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Panel Discussion 2: Litigation for Change

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PANEL DISCUSSION 2: LITIGATION FOR CHANGE

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JACQUELINE (JACKIE) DIXON: Thank you. I'm Jackie Dixon. It's really a privilege to be here. I graduated from this school twenty-five years ago and it's really changed a lot in terms of the facilities. It's wonderful. We did not have a room like this. Our big room was over in the part of the building that is no longer a part of the law school I believe. So it's really nice to be here. I enjoyed the first panel. I'm good friends with both Jennifer Evans and Libby Sykes and just really got a lot out of what they had to say. I have a case that's on appeal[1] that's going to address the issue of the distinction between a Rule 40A and a Rule 40 guardian, and so that will probably be out in a year or so. It really gave me a new perspective on the rule to hear them talk.

I feel like I need to state a disclaimer. I am not an expert on child welfare litigation, and I'm not a scholar either. If you knew how I struggled to get through law school, that's funny to hear me introduced as a scholar. But, anyway, I am not an expert on child welfare litigation. I had the good fortune to be in the right place at the right time. My former firm in Nashville was approached by lawyers from Children's Rights when they were investigating prior to filing the *Brian A.* lawsuit,[2] and my partner, my former partner now, David Raybin, and I were asked to be local counsel. And that has been a tremendous experience for me. It's been a privilege to work with those lawyers from Children's Rights in New York City. Marcia

[1] *In re* Jonathan S C-B, M2010-02356-COA-R3-JV (Tenn. Ct. App. June 28, 2011).
[2] *Id.*

Robinson Lowry and Ira Lustbader have been the two lead attorneys on the case.

Children's Rights is a public interest law firm. They started as part of the American Civil Liberties Union. They became their own entity in 1995. They protect the lives and legal rights of America's abused and neglected children by advocating for the reform of failing child welfare systems across the country. They have used legal action and policy initiatives to drive lasting reform in child protection, foster care and adoption. They have a website, and I realize you all may have looked at this as just being curious about *Brian* A.,[3] or as part of class work. They have an excellent website, childrensrights.org, and they have a complete archive of all of the *Brian A.* filings[4] on that website.

The case of *Brian A.*,[5] as it was known at the time *Brian A. v. Sundquist*, was filed in May of 2000 in the Middle District of Tennessee in federal court. It was assigned to Judge Todd Campbell. Brian A., the lead plaintiff at the time, was a little nine-year-old boy who had been in foster care for four years. At that time he lived in an emergency shelter in Shelby County where he had lived for seven months. He was waiting indefinitely for a home. He didn't have any social work plan or goal to get him out of foster care and into a permanent family. He was without necessary treatment, caseworker services, or appropriate schooling. He was in a grossly overcrowded and inappropriate facility that was meant for extremely short stays of under thirty days, and he had little or no contact with his five siblings. The lawsuit was filed and generated a lot of press. Prior to that there had been a big investigation by the attorneys and other staff people from Children's

[3] *Id.*

[4] Children's Rights, Tennessee (Brian A. v. Bredesen), Legal Documents, *available at* http://www.childrensrights.org/reform-campaigns/legal-cases/tennessee-brian-a-v-bredesen/2/.

[5] Brian A. v. Bredesen, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

Rights involving a lot of local Tennesseans that worked in the child welfare system, including local attorneys. The investigation had actually started years before the case was filed. Back in the early- to mid- 90s, close to ten years before the suit was filed, people in Tennessee were voicing concerns about the system, how the system was broken, how it needed to be fixed. Nothing was done for a number of years. At the time because all the State entities that provided services to this population of children were going to be consolidated into one department, the Department of Children's Services, the thought was let's give that a chance to work, let's see if that will make things better, and I believe that consolidation happened in '95 or '96.

Unfortunately, reforms were never put in place, or not put in place to really solve the problems. So in 1999, after Children's Rights began to receive more and more complaints from the advocates on the ground here in Tennessee, they began investigating the concerns, and developed a team of local counsel that was statewide. Wade Davies from a law firm here in Knoxville was one of the local counsel, and he did a lot of work up to the filing of the suit in May of 2000. The main things that were complained about in the lawsuit at that time were children were placed in large orphanage-like settings and other group settings at one of the highest rates in the nation. Children were routinely placed in emergency shelters, like Brian A., our lead plaintiff, and other temporary holding facilities for more than six months at a time without any services, without any appropriate treatment because the State had no other foster care placements for these children. Case workers were overworked and poorly trained with caseloads that prevented them from adequately monitoring and supervising the children in their care. This, unfortunately, in some instances, led to additional abuse and neglect while the children were in custody to remedy home situations where that had happened. Children were bounced around from one inappropriate foster placement to

another, based not on their specific needs, but just because there was a slot here, there was a slot over there at this group home, so they stuck the child there. That attitude was prevalent.

