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United States District Court,
M.D. Pennsylvania.

Florence WALLACE, et al., Plaintiffs,
v.
Robert J. POWELL, et al., Defendants.
William Conway, et al., Plaintiffs,
v.
Judge Michael T. Conahan, et al., Defendants.
H.T., et al., Plaintiffs,
v.
Mark A. Ciavarella, Jr., et al., Defendants.
Samantha Humanik, Plaintiff,
v.
Mark A. Ciavarella, Jr., et al., Defendants.

Civil Action Nos. 3:09–cv–286, 3:09–cv–0291, 3:09–cv–0357, 3:09–cv–0630. | Nov. 20, 2009.

West KeySummary

1 **Civil Rights**
Criminal law enforcement; prisons

County commissioners' actions in funding juvenile detention facility could not establish liability for alleged constitutional harms suffered by juveniles in the facility. Therefore, amendments to civil rights complaint against county were dismissed as futile. Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

Opinion

MEMORANDUM

A. RICHARD CAPUTO, District Judge.

***1** Presently before the Court are two motions to file amended master complaints, one by the individual plaintiffs (Doc. 249), and one by the class action plaintiffs (Doc. 250). Defendant Luzerne County objects to these amendments, arguing that they are futile. (Docs.298, 297.) Because the amendments are futile, I will deny the motion to amend.

BACKGROUND

The individual and class action plaintiffs in this case bring federal and state law claims against a number of defendants for an alleged scheme involving the corruption of the Luzerne County Common Pleas and Juvenile Courts. Because the allegations are lengthy, only those relevant to liability for Luzerne County will be discussed below.

The Plaintiffs' allegations relevant to the present motions are as follows:

A. Conspiracy
Defendants Michael Conahan ("Conahan") and Mark Ciavarella ("Ciavarella") abused their positions as judges of the Luzerne County Court of Commons Pleas by accepting compensation in return for favorable judicial determinations. (Ind.Amend.Compl.("Ind.") ¶ 59, Doc. 249.; Class Action Amend. Compl. ("CA") ¶ 2, Doc. 250.) As part of this conspiracy, Conahan and Ciaverella acted with Defendants Powell, Mericle, Mericle Construction, Pennsylvania Child Care ("PACC"), Western Pennsylvania Child Care ("WPACC"), Pinnacle, Beverage, Vision, and perhaps others. (Ind.¶ 60.) The basic outline of the conspiracy was that Conahan and Ciavarella used their influence as judicial officers to select PACC and WPACC as detention facilities, and that they intentionally filled those facilities with juveniles to earn the conspirators excessive profits. (*Id.* ¶ 110.) In return, approximately $2.6 million was paid to Conahan and Ciavarella for their influence. (*Id.* ¶ 66.)

Conahan took official actions to remove funding from the Luzerne County budget from the Luzerne County facility, and he exerted influence to facilitate the construction, expansion, and lease of the PACC facility. (Ind.¶ 63.) Conahan also signed a secret "Placement Guarantee Agreement" with PACC on behalf of Luzerne County. (*Id.* ¶ 29.) Conahan had "final decision-making authority with regard to Luzerne County's funding of the county-

run River Street juvenile detention center."[1] (*Id.*) Ciavarella acted "in his administrative capacity" when he began discussions with Powell about constructing a new facility. (CA ¶ 648.) Conahan and Ciavarella also executed a number of schemes to conceal the unlawful proceeds of this conspiracy. (Ind.¶ 64.)

B. Courtroom Conduct

Ciavarella sentenced thousands of juveniles to detention in violation of their constitutional rights such as the right to counsel, the right to an impartial tribunal, and the right to a free and voluntary guilty plea. (CA ¶¶ 176–77.) Conahan and Ciavarella also pressured court probation officers to make recommendations in favor of incarcerating juvenile offenders, even when the probation officers would have otherwise recommended release. (Ind. ¶ 96.; CA ¶ 713.) Chief Juvenile Probation Officers Sandra Brulo ("Brulo") and Michael Loughney ("Loughney") also acted to influence probation officers in this fashion. (Ind. ¶ 96 .) Brulo and Loughney created waiver forms for the county department of probation, which were given to juveniles to encourage them to waive their right to counsel. (*Id.* ¶ 174.) Brulo also told juvenile offenders that they did not need a lawyer, and that if they did not plead guilty they would risk being charged with additional offenses. (*Id.* ¶ 99.)

***2** Plaintiffs also allege that the constitutional harms resulted from the deliberate indifference of the district attorney and public defender to the actions of Ciavarella. (CA ¶ 728.) Plaintiffs allege that both were Luzerne County decision-makers, and that they effectively sanctioned the actions of Ciavarella by failing to intervene. (*Id.*)

C. Actions of the County Commissioners

In July 2001, Defendant Pennsylvania Child Care ("PACC") sent Luzerne County an unsolicited proposal to build a juvenile detention facility and to lease the facility to the county over a thirty (30) year period. (Ind.¶ 28.) A consultant hired by Luzerne County estimated that the cost to construct the PACC facility would be $8 million, and that it would be worth about $8 million or $9 million if the County wanted to purchase the facility. (*Id.* ¶ 30.) Luzerne County Commissioners Greg Skrepenak and Todd Vonderheid rejected concerns that PACC wanted to charge too much for the facility, and on October 18, 2004, they announced they would vote for the construction. (*Id.* ¶ 31.) In doing so, they also abandoned the County's existing plans to construct its own facility. (*Id.;* CA ¶ 660.)

