IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FLORENCE WALLACE ET AL., Plaintiffs, v. ROBERT J. POWELL ET AL., Defendants.	**CONSOLIDATED TO:** Civil Action No. 3:09-cv-0286 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM CONWAY ET AL., Plaintiffs, v. MICHAEL T. CONAHAN ET AL., Defendants.	Civil Action No. 3:09-cv-0291 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T. ET AL., Plaintiffs, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0357 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0630 (JUDGE CAPUTO)

CLASS PLAINTIFFS' BRIEF IN SUPPORT OF THEIR SECOND MOTION FOR LEAVE TO AMEND THE MASTER COMPLAINT FOR CLASS ACTIONS

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I. INTRODUCTION

On November 10, 2009, former Luzerne County District Attorney (and current Luzerne County Juvenile Court Judge) David Lupas and current Luzerne County District Attorney ("DA") Jacqueline Musto Carroll testified before the Interbranch Commission on Juvenile Justice (the "Commission") that the DA's Office did not train its assistant district attorneys ("ADAs") who appeared in juvenile court as to juvenile court rules, juvenile court procedures, or the special duties of a prosecutor.[1] In addition to admitting to this inexplicable failure to adequately train the ADAs, both Judge Lupas and DA Carroll testified that they provided essentially no supervision to these ADAs. At the Commission's hearings on December 7 and 8, 2009, Luzerne County ADAs Thomas Killino and Sam Sangueldolce affirmed their supervisors' testimony: they had not received training relevant to their duties in juvenile court and were essentially unsupervised with respect to juvenile court matters. ADA Killino further stated that he was told by his supervisors not to question Ciavarella's procedures and rulings. *See* Mark Guydish & Terri Morgan Besecker, *Testimony: Ciavarella's Ways Accepted,*

[1] Rule 3.8 of Pennsylvania's Rules of Professional Conduct provides, *inter alia*, that a prosecutor shall "make reasonable efforts to assure that the accused has been advised of the right to . . . obtain[] counsel," and "not seek to obtain from an unrepresented accused a waiver of important pretrial rights." A prosecutor has "the responsibility of a minister of justice" and has "specific obligations to see that the defendant is accorded procedural justice." *Id.* cmt. 1.

Times Leader, Dec. 8, 2009, attached to the proposed amended complaint as Exhibit "Q." The policy was generally to get a plea to the highest charge. *Id.* This testimony demonstrates how the failure to train or supervise left the ADAs ill-prepared to challenge or correct the unconstitutional practices of former Luzerne County judge (and defendant in this action) Mark A. Ciavarella ("Ciavarella"), and directly points to the DA's willful participation in the daily constitutional violations in Ciavarella's courtroom.

Plaintiffs in No. 09-0357 and No. 09-0291 ("Class Plaintiffs") were not previously aware of deficiencies in the training and supervision of the juvenile court ADAs, much less of the absence of *any* training relating to juvenile court matters and almost no supervision. In light of the Commission testimony, Class Plaintiffs request the Court's permission to amend the Master Complaint for Class Actions (the "Master Complaint") pursuant to Federal Rules of Civil Procedure 15(a) and 16(b) and M.D. Pa. Local Rule 15.1 to bring a new claim against Luzerne County, alleging that Luzerne County is liable for its DA's failure to adequately train and supervise the ADAs who appeared in juvenile court before Ciavarella from 2003 through May 31, 2008.

II. RELEVANT FACTUAL BACKGROUND

A. Procedural History

On June 25, 2009, Class Plaintiffs filed a Master Complaint, consolidating the factual allegations and claims in Nos. 09-0291 and 09-0357. (*See* Doc. No. 136.) The Master Complaint included a claim against Luzerne County for violation of Class Plaintiffs' due process rights based on the DA's and public defender's noncompliance with controlling United States Supreme Court case law, Pennsylvania statutory law, and Pennsylvania court rules. On July 27, 2009, Luzerne County filed a motion to dismiss all claims against it. (*See* Doc. Nos. 218 and 219.) On August 27, 2009, Class Plaintiffs filed a motion for leave to amend the Master Complaint ("First Motion to Amend") to, among other things, clarify their claim that Luzerne County had violated 42 U.S.C. § 1983, pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), because, as a matter of custom, practice, and policy, final County decision-makers acted with deliberate indifference to the constitutional rights of Class Plaintiffs "by participating in and sanctioning . . . illegitimate proceedings [in Ciavarella's courtroom]" in violation of federal and state law. (*See* Doc. No. 250, Ex. A, at ¶¶ 728, 818-29.)