So the lawsuit was filed. For those of you who enjoy civil procedure, there was a motion to dismiss filed, and that opinion[6] is in the written materials that you were provided today. We undertook voluminous discovery; that was very interesting. There were lots of documents. The State fought discovery. The case was assigned to a magistrate judge, Judge Joe Brown, for discovery disputes. Again, for a little civil procedure issue, most federal court discovery disputes do go to the magistrate judge who's assigned to the case. Magistrate Judge Joe Brown ruled that we could take discovery. The case moved forward. The discovery phase lasted about a year. Then in the summer of 2001 we reached a settlement with the State and a consent decree[7] was entered that provided for a lot of work to be done by the State. A lot of times when you settle a case, for those of you who do litigation, that's the end of it, you're done with the case, the file goes away. You expect that there's going to be just compliance with the settlement, that's it. But in this instance, there was a plan put in place where the folks from Children's Rights would continue to be involved and there would be technical assistance people, experts in child welfare, involved in monitoring and working on remedies to specific problems that existed at that time. The settlement also required the State to commit resources to care for and move children through the system

[6] Order and Memorandum, Feb. 24, 2010, *available at* http://www.childrensrights.org/wp-content/uploads//2010/02/2010-02-24_tn_order_and_memorandum_denying_defs_motion_to_dismiss.pdf.
[7] Consent Decree, July 27, 2001, *available at* http://www.childrensrights.org/wp-content/uploads/2008/06/2001-07-27_tn_briana_settlement.pdf.

safely and appropriately, and as I mentioned, it provided this independent group of experts.[8]

The major terms of the settlement were very detailed, spelled out very specific things that had to be done. There were both quantitative results, such as the size of the case loads and worker/child contact, and there were qualitative outcomes for the children, such as moving among fewer foster homes and staying for shorter periods of time in foster care.[9]

Unfortunately, after that settlement agreement in the form of a consent decree was approved by the judge in the summer of 2001, after a public fairness hearing was held in federal court, not a whole lot happened. And in 2003, the attorneys from Children's Rights with local counsel filed a contempt petition against the State[10] for failure to comply with the consent decree. At that time there had been a report[11] by this technical assistance committee that stated a lot of deficiencies in the system that just had continued. Things just hadn't progressed the way we had hoped. The contempt action was actually resolved with a new agreement. There was some discovery taken on the contempt action. We mediated to reach a resolution on that. The contempt action was actually set for trial between Christmas and New Year's in 2003, and for those of you who are still in law school, and I think the practicing lawyers will appreciate this, you try not to have a whole lot of calendar during the holidays. When you see like some

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[8] *See id.*

[9] *Id.*

[10] Contempt Petition, Nov. 20, 2003, *available at* http://www.childrensrights.org/wp-content/uploads/2008/06/2003-11-20_tn_briana_contempt_motion.pdf.

[11] STATUS REPORT BY THE TECHNICAL ASSISTANCE COMMITTEE IN THE CASE OF BRIAN A. V. SUNDQUIST TO THE PARTIES AND THE MONITOR (TAC MONITORING REPORT), Dec. 10, 2003, *available at* http://www.childrensrights.org/wp-content/uploads//2008/12/2003-12-10_tn_status_report.pdf.

big lawsuit is just hanging at that time of the year, I now think, "Oh, those people have been working way too hard; they've messed up their holidays." But we went to Baltimore for mediation on December 23rd to try to get this resolved so we wouldn't be having this hearing right there between Christmas and New Year's, and mediation worked, and we got it resolved, and we entered a new agreement with some new goals to try to remedy these deficiencies that were ongoing. For example, the report[12] that prompted the filing of the contempt action showed that the State had only complied with twenty-four out of 136 stipulations in the original consent decree. At that time, the Department of Children's Services got a new commissioner, Viola Miller, who had similar experience in Kentucky and was a real asset. She was a joy to work with, and she worked very hard, and, in my personal opinion, did a lot to turn things around.

