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

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

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

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

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

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

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

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I. INTRODUCTION

In its brief, Luzerne County ("Luzerne" or "the County") asks the Court to conflate two well-settled and distinct doctrines. Luzerne asks the Court to ignore cases decided under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), *McMillian v. Monroe County*, 520 U.S. 781 (1997), and the Eleventh Amendment – which apply state law to determine the status of governmental officials – and, instead, to look solely to *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), which applies the federal common law of prosecutorial immunity and is, in fact, inapplicable here.

Relying on law that is applicable, Class Plaintiffs have properly stated a claim based on Luzerne's complete failure to train and supervise its assistant district attorneys ("ADAs") appearing in juvenile court. Class Plaintiffs are not required at this stage to "establish" (Def. Luzerne County's Mem. of Law in Supp. of Its Resp. to Pls.' Second Mot. for Leave to Amend the Master Compl. for Class Actions 20 (Doc. No. 400, "Def.'s Br.")) elements of their claim such as causation; as explained below, all elements are sufficiently pled. Class Plaintiffs' Motion should be granted.

II. ARGUMENT

A. The Luzerne DA Acted As A County Policymaker In Failing To Train And Supervise ADAs

Under Pennsylvania law, the Luzerne District Attorney ("DA") acted as a *county* official in failing to train and supervise the ADAs appearing in Luzerne's juvenile court. In *McMillian*, 520 U.S. at 786, the Supreme Court held that state law determines whether an actor has final policymaking authority for a municipality. Similarly, under *Monell* and the instructive Eleventh Amendment factors, courts look to state law to determine an entity's status. Under *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999), the Third Circuit's most relevant opinion, it is clear that the Luzerne DA acted as a county policymaker in failing to train and supervise the ADAs.

1. *Van De Kamp* Does Not Change Pennsylvania Law That DAs Act On Behalf Of The County When They Train And Supervise ADAs

In *Van de Kamp*, 129 S. Ct. at 864-65, the Court held that a DA was entitled to absolute prosecutorial immunity for his failure to train and supervise. This holding does not disrupt Third Circuit law that, under *Monell* and *McMillian*, Pennsylvania DAs act as county policymakers when engaged in training and supervision.

Prosecutors are entitled to absolute immunity for "actions that are 'intimately associated with the judicial phase of the criminal process.'" *Id.* at 860

(quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). In extending prosecutorial immunity to § 1983 suits, the Supreme Court "[r]el[ied] in part on common-law precedent, and perhaps even more importantly on the policy considerations underlying that precedent." *Kalina v. Fletcher*, 522 U.S. 118, 123-24 (1997). Expressly acknowledging that the acts at issue in *Van de Kamp* involved general methods of supervision and training, not prosecutorial decisions in individual cases, the Court "[did] not agree that that difference is critical *for present purposes*." 129 S. Ct. at 862 (emphasis added).[1] In finding immunity, the Court relied on *Imbler's* policy concerns that stripping DAs of prosecutorial immunity for failure to train would allow the fear of litigation to color these decisions and expose even innocent DAs to a substantial risk of liability. *Id.* at 863-64. Importantly, the Court's analysis involved no examination of any state's law. *See id.*

Van de Kamp's analysis is hardly relevant here**.** While this Court noted that prosecutorial immunity and §1983 liability under *McMillian* use "a parallel dichotomy between prosecutorial and administrative acts" (Mem. & Order, Doc. No. 335, at 22 n.6 (Nov. 20, 2009) ("Amend. Mem.")), other courts have explained that, "however helpful [prosecutorial immunity] jurisprudence may be, it is not

[1] Significantly, the Court left unanswered whether the difference is critical for purposes other than the prosecutorial immunity analysis.

dispositive" in a *McMillian* analysis. *See Goldstein v. City of Long Beach*, No. 04-9692, 2009 U.S. Dist. LEXIS 87682, *8 (C.D. Cal. Sept. 23, 2009). Therefore, while *Van de Kamp* appears to blur the line between administrative and prosecutorial acts by providing absolute immunity for a claim based on "the office's administrative procedures," 129 S. Ct. at 861, that distinction remains vital for the purposes of determining municipal liability under *Monell* and *McMillian*.