Neither the Master Complaint nor the first proposed amended complaint contained a claim against Luzerne County based on the failure to adequately train or supervise ADAs. Counsel for Class Plaintiffs noted in their briefing supporting

the First Motion to Amend that they would seek further amendment if new information revealed a failure to provide adequate training. (*See* Doc. No. 311, at 26 n.15.)

Luzerne County opposed Class Plaintiffs' First Motion to Amend. In its opposition brief, in noting that Class Plaintiffs had not pled any failure by county policymakers to adequately train or supervise county employees, the County recognized that such a claim would be different than the claim then pled against the County. (*See* Doc. No. 297, at 23-24.)

On November 20, 2009, the Court denied Class Plaintiffs' First Motion to Amend. (*See* Doc. No. 335.) In its opinion, the Court discussed whether the DA is a county or state actor in a particular activity and ultimately concluded that under Pennsylvania law DAs have "a hybrid role." (*Id.* at 19-20, 22.) The Court did not question the gravity of the allegations in the first proposed amended complaint of the DA's deliberate indifference – namely, the ADAs' failure to intervene in the denial of basic constitutional rights in Ciavarella's courtroom. Rather, the Court held that, in the context of establishing a policy, custom, or practice of failing to intervene in the courtroom, the DA acted in the "state role of a prosecutor." (*Id.* at 22.) Therefore, the Court held: "I find that for the *specific conduct* alleged the district attorney was a state, not county, official." (*Id.* at 22-23 (emphasis added).) In doing so, the Court contrasted Class Plaintiffs' allegations against Luzerne

County with "allegations of a failure to manage a subordinate officer in an administrative capacity" and noted that Class Plaintiffs had not alleged such a failure to train and supervise. (*See id.* at 10, 22.)

In light of new evidence described below, Class Plaintiffs now bring this Second Motion for Leave to Amend the Master Complaint (the "Motion"). As explained below, good cause exists pursuant to Federal Rule of Civil Procedure 16(b) to modify this Court's scheduling order – setting a September 10, 2009 deadline for the filing of further amendments to the complaint (*See* Doc. No. 132) – and permit the proposed amendment.

B. The Interbranch Commission On Juvenile Justice

Reacting to the Luzerne County judicial scandal, the Pennsylvania General Assembly, with the Governor's endorsement, created the Interbranch Commission on August 7, 2009. *See* H.B. 1648, 193rd Gen. Assem., Reg. Sess. (Pa. 2009); Governor's Message (Pa. Aug. 7, 2009), attached as Exhibit "3." The Commission's purpose is to "investigate circumstances that led to corruption in the juvenile court of Luzerne County . . . [,] to restore public confidence in the administration of justice, and to prevent similar events from occurring there or elsewhere in the Commonwealth." *See* Interbranch Commission on Juvenile Justice website, http://www.courts.state.pa.us/Links/Public/InterbranchCommissionJuvenileJustice.htm, attached as Exhibit "4."

The Commission began a series of public hearings on October 14, 2009. Chairman Judge John M. Cleland explained that the Commission would investigate, *inter alia*, "the inaction of those who would have acted but did not have the tools needed to assess the information that might have been an early warning of the system's breakdown," including "prosecutors." IC Tr. at 3:19-20, 4:2-11 (Oct. 14, 2009).[2]

On November 9, 2009, the Commission heard sworn testimony from Judge Lupas and DA Carroll. Judge Lupas was the DA of Luzerne County from 2000 until 2008. IC Tr. at 9:8-9, 41:17-18, 58:18-21 (Nov. 10, 2009). DA Carroll was the first assistant DA from 2004 though 2008; DA Carroll succeeded Judge Lupas in 2008. (*Id.* at 86:1-5.) On December 7-8, 2009, the Commission heard sworn testimony from ADAs Killino and Sangueldolce.[3]

According to the testimony, the DA and first assistant DA were responsible for training and supervising the ADAs who appeared in juvenile court. Between 2003 and 2008, one or two ADAs were assigned to the juvenile docket. (IC Tr. at 11:15-20, 87:20-21 (Nov. 10, 2009).) They handled approximately 1,000 juvenile cases each year (*id.* at 25:22) and were present in each case before the court

[2] Citations to "IC Tr." are to transcripts of public hearings before the Commission. Cited excerpts are attached to the proposed amended complaint as Exhibit "H."