From that beginning, early in 2004 up to now, we've had a lot of reports filed by this new technical assistance committee. The DCS implemented their Path to Excellence Implementation plan to work on the deficiencies. This technical assistance committee has issued a report pretty much every year. For example, in January of 2006, the report[13] noted that although there had been a lot of progress made in some areas, such as addressing staffing issues, which were initially a big issue, there still hadn't been progress made in improving placement stability, reducing reliance on shelter and emergency placements, obtaining timely permanency, and putting the child in a home that's a forever home, not a temporary fix to a problem. The settlement agreement has been modified several times based on these reports that have been filed by the technical

[12] *Id.*

[13] TAC MONITORING REPORT, Jan. 19, 2006, *available at* http://www.childrensrights.org/wp-content/uploads/2008/06/2007-01-19_tn_briana_tac_report.pdf.

assistance committee. Almost every year there's been some modification based on the report. But, all in all, things moved along pretty well and progress has been made.

In late 2009, we were in the news again with this case when our legislature had passed a law[14] that looked like it was trying to tie the hands of juvenile court judges on how many children they could actually place into State custody, and it appeared that the problem was more acute in counties where there is a big meth problem, where kids are coming into custody after a meth lab is busted. And I think we all know meth is a huge problem, and especially here in East Tennessee. I understand that it's maybe not quite the problem in more urban areas. It's more of a rural problem. But this law that was passed by the legislature[15] attempted to put some financial responsibility on the counties and really attempted to limit how many children a juvenile court judge could take into State custody. We felt like that was a big no-no under *Brian A.*,[16] so we filed a supplemental complaint.[17] We call this an "Over-Commitment" law, because it violated the consent decree.[18] That issue was ultimately resolved when the legislature repealed that law, or changed it.[19] I can't remember if they changed it or repealed it. But there was a big change made, so that became a moot issue. That happened last spring in the legislature.

So that kind of brings us up to where we are now. In your materials, there is a monitoring report. This is the most recent monitoring report that's filed by the technical

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[14] TENN. CODE ANN. §37-2-205(f) (2011).

[15] TENN. CODE ANN. §37-2-205(f).

[16] *Brian A.*,149 F. Supp. 2d 941.

[17] Supplemental Complaint, Nov. 9, 2009, *available at* http://www.childrensrights.org/wp-content/uploads//2009/11/2009-11-09_tn_overcommitment_law_supplemental_complaint_final.pdf.

[18] *Id.*

[19] TENN. CODE ANN. §37-2-205(f) was deleted in its entirety and amended on Mar. 30, 2010 by 2010 Tenn. Pub. Acts 662.

assistance committee.[20] As you can see, it's quite lengthy, but it has a lot of very detailed information in it. I had sent Jessica the executive summary and introduction. It's kind of interesting and it shows the detail and thought that have gone into this settlement. I also have the 2009 modified settlement agreement and exit plan,[21] which is also a fairly lengthy document and very detailed. If anybody is interested in that, I can e-mail any of this stuff to you electronically if you'd like to see that.

Where we are now, there is still some room for improvement. DCS has made great strides in fixing problems, but there is still some room for improvement. And the specific things that – and this was all in the monitoring report[22] – need to be worked on are improved services for youth transitioning out of foster care. This has been a big issue. Most of us, like Jessica stated when she introduced the program, had parents or at least an adult in our lives that cared about us, that took care of us, read to us, and they didn't just send us out the door when we turned eighteen and say, "Okay, done, you're on your own." No, they continued to monitor us and help us, get through our college years. But there still needs to be work done in Tennessee on improving services for youth transitioning out of foster care. DCS is certainly doing a better job in finding permanent homes for older youth in foster care. The Department must work harder to support teens leaving foster care without an adopted family or ties to family members. These youth especially need help in developing plans for life after foster care and need connections to stable housing, educational opportunities, and other vital

[20] TAC MONITORING REPORT, April 6, 2011, *available at* http://www.childrensrights.org/wp-content/uploads/2011/04/20110412_tn_monitoring_rpt_8_as_filed.pdf.
[21] Modified Settlement Agreement and Exit Plan, Nov. 10, 2010, *available at* http://www.childrensrights.org/wp-content/uploads//2010/11/2010-11-10_tn_joint_exit_plan.pdf.
[22] TAC MONITORING REPORT, April 6, 2011, *supra* note 20.

services aimed at strengthening their independent living skills.

