March 26, 2025

Daniel A. Durst, Chief Counsel
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VIA ELECTRONIC MAIL

Re: *Comments Regarding Proposed Amendment of Pa.R.Crim.P. 403, 407, 408, 409, 411, 412, 413, 414, 422, 423, 424, 454, 462, 470, 702, 704, 705.1, 706, 1002, and 1030, adoption of Pa.R.Crim.P. 454.1, 456.1, 456.2, 702.1, 705.2, and 706.1, and rescission and replacement of Pa.R.Crim.P. 456 and Pa.R.Crim.P. 470*

Dear Chief Counsel Durst :

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 Pa.R.Crim.P. 403 (Contents of Citation), 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 Summons), 423 (Not Guilty Pleas – Notice of Trial), 424 (Guilty Pleas), 454 (Trial in Summary Cases), 462 (Trial De Novo), 470 (Procedures Related to License Suspension After Failure to Respond to Citation or Summons or Failure to Pay Fine and Costs), 702 (Aids in Imposing Sentence), 704 (Procedure at Time of Sentencing), 705.1 (Restitution), 706 (Fines or Costs), 1002 (Procedure in Summary Cases), and 1030 (Scope of Summary Municipal Court Traffic Division Rules), adoption of Pa.R.Crim.P. 454.1 (Sentencing in Summary Cases), 456.1 (Ability to Pay Determination), 456.2 (Commonwealth Request for Ability to Pay Hearing), 702.1 (Ability to Pay Determination), 705.2 (Fines – Sentencing), and 706.1 (Commonwealth Request for Ability to Pay Hearing), and rescission and replacement of Pa.R.Crim.P. 456 (Default Procedures: Restitution, Fines, and Costs) and 470 (Proceedings Related to License Suspension After a Failure to Respond to Citation or Summons or Failure to Pay Fines and Court Costs) as published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Our comments are focused on the negative impact of imposing fines, fees, and costs on parents and students in the truancy context and the importance of establishing clearly defined

guardrails to narrow the scope of imposing fines on families experiencing poverty, including precluding the imposition of installment payments over many months or years.

Who We Are

The Education Law Center-PA ("ELC") is a non-profit legal advocacy organization that uses impact litigation and individual representation to advocate on behalf of Pennsylvania's students who are most marginalized. Over our 48-year history, ELC has focused much of its attention on addressing the educational needs of children living in poverty, Black and Brown students impacted by systemic racism and other forms of oppression, children who are immigrants, families experiencing homelessness, those who are marginalized due to involvement in the dependency and/or delinquency system, and children at the intersections of these identities. Over the years, ELC has handled thousands of intakes and individual matters on behalf of students and parents, many of whom we have represented in federal and state courts, including representing parents and students facing fines, fees, and jailtime relating to truancy violations.

As experts in education law, we have trained juvenile court judges and MDJs regarding federal and state education mandates, including truancy laws. We have also been active participants in several committees and workgroups at the state and local level. Our advocacy seeks to expand educational opportunities and improve life outcomes for children impacted by deep poverty and support families. Our experiences as litigators in this context informs our comments and recommendations regarding the proposed amendments to the Criminal Procedural Rules We appreciate this opportunity to comment on the Proposed Rules which will have a direct impact on our clients' ability to vindicate their right to education.

Notably, ELC has engaged in and led statewide advocacy campaigns to reform Pennsylvania's Juvenile Court Rules 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 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 for truancy. Along with partners the American Bar Association Center on Children and the Law and the Juvenile Law Center, ELC also co-founded the national Legal Center on Foster Care and Education and National Working Group on Foster Care and Education and with additional partner Southern Poverty Law Center created 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 to improve educational and life outcomes for children and youth. All of these experiences inform our comments and recommendations regarding the proposed amendments to the Criminal Procedural Rules.

The Impact of Fines, Fees and Imprisonment on Parents, Caregivers, and Students in Truancy Proceedings

A nationwide analysis by Attendance Works found that 445,481 Pennsylvania students

(26%) were chronically absent during the 2021-2022 school year.[1] Hundreds of parents, many of whom are living in poverty and overwhelmed, are required to pay fines and fees and may be subject to jail time for failing to pay such fees emanating from their child's absences from 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. According to research, at that time 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. Ms. DiNino's death exposed flaws in Pennsylvania truancy procedures prompting lawmakers to pass Act 138 amending state truancy laws. Although the act reduced jail time, it increased the amount of money parents could be fined for habitual truancy, exchanging one punitive response for another. Courts across the state continue to levy fines against parents for truancy. In Allegheny County alone the court reported 11,708 truancy cases between 2018 and June 2021. Due to privacy protections, details about the students or their guardians -- including the fines and fees imposed -- were available in fewer than 20% of these cases.[2] While the Administrative Office of Pennsylvania Courts ("AOPC") does not maintain disaggregated data regarding fines and fees imposed by courts relating to truancy proceedings, a recent report issued by the Joint State Government Commission reports that dollars disbursed to school districts as a result of truancy violation fines imposed by magistrate district judges ranged from $1,096,352 in 2018 to $891,303 in 2022.[3]