[3] Transcripts of the December 7 - 8, 2009 hearings are not yet available.

between 2003 and 2008 in which Class Plaintiffs' constitutional rights were violated. (*Id.* at 60:5-7.) DA Carroll recognized that the ADAs appearing in Ciavarella's courtroom were young and inexperienced. (*Id.* at 92:15-16, 92:19-23.) Nevertheless, neither the DA nor the first assistant DA ever appeared in juvenile court or observed juvenile court proceedings. (*Id.* at 15:20-21.) Neither reviewed the juvenile cases or the juvenile case files, (*id.* at 88:19, 89:13-15), nor conducted performance evaluations or reviews of the ADAs appearing in juvenile court. (*Id.* at 91:11-13, 91:25.)

Incredibly, the ADAs assigned to juvenile court received no training in juvenile court rules and procedures. When the Pennsylvania Supreme Court promulgated new Rules of Juvenile Court Procedure in 2005, including *specific rules regarding waiver of counsel and admission colloquies*, the ADAs received no training regarding these new rules (*id.* at 35:25-26, 36:1), despite the availability of low-cost training on the new Rules through the Pennsylvania District Attorneys' Association. Because they were not adequately trained, the ADAs failed to recognize and challenge the routine deprivation of Plaintiffs' constitutional rights by Ciavarella and considered the violations accepted by the DA's office.

The DA also failed to provide, directly or through other sources, any trainings regarding a prosecutor's special ethical duties to, *inter alia*, make reasonable efforts to ensure that a defendant is advised of his right to obtain

counsel, and to not seek a waiver of important pretrial rights from an unrepresented defendant. *See* Pa. R. Prof'l Conduct 3.8.

Based on the testimony summarized above, Plaintiffs now know that the ADAs who appeared in Ciavarella's courtroom were essentially unsupervised and untrained with regard to both juvenile court rules and procedures and the special duties of a prosecutor to ensure that the defendant is accorded procedural justice.

C. Class Plaintiffs' Proposed Amended Complaint[4]

Class Plaintiffs request leave to amend the Master Complaint to add a claim against Luzerne County reflecting the DA's failure to adequately train and supervise the ADAs appearing in juvenile court. Class Plaintiffs allege in Count IX (*see* PAC ¶¶ 810-821) that, from 2003 through May 31, 2008, the Luzerne County DA, acting in his administrative capacity on behalf of the County, failed to train the ADAs regarding juvenile court rules and procedure and their special duties as prosecutors, and failed to supervise the ADAs, despite the obvious risk that a lack of adequate training and supervision would result in violations of Class Plaintiffs' constitutional rights and despite the DA's knowledge that such violations were in fact occurring. The DA's failure to train or supervise was a

[4] Pursuant to M.D. Pa. Local Rule 15.1(b), the entire proposed amended Master Complaint, including exhibits, is attached as Exhibit "1"; a copy of the original Master Complaint in which stricken material has been lined through and new material has been inserted and underlined is attached as Exhibit "2."

conscious choice, evidencing deliberate indifference, and resulted in violations of Class Plaintiffs' due process rights.

III. LEGAL ARGUMENT

Federal Rule of Civil Procedure 15 provides, in pertinent part, that "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see also Forman v. Davis*, 371 U.S. 178, 182 (1963). "A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)(2)." James Wm. Moore, *Moore's Federal Practice* § 15.14[1] (3d ed. 2009). "In the absence of substantial or undue prejudice, denial . . . must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (citing *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the V.I., Inc.*, 663 F.2d 419, 425 (3d Cir. 1981)). "[U]nder Rule 15(a), the burden is on the party opposing the amendment to show" that these reasons to deny an amendment are present. *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 700 (E.D. Pa. 2007). There are no such reasons here.