On or around October 19, 2004, an auditor for the Pennsylvania Department of Public Welfare ("DPW") notified Luzerne County that the Commonwealth of Pennsylvania would be auditing the PACC facility. (Ind.¶ 32.) Despite this notice from the DPW and public disapproval, a majority of the county commissioners voted to lease the PACC detention center for twenty (20) years at a cost of $58 million. (*Id.* ¶ 33.) On or about November 16, 2004, the state auditor faxed an urgent letter about the PACC audit to the Luzerne County Commissioners. (*Id.* ¶ 36.) Despite the ongoing audit, a majority of the county commissioners continued with the lease signing process. (*Id.* ¶ 37.) Luzerne County Controller Steve Flood subpoenaed documents from the DPW relating the audit of the PACC facility. (*Id.* ¶ 38.) Before Flood or the DPW could release the contents of the audit, Conahan granted an *ex parte* preliminary injunction filed by PACC which prevented the release of the PACC audit documents. (*Id.* ¶ 40.) On December 23, 2004, the Times Leader, a local newspaper who had copies of the PACC audit documents, moved to intervene. (*Id.* ¶ 41.) That same day Conahan granted final injunctive relief preventing the release of the PACC audit documents. (*Id.*) Conahan filed an opinion in support of this decision on Mar 31, 2005. (*Id.* ¶ 45.) On November 16, 2005, the Pennsylvania Superior Court reversed Conahan's decision. (*Id.* ¶ 46.) The PACC audit documents were never made public. (*Id.* ¶ 47.) The DPW issued its final report on February 6, 2007, but stated that because of the inability to obtain certain information from PACC and Luzerne County the results of the audit were limited. (*Id.* ¶¶ 48–49.)

***3** In January 2005 the lease agreement between Luzerne County and PACC when into effect. (Ind.¶ 43.) The Luzerne County Commissioners hired Defendant Mid–Atlantic Youth Services ("MAYS") to run the PACC facility at a cost of $3.5 million per year. (*Id.* ¶ 44.) Under the terms of this agreement if the facilities actual operating costs were less than the budgeted costs, MAYS would have to remit a portion of the savings to Luzerne County. (*Id.* ¶ 44.) The DPW audit revealed that PACC was projected to have a profit of 34% in 2004. (*Id.* ¶ 50(a).) PACC's detention rates exceeded actual costs by the average amount of $85.26 in 2004–2005. (*Id.* ¶ 50(b).) Under the agreement PACC received excessive federal and state reimbursements in the amount of $1.6 million annually for the term of the lease. (*Id.* ¶ 50(d) .) The lease agreement was also unusual in that it did not include standard language prohibiting PACC from charging for the day of discharge, resulting in $387,359.000 worth of improper reimbursements from the Commonwealth of Pennsylvania. (*Id.* ¶ 50(e).) Luzerne County also

purchased in excess of $1 million in services from Western Pennsylvania Child Care ("WPACC") during 2006–2007. (*Id.* ¶ 50(f).) The audit also found that Luzerne County had violated state and federal contracting rules and regulations in its agreement with PACC. (*Id.* ¶ 52.) PACC's profits on its face demonstrate that Luzerne County failed to perform its required analysis or simply disregarded the regulations. (*Id.* ¶ 54.) "In sum, Defendant Luzerne County allowed excessive amounts of public money to be paid to Defendant PACC ... who yielded excessive profits and were able to use these excessive funds to pay Defendants Conahan and Ciavarella." (*Id.* ¶ 57.)

LEGAL STANDARDS

I. Motion to Amend Pleadings

Under Federal Rule of Civil Procedure 15(a), "a party may amend the party's pleadings ... by leave of court ... and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a). It is within the sound discretion of the trial court to determine whether a party shall have leave to amend pleadings out of time. *See Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing,* 663 F.2d 419, 425 (3d Cir.1981). However, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given.' " *Foman,* 371 U.S. at 182.

In the Third Circuit, the touchstone for the denial of leave to amend is undue prejudice to the non-moving party. *Lorenz v. CSX Corp.,* 1 F.3d 1406, 1413–14 (3d Cir.1993); *Cornell & Co., Inc. v. OSHRC,* 573 F.2d 820, 823 (1978). "In the absence of substantial or undue prejudice, denial instead 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,* 1 F.3d at 1414 (citing *Heyl,* 663 F.2d at 425).

***4** The only pertinent issue here is whether Plaintiffs' proposed amendments to their Complaint are "futile." An amendment is futile if "the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir.1997) (citing *Glassman v. Computervision Corp.,* 90 F.3d 617, 623 (1 st Cir.1996)). In making this assessment, the Court must use the same standard of legal sufficiency employed under Federal Rule of Civil Procedure 12(b)(6). *Id.* In other words, "[a]mendment of the complaint is futile if the amendment will not cure the deficiency in the original complaint or 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).

II. Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. FED. R. CIV. PRO. 12(b)(6). 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," *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), meaning enough factual allegations " 'to raise a reasonable expectation that discovery will reveal evidence of' " each necessary element, *Phillips v. County of Allegheny,* 515 F.3d 224, 234 (3d Cir.2008) (quoting *Twombly,* 550 U.S. at 556); *see also Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993) (requiring a complaint to set forth information from which each element of a claim may be inferred). 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.' " *Erickson v. Pardus,* 551 U.S. 89, 93, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam) (quoting *Twombly,* 550 U.S. at 555). "[T]he factual detail in a complaint [must not be] so undeveloped that it does not provide a defendant [with] the type of notice of claim which is contemplated by Rule 8." *Phillips,* 515 F.3d at 232; *see also Airborne Beepers & Video, Inc. v. AT & T Mobility LLC,* 499 F.3d 663, 667 (7th Cir.2007).