First, *Van de Kamp* applied federal common law principles without regard to state law. *See Goldstein*, 2009 U.S. Dist. LEXIS 87682, *7 ("[*Van de Kamp*] did not examine [state] law. It was based solely on common law precedents and policy implications relating to prosecutorial immunity."). In contrast, to decide whether the specific conduct at issue here is properly attributable to the state or the county, the Court, under *McMillian*, must examine state law. 520 U.S. at 786. Having failed to consider state law, *Van de Kamp* cannot dispositively answer the question of whether Pennsylvania DAs act on behalf of the county or the state when they train and supervise.

Second, the policy considerations supporting municipal liability under *Monell* are wholly distinguishable from those applicable to prosecutorial immunity considerations. "The concerns that justif[y] . . . decisions [conferring immunity on government officials] . . . are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." *Owen v. City of Independence*, 445

U.S. 622, 653 (1980). While prosecutorial immunity protects individual officials, municipal liability protects completely distinct interests: compensating victims, spreading the loss resulting from constitutional wrongs, deterring future abuses, creating incentives for officials to err on the side of protecting citizens' rights, and encouraging policymakers to "institute internal rules and programs designed to minimize the likelihood of unintentional infringements." *Id.* at 651-56. This Court previously rejected Luzerne's argument that, because "relevant actors . . . may be entitled to immunity, so too should the county be immune." (Mem. & Order, Doc. No. 336, at 23 (Nov. 20, 2009).)

Post-*Van de Kamp* cases have confirmed that prosecutorial immunity and municipal liability for prosecutorial conduct require separate analyses. Indeed, after the plaintiff's claims against individual prosecutors were dismissed in *Van de Kamp*, claims against the county, based upon the DA's failure to train and supervise, remained. *See Goldstein*, 2009 U.S. Dist. LEXIS 87682, at *5, 7. On remand, the district court rejected the county's reasoning that "because the Supreme Court found that [supervision and training] were prosecutorial, under California law, the District Attorney was acting on behalf of the State, not the County." *Id*. at *7. The court looked to *McMillian* to determine whether, under

California law, the DA acted for the county or the state as to the specific conduct in question. *Id.* at *25-30.[2]

Moreover, in *Burrell v. Adkins*, No. 01-2679-M, 2007 WL 4699169, at *4, 10 (W.D. La. Oct. 23, 2007), the magistrate judge found, before *Van de Kamp*, that the plaintiff could maintain a *Monell* action based on the local DA's policies because, under Louisiana law, a DA is a local official.[3] After *Van de Kamp*, in denying a motion for reconsideration, the court, as in *Goldstein*, held that "[*Van de Kamp*] is a unanimous reaffirmation only of the principle that individual prosecutors enjoy absolute immunity from § 1983 actions against them in their individual capacities." *Burrell v. Adkins*, No. 01-2679, 2009 WL 365662, at *1 (W.D. La. Feb. 13, 2009). Having previously dismissed the individual capacity claims against the DAs, *id.*, the court declined to apply *Van de Kamp* to the remaining *Monell* claims.

Accordingly, for the purposes of this Motion, this Court must look to Pennsylvania law – not *Van de Kamp* – and find under *Carter* (*see, infra,* Part

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[2] The Court "reluctantly" concluded that, under California law, the DA was acting as a state officer, but it indicated that, based on conflicting California laws, it would be inclined to certify the question for review by the Ninth Circuit. *Id.* at *31-39.

[3] The district court subsequently denied, in part, the defendant's motion for summary judgment as to the § 1983 claim based on the DA's failure to train. *Burrell v. Adkins*, No. 01-2679, 2008 WL 6930189, at *1 (W.D. La. Jan. 10, 2008).

II.A.2-3) that Luzerne DAs act on behalf of the county when sued for failure to train and supervise. 181 F.3d at 353.[4]

2. Applying Pennsylvania Law And Eleventh Amendment Factors, The *Monell* Issue Should Be Resolved In Class Plaintiffs' Favor

Eleventh Amendment jurisprudence is central to the *Monell* analysis. "The limitations that define the boundaries of the holdings in *Monell* and *Will* [*v. Michigan Department of State Police*, 491 U.S. 58 (1989),] establish that the most important inquiry in determining whether a governmental entity is a 'person' within the meaning of § 1983 is whether the entity is an '"arm[] of the State" for Eleventh Amendment purposes.'" *Indep. Enters. Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1173 (3d Cir. 1997) (citing *Will*, 491 U.S. at 70; *Monell*, 436 U.S. at 690 n.54).