Because the time for amendments in accordance with the Court's Case Management Order (Doc. No. 132) has passed, the Court, as a threshold matter, may evaluate Class Plaintiffs' request under Rule 16(b)'s "good cause" standard

for modifying a scheduling order. *See E. Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 340 (3d Cir. 2000). Because Class Plaintiffs have promptly sought to amend the Master Complaint after obtaining the above-described evidence, Class Plaintiffs meet the good cause standard.

A. Class Plaintiffs Have Good Cause To Amend At This Time

A showing of good cause to amend a complaint outside a set time "require[s] the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension." Charles A. Wright et al., *Federal Practice & Procedure* § 1522.1. "Good cause . . . exists when evidence supporting the proposed amendment would not have been discovered in the exercise of reasonable diligence until after the amendment deadline had passed." *DeWitt v. Hutchins*, 309 F.Supp.2d 743, 748 (M.D.N.C. 2004).

Because the testimony of Judge Lupas and DA Carroll and the ADAs was not taken until November 10, 2009, and December 7-8, 2009, the evidence underlying Class Plaintiffs' new claim against Luzerne County could not have been discovered in the exercise of reasonable diligence before the deadline. Class Plaintiffs have a "[c]lear and cognizable explanation why the proposed amendment was not included in the original pleading," *Chancellor*, 501 F. Supp. 2d at 702; good cause thus exists for modifying the Case Management Order to permit the amendment.

B. Class Plaintiffs' Proposed Amended Complaint Will Not Prejudice Defendants And Does Not Reflect Bad Faith, Dilatory Motives, Or Undue Delay

None of the reasons to deny an amendment under Rule 15(a) are present here. First, Luzerne County will not be prejudiced by the proposed amendment. The question of prejudice focuses on whether the amendment places an unfair burden on the opposing party. *Adams*, 739 F.2d at 868. This factor requires the Court to focus on the effect of the amendment on the defendant. *Id.*

To date, Luzerne County has neither filed an answer to the Master Complaint nor produced any documents. Neither a discovery deadline nor a trial date has been set in this matter. The County cannot credibly assert that it would be prejudiced by Class Plaintiffs' second proposed amendment.

Second, Class Plaintiffs have not delayed or acted in bad faith in moving to amend based on the November 10, 2009 and December 7-8, 2009 Commission testimony. Class Plaintiffs filed this Motion nine days after the most recent testimony was taken, "as soon as the necessity for altering the pleading bec[ame] apparent," 6 Charles A. Wright et al., *Federal Practice & Procedure* § 1488.

Class Plaintiffs stated in their reply brief in support of their First Motion to Amend that they lacked knowledge of the training practices of the DA's office (*see* Doc. No. 311, at 26 n.15); this demonstrates that Class Plaintiffs had previously contemplated this claim but had no factual basis to support it. Based on recent

testimony, Class Plaintiffs are timely pleading the new claim. *See Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982) (permitting a new negligent hiring and supervision amendment against a sheriff because the plaintiff "alleged that he had discovered new facts in between the filing of the second amended complaint and the proposed third amended complaint").[5]

C. Class Plaintiffs' Proposed Amendment Is Not Futile

The Third Circuit has squarely held that, under Pennsylvania law, a DA's training and supervision of ADAs is an administrative function in which the DA acts as a *county* official. *Carter v. City of Philadelphia*, 181 F.3d 339, 352-53 (3d Cir. 1999). The alleged facts in the proposed new claim, necessarily accepted at this point as true, "raise a reasonable expectation that discovery will reveal evidence of" the DA's failure to adequately train and supervise the ADAs who appeared before Ciavarella. *See Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).

1. Futility Standard

[5] Class Plaintiffs' proposed amendments also add factual allegations based on the criminal proceedings against defendants Ciavarella, Conahan, Mericle, and Powell, and based on the King's Bench proceedings in the Pennsylvania Supreme Court that have resulted in the Supreme Court's order that Class Plaintiffs' adjudications before Ciavarella be vacated and the related records be expunged. These proposed additions are simply updates, and the addition of these factual allegations does not prejudice any defendant.