Truancy is not a one-size-fits-all problem. Instead, it often arises out of root-causes that undermine a child's ability to access school including lack of access to basic necessities, unmet mental health needs, lack of reliable safe transportation, unmet special education needs or lack of accommodations for students with disabilities and negative school conditions such as bullying, harassment, or a hostile school environment, and safety concerns due to violence in the community.[4] Successfully addressing this issue requires an understanding of the individual circumstances of each student and family. Numerous studies have shown that punitive measures such as imprisoning parents and imposing fines fail to reduce truancy rates.[5] A study of high school dropouts conducted in southern California found that in addition to failing to reduce truancy, punitive truancy measures contributed to pushout, which is the opposite of their intended impact.[6] Effective truancy policies focus on identifying and addressing the root causes

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[1] Attendance Work, Monitoring Who Is Missing Too Much School: A Review of State Policy and Practice in School Year 2021-22 (June 2022) https://www.attendanceworks.org/monitoring-who-is-missing-too-much-school-a-review-of-state-policy-and-practice-in-school-year-2021-22/ (last visited April 23, 2024).

[2] TyLisa C Johnson, Unexcused: Truancy Cases continued for thousands of Allegheny County students and their families amid pandemic, PublicSource (2021), https://www.publicsource.org/truancy-cases-allegheny-schools-covid/, (last visited Apr 19, 2024)

[3] Joint State Government Commission, The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools: Report of the Advisory Committee on Act 138 of 2016, Table 21 - Dollars Disbursed to School Districts from Truancy Violation Fines by County Pennsylvania 2018-2023, http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2024-04-09 (Act138) Truancy Web 4.9.24 930am.pdf (2024) (last visited April 23, 2024).

[4] *See e.g.*, Advisory Comm. on Act 138, Joint State Gov't Comm'n, *The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools* 11, 20 (2024), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2024-04-09%20(Act138)%20Truancy%20Web% 204.9.24%20930am.pdf.

[5] Augestina Reyes, Compulsory School Attendance: The New American Crime, 10 Education Sciences (2020). Rebecca Mireles-Rios, Victor M. Rios and Augustina Reyes, Pushed Out for Missing Class: The Role of Social Disparities in Dropping Out, 10 Education Sciences (2020).

of a student's chronic- absenteeism and building relationships between schools and families rather than punishment.[7] Because of similar research, a report by Research for Action on Strategies for Reducing Student Absenteeism in Philadelphia recommended that the school district focus on community awareness, attendance monitoring, family engagement, relationship building, reliable, community wide coordination, and safe school transportation to combat truancy and recommended against implementing punitive measures such as fines and court appearances.[8]

In short, there is no evidence that these punitive policies, including imposing fines, fees, and subjecting parents to imprisonment reduce truancy or curb high dropout rates. Research suggests they may have the opposite effect. In fact, anecdotally ***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 and imposing fines and fees on families who are struggling financially negatively impacts families and children rather than supporting attendance and estranges them further from their school community.

Conversely, what *does* work to reduce truancy are clear and known rules governing absenteeism and excused absences, the availability of support for students and families, strong communication with schools, and rules that are consistently enforced based on accurate facts and data. Prompt school-based interventions such as individualized attendance improvement plans which address the root causes of truancy and engage families while connecting students with school-based or community services are also effective. We need to consider the negative implications of laws, policies, and court rules which push students and families away from school by imposing fines, fees, and imprisonment on parents and students who are commonly unable to pay and often live in deep poverty.

Imposing Fines Under Act 138

Pennsylvania's Act 138 adopted in 2016 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.*[9]

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

[7] Ericka S. Weathers, Karen Babbs Hollett, Zoe R. Mandel, and Christine Rickert, Absence Unexcused: A Systematic Review on Truancy, 96 Peabody Journal of Education (2021).
[8] Rachel Comly, Jason Fontana, and Anna Shaw-Amoah, Strategies for Reducing Student Absenteeism in Philadelphia, Research for Action (2020).
[9] 24 P.S. §§ 13-1325(1)-(3).

disrupt the family unit, cause or contribute to the loss of housing, or push the child into foster care. MDJs are empowered with considerable discretion to impose a range of fines or other penalties in individual cases. These cases are rarely appealed. Judges also have discretion as to whether to forward a student's conviction for truancy to the Department of Transportation (DOT) for automatic license suspension. Act 138 also significantly increased the amount of money a judge imposed on parents of students 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.[10] In addition, jail time was reduced from five days to three days. Pursuant to Act 138, a judge may jail a parent only if (1) the court makes specific findings that the parent has the ability to pay the fine or complete the community-service and (2) the court finds that parent's non-compliance was willful.

