprisoned (Rule 456). 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. Case law establishes that the Due Process and Equal Protection clauses of the 14th Amendment require that before imposing any sanction, courts must affirmatively inquire into a defendant's reasons for nonpayment, and courts must also find that a defendant willfully refused to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Pennsylvania's Rules of Criminal Procedure should articulate this requirement with equal clarity. This is not an affirmative defense to be raised by a defendant; instead, the obligation is on the court to look at the defendant's entire financial picture. The Superior Court reaffirmed this last year in the debtors' prison case *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. Ct. 2018), and it also explained in *Commonwealth v. Diaz*, 191 A.3d 850, 866 n.24 (Pa. Super. Ct. 2018) that a defendant who is indigent is by definition not willfully failing to pay. The rules should make these requirements clear, and they should also make explicit that Pennsylvania law prohibits incarcerating indigent defendants for nonpayment. MDJs should have all of this binding law clearly set out for them in the Rules.

The rules should provide clear—and mandatory—guidance to MDJs whenever evaluating a defendant's ability to pay (Rules 454, 456, 470 and others). MDJs should not be left to guess about how to evaluate a defendant's finances and ability to pay, and they should not be required to do case law research. The Rules must provide clear and specific guidance, which already exists in case law. For example, binding case law already says 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. *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). 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." *Commonwealth v. Cannon*, 954 A.2d 1222,1226 (Pa. Super. Ct. 2008). Moreover, last year the Superior Court explained that defendants cannot be required to borrow money from friends or families to make payments—which represents a fundamental shift in how some MDJs expect defendants to pay. *See Commonwealth v. Smetana*, 191 A.3d 867, 873 (Pa. Super. Ct. 2018). At a minimum, the rules should reflect these precedents; to do otherwise is to invite error.

The rules should go further and 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. Although, as with every presumption, the court can overcome it by making findings on the record based on the evidence before it. The rules should reflect the requirements from the civil contempt case law (Rule 456). Courts almost always use their civil contempt authority when they imprison a defendant and set a purge condition (criminal contempt is governed by separate rules). Accordingly, the body of civil contempt case law directly applies to this type of imprisonment, including the requirement that a court can impose a purge condition only if it finds *beyond a reasonable doubt* that the defendant is *presently* able to comply with the condition (*e.g* that a defendant who has been put in jail with a purge of $500 has the present ability to pay that money).The rules should clarify this important principle for the MDJs.

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 Committee to adopt the Rules with the proposed amendments outlined herein.

Sincerely,

Maura McInernery
Legal Director

Reynelle Brown Staley
Policy Director