"Amendment of the complaint is futile . . . if the amended complaint cannot withstand a renewed motion to dismiss." *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 292 (3d Cir. 1988). As this Court explained in resolving Class Plaintiffs' First Motion to Amend:

> Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. In light of Federal Rule of Civil Procedure 8(a)(2), the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"

(Doc. No. 335, at 8 (internal citations omitted).) Because Class Plaintiffs' amendment states a claim under § 1983 for failure to adequately train and supervise, the amendment is not futile.

2. In Failing To Adequately Train And Supervise The ADAs, The DA Acted In An Administrative Role And Thus Was A County Actor

In denying Class Plaintiffs' First Motion to Amend, the Court, referencing *Carter,* noted that "[u]nder Pennsylvania law, . . . district attorneys have a hybrid status and the alleged conduct must be considered in light of their role." (Doc. No. 335, at 20-21.) "[T]he status of the district attorney as a state or county official hinges on whether the actions alleged were prosecutorial or administrative in

nature." (*Id.* at 21.) The Court further recognized that for § 1983 purposes the determination is a matter of *state – i.e.*, Pennsylvania – law. (*Id.* at 19-20.)

The Court then concluded that Luzerne could not be liable for the DA's acceptance of unconstitutional admissions and waivers of counsel, finding that this practice "is made in the state role of a prosecutor." (*Id.* at 22.) The Court explicitly noted that there were "no allegations of a failure to manage a subordinate officer in an administrative capacity." (*Id.; see also id.* at 10) Class Plaintiffs' new claim is based on the DA's failure to adequately train and supervise the ADAs – the precise claim that this Court apparently contemplated would survive a motion to dismiss.

Even courts that have held that DAs are state actors in their prosecutorial functions have found them to be local actors in their training and supervisory capacities. Most compellingly, in *Carter*, where the Third Circuit reversed the dismissal of a claim against a DA's Office for failure to train and supervise, 181 F.3d at 343, the Court explained that "[t]he District Court mischaracterized the basis of Carter's claim as a prosecutorial function and declined to distinguish the Philadelphia DA's training/supervision/administrative activities from its core state function of prosecution." *Id.* at 351. The Court held that the plaintiff's § 1983 claim against employees of the DA's office in their official capacities "was premised on their failure as administrators to establish training, supervision and

discipline policies" that would have ultimately prevented the introduction of perjurious eyewitness testimony into evidence. *Id.* at 343. Analyzing the "status of the DA's [o]ffice under state law," the Third Circuit concluded that "the function complained of is . . . administrative: it involves local policies relating to training, supervision and discipline, rather than decisions about whether and how to prosecute violations of state law." *Id.* at 353. "Therefore, even if a member of the Philadelphia DA's Office were deemed a state actor with respect to prosecutorial functions, she would nevertheless be a local policymaker with respect to the conduct at issue here." *Id.* [6]

The *Carter* court relied on the Second Circuit's reasoning in *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), in which the Court evaluated a § 1983 *Monell* claim against New York City based on "the district attorney's management of the office – in particular the decision not to supervise or train ADAs on Brady and perjury issues." *Id.* at 301. It reversed the district court's grant of the City's

[6] The decision of the United States Supreme Court in *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862 (2009), is not to the contrary. In *Van de Kamp*, the Court held that (a) individual prosecutors have absolute immunity, (b) under federal law, (c) for failing to train and supervise when that training and supervision requires legal knowledge and the exercise of discretion. *Id.* at 862. In stark contrast, the instant case involves (a) the question of the liability of a municipality – not an individual – under § 1983 and *Monell*, not an issue of absolute immunity, (b) the prosecutorial/administrative distinction under state – not federal – law, and (c) a failure to supervise and train as to conduct so fundamental – the right to counsel and to a guilty plea colloquy – that no discretion is involved.

motion to dismiss, holding that "where the district attorney acts as the manager of the district attorney's office, the district attorney acts as a county policymaker." *Id. See also Williams v. Fedor*, 69 F. Supp. 2d 649, 663 (M.D. Pa. 1999) (district court for Middle District of Pennsylvania relied on *Carter* in denying plaintiff's motion to dismiss a claim against a county based on DA's failure to train and supervise his subordinates; "a failure to train/supervise claim can be asserted against a county based upon a district attorney's management of his or her office").