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id.* The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.,* 147 F.3d 256, 263 & n. 13 (3d Cir.1998), or credit a complaint's " 'bald assertions' " or " 'legal conclusions,'

" *Morse v. Lower Merion Sch. Dist.,* 132 F.3d 902, 906 (3d Cir.1997) (quoting *In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1429–30 (3d Cir.1997)). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal,* —— U.S. ——, ——, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

DISCUSSION

***5** Plaintiffs seek to amend the Individual and Class Action Master Complaints to provide additional detail to the allegations against Luzerne County. (Docs.249, 250.) Luzerne County opposes these amendments as futile. (Docs.298, 297.) As stated above, futility uses the same standard applied during a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Under 42 U.S.C. § 1983, municipal liability cannot be established under the doctrine of *respondeat superior. See Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents"). "A public entity such as [Luzerne] County may be held liable for the violation of a Constitutional right under 42 U.S.C. § 1983 only when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." *Reitz v. County of Bucks,* 125 F.3d 139, 144 (3d Cir.1997). Alternatively, "in the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under § 1983 ... where the failure to train amounts to deliberate indifference to the rights of persons with whom the [municipal employees] come into contact.' " *Id.* at 145. Plaintiffs make no allegations about the failure to train municipal employees, therefore liability will rely upon the creation of a policy or custom which caused the alleged constitutional harm.

When a government policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," inflicts constitutional harm then the governmental entity may be held responsible under § 1983. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). While the proposed amendments by the individual and class-action plaintiffs allege slightly different causes of action, they are sufficiently similar to be analyzed together.

I. Plaintiffs' Claims

The amended individuals master complaint contains four subheadings with theories of liability: (1) liability based on actions of persons with final authority; (2) liability based on persons with final authority conspiring with defendants; (3) liability based on persons with final authority being deliberately indifferent to constitutional violations; (4) liability based on the creation of a custom, policy, or practice. These claims are directed against three individuals/groups: (1) former President judge Conahan, (2) Chief Juvenile Probation Officers Brulo and Loughney, and (3) the Luzerne County Commissioners.[2] In the proposed amended class-action complaint, the Plaintiffs' allegations with respect to Luzerne County are found in Count VIII, for violations of the Plaintiffs Fifth, Sixth, and Fourteenth Amendment rights. Specifically, they allege: (1) that Ciavarella instituted a custom, policy, or practice of denying constitutional rights, and (2) that "County decision-makers ... including, but not limited to, the Luzerne County District Attorney ... and Public defender" failed to intervene after observing these violations, thus demonstrating deliberate indifference on the part of the County.

***6** To determine if the Plaintiffs articulate a claim against Luzerne County via the proposed amendments, first it must be determined whether any of these actors had final policy-making authority for Luzerne County. Then it must be determined whether any final policy-maker created liability for Luzerne county through their own actions, through affirming a subordinate's conduct, or through the creation of a policy or custom, which caused the alleged harm.

II. Final Policy–Making Authority

The power to establish policy is not the exclusive province of the legislature. *McGreevy v. Stroup,* 413 F.3d 359, 367 (3d Cir.2005). *"Monell'* s language makes clear that it expressly envisioned other officials whose acts or edicts may fairly be said to represent official policy." *Pembaur v. City of Cinncinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (internal quotations omitted). "[T]he authority to make municipal policy is necessarily the authority to make final policy." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality opinion). "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* Similarly, "when a subordinate's

decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *Id.* Any inquiry into the status of an official as a final policy-maker must focus on whether decisions are final on a particular issue, not in an "all or nothing manner." *McMillian v. Monroe County,* 520 U.S. 781, 785, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997); *Praprotnik,* 485 U.S. at 123 (official must have final policy-making authority in that area of the city's business). The identification of policy-making officials is not a question of fact, but is instead a question of law which is appropriate for the court to determine. *Praprotnik,* 485 U.S. at 125–26.

In *McMillian v. Monroe County,* the Supreme Court set forth the applicable standard when determining if a governmental actor has final policy-making authority as a county actor under § 1983. The Court noted that state law controlled the determination of whether an actor has final policy-making authority. *McMillian,* 520 U.S. at 783. The Court also emphasized that the inquiry must be focused on the specifically alleged conduct, rather than the general authority of that position under state law. *Id.* at 783. The *McMillian* Court ultimately concluded that an Alabama sheriff acted as a state official, rather than a county official, through a consideration of the Alabama Constitution, Alabama statutory and case law, and the allegations of the parties. *Id.* at 786. A similar analysis is appropriate here with respect to each alleged actor.

A. Former Judges Conahan and Ciavarella[3]

The Pennsylvania Constitution outlines a separation of powers between the legislature and judiciary. PA CONST. art. V (judiciary); *Id.* art. V (legislature). Pennsylvania has a unified judicial system, extending authority in one sweep from the Pennsylvania Supreme Court down to the Courts of Common Pleas and Community Courts. *Id.* art. V, § 1. The role of the president judge, in addition to traditional judicial functions, is to act as an administrator for the trial courts. *Id.* art. V, § 10. (discussing the administrative responsibilities of a president judge). Notably, the Pennsylvania Constitution also explicitly defines "county officers" including numerous court officials, but never mentions judges. *Id.* art. IX, § 4 (county officers include clerks of the courts, prothonotaries, district attorneys, and public defenders). Examining the Pennsylvania Constitution, the president judge is defined as a state judicial officer, rather than as a county official. The Pennsylvania Constitution suggests that even in the administrative role, the president judge is a state policy-maker.

***7** The statutory law of Pennsylvania also supports the role of the President judge as a state, rather than county, officer. 42 PA. C.S. § 325(e) expands upon the administrative duties of a Pennsylvania President judge, stating:

> (e) POWERS OF President judge.—Except as otherwise provided or prescribed by this title, by general rule or by order of the governing authority, the president judge of a court shall:
>
> (1) Be the executive and administrative head of the court, supervise the judicial business of the court, promulgate all administrative rules and regulations, make all judicial assignments, and assign and reassign among the personnel of the court available chambers and other physical facilities.
>
> (2) Exercise the powers of the court under section 2301(a)(2) (relating to appointment of personnel).