Fines are discretionary, not mandatory, and courts are strictly prohibited from jailing parents and students who are unable to pay.[11] 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. However, the parameters of what constitutes an inability to pay remain unclear. A court can impose fines only if the "defendant is or will be able to pay the fine." Statutes and caselaw direct that 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."[12] It also must hold an ability-to-pay hearing at sentencing to affirmatively inquire into the defendant's financial circumstances.[13] Without holding such a hearing and gathering information about the defendant's finances, the court should not impose a fine (even if the defendant pleads guilty).[14] Among the information the court must consider is the defendant's current income, indebtedness, and living situation.[15]

However, there are no clear guardrails as to what constitutes "inability" to pay and in the truancy context, many MDJs conclude that a parent or student will be able to pay in the future and therefore fines can always be imposed as long as it occurs through an installment plan set forth by the court. As a result, we are aware of several instances across the Commonwealth where parents who live in deep poverty or who have disabilities and are unable to work or who care for multiple family members have been required to pay truancy fines, in either a lump sum or in an installment plan, despite record evidence of their inability to pay.

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[10] 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.

[11] *See* Pa.R.Crim.P. 456; 42 Pa. Cons. Stat. § 9730(b).

[12] 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).

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

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

[15] *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).

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 fine, incarcerate and punish indigent parents and youth for failure to pay court fines, costs, and/or restitution (collectively "legal financial obligations," or "LFOs").

Understanding Deep Poverty and Why Fines and Fees Should NOT Be Imposed

Imposing truancy fines on parents living in poverty significantly harms families without providing benefits to the child or to the state. A survey conducted by Wilson Center for Science and Justice and the Fines and Fees Justice Center found that 99% of parents impacted by fines and fees had to cut back on at least one daily need, 35% of people impacted struggled obtaining food, and 27% experienced housing hardship due to their fines in fees. From their data they estimated 17 million American households with children likely experienced food, housing, or healthcare instability because of a parent's court debt.[16] A study in Oklahoma found that court fines and fees put low-income defendants at risk of ongoing court involvement through new warrants and debt collection while failing to reduce new convictions and provided little financial benefit to the government.[17]

Courts have implemented payment plans with the goal of alleviating this burden. However, these plans can also be harmful, as they prolong the family's contact with the criminal legal system and sometimes incur additional fees. This research demonstrates the necessity of requiring courts to affirmatively conduct ability to pay determinations and providing clear guidance on what factors can render a client unable to pay. Clients found unable to pay should have their fines and fees waived and should not be placed on a payment plan they cannot afford.[18]

The National Center for Access to Justice ranked Pennsylvania 31st in the nation with a score of 27 out of 100 on its Fines and Fees Assessment, noting in part that Pennsylvania courts do not require the state to prove that a person's failure to pay was "willful" before a judge imposes sanctions and that the Commonwealth has not codified into law exactly how a person's ability to pay will be determined nor has it established clear standards that trigger a "presumption" that a person is indigent such as receiving public assistance or establishing an income threshold or tying it to eligibility for court appointed council. Currently, 12 states have established such clear standards and 8 states have adopted a presumptive threshold.[19]

Proposed Rules Governing Ability to Pay Fines and Fees

[16] Debt Sentence: How Fines and Fees Hurt Working Families, Wilson Center for Science and Justice and Fines and Fees Justice Center (2023).
[17] Devah Pager, Rebecca Goldstein, Helen Ho, and Bruce Western, Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment, 25 American Sociological Review, (2022).
[18] Debt Sentence: How Fines and Fees Hurt Working Families, Wilson Center for Science and Justice and Fines and Fees Justice Center (2023).
[19] National Center for Access to Justice, The Fines and Fees Justice Index, (2022) https://ncaj.org/state-rankings/justice-index/fines-and-fees (last visited April 23, 2024).

I. ELC Supports Several Key Revised Provisions in 2025 Revised Rules and Proposes Additional Protections.

a. ELC Supports Utilizing Multiple Presumptive Standards to Establish a Person's Inability to Pay Fines, Fees, and Costs

With regard to Proposed Rule 456.1 and 702.1, ELC strongly supports the adoption of a standard for establishing a "presumption" of when a person is unable to pay court debt. Creating uniform standards will have a significant and positive impact on parents, caregivers, and students in the truancy context to ensure that courts are considering the right objective factors when assessing someone's ability to pay. However, employing several alternative presumptions to establish indigency/inability to pay is critical. For example, if the person receives means-based public assistance, is eligible for SNAP benefits or has income under 200% of the federal poverty level the person should automatically qualify as unable to pay court debt at all. This is a critical and welcome change and we urge the Rules Committee to adopt several presumptive thresholds. Such a changes aligns with relevant case law governing inability to pay as well as forthcoming *in forma pauperis* rules changes.

b. ELC Urges the Rules Committee to Require MDJs to Provide a Written Explanation of the Factors They Relied On to Determine a Defendant Was Able to Pay and the Basis for This Determination

Ability-to-pay determinations are often the last layer of protection defendants have against sentences that could eliminate their ability to provide the most basic necessities (*e.g.,* food, healthcare) or subject families to collateral consequences, such as loss of employment or housing. In the truancy context, in particular, there is significant cause for alarm that these legally required determinations are not being made or are based on a presumption that any individual can pay a substantial fine if payments are made over several years.