As in *Carter*, *Walker* and *Williams,* "[r]eading the [Master] Complaint in the light most favorable to [Class Plaintiffs], it appears that the function complained of here is not prosecutorial, but administrative: it involves local policies relating to training [and] supervision . . . rather than decisions about whether and how to prosecute violations of state law." *Carter,* 181 F.3d at 353. Therefore, the DA is a "local policymaker with respect to the conduct at issue here." *Id.*

3. Plaintiffs' Second Proposed Amended Master Complaint States A Claim Under § 1983 Based On The DA's Failure To Adequately Train And Supervise The ADAs

Liability under §1983 may be based on a municipal custom, policy, or practice of failure to train or supervise municipal employees, where the failure "amounts to deliberate indifference to the rights of persons with whom the [subordinates] come into contact," *City of Canton v. Harris*, 489 U.S. 378, 387-88

(1989), and a "'deliberate choice to follow a course of action . . . made from among various alternatives.'" *Id.* at 389 (quoting *Pembauer v City of Cincinnati,* 475 U.S. 469 (1986)); *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997); *see also Christopher v. Nestlerode*, 240 F. App'x 481, 489 n.6 (3d Cir. 2007) (the same "deliberate indifference" standard applies to claims of both failure to train and failure to supervise).

Deliberate indifference is found where, "in light of the duties assigned to specific . . . employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights." *City of Canton*, 489 U.S. at 390. The Supreme Court has further explained:

> in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip . . . officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference' to the obvious consequence of the policymakers' choice – namely, a violation of a specific constitutional or statutory right."

Bd. of Comm'rs of Bryan County v. Brown, 520 U.S. 397, 409 (1997).

Class Plaintiffs have alleged a complete lack of training of ADAs appearing in juvenile court as to juvenile court rules, juvenile court procedure, and the special duties of a prosecutor, as well as a stunning lack of supervision of these same

ADAs. (PAC ¶¶ 707-09.) The ADAs in juvenile court were recent law school graduates with no prior juvenile court experience. (*Id.*) They were not trained in juvenile court rules or procedures, either before or after the new Rules of Juvenile Court Procedure were promulgated in 2005, even though trainings were available. (*Id.* ¶ 708.) Nor were they trained in the special obligation of prosecutors to ensure procedural justice, either before or after the 2001 reversal of Ciavarella by the Superior Court of Pennsylvania due to an improper waiver of counsel, *see In re A.M.*, 766 A.2d 1263, 1264-65 (Pa. Super. Ct. 2001). (*Id.* ¶ 709.) Their supervisors neither observed them in court nor reviewed case files or transcripts of proceedings. (*Id.* ¶ 707.) Given these facts, the violations of Class Plaintiffs' constitutional rights were "a highly predictable consequence of [the] failure to equip . . . [the ADAs] with specific tools to handle recurring situations," such as the systemic violations at issue here. *See Bryan County*, 520 U.S. at 409.

As to the constitutional rights of juveniles appearing in juvenile court, and especially the juveniles' right to counsel, "the wrong choice by an employee will frequently cause deprivation of constitutional rights." *Carter*, 181 F.3d at 357. With supervision and training, it would have been readily apparent that constitutional violations were widespread and recurring in Ciavarella's courtroom. Only because of the DA's deliberate failure to supervise the ADAs appearing in juvenile court, despite the obvious need for such supervision and the profound

consequences for Class Plaintiffs in its absence, could the DA even dare to deny – we believe falsely – that he was unaware of the consequences of his failure to train, consequences that continued for five years and affected thousands of children.

Class Plaintiffs have alleged on information and belief that the DA and first assistant DA knew about the constitutional violations occurring in Ciavarella's courtroom. (PAC ¶ 706.) At least one ADA stated that the constitutionally deficient practices were generally accepted by the District Attorney's Office, and he was told by his supervisors not to question Ciavarella's procedures and rulings. (*Id.*) Moreover, the DA was aware of a 2001 case in which Ciavarella's adjudication was reversed on appeal because the child was not represented by counsel, *see In re A.M.*, 766 A.2d 1263, 1264-65 (Pa. Super. Ct. 2001), as well as a 2007 habeas petition Ciavarella granted after Ciavarella's violations of the youth's constitutional rights were challenged before him. (*Id.*) These reversals, together with the thousands of other violations of youths' constitutional rights that routinely occurred in the presence of ADAs between 2003 and 2008,[7] were a clarion call to the DA as to the need for additional training and supervision, a call that the DA