42 PA.C.S. § 325. There is no question that a Court of Common Pleas is a state entity. *See Benn v. First Judicial District of Pa.,* 426 F.3d 233, 240 (3d Cir.2002) ("under the Pennsylvania Supreme Court's interpretation of the state constitution, the Judicial District and its counterparts are state entities."). Therefore, the executive and administrative decisions made by a president judge as the "head of the court" are made as a state actor. Even in employment matters, the authority of the president judge stems from his role as a state actor. *See Jakomas v. McFalls,* 229 F.Supp.2d 412, 428–29 (W.D.Pa.2002) (finding judge not a county actor when firing his staff). Furthermore, the statutory language provides no explicit basis, powers, or duties to the president judge as a county official. There is no language to suggest that included in the powers of a president judge is the ability to apportion or spend a budget. The statutory law also provides no support that the president judge is a county actor.

Plaintiffs also fail to cite any cases in support of the proposition that a Pennsylvania president judge is a county policy-maker with final authority. Courts which have considered the judicial actions of common pleas judges have found that they are not county actors. *See e.g., Giallorenz v. Beaver County,* No. 06–0354, 2006 U.S. Dist. LEXIS 79427, at * 11 (W.D.Pa.2006) (county not proper party for actions taken by Court of Common Pleas or one of its magisterial justices). There appears to be no legal basis for the argument that the president judge has final authority with respect to the county budget.[4] Indeed the Plaintiffs argue in their brief in opposition to Conahan's claim of legislative immunity that "Pennsylvania law does not vest a president judge with

the power to create, vote on, or sign into law a county budget." (Doc. 282 at 67.)[5] The cases which address the interaction between the president judge and the county commissioners instead suggest that the president judge makes budget *recommendations* to the commissioners, but that the commissioners must make the final spending allocations. *See e.g., Lavelle v. Koch,* 532 Pa. 631, 617 A.2d 319 (Pa.1992) (president judge seeking to compel commissioners to disperse funds); *Becket v. Warren,* 497 Pa. 137, 439 A.2d 638 (Pa.1981) (same). This type of political lobbying is a far cry from final policy-making. Plaintiffs argue that these recommendations, combined with the fact that the courts received funding through Luzerne County, makes the president judge a county policy-maker. The argument that county funding alone makes an actor a county official and policy-maker was specifically rejected in *McMillian. McMillian,* 520 U.S. at 791. In *McMillian* the Court also rejected the argument that being elected locally was a sufficient justification to support a finding as a county actor. *Id.* The evidence as to a Pennsylvania president judges' status weighs even more towards the conclusion that the president judge is a state actor.

***8** With this state law in mind, it is appropriate to focus specifically on the alleged conduct by Conahan. Here the conduct can be divided into three categories. First, those actions which were conducted in the courtroom as a judge. Second, those actions of inappropriately pressuring probation officers to change their recommendations. Third, the alleged budgetary and contract signing actions. Any actions taken in the courtroom in his capacity as a judge, such as the granting of an injunction to conceal the audit results (Ind.¶ 40) were taken as a state official. *See Giallorenzo,* No. 06–cv–0354, 2006 U.S. Dist. LEXIS 79427 (W.D.Pa. Oct. 31, 2006). Therefore, there is no liability for Luzerne County based on those types of actions. Similarly, allegations with respect to a failure to be impartial in the courtroom and failure to disclose sources of income (Ind.¶¶ 93–94, 102) deal with Conahan's judicial role, not county role. Any direction to court officials, like probation officers, would be drawn from the authority of the president judge as a state judicial officer. Finally actions as to where an individual was to be detained (*Id.* ¶ 95) or via orders to close certain facilities, were also clearly taken in the role of a state judicial officer. I find that Conahan was not a Luzerne county final policy-maker with respect to any of these actions.

The Plaintiffs also allege that several of Conahan's actions were taken as a policy-maker over budgetary expenditures. Plaintiffs allege that Conahan executed a "Placement Guarantee Agreement" with PACC (Ind.¶¶ 70, 95), that he "took official action to remove funding from the budget" (*Id.* ¶ 71), and that he was the person with final authority in the County of Luzerne regarding the funding of the detention facilities (*Id.* ¶ 172). As a matter of law, there is no support for the Plaintiffs' legal conclusion that Conahan had the final authority to distribute the budget on his own. Instead, as Plaintiffs state in their proposed amended complaint when arguing the county commissioners approved of his conduct, Conahan as the president judge would make budget recommendations. (CA ¶ 657) ("A majority of the three Luzerne County Commissioners approved the Court's budget request to remove funding from the River Street facility ...."). Even if Conahan could be considered a county actor for these administrative requests, to create *Monell* liability Conahan must be a *final* policy-maker. Because the commissioners had ultimate oversight on those matters, Conahan clearly is not the final policy-maker who can bind the county. Finally as to any contracts such as the "secret Placement Guarantee Agreement" allegedly signed by Conahan, because he was a state actor any contracts would be imputed to the state, not the county. The president judge is a state actor with administrative authority over a state agency, the Court of Common Pleas.

As to Ciavarella, his authority as a Common Pleas Judge extends from the same constitutional and legal background as the President judge. Unlike the president judge, however, a traditional judge has no specific administrative duties which could be argued as county actions. Furthermore, the allegations against Ciavarella are mainly for his conduct in the courtroom, which would clearly be in his capacity as a state officer. Finally, as to any oversight or influence over probation officers, if the president judge is not a county policy-maker, then certainly a traditional judge would also not be one.

***9** Despite Plaintiffs' assertions that Conahan as president judge was a final policy-maker for Luzerne County, after considering Pennsylvania law and the factual allegations, I find that Conahan was not a final policy-maker for the county. I also find that as a common pleas judge Ciavarella was not a final policy-maker for the county.