The Joint State Government Commission's 2024 report, *The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools*, includes results from a survey in which 86 magistrates responded to a series of questions about Act 138 and their decisions in truancy matters. As reflected in the *Report*, only 62% of surveyed magistrates responded that they "always" conducted the legally required ability to pay determinations before imposing a fine.[20] Concerningly, 33% of surveyed magistrates "sometimes" performed this legally required process and 5% of surveyed magistrates admitted to "never" making such determinations[21] — in clear contravention of Act 138's mandates.[22] These findings are particularly troubling as 16% of surveyed magistrates "always imposed a fine,"[23] and 63% of magistrates imposed additional punitive consequences if a student or family failed to pay a fine by making a referral to the juvenile probation department.[24] Each of these facts underscores the importance of conducting

[20] Advisory Comm. on Act 138, Joint State Gov't Comm'n, *The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools 1, 93* (2024), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2024-04-09%20(Act138)%20Truancy%20Web% 204.9.24%20930am.pdf.
[21] *Id.* at 93.
[22] 24 P.S. § 13-1333.3 (requiring fines to be based on ability to pay)
[23] Advisory Comm. on Act 138 at *95.*
[24] *Id.* at 100.

and documenting ability-to-pay determinations to ensure that they happen in each and every truancy matter where a fine is contemplated. Additionally, absent this requirement, the rights of students and families will continue to be violated, and many more young people and their families will be driven deeper into systems despite the fact that a key purpose of Act 138 to "preserve the unity of the family whenever possible" and "[a]void . . . the possible entry of a child to foster care and other unintended consequences of disruption of an intact family unit."[25]

Requiring judges to provide an explanation to defendants about the criteria used is also essential to ensure that meaningful ability-to-pay determinations are conducted as required by law. This provides vital, and oftentimes otherwise unavailable information to defendants about what evidence they need to provide to the court if they are subsequently unable to make payments and to recognize if a basis for appeal exists. Should Rule 456(d) be adopted as drafted it must provide an on-the-record verification that an ability-to-pay determination has in fact taken place. Moreover, this practice establishes needed transparency and is not unduly burdensome to judges, who are already legally obligated to undertake consideration of a defendant's individual circumstances.

c. ELC Cautions Against Imposing Payment Plans on Persons Who Are Currently Unable to Pay Court Debt

As currently written in Proposed Rules 456, 456.1, 702.1, and 706, the Proposed Rules would only use the new ability-to-pay standards to determine if someone is unable to pay in full now, including a person with an income of under 200% of the federal poverty level and assets of less than $10,000. The Proposed Rules do not address what constitutes an affordable payment plan for a person at or over that threshold and appears to presume that all indigent persons may be subject to long term payment plans, thereby spreading the debt over many months or years.

We disagree with this perspective and believe that permitting payment plans for all will undermine the housing and food stability of many families, including those caring for children who are school age and already living on the edge. To address this situation and ensure statewide consistency, we propose that the Rules be further amended to recognize that families who have very limited income and are struggling financially simply cannot pay court debt – even if it is spread over many years. The Proposed Rules should be explicit that a person who is unable to pay based on any one of the multiple established presumptions is also unable to afford to make any monthly payments at all. A family should not be required to forfeit stable housing, or forego basic life needs to pay court debt. Imposing additional fines and debt on families who are struggling will only undermine family stability, housing, healthcare, etc. particularly where children are involved.

The Rules Committee should consider setting a standardized payment schedule based on income that is grounded in clear and realistic standards and guardrails for determining whether a payment plan is truly affordable. For example, if someone makes 300% of the federal poverty level they should not be required to pay more than $5 per month, etc. while others should not pay at all. In all cases, the Proposed Rules should explicitly require judges to inquire about how many family members are supported by a person's salary or income. In many cases in the

[25] 24 P.S. § 13-1325

truancy context, we have learned that a single parent is caring not only for her children but for her sister's children as well – a fact that is often unknown to the MDJ when assessing a parent's ability to pay.

Finally, the 2019 proposal from the Rules Committee expressly required that payment plans be based on each individual person's "financial ability to pay" and prohibited "mandatory minimum installment payments" that are not tied to the person's finances. That language should be added back into the Proposed Rules.

d. ELC Cautions Against the Practice of Imposing Revised Installment Plans or Ordering Community Service in Matters Where a Defendant Has Already Demonstrated an Inability to Pay Ordered in a Previous Installment Plan

With regard to the Court process set forth in the revised Proposed Rule 456, ELC urges the Rules Committee to establish more robust protections for defendants by eliminating the ability for a court to either order a new installment payment plan as outlined in 456(d)(2)(i) or impose community service as set forth in 456(d)(2)(ii). These proposals would result in defendants--who have already demonstrated an inability to pay in single installments and in accordance with a previously established payment plan reflecting their then-current ability to pay -- being subject to additional court intervention and placed in circumstances of further financial precarity that could jeopardize their ability to meet their basic needs or maintain employment. As explained in detail above, the imposition of fines and court costs is a recognized driver into deep — and at times seemingly inescapable — poverty for families who are already struggling to meet basic needs such as food, healthcare, and transportation to work.