In determining whether a governmental entity is an arm of the state under the Eleventh Amendment, the Third Circuit considers "(1) the source of the money that would pay for the judgment; (2) the status of the entity under state law; and (3) the entity's degree of autonomy." *Haybarger v. Lawrence County Adult Probation*

[4] Taking Luzerne's argument to its logical conclusion would effectively preclude future *Monell* claims against DAs and prosecutors for their failure to train and supervise, regardless of their status as county or state employees under state law. Given the Supreme Court's silence on this question, this is an untenable interpretation of *Van de Kamp*. Wholesale evisceration of claims under our civil rights laws must be express, not wished for or imagined.

& Parole, 551 F.3d 193, 198 (3d Cir. 2008). The Third Circuit has "repeatedly held" that "the most important factor in determining whether an entity is an 'arm of the State' for purposes of the Eleventh Amendment is 'whether any judgment would be paid from the state treasury.'" *Indep. Enters. Inc.*, 103 F.3d at 1173 (citing *Fitchik v. N.J. Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)).

On this issue, Luzerne's reliance on *Hyatt v. County of Passaic*, 340 F. App'x 833 (3d Cir. 2009) (Def.'s Br. 17), rather than on *Carter,* is completely misplaced. *Hyatt* dealt with the question of whether, under *New Jersey* law, in a § 1983 action against the Passaic County (New Jersey) Prosecutor's Office and its officials ("PCPO"), among others, Eleventh Amendment immunity barred claims based on PCPO's "procedures, policy, and training regarding sexually abused child witnesses." *Id.* at 836-37.

As to the first factor, the *Hyatt* court concluded that "the State [of New Jersey] would be liable for any judgment." *Id.* at 837. With respect to this "most important" factor, *Fitchik*, 873 F.2d at 659, *Carter*, applying Pennsylvania law, concluded that "*no* portion of the DA's funds are provided by the state and *no* portion of any judgment will be paid directly or indirectly by the state." 181 F.3d at 348.

Considering the second factor, the *Hyatt* court explained that, "[u]nder *New Jersey* law, when county prosecutors and their subordinates perform law enforcement and prosecutorial functions, 'they act as agents of the State.'" 340 F. App'x at 836 (emphasis added). The court cited *Van de Kamp* for its view that PCPO's training decisions related to PCPO's prosecutorial function – apparently because that statement is consistent with New Jersey law relating to the status of PCPO. *Id.* at 836-37. However, in citing *Van de Kamp*, the Third Circuit did not – and could not – overrule established case law requiring courts to look to state law to determine the status of a public entity under the Eleventh Amendment or *Monell*. Thus, while the federal law cited in *Van de Kamp* may be consistent with New Jersey law, it is neither consistent with Pennsylvania law nor, for the reasons set out in Part II.A.1, *supra,* controlling. "Pennsylvania case law makes it clear that performance of an essential sovereign function [such as prosecution] on behalf of or in the name of the state does not give rise to state surrogate status under state law." *Carter*, 181 F.3d at 351.

Finally, the *Hyatt* court concluded, again on the basis of *New Jersey* law, that PCPO "remains at all times subject to the supervision and supersession power of the Attorney General when performing its prosecutorial function and is not autonomous from the State." 340 F. App'x at 837. In contrast, *Carter* found that

Pennsylvania "consciously and deliberately designed [an] autonomous role for its district attorneys." 181 F.3d at 353.[5]

3. Under Pennsylvania Law, The Luzerne County DA Acted As A County Policymaker In Failing To Train And Supervise The ADAs

In determining whether Pennsylvania DAs act as county policymakers when they train and supervise, *Carter* extensively analyzed Pennsylvania law, including the state constitution, statutes, and precedent. 181 F.3d at 348-51.[6] The court found that "the function complained of here is not prosecutorial, but administrative: it involves local policies relating to training, supervision and discipline, rather than decisions about whether and how to prosecute violations of