Another issue or area for improvement is to improve the quality of work on each individual case and the quality of case worker supervision. DCS has implemented a number of strong initiatives to enhance case practice such as holding regular team meetings with youth and their families to develop short- and long-term plans to strengthen the family and keep kids safe. However, its new policies and practices have not yet been fully implemented. For example, this report that came out late last fall[23] shows meetings aren't happening on a regular basis, foster parents are being left out, and many meetings aren't being tracked by the State's data system.

Another issue is improved recruitment and retention of foster parents, especially with respect to relatives of older kids in care. The State has done a commendable job of placing more children with families rather than in institutions. DCS must better engage relatives and recruit kinship homes for children in foster care. Additionally, DCS needs to improve its overall ability to recruit and retain new homes as the steady loss of available foster families is currently outpacing the overall decline in the number of children in foster care.

And finally, there needs to be a focus on finding permanent homes for children who have been in foster care for more than two years. The State must continue its diligent efforts to find adoptive families or legal guardians for children who have been stranded in the foster care system for more than two years. This includes a current initiative to seek outside funding, to expand programs that dig back into a child's history, back into a child's files, to find family members, coaches, teachers, and former foster

[23] TAC MONITORING REPORT, November 6, 2010, *available at* http://www.tn.gov/youth/dcsguide/fedinitiatives/TACMonitoringReport11.10.10.pdf.

parents who might become a positive connection or even a permanent family for that youth. So while there's still some work to be done, we feel like a lot of progress has been made and the end is in sight for the *Brian A.* litigation. I asked Ira Lustbader, who has worked really, really hard on this case, much harder than I have, just for some thoughts on how this litigation worked, and the importance of it, and he said, "what is so powerful about the *Brian A.* case,[24] as an illustration of effective reform through litigation, is how it has raised the profile of these vulnerable kids and the agency-wide problems to a level where this population can be protected." Mr. Lustbader reminded me of why I went to law school when he said, "to protect a population like abused and neglected kids – who do not vote, don't have a lobby, who can be re-victimized while in state custody mostly without anyone even knowing, who are subject to the intractably sad part of society – this elevation of the issues and heightened accountability of an otherwise closed system (due to confidentiality laws) – is why civil rights statutes like section 1983[25] were enacted in the first place."

I mentioned at the beginning of my comments what a privilege and inspiration it has been to work with the team of lawyers from Children's Rights especially Ira Lustbader and Marcia Robinson Lowry. There has been a book written about the efforts to reform the New York City child welfare which was a decades-long case for Marcia Robinson Lowry. *The Lost Children of Wilder*[26] by Nina Bernstein is an excellent book on child welfare reform. Thank you.

DEAN RIVKIN: Hi, everybody. It's great to see so many long-time colleagues and former students. Our part of the

[24] *Brian A.*, 149 F. Supp. 2d at 941.
[25] 42 U.S.C. § 1983 (1871).
[26] NINA BERNSTEIN, THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE (2001).

program on litigation for change is going to be a snapshot of a project that we have been involved in for the last couple of years through a course called Public Interest Lawyering, Education Law Practicum. It's a clinical course. This is going to be a choreographed presentation. I'm going to set the framework and five of our students are going to tell you different aspects of our work. This part of this panel is different from the major class action that you just talked about. It's more in the public interest realm of a case aggregation strategy, using individual cases, representing clients in individual cases to solve a major problem that I'll tell you about.

We started from a premise that there is a school-to-prison pipeline, it's well documented and we're quite concerned about it in a number of former cases. What we focused on was truancy prosecutions. You see this student behind bars? (Pointing to illustration). The abuses of truancy prosecutions nationwide have surfaced recently. I have an article[27] in your materials that's the final draft of an article that's going to be published in the Duke Forum for Law and Social Change that sets out exhaustively the collateral consequences flowing from truancy prosecutions nationwide, and I'm not going to go into it. In Tennessee, absences – and I'll get to the definition of truancy – are quite substantial, as you can see. These are the Tennessee Department of Education figures[28] on what their definition of truancy or excessive absences are. Nationwide, there are

[27] Dean Hill Rivkin, *Truancy Prosecutions of Students and the Right [To] Education*, 3 DUKE F. FOR L. & SOC. CHANGE __ (Fall 2011) (at the time of publication, the page number for Dean Rivkin's article was unknown as the article had not yet been published).