Additionally, the elimination of this language is consistent with the revised Rule 456.1(e), which recognizes that inability to pay can be established when "it would cause the defendant to suffer a substantial financial hardship" and they "would be unable to fully meet their basic human needs or obligations," such as "nutrition, housing, utilities, health, transportation, [and] care of dependents." Simply scaling back the amount of the impact to revised payment plans in light of the defendant's recognized and subsequently demonstrated inability to pay according to a prior installment plan circumvents the principle and the intention of inability to pay, causing grave risk of harm.

While ordering community services appears to be a reasonable non-financial consequence, many families and students are unable to afford the cost of transportation to participate in community service and comply with a court's order.

e. ELC Urges Advanced Notice to Defendants of an Ability to Pay Hearing

With regard to the Court process set forth in Proposed Rule 456.1 and 702.1, ELC urges the Rules Committee to mandate that whenever a court is going to consider ability to pay, it must tell the defendant in advance and provide a copy of the ability to pay evaluation form. In order for courts to effectively evaluate a person's ability to pay, the person must be aware in advance to complete the ability-to-pay evaluation form and bring any necessary documentation. Unless people are told what is expected of them, they will not be able to comply. Clarifying that the notice scheduling a sentencing hearing or payment determination hearing must inform the

defendant of the issues to be considered will streamline such proceedings and allow defendants to adequately prepare.

f. ELC Supports the Use of Standardized Criteria Outlined In the Statement of Financial Ability and Urges that This Form Be Included Alongside the Notice of The Ability To Pay Hearing

Utilizing standardized criteria in the Statement of Financial Ability form helps improve transparency and helps ensure that defendants can adequately prepare for their ability to pay determinations. ELC urges the Court to revise Rule 456(b) to require that the Statement of Financial Ability be included alongside the hearing notice in all cases. As explained above, defendants may not understand that they need to come prepared to adequately demonstrate their financial circumstances and may not be able to answer the court's questions or provide the evidence that the court "may require the defendant to present" in accordance with Rule 456.1(b) without advance notice. For example, defendants may not know that they need to come prepared with records establishing their eligibility for needs-based public assistance, payment stubs substantiating their wages, or confirmation that they are represented by appointed counsel.

Providing this essential information in advance will allow both the Court and the defendant to have the information needed to ensure that a meaningful and accurate ability-to-pay determination can be made.

g. ELC Urges the Rules Committee to Clarify the Statement of Financial Ability Criteria By providing Examples of Housing Circumstances That Qualify As Experiencing Homelessness to Ensure Defendants Can Properly Apprise the Court of Factors Related To Their Inability To Pay

It is well documented that students experiencing homelessness are disproportionately likely to experience absenteeism and therefore are more likely to interact with courts arising from attendance concerns. As set forth in the 2024 Pennsylvania Department of Education's 2024 publication *Education for Children and Youth Experiencing Homelessness Program 2022-23 State Evaluation,* during the 2022-2023 school year, 54% of identified children experiencing homelessness were "chronically truant" and missed ten or more days of school during a given school year.[26]

ELC has deep expertise in representing students and families who are experiencing homelessness and the federal McKinney-Vento Act, the law that protects the rights of students experiencing homelessness to ensure their school stability and immediate enrollment.[27] In many cases, these students have not been formally identified as experiencing homelessness until they contact ELC. In our experience, even when explicitly asked, many families may not be aware that they are currently living in circumstances that qualify as experiencing homelessness under

[26] Pa Dep't of Educ., Education for Child and Youth Experiencing Homelessness Program 2022-2203 State Evaluation Report (May 2024) 1, 12 available at https://www.pa.gov/content/dam/copapwp-pagov/en/education/documents/instruction/homeless-education/reports/2022-23%20ecyeh%20evaluation%20report.pdf.
[27] 42 U.S.C. § 11431 et seq.

the law. For example, despite being the most prevalent way that families experience homelessness,[28] families who are temporarily sharing the housing of others due to loss of housing or economic hardship are often unaware that such an arrangement, often called "living doubled up" or "couch-surfing" qualifies as experiencing homelessness, under the Act.[29] Moreover, many families may not identify or consider themselves to be experiencing homelessness, even when they are living in housing circumstances that are included in the definition of homelessness.[30] To address this well-established need, ELC has developed a screening tool for schools that provides examples of housing circumstances that qualify under law as experiencing homelessness. This tool can be used to understand a family's housing circumstances and screen a family to determine whether or not a student or family is experiencing homelessness.[31]

ELC applauds the Rules Committee for recognizing that homelessness impacts a defendant's ability to pay and urges the Rules Committee to adopt additional clarifying criteria included within the Statement of Financial Ability to ensure that all eligible defendants can access the information needed to alert the court that they are experiencing homelessness and explain barriers to their ability to pay. Absent these important examples, defendants may not be aware that they should complete the last question on the form, thereby missing a vital and time-limited opportunity to provide evidence of their inability to pay.