B. Chief Juvenile Probation Officers Brulo and Loughney

Similar to the sheriff discussed in *McMillian,* at the outset it is clear that the Chief Probation Officer has policy-making authority over the probation department and its officials. Here the question is the same as in *McMillian:* whether the actor is a state or county policy-maker. The same analysis discussed above for the President judge

must also be applied to the office of chief juvenile probation officer to determine if such an actor is a county final policy-maker. Similar to judges, when the Pennsylvania Constitution lists county officers, probation officers are not included in that list. PA. CONST. art. IX, § 4. Other courts who have considered this issue have found that probation officers, as an arm of the court, are more like judges as state actors than as county actors. *Kelly v. County of Montgomery,* No. 08–1660, 2008 U.S. Dist. LEXIS 61572, at *41 (E.D.Pa.2008) (suit based upon probation departments conduct should have been brought against the court, rather than against the county); *see In Matter of Antolik,* 93 Pa.Cmwlth. 258, 501 A.2d 697 (Pa.Commw.1985) (position of chief juvenile probation officer a judicial position). While these cases are not directly on point as to the issue of *Monell* final policy-maker liability, they effectively demonstrate probation officers fall on the "state" side of the line as an arm of the court.

Plaintiffs allege that Brulo and Loughney created liability for Luzerne County by creating the right to an attorney waiver forms, and by pressuring subordinate probation officers into making recommendations for incarceration. While it is clear that they acted as final policy-makers for the probation department, I find that they acted as state rather than county officers. Because Luzerne County may only be liable through the actions of their own final policy-makers, I find that for the purpose of these motions Brulo and Loughney were not final policy-makers.

C. County Commissioners

As to the county commissioners, there can be no question that they have final policy-making authority for Luzerne County, and that their actions (or inactions) can potentially create liability under § 1983. One can hardly imagine a more "final" decision-maker for the municipality. The conduct alleged such as allocating the county budget would also be within the expected decision-making authority of county commissioners. I find that the Luzerne County Commissioners were final policy-makers for Luzerne County.

D. District Attorney

Unlike judges and probation officers, the district attorney is defined in the Pennsylvania Constitution as a county officer. PA. CONST. art. IX, § 4. Similarly, there is some Pennsylvania statutory law which reflects the status of the district attorney as the "chief law enforcement officer" for the county in which they were elected. *Carter v. City of Philadelphia,* 181 F.3d 339, 350 (3d Cir.1999); 71 P.S. §§ 732–101, *et seq.* (2009); 16 P.S. § 401(1)(11) (2009). Pennsylvania case law also identifies that district attorneys may be local officials. *Chalfin,* 233 A.2d, 565; *Schroeck v. Pennsylvania State Police,* 26 Pa.Cmwlth. 41, 362 A.2d 486, 490 (Pa.Commw.Ct.1976) ("District attorneys and their assistants are officers of the counties in which they are elected and not officers of the Commonwealth."). There is also evidence demonstrates that district attorneys are state officials. The historical foundation for the office of district attorney as a replacement for state deputy attorneys' general leans in favor of district attorneys as state officers. *Williams v. Fedor,* 69 F.Supp. 649, 660 (M.D.Pa .1999). Similarly, the relationship between the state's chief law enforcement officer, the Attorney General, and prosecutors when enforcing Pennsylvania statutes also leans in favor of prosecutors as state officials. *Commonwealth v. Bauer,* 437 Pa. 37, 261 A.2d 573, 575 (Pa.1970).

***10** Prosecutors can have "a dual or hybrid status" sometimes as a state officer, and sometimes as a county officer. *Coleman v. Kaye,* 87 F.3d 1491, 1499 (3d Cir.1996) (discussing New Jersey law). In fact, in Pennsylvania they have such a hybrid role. In *Carter v. City of Philadelphia,* the Third Circuit Court of Appeals considered the status of a Pennsylvania district attorney under the Supreme Court's decision in *McMillian.* The *Carter* Court considered the "hybrid" status of a district attorney and stated:

> When "enforcing their sworn duties to enforce the law ... they act as agents of the State [but] when county prosecutors are called upon to perform administrative tasks unrelated to their strictly prosecutorial functions ... the county prosecutor in effect acts on behalf of the county that is the situs of his or her office." Absent direct intervention by the state, county prosecutors act as county officials when they are called upon to make administrative decisions on a local level.

Carter, 181 F.3d at 353 (citing Coleman, 87 F.3d at 1504). Under Pennsylvania law, therefore, district attorneys have a hybrid status and the alleged conduct must be considered in light of their role. In *Carter,* the alleged conduct was the failure to train or supervise police officers from procuring "perjurious eyewitnesses." *Id.* at 343. The district attorney was found to be a county official in completing this administrative task. *Id.* at 353.

This Court has considered this hybrid status twice for purposes of *Monell* liability since the Court of Appeals' decision in *Carter.* In *Williams v. Fedor,* 69 F.Supp.2d 649, 658 (M.D.Pa.1999), Judge Vanaskie stated:

> As in *McMillian,* there is some evidence in this case to

> support the proposition that a Pennsylvania district attorney is a county policy maker when engaged in his law enforcement capacity. Indeed, the constitutional designation of the Pennsylvania district attorney as a county officer is a factor not present in *McMillian* that supports Williams' position. But that factor does not tip the scales in Williams' favor. The historical foundation for the office of district attorney—serving as a replacement for state deputy attorneys' general, with the obligation to perform the duties that had been performed by those deputy attorneys' general—coupled with the district attorneys' subordinate relationship to the state's chief law enforcement officer, the Attorney General, compel the conclusion that when engaged in his or her "basic function—enforcement of the Commonwealth's penal statutes," a district attorney in Pennsylvania represents the interests of the Commonwealth and not the County.

Williams v. Fedor, 69 F.Supp.2d at 660 (citations omitted). This same analysis was adopted by Chief Judge Kane in *Tavenner v. Shaffer,* No. 08–cv–1089, 2008 U.S. Dist. LEXIS 90307 (M.D.Pa. Nov. 6, 2008) (dismissing actions against county for district attorney's conduct in a prosecutorial capacity). I find these discussions persuasive, and hold that the status of the district attorney as a state or county official hinges on whether the actions alleged were prosecutorial or administrative in nature.