[28] TENN. DEPT. OF EDUC. FIGURES, Apr. 12, 2010 (figures faxed to speaker by the Tennessee Department of Education independent of any publication).

57,000 or more truancy prosecutions of students.[29] In Tennessee, we know that there are thousands of those cases, and yet, when we started looking into this, there's absolutely no case law at all. In discussing this with lawyers around the state, we don't think there has ever been an appeal of a truancy case, and we know that there have only been the rarest number of cases ever tried. The large bulk of these cases are pleas that are taken.

Now, the definition of an unruly child in Tennessee is pretty simple: Habitually and without justification is truant from school.[30] What we, in our investigation and doing our cases on this, found is that the "without justification" part of this statute has not been used very frequently and there has been a conflation of the education statutes that deal with attendance and excessive absences with the juvenile statutes that have a standard that is interpretable, is litigable, involves defenses, as you'll see, without justification.

What we've been doing in this course in a real nutshell – and we've had really intrepid students last year and this year – is ranging through a wide variety of substantive legal issues. A lot of them involve special education, some involve more regular education, issues around alternative education, school discipline, the FERPA,[31] and a whole range of school attendance policies both on the state level and on the local level where there are procedures, and juvenile rules as well, that talk about when cases should be prosecuted. There are a range of mental health issues that we've run into. We have run into a number of TennCare issues, because the only kids who are prosecuted are kids from low-income families; families

[29] BENJAMIN ADAMS, ET AL, JUVENILE COURT STATISTICS 2006-2007: REPORT, NAT'L CTR. FOR JUV. JUSTICE, March 2010, *available at* http://www.ncjjservehttp.org/ncjjwebsite/pdf/jcsreports/jcs2007.pdf.
[30] TENN. CODE ANN. §37-1-102(25)(A)(i) (2011).
[31] Family Educational Rights and Privacy Act of 1974, 20 U.S.C. §1232g (2011); 34 C.F.R. § 99.1 (2011).

without resources. That's just an indisputable fact. People with resources can provide alternatives for their children before the case ever gets to court. TennCare issues galore: for example, transportation. When a kid gets sick in a low-income family and the parents don't have transportation, it's very difficult for them to get to the doctor to get the quote or notes that the school requires. We mined the TennCare laws with help from some great legal services lawyers and found that there is an urgent care transportation entitlement.[32] You don't have to make an appointment three days ahead, you don't have to take your kid to the emergency room, because the kid is not that sick, but there is a three-hour window, if you need to take your kid to the doctor, and we've instituted that in several cases. Residential placement is a matter of really last resort. We've also worked on those legal issues.

There are a number of child welfare issues you'll hear about. Juvenile defense, of course, is part of all this. Bullying, part of education I guess, but there is a body of emerging statutory law and case law around bullying.[33] Interesting constitutional law issues. You'll hear in a minute about the right to counsel. A lot of interesting administrative law issues too with respect to State rule-making by the Department of Education in terms of local school system policies and procedures. I mean, these are a range of legal issues that are embedded in the kind of legal work that we've been doing.

We've also been doing a lot of lawyering skills in this course. Our students have been interviewing, counseling, and investigating. They have been doing motion practice, arguing motions. I mean, there is a range of interesting legal skills that are unique to this kind of child advocacy effort. I am then going to turn this over to

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[32] TennCare Urgent Care Transportation Amendment, Sept. 2008 (on file with author).

[33] *See, e.g.*, TENN. CODE ANN. 49-6-1014 *et seq.* (2011).

Amanda Jay who is going to give you a very brief case study. We've asked our students to do five minutes max about some of their work.

AMANDA JAY: Thank you. Good morning. I'm going to talk to you today about one of our clients, Anita. Anita is a fifteen-year-old girl. During the 2009-10 school year, she missed over one-third of the school year. When I first sat down and interviewed her, the first thing she said to me is, "Look, I'm not laying out of school." And any kid who is that up front and straightforward with you usually has a story, and Anita has a pretty good one.

Just to set up some background about how these petitions are filed, at that point in time the school system was filing these petitions usually without any prior contact with the student or parent regarding the absences. In fact, when Anita's petition was filed, the petition was the first notice that the family received that her absences were a problem.