The Rules Committee could also consider utilizing a definition of homelessness that is the same as the definition used in the McKinney-Vento Act, as this definition may be more readily understood by defendants who may have already be familiar with this definition through attending public school themselves or through caregiving.

To ensure that defendants can correctly apprise the court of their housing circumstances and provide courts with needed information impacting a defendant's ability to pay, we recommend that clarifying language be added to the criteria contained in the Statement of Financial Ability to provide the following examples of housing circumstances that would qualify as experiencing homelessness:

> *Are there other facts that you would like the court to know about your circumstances that may help the court decide your ability to pay fines, costs, and restitution, such as whether you are experiencing homelessness (including living "doubled-up" with others or "couching surfing" due to loss of housing or financial hardship, living in an emergency shelter, or living unsheltered)*

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[28] *Id.* at 10 (explaining that 69% of all identified students experiencing homelessness in Pennsylvania were living "doubled-up").
[29] 42 U.S.C. § 11434a(2)(B)(setting forth a variety of housing circumstances that are considered to qualify as "homeless" under the law including living "doubled-up" as well as living in temporary or emergency shelter, temporarily residing in campgrounds, cars, hotels, or trailer parks, living in a place not ordinarily used for sleeping, living unsheltered or living in housing that is legally substandard).
[30] *Id.*
[31] Educ. L, Ctr, McKinney-Vento and Act 1 Screening Tools for Local Education Agencies (LEAs) (2024) available at https://www.elc-pa.org/wp-content/uploads/2021/04/MV-Screener_Fillable-1.pdf.

Do you have any health issues or financial obligations that impact your ability to pay?

h. ELC Supports Notification to Defendants of their Right to Counsel Prior to Incarceration for Nonpayment

A defendant's right to counsel prior to incarceration for nonpayment of fines must be communicated clearly. Pennsylvania's appellate courts have repeatedly ruled in recent years that individuals cannot be jailed for nonpayment of fines, costs, or restitution unless they are represented by a lawyer.[32] That the trial courts need this reminder shows how important it is to make this point clear in the Rules. This change was included in the 2019 proposal but did not carry over to the current draft, which instead only acknowledges the right to counsel in the comments to Proposed Rules 456 and 706. This is too important an issue and must be included in the text of the Proposed Rules, so that the judges who read the rules do not have to parse the lengthy comments to make clear this fundamental right.

In addition, we believe that the Proposed Rules must explicitly instruct judges to state in writing the reasons for a person's incarceration for nonpayment of court fees. While Rule 706 currently prohibits jailing "indigent" defendants, that prohibition has been lost in the Proposed Rules. With the shift in language away from indigence to instead focus on a person who is "unable to pay," both the summary and criminal rules must expressly put all judges on notice that it is unlawful to jail a person for nonpayment unless a court makes a finding that the person is *able* to pay. Such findings should be in writing. In its prior proposals on this subject, the Rules Committee included a provision that judges–including magisterial district judges–must put in writing the reasons why they have found a person able to pay and ordered incarceration. This is a straightforward requirement that will ensure transparency and public oversight and appellate review of why someone has been jailed.

i. ELC Urges the Rules Committee to Clarify that Courts must Schedule a Hearing Whenever a Defendant Falls behind on Payments Rather Than Issuing a Failure-to-Pay Bench Warrant

Under current practice, many magisterial district courts simply issue a bench warrant when someone has missed their payments and have that person arrested. The minor judiciary issues more than 400,000 such bench warrants each year.[33] The proposed changes to Rule 456(a) would help address this problem by instead requiring that courts actually schedule a hearing and provide notice of that hearing. However, due to some apparent drafting errors, part of Rule 456(b) was not fully updated and still reflects the current practice of issuing failure-to-pay warrants; that provision needs to be further clarified to be in line with the new Rule 456(a) hearing requirement. The provision should remove

[32] *See*, *e.g.*, *Commonwealth v. Diaz*, 191 A.3d 850 (Pa. Super. Ct. 2018).

[33] *See* AOPC, 2022 Caseload Statistics of the Unified Judicial System of Pennsylvania at 195 and 240 (2022), https://www.pacourts.us/Storage/media/pdfs/20231221/153957-2022annualcaseloadreport.pdf (last visited April 23, 2024). Post-dispositional warrants in summary traffic and non-traffic cases issued by the magisterial district courts and the Traffic Division of the Philadelphia Municipal Court are almost always issued for nonpayment. Adding these figures together shows that those courts issued more than 400,000 such warrants in 2022, the last year for which statistics are available.

any reference to a 10-day notice and instead explain that the defendant needs to either pay in full prior to the court hearing or appear at the payment determination hearing. Bench warrants should only ever be issued if someone fails to appear at a scheduled court appearance after receiving notice. In addition, the rules governing issuing and serving bench warrants should also be updated, to reflect that courts cannot issue those bench warrants unless the defendant fails to appear at a scheduled payment.