***11** Decisions whether to prosecute, or what specific charges should be brought against a defendant, have been found as prosecutorial actions. *Williams v. Fedor,* 69 F.Supp.2d at 660; *Tavenner,* 2008 U.S. Dist. LEXIS, at *10–11. The Plaintiffs' allegations in this case center on the failure to intervene when Ciavarella violated the Plaintiffs' rights in the courtroom. Specifically, they argue that the district attorney should not have accepted the guilty pleas which were in violation of constitutional norms. Allowing a defendant to plead guilty, however, is analogous to the clearly prosecutorial act of negotiating a plea bargain; both deal with the prosecutor's discretion whether to accept a guilty plea for a given charged offense. *See Imbler v. Pachtman,* 424 U.S. 409, 425 n. 24, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976) (discussing prosecutorial immunity and the need for discretion when to plea bargain); *Davis v. Grusemeyer,* 996 F.2d 617, 629 (3d Cir.1993) (prosecutorial immunity for determination not to divert defendant to pretrial intervention).[6] The decision to accept a guilty plea, like the decision to plea bargain, is prosecutorial in nature. Such a decision is made in the state role of a prosecutor. There are also no allegations of a failure to manage a subordinate officer in an administrative capacity. A common pleas judge is not an employee over whom the district attorney has administrative control. Any failure to intervene by the district attorney was within the prosecutorial—the state side—of the hybrid role.

As explicitly warned in *McMillian,* the question is to "ask whether governmental officials are final policymakers for the local government *in a particular area,* or on a particular issue." *McMillian,* 520 U.S. at 785 (citing *Jett,* 491 U.S. at 737) (emphasis added). While in many capacities the district attorney is indeed the "chief law enforcement officer" for Luzerne County, I find that for the specific conduct alleged the district attorney was a state, not county, official. Therefore, I find that given these allegations that the district attorney was not a final policy-maker for Luzerne County.

E. Public Defender

Like district attorneys, the public defender is also set forth in the Pennsylvania Constitution as a county official. PA. CONST. art. IX, § 4. Unlike other county officers listed in that section, public defenders are appointed rather than elected. *Id.* This is in light of their unique role in *opposing* the state during criminal proceedings. Plaintiffs seek liability for Luzerne County for the same type of deliberate indifference alleged against the district attorney. But a similar failure in the courtroom by the public defender in their "defense" capacity, mirroring the prosecutorial capacity of the district attorney, would not be imputed to Luzerne County. In fact, for purposes of § 1983 liability, the public defender cannot even be fairly categorized as a state actor. *Polk County v. Dodson,* 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981) (public defenders typically opposed the State and therefore do not act "under color of state law"); *Von Schlicten v. County of Northamption,* 279 Fed. Appx. 176, 179 (3d Cir.2008). I find that the public defender is not a final policy-maker for Luzerne County.

F. Summary

***12** A president judge, a common pleas judge, and a chief juvenile probation officer are all state, rather than county, actors and therefore they cannot be county policy-makers. The district attorney has a "hybrid" status, with some actions being taken as a state official and some being taken as a county official. The specific actions alleged will determine whether the district attorney is a state or county policy-maker. The public defender does not act under color of state law for purposes of § 1983. County commissioners are final policy-makers for a county.

Given the Plaintiffs' allegations, the only final policy-makers in this case are the Luzerne County

Commissioners. The actions alleged of the district attorney were within the prosecutorial role, and therefore the district attorney was a state, not county, actor at the time. Therefore, liability for Luzerne County must be predicated upon actions taken by the Luzerne County Commissioners.

III. Liability for a Policy or Custom

When a government policy or custom, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," inflicts constitutional harm then the governmental entity may be held responsible under § 1983. *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A municipality acts through the actions of its employees, and there are three instances when the constitutional torts of a municipal employee meet this standard. *McGreevy v. Stroup,* 413 F.3d 359, 367 (3d Cir.2005). First, a municipality is liable when its employee acts pursuant to formal government policy or standard operating procedure long accepted within the government entity. *Id.* (citing *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989)). Second, a municipality is liable for the actions of an employee when the employee has final policy-making authority, rendering his behavior an act of government policy. *Id.* (citing *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480–81, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)). Finally, a municipality is liable for the actions of its employee when an official with authority has ratified the unconstitutional actions of the subordinate, rendering the action official. *Id.* (citing *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)). Because only the Luzerne County Commissioners acted with final policy-making authority,[7] it is their conduct which is the focus of this analysis.

A. Formal Policy or Standard Operating Procedure

A policy is made "when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues a final proclamation, policy or edict." *Kneipp v. Tedder,* 95 F.3d 1199, 1212 (3d Cir.1996) (quoting *Pembaur v. City of Cincinnati,* 475 U.S. 469, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (plurality opinion)). A custom is an act "that has not been formally approved by an appropriate decision maker," but that is "so widespread as to have the force of law." *Bd. of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). In either case, the policy or custom must be tied to the responsible municipality. *Natale v. Camden County Correctional Facility,* 318 F.3d 575, 584 (3d Cir.2003). "It is only when the 'execution of the government's policy or custom ... inflicts the injury' that the municipality may be held liable under § 1983." *City of Canton v. Harris,* 489 U.S. 378, 386, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (quotations omitted). "[A] municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." *Id.* (citing *Monell,* 436 U.S. at 694; *Polk County v. Dodson,* 454 U.S. 312, 326, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)). A plaintiff must show "a direct causal link between a municipal policy or custom and the alleged constitutional violation." *Chernavsky v. Twp. of Holmdel Police Dep't,* 136 Fed Appx. 507, 509 (3d Cir.2005) (no n-p recede ntial) (citing *Carswell v. Borough of Homestead,* 381 F.3d 235, 244 (3d Cir.2004); *Brown v. Muhlenberg Twp.,* 269 F.3d 205, 214 (3d Cir.2001)).