[7] In light of (a) the small size of Luzerne County and the DA's office, (b) the huge number of constitutional violations, (c) the five-year period over which they occurred, (d) the fact that ADAs were specifically instructed not to challenge Ciavarella, and (e) Ciavarella's general "zero tolerance" reputation, the DA's claim that he was unaware of ongoing violations in Ciavarella's courtroom is simply not credible. Even if the DA were unaware of the violations, that lack of awareness would have been created by his conscious lack of supervision.

consciously ignored. Moreover, the supervisor's "knowledge of a prior pattern of similar incidents," and "the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate[s]," *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997) (quoting *Freedman v. City of Allentown*, 853 F.2d 1111, 1117 (3d Cir. 1988)), thus also demonstrating the DA's deliberate indifference to the rights of the juveniles appearing before Ciavarella.

Liability also requires an ultimate showing that "the identified deficiency in a city's training program [is] closely related to the ultimate injury"; *i.e.*, "that the deficiency in training actually caused" the injury. *City of Canton*, 489 U.S. at 391. This causation question is left to the factfinder. *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004).[8] Taking Class Plaintiffs' allegations as true, a reasonable jury could find that the training and supervision deficiencies were "closely related to the ultimate injury." *City of Canton*, 489 U.S. at 391. Adequately trained and supervised ADAs would have objected and prevented the constitutional violations that occurred in Ciavarella's courtroom – just as they were able to do in adult criminal cases. (*See* PAC ¶ 710.)

[8] "Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task *for the factfinder*, particularly since matters of judgment are involved." *City of Canton*, 489 U.S. at 391 (emphasis added).

The DA exhibited deliberate indifference to a need for training when "in light of the duties assigned to [the ADAs appearing in juvenile court] the need for more . . . training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights." *City of Canton*, 489 U.S. at 390. Taking all the well-pleaded facts as true and viewing them in the light most favorable to Class Plaintiffs, the motion to amend must be granted.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Class Plaintiffs' Second Motion for Leave to Amend.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T. ET AL., Plaintiffs, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0357 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0630 (JUDGE CAPUTO)

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

I, Lourdes M. Rosado, hereby certify, pursuant to Local Rule 7.8(b)(2), that the foregoing brief complies with the word-count limit described in Local Rule 7.8(b)(2). Relying on the word-count feature of Microsoft Word, the text of the brief contains 4,988 words.

Dated: December 7, 2009 /s/ Lourdes M. Rosado

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FLORENCE WALLACE ET AL., Plaintiffs, v. ROBERT J. POWELL ET AL., Defendants.	**CONSOLIDATED TO:** Civil Action No. 3:09-cv-0286 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM CONWAY ET AL., Plaintiffs, v. MICHAEL T. CONAHAN ET AL., Defendants.	Civil Action No. 3:09-cv-0291 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T. ET AL., Plaintiffs, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0357 (JUDGE CAPUTO)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK, Plaintiff, v. MARK A. CIAVARELLA, JR. ET AL., Defendants.	Civil Action No. 3:09-cv-0630 (JUDGE CAPUTO)

CERTIFICATE OF NON-CONCURRENCE

I, Lourdes M. Rosado, hereby certify, pursuant to Local Rule 7.1, that counsel for Class Plaintiffs sought concurrence in Class Plaintiffs' Second Motion for Leave to Amend the Master Complaint for Class Actions from counsel for Luzerne County, and that counsel for Luzerne County stated that he did not concur in Class Plaintiffs' Motion.

Dated: December 7, 2009 /s/ Lourdes M. Rosado

CERTIFICATE OF SERVICE

I, Lourdes M. Rosado, hereby certify that, on this 17th day of December, 2009, Class Plaintiffs' Second Motion for Leave to Amend the Master Complaint for Class Actions was filed and made available via CM/ECF to all counsel of record. Additionally, the foregoing motion was served by first class mail upon the following:

Mark Ciavarella
585 Rutter Avenue
Kingston, PA 18704

Michael T. Conahan
301 Deer Run Drive
Mountaintop, PA 18707

/s/ Lourdes M. Rosado