I'd like to talk to you guys a little bit about justification, because, as Dean said, in many of these cases, the justification prong[34] isn't even discussed at the time. In fact, when Anita appeared in court, she was asked, "Are you absent?" and being generally a truthful child, she said "Yes," and ended up pleading guilty to this charge. She was sentenced to complete a social services program, which is a character education program that really didn't address any of the underlying causes of her truancy or serve any purpose in eliminating her absences. And I'm going to go back to that definition of what an unruly child is. An unruly child is one who is habitually and without justification absent from school.[35] Let's talk a little bit about justification. This particular student suffered from multiple chronic medical conditions and the school was aware of

[34] TENN. CODE ANN. §37-1-102(25)(A)(i).
[35] TENN. CODE ANN. §37-1-102(25)(A)(i).

this. Part of her medical condition required her to take pain medication, so, oftentimes, even when she wasn't in need of seeing a medical professional, she was unable to attend school because the pain medication made her sleepy or unable to concentrate, that sort of thing. Anita also comes from a family who is very poor; therefore, they sometimes had trouble getting her to a doctor. And one of the things we've seen is that the school system wants a note for each and every absence. So even if she's absent for one day and has a note, the next two days will not necessarily be excused unless that note explicitly states this is for this time period. A lot of times these families who are involved in truancy prosecutions aren't very sophisticated in dealing with systems, whether it is a medical office, the emergency room, or the social services office at the school. They really don't know what resources are available to help them get through the process. And we came to find out that Anita was also dealing with some pretty complicated mental health issues that no one was really aware of and that weren't really being addressed.

One of the major problems with this case is at the very beginning the school and the court didn't really make any inquiry into why she was absent. When she appeared in court, the question was, "Are you absent?" she responded "Yes." Usually the proof or evidence that's brought against these students is a STAR[36] report. It's generated by the school, and it just lists their absences and whether there was a medical excuse. In this case, with the help of juvenile court workers and the attorney general's office, we were eventually able to get some supports in place for this child. She is now in therapy, the school is more aware and willing to work with her with her medical conditions, and we're also trying to help her catch up in school to address some of her educational needs. This is a great child. She has lots of goals. She hopes to be a nurse. And this is just one

[36] Student Teacher Achievement Ratio.

illustration of some of the issues we're dealing with as we do these truancy cases. Thank you.

DEAN RIVKIN: Kate Holtkamp is going to talk about an adult who we were appointed to represent in a truancy case, which is not the gist of our work, but you'll see some of the issues here.

KATE HOLTKAMP: As Dean said, this is the only adult that we represented this year. Jane Doe was a single mom. She's about twenty-five with two kids: a five-year-old, John, and a one-year-old. She was charged with contributing to the unruly behavior of a minor, and this charge was based only on John's thirty-four documented absences during his kindergarten year. When we investigated the reasons behind the absences, it became pretty clear there was some substantial justification for why this kid was missing. In the spring of 2009, Jane was estranged from her abusive husband and had begun her divorce. Around September, she was assaulted by her husband and her five-year-old son was kidnapped, and this went on for about two weeks. John, after being returned to his mom, developed some serious anxiety issues resulting from the kidnapping. On some school days he refused to part with his mom to go to school. Jane attempted to work with him and to get counseling services both through DCS and through the school's guidance department, but wasn't able to get any sort of regular service in place. And getting John to school was particularly challenging for Jane because they lived too close to the elementary school to allow him to ride the bus but too far away for her to walk with two little kids. Further complicating this issue is the fact that she simply could not afford to buy a car and her husband had taken the only family vehicle. She was totally reliant on her friend, who lives about twenty minutes away, to take her son to school, and obviously this was not a reliable way to get him to school.

In the spring of 2010, John became seriously ill. He was originally diagnosed with seasonal allergies but there was really no serious attempt to get him strong treatments. Two or three weeks later he developed a golf-ball-sized abscess in his throat and required immediate surgery and subsequent hospitalization. Throughout the school year, Jane had been in constant communication with the school, she had spoken with the vice-principal, the school social worker, the school nurse, and her son's classroom teacher about her situation and particularly the custody dispute. The school was aware of her ongoing struggles with her husband and she felt that the school understood why she was having trouble getting her son to school, so she didn't worry a lot about getting precise documentation and medical notes.