***13** The Plaintiffs make two arguments with respect to the adoption of a policy or custom. First, that the Luzerne County Commissioners adopted an explicit policy when they decided to privatize the juvenile detention facilities, thus creating the danger for abuse. Second, the Luzerne County Commissioners established a custom for Luzerne County by being deliberately indifferent to the constitutional violations occurring in Ciavarella's courtroom. Neither of these arguments, however, correctly states the basis for liability against Luzerne County.

1. Creation of a Policy

The Plaintiffs argue that by adopting the policy of having a private, instead of public, juvenile detention facility the Luzerne County Commissioners created the ability for this corruption scheme to succeed. "[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct casual link between the municipal action and the deprivation of federal rights." *Bd. Of the County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997). "It is only when the 'execution of the government's policy or custom ... inflicts the injury' that the municipality may be held liable under § 1983." *City of Canton v. Harris,* 489 U.S. 378, 386, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) (quotations omitted). Here the "injury" was the deprivation of constitutional rights during the juvenile delinquency proceedings. The alleged policy is the determination that a private facility should be used to incarcerate individuals. The execution of this policy did not directly cause any of the constitutional failures in Ciavarella's courtroom. At best, and in the light most favorable to the plaintiffs, this policy

created an environment in which the corruption could grow. Even this does not establish a direct causal link as required. It cannot fairly be said that Luzerne County was the "moving force [behind] the constitutional violation." *Id.*

Plaintiffs also advance the argument that it was the excessive payments to PACC and WPACC that provided the source of the funds used to bribe Conahan and Ciavarella. But again, this argument fails to demonstrate that the Luzerne County policy, namely the funding a private facility, *directly inflicted* the constitutional harm. Simply because the county allegedly filled PACC's pockets with the money allegedly used in this conspiracy does not demonstrate that Luzerne County was the direct cause of every resulting use of those funds. At worst, the agreements signed with PACC and WPACC allege poor management and violations of state law in the use of Luzerne County Funds. Again, there is no direct causal link between the agreement with PACC and the unconstitutional actions by Ciavarella. The policy of privatizing the juvenile detention facility was not a direct cause of the constitutional violations, and therefore this policy does not establish liability for Luzerne County under § 1983.

2. Formation of a Custom

***14** Plaintiffs also argue that the county commissioners were deliberately indifferent to the actions of Ciavarella, and that their indifference caused the constitutional harms.[8] Deliberate indifference may be inferred from a failure to supervise municipal employees. *Knicrumah v. Albany City School Dist.,* 241 F.Supp.2d 199 (N.D.N.Y.2003). The key question is whether the State, rather than the municipality, controlled the official when he was performing the particular function that is alleged to have resulted in an injury under Sections 1981 and 1983. *Huminski v. Corsones,* 396 F.3d 53, 70–71 (2d Cir.2005); *Grech v. Clayton County, Ga.,* 335 F.3d 1326, 1330–31 (11th Cir.2003); *Cortez v. County of Los Angeles,* 294 F.3d 1186, 1189 (9th Cir.2002) (citing *McMillian,* 520 U.S. at 790–91). "[A] municipality cannot be held liable under § 1983 for officials acting as state, rather than municipal, policymakers. *Hailey v. City of Camden,* 631 F.Supp.2d 528, 542 (D.N.J.,2009) (citing *McMillian v. Monroe County, Ala.,* 520 U.S. 781, 793, 117 S.Ct. 1734, 138 L.Ed.2d 1(1997)).

When a subordinate continuously violates the constitutional rights of citizens, and a supervisor does nothing with full knowledge of this violation, then the supervisor has adopted the "custom" of allowing the violations to occur. If the supervisor is a final policy-maker, then she has created potential liability for the municipality. In the present case, however, deliberate indifference to the courtroom conduct of Ciavarella is very different. Ciavarella was a state, not county, employee over whom the Luzerne County final policy-makers had no control. Even if the county wanted to stop the conduct, it had no ability to do so directly. *See e.g. Eggar v. City of Livingston,* 40 F.3d 312, 316 (9th Cir.1994) ("A municipality cannot be liable for judicial conduct it lacks the power to require, control, or remedy, even if that conduct parallels or appears entangled with the desires of the municipality.") Unlike conduct committed by municipal police officers, over whom the county would have authority, here there was no formal ability to stop Ciavarella. If the Plaintiffs argument was correct, then the Luzerne County Commissioners would be liable for the unconstitutional actions of *any* governmental actor, state or federal, operating within the county limits, so long as the violations were continuous enough to put them on notice. To create liability there must be deliberate indifference to the conduct of an individual over whom there is control or responsibility. Short of that, it cannot be said the municipality is "adopting" the behavior of actors beyond its authority.

Additionally, it is worth noting that the Plaintiffs correctly argue that detaining an individual in violation of their rights is not automatically excused by affirmation from a state judge. *Anela v. Wildwood,* 790 F.2d 1063, 1067 (3d Cir.1986). In *Anela,* an inappropriate bond schedule was developed by the municipality, and implemented by a state court judge. *Id.* Despite being approved by the judicial officer, the municipality was still held liable since its officers applied the bail schedule in what was a clear violation of state and constitutional law. *Id.* The critical distinction in the present case is that the unconstitutional actions were taken *by the judge,* rather than by the municipal officials. In *Anela* it was municipal conduct ratified by the judge. Here the alleged violations were committed *by the judge.* Because there is no unconstitutional act by the municipality which was then ratified by Ciavarella, *Anela* is inapposite given the present allegations.