[5] "In Pennsylvania, the Attorney General . . . is without authority to replace a district attorney (who must be impeached, like other locally elected officials) and in Pennsylvania, unlike many other jurisdictions, the AG has no inherent authority to supersede a district attorney's decisions generally." *Id.*

[6] Luzerne wrongly claims that *Carter* is not on point because it concerns a DA's training and supervision of police officers, not ADAs. *Carter* held that the state's powers over the DA's office "clearly do not extend to control over the district attorney's office administration . . . over training, supervision and discipline of *assistant district attorneys* and police officers." *Id.* at 354 (emphasis added). Luzerne's citation of *Burns v. Reed,* 500 U.S. 478 (1991), is also inapposite; *Carter*'s discussion of *Burns* related to prosecutorial immunity, not county liability. *See Carter*, 181 F.3d at 355-56.

state law." *Id.* at 353. It therefore held that a Pennsylvania DA is a local policymaker with respect to training and supervision. *Id.*[7]

Similarly, in *Williams v. Fedor*, 69 F. Supp. 2d 649, 663 (M.D. Pa. 1999), the court noted, following *Carter*, that "when the focus of the plaintiffs [sic] civil rights claims are on the administration of the district attorney's office, the district attorney is regarded as an official of the county." Therefore, "the county may be held liable where the facts establish a failure to train or supervise that evidences a deliberate indifference to the rights of the plaintiff." *Id.*[8] Likewise, here, this

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[7] Luzerne's contention that training and supervision cannot be a county function because the Pennsylvania Supreme Court is the "*exclusive* source of training, supervision, and discipline of Pennsylvania attorneys" (Def.'s Br. 29 (emphasis added)) is meritless. The Pennsylvania Supreme Court's role in ensuring Pennsylvania attorneys are generally competent (*i.e.*, by establishing criteria for admission to the state bar) hardly means that the Court is responsible for the specialized training, supervision, and discipline of every attorney practicing in Pennsylvania. The Third Circuit has held that the powers of the legislature *and courts* over a DA's office "clearly do not extend to the district attorney's office administration in general, or over training, supervision and discipline of assistant district attorneys and police officers in particular." *Carter*, 181 F.3d at 354. According to DA Carroll's testimony, the DA and First Assistant DA, not the Supreme Court, had the authority to send ADAs to specific, relevant trainings (IC Tr. at 93:9-22 (Nov. 10, 2009), attached as Ex. H to Class Plaintiffs' Second Proposed Amended Complaint ("PAC")).

[8] Luzerne wrongly asserts that Class Plaintiffs have "grossly mis-cite[d]" *Williams*. (Def.'s Br. 14 n.5.) In a previous order, the *Williams* court denied the county's motion to dismiss the plaintiff's § 1983 claim alleging a DA's failure to train and supervise, *Williams*, 69 F. Supp. 2d at 663, allowing the failure to train and supervise claim against the county to proceed. Later, at summary judgment, the court held that the "facts of record defeat" the claim – *i.e.*, the plaintiff had not

(continued...)

Court found that in Pennsylvania, "the status of the district attorney as a state or county official hinges on whether the actions alleged were prosecutorial or administrative in nature." (Amend. Mem. 21.) The Court explicitly noted that in *Carter* "[t]he district attorney was found to be a *county* official in completing this administrative task," *i.e.*, failing to train and supervise. (*Id*. (emphasis added).) For the reasons set forth in Class Plaintiffs' initial brief and here, the Court should follow *Carter* and conclude that the Luzerne DA, in failing to train and supervise the ADAs, acted as a final county policymaker.

B. Class Plaintiffs Have Sufficiently Pled That The Luzerne DA's Failure To Train And Supervise ADAs Reflected Deliberate Indifference To Class Plaintiffs' Rights And Resulted In The Ultimate Injury To Class Plaintiffs

Luzerne erroneously argues that the DA cannot be held responsible for the constitutional violations in Ciavarella's courtroom because the ADAs were mere onlookers to Ciavarella's malfeasance and did not directly cause harm to Plaintiffs. (Def.'s Br. Part IV.D.1.) Supreme Court and Third Circuit case law hold to the contrary.