At the end of the school year, John's teacher expressed concern to Jane that he had missed so many days and she was a little worried that he might not be ready for the first grade. So, in May, well before she was aware of any prosecution efforts against her, Jane voluntarily enrolled John in summer school. This is not a mom who was neglectful. This was not a mom who was not concerned about her child's education. She was dealing with incredibly difficult circumstances and she just had incredibly limited means.

In July, Jane was arrested by police officers, and as they forced their way into her home, they broke down her door and removed her from bed, handcuffed her, and took her to the penal farm. After being released, Jane was never notified of a court date. She had to call the court herself to make sure she knew when to come, and she was never offered a public defender before her first appearance in court.

We were appointed to represent her in September. In November, we filed a motion to dismiss. We successfully argued that under Tennessee compulsory

education laws[37] only children age six through seventeen are required to attend school. When we researched it, it became clear that the mom of a five-year-old was under no legal obligation to send her child to school and could not be prosecuted for his unexcused absences.

DEAN RIVKIN: Ebony Connor is going to give you one more snapshot of a case in which we're representing kids.

EBONY CONNOR: Hi. Good morning. I've walked into a lot of classrooms, and I don't think I've ever had all eyes on me. I feel like I need intro music for this. I'm going to talk about two of the students that we've been representing and the economic barriers that have affected them, both in their entrance into the juvenile justice system and their ability to communicate with us and for us to effectively represent them. One of our students is a fourteen-year-old boy, he is an eighth-grader at a local Knoxville area school, and the other is a sixteen-year-old boy also at a local school. They are both adamantly into sports. One is really into basketball. The other is really into boxing. But they have horrible circumstances behind them. They are both intelligent boys who have interests, but don't necessarily have the economic means to do the things that interest them and so it's affected them in a multitude of ways. And that has affected their entrance into the juvenile justice system.

They've had a family member who lost a job and there were some traumatic things that resulted from that, including homelessness. As homeless students in the area, they were staying at one point in a homeless shelter, at another point they were staying with friends, and at a third point they were staying with friends that were an hour-and-a-half outside of Knoxville and were being transported in. All of these things resulted in their irregular school attendance, but not necessarily without justification for not

[37] TENN. CODE ANN. §49-6-3001 *et seq.* (2011).

being in school. They also don't always have adequate access to health care, as Dean mentioned very early on. They have TennCare, but there are programs that are available through TennCare that most aren't aware of, including transportation located within three hours distance. They do not always have access to a car, so if they weren't aware of TennCare-provided transportation and they needed a doctor, they weren't aware that they could call this service, so they weren't getting to school and weren't coming with doctor's notes when they were able to get back. As I said, they also don't have adequate personal transportation. They have a vehicle but it hasn't always been in good shape and there have been some instances where they just haven't had anything. That has affected the parent's ability to get them to school when they weren't living within an area where the bus picked them up and dropped them off. This has also affected their ability to get to court and to status hearings when required to do so. Again, as people with very little economic means, they haven't always had adequate communication devices. So it has been difficult for them to contact the school, doctors, and us. These are issues that have to some extent led them into the juvenile justice system. But in terms of my representation of them and our working with them, we found that it's very difficult to have them understand the importance of what is going on if we're not able to actually get in touch with them, and that's all based on their economic status. And because they are fourteen- and sixteen-year-old boys who have interests, they've developed some anger management issues that are a result of a lack of opportunities that they do or don't have because of their family's economic status.

After we were appointed to represent them, there has been some dramatic and some amazing changes. We have absolutely been advocating very heavily for a change in the truancy system, but a good portion of what we've been doing with regards to these students is advocating for

some of the social programs, that had the school system or community workers been involved in, may not have prevented these students from entering the juvenile justice system. They are now aware of programs and organizations that are designed to better serve them and their family, which actually helps them deal with some of the underlying issues that resulted in their not attending school regularly. They're aware of health programs that are available to them, including the transportation that I've mentioned and that Dean mentioned. They're aware of extracurricular activities. Because the absences from school affect their grades, they're not always eligible for school programs, but there are outside programs that are available to them that they are now aware of them. There have also been some educational changes with them as a result of our representation. They are now aware of the services that have always been available that the school did not make known to them or most others that we've worked with. And so I can say that while we are strongly advocating for a change in the truancy process, a lot of what we've done is to advocate for social change, and these are all things that would have been available to them had an interested party taken interest prior to them entering the juvenile justice system. Thank you.