B. Actions of a Final Policy–Maker

***15** Plaintiffs next argue that the Luzerne County Commissioners' actions in funding PACC and WPACC establish liability for the constitutional harms. If made by a final policy-maker, even a single decision may expose a municipality to liability by creating official policy. *McGreevy,* 413 F.3d at 367–68. Again, only the actions of the county commissioners are relevant. A municipality can be held liable under § 1983 for its unconstitutional

acts in formulating and passing a budget. *Langford v. City of Atlantic City,* 235 F.3d 845, 850 (3d Cir.2000). However, for *Monell* liability to be appropriate, it must be this policy which *inflicts* the constitutional harm. *Pembaur,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 ("municipal liability is limited to action for which the municipality is actually responsible"). In *Langford,* the plaintiffs alleged that the budget was adopted to eliminate their positions in retaliation for their political speech. *Id.* at 18–19. It was therefore directly the passing of the budget which was the unconstitutional action. *Id.* This is distinguishable from the present situation, since the passage of the budget and signing of contracts did not deprive the juveniles of their constitutional rights. As stated above, none of the funding determinations or contract signing inflicted the injuries alleged. *See supra* III.A. The budget decisions with respect to the detention of juveniles by the Luzerne County Commissioners cannot be a direct cause of the constitutional harms.

C. Ratification by a Final Policy–Maker

Slightly different than the adoption of a custom by long-term deliberate indifference is the ratification of a decision by a final policy-maker. Here even a single act of a subordinate can become municipal policy if there is an explicit adoption of the subordinate's conduct by a final policy-maker. The Plaintiffs argue that when the county commissioners adopted Conahan's budget recommendations, they effectively adopted his corrupt behavior as their own. This, however, is too broad a reading of the scope of adopting behavior. Only where the supervisor is aware of the motive behind the behavior, does the municipality become liable. *St. Louis v. Praprotnik,* 485 U.S. 112, 127, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (ratification chargeable to municipality where policy-maker approve a subordinate's decision *and the basis for it*) (emphasis added). If, for example, the subordinate reaches a decision but hides the unconstitutional basis of the decision when on review, then a supervisor without knowledge of the unconstitutional decision cannot adopt it on behalf of the municipality. *Id.*

Here there are two problems with liability through ratification. First, Conahan was at the relevant times a state actor, even when requesting funding. In his capacity as the state administrator for the courts, budget requests would have been within his state role and not as a subordinate. Second, for the conduct to be imputed to Luzerne County, the commissioners must have been aware of the corruption behind the decision. The Class Action Plaintiffs make no such allegation, nor do they include the county commissioners as a party to the bribes or Civil RICO conspiracy. While the Individual Plaintiffs allege "[t]he Luzerne County Commissions ... were willful participants in joint activity and or jointly engaged" in the conspiracy, this legal conclusion is insufficient without factual allegations which would support it. *Ashcroft v. Iqbal,* ––U.S. ––––, ––––, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009). There are no factual allegations as to what the commissioners knew, or perhaps more importantly when they knew it. Without any such allegations, the factual allegations are insufficient to support the argument that the Luzerne County Commissioners ratified conduct of Conahan. Either of these two problems would be sufficient to defeat the argument that the commissioners ratified Conahan's conduct, effectively adopting it as a Luzerne County Policy.

***16** The Plaintiffs fail to allege a policy of Luzerne County which inflicted the constitutional harms under any of the following theories: a formal policy of Luzerne, adoption of a long-standing custom by deliberate indifference, direct actions of a final policy-maker, or ratification of a subordinates conduct by a final policy-maker.

CONCLUSION

Given the current allegations, the only final policy-maker for Luzerne County was the Luzerne County Commissioners. Because the alleged conduct of the commissioners fails to state a claim for liability under § 1983, the Plaintiffs' Motions to Amend will be denied.

An appropriate Order follows.

ORDER

NOW, this 20th day of November, 2009, **IT IS HEREBY ORDERED** that:

1. Individual Plaintiffs' Motion for Leave to File an Amended Master Complaint (Doc. 249) is **DENIED.**

2. Class Action Plaintiffs' Motion for Leave to File an Amended Master Complaint (Doc. 250) is **DENIED.**

Footnotes

1 While Plaintiffs make the assertion that Conahan had final decision-making authority, this is a question of law to be decided by the court. *See supra* Discussion, II.A.; *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 138 L.Ed.2d 1 (1997).

2 While not listed in their proposed amended complaint, the Individual Plaintiffs' Brief argues that the county is also liable for the indifference of the district attorney and the public defender. (Doc. 310, at 16, n 5.) While the Court need not address these arguments as to the individual plaintiffs because they are not plead, these issues will be discussed as they have been raised by the class action plaintiffs.

3 Luzerne County cites a number of decisions from other Circuits in support of their argument that Conahan and Ciavarella are not county actors. While I reach a similar conclusion to these courts, they are not particularly persuasive because none discuss the role of a president judge under *Pennsylvania* law. After all, the hallmark of our system of federalism is that each state may create different laws and different roles for their officials.

4 Not only is the power to directly control budgetary matters not specifically given to president judges, it would likely violate the separation of powers under the Pennsylvania Constitution to give this type of legislative spending power to a judicial officer. *See Leahey v. Farrell,* 362 Pa. 52, 57, 66 A.2d 577 (Pa.1949) ("The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds."); *Commonwealth ex rel. Schnader v. Liveright,* 308 Pa. 35, 161 A. 697 (Pa.1932) (Control of state finances rests with the legislature, subject only to constitutional limitations).

5 Plaintiffs also argue that because Conahan claims legislative immunity, he must be a county actor. Regardless of whether that immunity applies, the mere claim of a party is insufficient to establish as a matter of law that the actor has such authority.

6 While these cases discuss the related issue of prosecutorial immunity, rather than § 1983 liability, absolute prosecutorial immunity uses a parallel dichotomy between prosecutorial and administrative acts.

7 *See supra,* Part II. Final Policy–Making Authority.

8 Ciavarella's repeated courtroom conduct is the only possible event, as alleged by the plaintiffs, which was "so widespread as to have the force of law." *Bd. of County Comm'rs of Bryan County v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).