j. ELC Recommends Removing or Narrowing the Use of "Collateral" as a Form of Cash Bail Upon Default in Summary Cases

The Proposed 456(c)(2)(ii) would continue and in fact worsen the troubling practice of allowing a court to detain a person for up to 72 hours if the court cannot immediately hold a payment determination hearing when the person appears at the court. Under the Proposed Rules, a person could be arrested and detained even if the person *voluntarily* appears at court and asks for a hearing> Certainly under those circumstances, there is no reason to believe the person would not appear for a scheduled hearing. If the Rules Committee will not do away with this entirely, it must at a minimum ensure that: 1) collateral could only ever be set for a person who is arrested for failure to appear; 2) the amount of the collateral does not exceed the defendant's ability to pay; 3) the amount of collateral does not exceed the amount of past-due money owed.

k. Juveniles Should be Certified Delinquent Only if They are First Found Able to Pay

The Proposed Rule 456 includes a comment that juveniles who do not pay fines, costs, or restitution in summary cases should be certified as delinquent and have their cases transferred to juvenile court if they do not pay within 10 days. It should be clarified that this does not apply to truancy fines.

Separately, ELC supports the Rule Committee's revisions to Rule 456(e), setting forth the procedural rules that apply in failure to pay matters involving a juvenile defendant under the age of 18. It is crucially important that the Rules specifically set forth that no " issuing authority shall certify a notice of a failure to pay to the court of common pleas unless" an ability to pay determination has been made of a juvenile defendant who fails to appear. Otherwise the Rules will continue to lead to referrals that needlessly trap juveniles in the juvenile justice system due to their poverty, without a court ever first assessing why the juvenile has not paid.

l. The Rules Should Clarify the Scope of the Judge's Authority to Waive Payments

Act 163 of 2022 permits courts to reduce or waive fines and costs (other than the Crime Victim Act cost) when a person is unable to pay either in a single payment or in compliance with an existing payment plan. However, the Proposed Rules should make clearer in Rules 456 and 706 that even if a defendant is found *able* to pay, the court still has the authority to place the person on a new payment plan; that option is missing from the current draft. In addition, for individuals found *unable* to pay, the Proposed Rules should make clear that, pursuant to Act 163, the court can waive fines and costs upon a finding that the person cannot pay in a single remittance and the court does not have to first attempt a payment plan. *See* 42 Pa.C.S.

9730(b)(3)(i).

m. The Rules Should Incorporate the Well-Established "Willfulness" Standard as the State's Burden to Prove Whenever a Court Considers A Defendant's Ability to Pay

Case law has clearly established that a person can only be punished for the *willful* refusal to pay.[34] That standard must be reflected in the Rules so that judges are aware of what findings they need to make when determining that someone can be punished. The Proposed Rules should not assume that judges are aware of what case law requires, and the Rules should spell out the requirements as clearly as possible, particularly since the many non-lawyer magisterial district judges should not be expected to perform their own legal research; the rules should contain all of the necessary information for the court.

In making this addition, the Proposed Rules must reflect precedent that the burden at a payment determination hearing—which is actually a civil or criminal contempt hearing—is not on the defendant to prove an inability to pay but instead on the state to demonstrate that the person is able to pay and willfully refusing to pay. The Proposed Rules cannot and should not flip that burden. Instead, using the financial information that the defendant must provide under the Proposed Rules, including whatever documentation the court reasonably requires, will be sufficient for the court to determine if the Commonwealth has established its burden to prove an ability to pay such that the person can be punished.

n. ELC Supports Revised Rule 456 (a)(3)'s Requirement that Courts Must Inform Private Debt Collection Agencies that An Ability to Pay Hearing Has Been Scheduled on Behalf of the Defendant

In line with Act 163 of 2022, a person whose case has been sent to a private debt collection agency can ask the court to schedule a hearing to consider the person's ability to pay. Once this request is made, the court must schedule a hearing and the private debt collector must stop collections. The Proposed Rule, as revised, would appropriately shift the burden to the court to notify the private debt collector. This is appropriate because the court was the entity that initially set in motion the circumstances leading to the creation of debt and sent the matter to private collections.

Absent this requirement, the onus would remain on the defendant to try to convince the private debt collector that a court hearing has been scheduled. Defendants who find themselves in these very precarious circumstances and who are already subject to debt collection practices, are unlikely to be believed by private debt collectors without court-provided and initiated corroboration and may even be subject to more aggressive or abusive collections practices that may otherwise violate their rights.

