Supplemental Testimony of Juvenile Law Center
for the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security
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Juvenile Law Center works to ensure that the child welfare, juvenile justice and other public systems provide vulnerable children with the protection and services they need to become happy, healthy and productive adults. This testimony supplements Jessica Feierman's November 8, 2007 submission on behalf of Juvenile Law Center, Youth Law Center, National Center for Youth Law, and Center for Children's Law and Policy.

At Juvenile Law Center, where I have been since 1975, we have used many strategies to improve conditions for foster youth, for youth with mental health problems, for youth with education needs and for those who have been harmed by the juvenile justice system. Litigation, which we have used sparingly, has been one of the tools available to us from the time we opened our doors. We have found that even the threat of litigation can reduce harm to children and youth, regardless of the system that has custody of them.

When the state takes children into custody, it should protect them. It should do a lot more, of course—it should prepare youths for lives as citizens—but at a minimum it owes a duty of protection. The PLRA removes one important vehicle that lawyers for children and youth can use to ensure that the state protects vulnerable children from harm. We urge you to protect these children by removing them from the Act.

Our earlier testimony addressed our key points. I would like to make some additional observations.

First, although the PLRA was enacted in part to prevent frivolous prisoner litigation, in over 30 years of working locally, nationally and internationally on juvenile law, I have never heard of a frivolous law suit brought by a confined youth. Our earlier testimony made this point, but it is worth emphasizing. Juveniles are different.

Second, the greater the harm, the more far-fetched it is to expect juveniles to exhaust administrative remedies. Recent abuses in the Texas system suggest why. The

abusers—administrators and staff—are the people who would process the grievances. Juveniles have enormous deference to authority, and they also fear authority figures, especially those who have already harmed them in some way. Research of the MacArthur Foundation Research Network on Adolescent Development, in its landmark 2003 study of juvenile competence, noted deference to authority as one of several important ways in which juveniles differ from adults. See "Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants," Grisso, et al. (Law and Human Behavior, Vol. 27, No. 4, August 2003).

Juvenile Law Center's experience reinforces this point. One of our cases in the early 1990s involved horrible conditions at a state training school. Several administrators had recruited older youth to maintain order—those youths beat other youths and received privileges for their efforts. If the victims had to "exhaust" remedies first, they would have had their complaints known not only by the administrators who arranged for them to be "controlled," but by the administrators' henchmen: the youths in the facility who were part of the problem. Litigation was a safe way to address the problem after other approaches proved futile.

Third, the PLRA limits attorney's fees, arguably because public officials worry that plaintiffs' attorneys will build exorbitant bills at taxpayers' expense. While institutional conditions litigation can be expensive, it is often public officials who increase costs. We have found, in public litigation, that outside counsel often represent public officials. They are in a position to delay proceedings and run up costs. The provisions of the PLRA that require, essentially, a new trial as to constitutionality of conditions create enormous new litigation costs for everyone. Prior to enactment of those settlement and consent decree provisions, it was much easier for counsel to sit down, discuss problems, and fashion new relief. The solution to excessive billing—as in the area of "frivolous" lawsuits—is strong judicial oversight. In our experience, federal judges have no difficulty slashing excessive claims for attorney's fees. In fact, most of our fees in institutional litigation were negotiated, with defendants finding our claims quite reasonable.

PLRA's backers sometimes refer to overcrowding litigation and cite a Philadelphia Youth Study Center (secure juvenile detention center) tragedy from the late

1980s to support their argument that federal court oversight caused a fatality. There was a tragedy at that time. As I recall, a 12-year-old boy who was moved from the Youth Study Center to a community program, fled, stole a car, and while driving got into a fatal auto accident. It is quite a stretch, however, to attribute the tragedy to the power of the federal court to approve a settlement, or to imply that the single example was part of a larger problem.

The settlement in that case was designed to ensure that Philadelphia detained the highest risk arrestees. It prohibited detention of youth who were charged with minor offenses or technical probation violations, or who were so seriously mentally ill that they were committable under Pennsylvania's mental health laws. It also prohibited detention of youth who were under the age of 13.

Of course, the 12-year-old should have been better supervised—he was supposed to be in one of hundreds of staff secure beds created to address overcrowding—but he fled. It is unseemly to attribute a horrible outcome to the federal court settlement. Indeed the specific policy at issue - prohibiting detention for youth aged 12 and under - is in place in many jurisdictions around the country today. The incident did not happen because of the court's authority over settlement agreements, but because even correct decisions sometimes turn out badly. That can happen when a risk-management plan carefully devised by all stakeholders doesn't work for a particular youth. Such failures can happen at every stage of every system in which people make decisions that involve risk. (I would add that, although it was never part of the settlement, prosecutors in Philadelphia are routinely involved in *every* step down hearing to decide detained youths' level of risk and whether an alternative to the Youth Study Center can safely manage the risk.) In the world of corrections, decisions about who to place in secure detention - and the risks that ensue - will always be necessary, whether or not there is a PRLA.

At the end of the day, there are times when federal court oversight is necessary to ensure that children aren't brutalized. In juvenile detention facilities, populations can rise or fall rapidly, depending on whether there are delays in bringing cases to trial, or a shortage of beds for sentenced youth (so that they have to wait in detention awaiting an opening), or a shortage of judges. The reasons are many. Several times in the early 1990s, the Youth Study Center population went to 200 percent of capacity. When we as

plaintiffs' counsel were unable to negotiate relief with the city, so that youths wouldn't have to sleep on floors, and so youth and institution staff could be safe, we would return to federal court. If the PLRA had applied to our work at that time, we would have had to bring an entirely new federal law suit every time that happened. Youths would be left in brutal conditions while lawyers spent the next couple of years relitigating constitutional issues. In the pre-PLRA world in which we operated, we could return to court, get quick relief, work with the city and its courts to solve the problem. In short, we could save kids, protect staff, and save dollars.

The PLRA permits institutionalized child abuse, without advancing public policy or public safety. As we noted in our earlier testimony, applying the PLRA to juveniles serves neither the goals of the Act nor the welfare of our country's children for a number of reasons: (1) children's conditions cases are extremely rare, regardless of the PLRA; (2) federal court procedures and judicial oversight protect the courts from frivolous litigation by incarcerated youth without the need for including them in the PLRA; (3) the unique characteristics of incarcerated youth mean that many of the PLRA's provisions serve as a complete bar to court; (4) the PLRA undermines the rehabilitation at the core of the juvenile justice system; and (5) applying the PLRA to children reduces public safety.

We urge you, once again, to protect vulnerable children, and remove them from the Act.