A municipality can be held liable for failing to train employees if the "deficiency in training actually caused the [employees'] indifference to [plaintiff's

(continued...)

produced sufficient evidence that the prosecutor acted with deliberate indifference. *Id.* at 663-65.

constitutional rights]"; in other words, if the "identified deficiency in [the] city's training program [was] closely related to the ultimate injury." *Canton v. Harris*, 489 U.S. 378, 391 (1989); *see also Groman v. Twp. of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995) (holding that municipality may be liable under § 1983 for failure to supervise employees if failure reflects policy of deliberate indifference to citizens' constitutional rights). To assess whether a municipality's failure to train rises to a constitutional breach, the jury must determine if, "in light of the duties assigned to" specific officers or employees, "'the need for more or different training [was] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city [could] reasonably be said to have been deliberately indifferent to the need.'" *Simmons v. Phila.*, 947 F.2d 1042, 1069 (3d Cir. 1991) (quoting *Canton*, 489 U.S. at 390). This Supreme Court and Third Circuit jurisprudence establishes that Class Plaintiffs have stated a failure to train claim by alleging that the deficiency in the DA's training and supervision caused ADAs in the courtroom to be indifferent to the youths' constitutional rights and that such deficiency was closely related to the youths' ultimate injury – their adjudication in violation of their constitutional rights. *See Canton*, 489 U.S. at 391.

Plaintiffs also have sufficiently pled deliberate indifference. The ADAs assigned to Ciavarella's courtroom had a primary duty to prosecute the cases there.

In light of that duty, the need for training on the constitutional prerequisites of a valid delinquency adjudication or guilty plea was so obvious, and the complete lack of training by the DA was so likely to result in the violation of Class Plaintiffs' constitutional rights, that allegations that the DA was "deliberately indifferent" to Plaintiffs' needs cannot be dismissed at the pleading stage. *See Simmons*, 947 F.2d at 1069 (citing *Canton*, 489 U.S. at 390). Indeed, the Interbranch Commission on Juvenile Justice ("Commission") testimony of the former and current DA, as well as ADAs who served in Ciavarella's court, provide a credible basis for Class Plaintiffs' claim that the DA "acquiesced in a longstanding practice or custom of providing no training in this area." *Simmons*, 947 F.2d at 1064.[9]

It is important, too, that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the

[9] Excerpts of DA Carroll's and former DA Lupas's Commission testimony are attached as Exhibit "H" to the PAC. *See also* IC Tr. at 100:2-5, 100:24-25, 101:1-2-116:16-25, 117:1-3, 120:13-18, 125:14-20, 166:6-20, 169:21-25 (Dec. 7, 2009) (testimony of former ADA Tom Killino); IC Tr. at 197:24-25, 198:4-12, 198:23-199:17, 211:1-14, 212:22-213:2, 219:1-14, 226:2-24, 233:18-234:18 (Dec. 8, 2009) (testimony of former ADA Sam Sangueldolce), attached hereto as Exhibits "A" and "B," respectively.

plaintiff's injury." *Bryan County v. Brown*, 520 U.S. 397, 407-408 (1997). Just such a pattern existed here. In the related King's Bench proceedings before the Pennsylvania Supreme Court, Special Master Grim found that, between 2003 and 2008, approximately 1,866 youth appeared without counsel before Ciavarella; in none of the hearing transcripts he reviewed did Ciavarella or anyone else in the courtroom ask the juvenile if she knew she had a right to counsel or if she wished to be represented by counsel; clear and convincing evidence existed that no juvenile who appeared without counsel during this period knowingly and intelligently waived his/her right to counsel. *In re: Expungement of Juvenile Records & Vacatur of Luzerne County Juv. Court Consent Decrees or Adjudications from 2003-2008*, No. 81 MM 2008, Third Interim Report & Recommendations of the Special Master ¶¶ 30-32 (Pa. Aug. 12, 2009). The ADAs acquiesced and participated in these unconstitutional practices for more than five years.