[34] *See*, *e.g.*, *Commonwealth v. Mauk*,185 A.3d 406, 411 (Pa. Super. Ct. 2018); *Commonwealth v. Dorsey*, 476 A.2d 1308, 1311-12 (Pa. Super. Ct. 1984) (explaining constitutional basis for willfulness standard)

o. ELC Supports the Revision of Rule 470(e)(2) Permitting a Notice to Be Sent to the Pennsylvania Department of Education Only After an Ability to Pay Determination Pursuant to Rule 465 Has Occurred and an Ability to Pay Finding Has Been Made

Revising the rules to better safeguard the rights of defendants who have not yet received all of the required due process helps to prevent defendants from losing access to transportation in violation of their rights. Explicitly including such language is needed to address possible misunderstandings of the law, particularly because the "majority of magistrates" reported "sometimes" pursuing a suspension of a student's license as a penalty for nonattendance in the above-mentioned survey conducted by the Joint State Government Commission.[35]

p. Keep the new increased time given to respond and enter a plea to a summary citation from 10 to 30 days

Every person who is currently charged with a minor summary traffic or criminal offense currently has only ten days to respond to that citation by pleading guilty or not guilty. Missing that deadline has significant consequences: the court will issue an arrest warrant, and if it is a traffic case, the court will also ask PennDOT to suspend the person's driver's license. The Proposed Rules would extend that deadline to 30 days. The extra time should reduce the number of people who face these warrants and driver's license suspensions, by giving them a fairer opportunity to determine which course of action to take, potentially consult with a lawyer, and contact the court.

q. Keep the new elimination of the monetary "collateral" requirement to plead not guilty to a summary offense.

Under current practice, any person who is charged with a minor summary traffic or criminal offense and wishes to plead not guilty must pay the entire amount of fines and costs that would be imposed if the person were convicted. The only exception is if the person appears at court and asks the judge to reduce the amount, which places a disproportionate burden on low-income individuals who have to travel to court to ask for such a reduction. This so-called "collateral" is apparently intended to ensure the court has the person's money if the person fails to appear for court and/or is eventually convicted. In its report, the Rules Committee concluded that this practice is "fundamentally unfair" and should end. The Proposed Rules would remove this type of collateral entirely, so that a person can plead not guilty by mail without having to post any money.

r. Remove the Requirement That People Who Plead Guilty But Cannot Afford to Pay in Full Must Go to Court In Person to Request a Payment Plan

The people who are most likely to need an affordable payment plan are also the people least likely to be able to travel to court because of their work or family care responsibilities. The Proposed Rules should instead set forth a mechanism for a person to plead guilty by mail and have a time period, such as 30 days, from the date of that guilty plea to contact the court and set up a payment plan over the phone with court staff. This would limit trips to court to those circumstances where a person needs a payment plan that court staff could not set up.

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[35] Advisory Comm. on Act 138, Joint State Gov't Comm'n, *The Truancy Process: The Challenge of Improving Attendance in Pennsylvania Schools 1,* 97 (2024), http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2024-04-09%20(Act138)%20Truancy%20Web% 204.9.24%20930am.pdf.

s. ELC Supports Maintaining the Requirement for Judges in Summary Cases to Consider the Defendant's Ability to Pay Discretionary Fines and Costs at Sentencing

While most fines and costs in summary traffic cases are "mandatory," most of the fines in summary criminal offenses such as truancy or disorderly conduct are discretionary. If courts consider ability to pay at sentencing, this would reduce the financial burden on Pennsylvanians who cannot afford to pay these fines and likewise reduce subsequent instances of default. Current law permits courts to reduce or waive costs at sentencing, per 42 Pa.C.S. 9721(c.1) and 9728(b.2) and their cross-references to Rule 706(C), as interpreted by both the Supreme Court and Superior Court in the *Lopez* case.[36] As those courts explained, courts *can* consider the defendant's ability to pay.

ELC supports the revised Rule 705.2(b) which explicitly prohibits a defendant from paying a fine, until a review of the defendant's statement of financial ability," and after determining both that the "defendant has the financial ability to pay" and "the fine will not prevent the defendant from making restitution."

The Rules should also provide 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 also supports this change. However, it must be more specific and direct MDJs to explain how the evidence was assessed to both incarcerate defendants for failure to pay and communicate how the court assessed the evidence to determine whether the defendant was able to pay. Additional instruction is badly needed to address this problem.

II. 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

[36] *Commonwealth v. Lopez*, 248 A.3d 589, 596 (Pa. Super. Ct. 2021) (en banc) (holding that the "trial court may also provide that a defendant shall not be liable for costs under Rule 706," and sentencing courts have "discretion to conduct such a hearing at sentencing" to reduce or waive costs); *Commonwealth v. Lopez*, 280 A.3d 887, 893 (Pa. 2022) (affirming that "its opinion should not be construed to strip the trial court of the discretion to conduct an ability-to-pay hearing at sentencing.").

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.

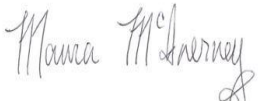
The rules should provide clear—and mandatory—guidance to MDJs whenever evaluating a defendant's ability to pay (Rules 454, 456, 470 and others). MDJs should not be left to guess about how to evaluate a defendant's finances and ability to pay, and they should not be required to do case law research. The 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.

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,



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