Because questions of causation in failure to train cases are typically left to the factfinder, *Canton*, 489 U.S. at 391, they plainly should not be subject to dismissal at the pleading stage. Similarly, whether (1) the reversals of Ciavarella's adjudications because of violations of youths' constitutional rights cited by Class

Plaintiffs,[10] or (2) the 2005 promulgation of juvenile court rules by the Pennsylvania Supreme Court (*see* Pls.' Br. Part III.C.3), put the DA on notice of the need for more or different training of its employees are also fact questions inappropriate for dismissal without even an opportunity for discovery. *See Simmons*, 947 F.2d at 1074 (holding it is a "close evidentiary question" whether small number of suicides relative to large number of intoxicated persons in city lockups made need for more training obvious to city policymakers).[11]

Relying on its bald assertion that the DA and ADAs could do nothing to stop Ciavarella, Luzerne asserts that Class Plaintiffs could never sustain their burden of demonstrating that the DA's failure to train and supervise constituted deliberate indifference to Class Plaintiffs' constitutional rights or establishing the causal link

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[10] Luzerne incorrectly asserts that Plaintiffs' counsel misrepresented the facts of *In re A.M.*, 766 A.2d 1263 (Pa. Super. Ct. 2001), and that A.M. was represented by counsel in his delinquency case. (Def.'s Br. 4 n.3.) The record filed with the Superior Court in A.M.'s appeal, which includes the transcripts of A.M.'s adjudicatory and disposition hearings, conclusively shows that no attorney entered an appearance on A.M.'s behalf, nor did any attorney appear or speak on A.M.'s behalf at either hearing.

[11] *See also Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996) (reversing grant of summary judgment in favor of city and officers; remanding to consider, *e.g.,* whether training was adequate and whether city was deliberately indifferent to training deficiency); *Decker v. Borough of Hughestown*, No. 09-1463, 2009 WL 4406142, at *1, 4 (M.D. Pa. Nov. 25, 2009) (denying borough's motion to dismiss plaintiff's claim that borough failed to train police officers on citing citizens for disorderly conduct within the bounds of the First Amendment, where plaintiff alleged a causal nexus between failure to train, patrolman's issuance of citation, and retaliatory acts against plaintiff by public).

to Class Plaintiff's ultimate harm. (Def.'s Br. Parts IV.D.1 and 2.) In support, Luzerne improperly cites to inapposite passages in this Court's Memorandum denying the first motion for leave to amend. What Luzerne omits, however, is the fact that the Court specifically found that Plaintiffs had *not* at that time pled a failure to train. (Amend. Mem. 10.) This Court determined which individuals or entities had final policy-making authority for the County with respect to the *non-training claims* asserted by Plaintiffs and concluded only that the DA was acting as a state official and, therefore, was not a final policy-maker for Luzerne County with respect to these *non-training claims*. (*Id.* at 11-23; *see also id.* at 22 (noting that the key question is "'whether governmental officials are final policymakers for the local government in a *particular area*, or on a particular issue'" (quoting *McMillan*, 520 U.S. at 785)).) This Court ultimately concluded that any liability for the *non-training claims* asserted by Plaintiffs must be based on actions taken by the county commissioners. (*Id.* at 24.) The subsequent passages in this Court's opinion that Luzerne inappropriately cites in Parts IV.D.1 and 2 of its brief – that Ciavarella was a state employee over whom Luzerne had no control or responsibility, and therefore that Luzerne cannot be held liable for the harm that he caused – refer exclusively to the county commissioners' powers with respect to the

non-training claims, specifically the commissioners' powers *vis-à-vis* Ciavarella's actions. (*Id.* at 28-29).[12]

In contrast to the county commissioners, the ADAs could have (and should have) taken steps to halt Ciavarella's unconstitutional practices. Those include, *inter alia*, objecting on the record to his practices, refusing to proceed with prosecutions without counsel for the juvenile, refusing to accept guilty pleas without counsel for the juvenile and proper colloquies, and filing formal complaints with the Judicial Conduct Board.[13] But in the absence of any training or supervision by the DA and First Assistant DA, the ADAs may not have known that they could or should have taken such actions. Class Plaintiffs should be allowed to elicit expert testimony regarding how the ADAs could have challenged Ciavarella's unconstitutional actions as well as what training would have prepared

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[12] Before the November 10 Commission hearings, Class Plaintiffs were unaware that Luzerne had so utterly failed to train its ADAs. While Class Plaintiffs had reason to believe the ADAs sat mute in Ciavarella's courtroom, the fact that their failure to challenge the proceedings was because of a failure of Luzerne policymakers to ensure that they had the tools to "see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence," Pa. R. Prof'l Conduct 3.8 cmt. 1, was first revealed at the November 10 Commission hearing and was confirmed at December 7 and 8, 2010 hearings.

[13] Indeed, during the relevant time period, when defendant Michael T. Conahan failed to provide on-the-record guilty plea colloquies in *adult* criminal court, the First Assistant DA instructed the ADAs to get the factual basis for the plea agreements on the record so that the pleas would not be overturned on appeal. PAC at ¶ 710 (citing IC Tr. at 107:25, 108:1-11.)

them to do so. *See Simmons*, 947 F.2d at 1051-52 (citing expert trial testimony regarding available training about detecting signs of suicidal tendencies among detainees and appropriately monitoring such detainees).

Luzerne incorrectly argues that the only person who caused the deprivation of Plaintiffs' constitutional rights was Ciavarella. (Def.'s Br. Part D.1.) To the contrary, Class Plaintiffs have sufficiently alleged that the DA, through the inaction of its ADAs in the courtroom, also directly violated their constitutional rights. (*See* PAC ¶¶ 701-710.) But assuming *arguendo* that Luzerne's assertion is correct and Ciavarella inflicted the "ultimate injury," applicable Supreme Court and Third Circuit law would still allow Class Plaintiffs to pursue their failure to train claim. In a series of cases in which plaintiffs either harmed themselves or were harmed by third parties, their claims that a municipality's failure to train or supervise its employees resulted in the latter's indifference to their rights, and that there was a causal nexus between that indifference and the "ultimate injury" suffered by plaintiffs, have been allowed to proceed. *See Canton*, 489 U.S. at 381, 391 (holding that detainee may assert claim that city's failure to train demonstrated deliberate indifference to detainee's medical needs); *Simmons,* 947 F.2d at 1074 (holding that estate of detainee who committed suicide may sustain claim against municipality for failure to train officers); *see also A.M. v. Luzerne County Juvenile Detention Ctr.*, 372 F.3d 572, 581-83 (3d. Cir. 2004) (reversing summary judgment

in favor of detention center because evidence showed plaintiff was injured by other youth and adequacy of training program for workers charged with supervising youth was in dispute); *Enright v. Springfield Sch. Dist.*, No. 04-1653, 2007 WL 4570970, at *5-7 (E.D. Pa. Dec. 27, 2007) (denying school district's motions for new trial and directed verdict on finding that plaintiff, who was sexually harassed on school bus, presented sufficient evidence that school district's failure to train bus drivers showed deliberate indifference to her rights); *Gallagher v. Borough of Dickson City*, No. 06-1626, 2007 WL 2480977, at *1, 4 (M.D. Pa. Aug. 29, 2007) (denying city's motion to dismiss plaintiff's claim that, by failing to provide adequate training, city was deliberately indifferent to plaintiff's right to not be sexually harassed by co-workers).

Finally, while Luzerne argues that Class Plaintiffs have not presented sufficient evidence of causation and failure to train and supervise, doing so is not Class Plaintiffs' burden at this early pleading stage. Notably, plaintiffs in the Third Circuit's failure to train cases cited by Luzerne were allowed to proceed with discovery. The rulings against the plaintiffs in these cases were based on findings that they, *after completing discovery*, did not adduce sufficient evidence to sustain their claims. *See Woloszyn v. County of Lawrence*, 396 F.3d 314, 325-26 (3d Cir. 2005) (affirming grant of summary judgment on failure to train claim where plaintiff had no evidence as to what type of training would have alerted officers

that detainee was suicidal); *Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997) (affirming grant of summary judgment on failure to train claim on finding that plaintiffs failed to present sufficient evidence of causal link between plaintiffs' injuries and deficient training). Class Plaintiffs ask nothing more than the discovery opportunity that was given the plaintiffs in those cases.

III. CONCLUSION

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

February 12, 2010

Respectfully submitted,

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

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

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

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

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

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

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

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

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 4,998 words.

Dated: February 12, 2010

/s/ Lourdes M. Rosado
Lourdes M. Rosado

CERTIFICATE OF SERVICE

I, Lourdes M. Rosado, hereby certify that, on this 12th day of February, 2010, Class Plaintiffs' Reply Brief in Support of Their 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 brief was served by first class mail upon the following:

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