DEAN RIVKIN: Our final two presentations are going to be nutshells of a couple of legal issues that we have encountered in our practice. And Brennan Wingerter is going to present the first one on guardians ad litem.

BRENNAN WINGERTER: Good morning. I'm going to talk to you all about the role of Rule 40[38] GALs in truancy cases. So starting with Tennessee Rule of Juvenile Procedure 37,[39] as you can see under Rule 37(a), which

[38] TENN. SUP. CT. R. 40.
[39] TENN. R. JUV. P. 37.

governs the appointment of GALs in delinquent and unruly proceedings, truancy, by definition, is an unruly offense.[40] Then we also have Rule 37(c),[41] which governs the appointment of GALs when there has been a report of harm. Now, under T.C.A. Section 37-1-403, this report of harm contemplates that there is a child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition that has been caused by brutality, abuse or neglect.[42] So under this statutory scheme, with truancy being an unruly defense, if the court decides to appoint a GAL in a truancy case, Tennessee Rule of Juvenile Procedure 37(a)[43] would apply. However, sometimes GALs are appointed in truancy cases under Rule 37(c).[44]

So let's take a look at what that does. When a GAL is appointed under Rule 37(c),[45] you can see that Tennessee Supreme Court Rule 40[46] comes into play, and DCS becomes involved, so a guardian should be appointed for the child and the indigent parent should receive an attorney. But, in a truancy case, those next steps don't come into play. DCS doesn't become involved and the parent usually doesn't get an attorney. So if I'm a GAL and I've been appointed to a truancy case under Rule 37(c),[47] I'm kind of in an awkward position and I'm probably thinking, "What is my role? What should I do?" So, taking a look at how the statute[48] works, when there is an appointment under

[40] TENN. R. JUV. P. 37(a).
[41] TENN. R. JUV. P. 37(c).
[42] TENN. CODE ANN. §37-1-403 (2011).
[43] TENN. R. JUV. P. 37(a).
[44] TENN. R. JUV. P. 37(c).
[45] TENN. R. JUV. P. 37(c).
[46] TENN. SUP. CT. R. 40.
[47] TENN. R. JUV. P. 37(c).
[48] TENN. CODE ANN. §37-1-403.

37(c),[49] it's clear that Tennessee Supreme Court Rule 40[50] does apply.

So let's take a look at Rule 40.[51] As you can see, it's basic. It starts off the application, and it does apply under Rule 37 of the Tennessee Rules of Juvenile Procedure. And Rule 40 goes on to set forth some of the basics of a GAL who has responsibilities under that rule. For example, it defines a guardian ad litem as a lawyer appointed by the court to advocate for the best interest of a child and to ensure that the child's concerns and preferences are effectively advocated.[52] A key to Rule 40 GAL lawyers is that the child is the client of the GAL, not the court. And, with that in mind, Rule 40 goes on to lay out some of the specific responsibilities of Rule 40 GALs. For example, conducting an independent investigation of the facts.[53] This can include reviewing court files, medical and school records, and interviewing parents, mental health professionals and caseworkers.[54] It also goes on to state that GALs' responsibilities include explaining the litigation process, which means consulting with the child.[55] Constant communication with the child client is essential to the GAL's responsibilities. Further, Rule 40 has a provision where responsibility for the GAL is to consider resources that are available through programs and processes.[56] And I specifically want to point out, because Dean mentioned it earlier, when there's a special education issue involved, GALs can and should remember that there are also federal

[49] TENN. R. JUV. P. 37(c).
[50] TENN. SUP. CT. R. 40.
[51] TENN. SUP. CT. R. 40.
[52] TENN. SUP. CT. R. 40(c)(1).
[53] TENN. SUP. CT. R. 40(d)(1).
[54] TENN. SUP. CT. R. 40(d)(iv).
[55] TENN. SUP. CT. R. 40(d)(2)-(3).
[56] TENN. SUP. CT. R. 40(d)(5).

law processes available, such as IDEA[57] and a disability statute[58] that are there.

Some other responsibilities include ensuring that the child is prepared to testify and making the child feel comfortable.[59] And another big one is the responsibility to advocate the position that serves the best interest of the child.[60] And the bottom line with that responsibility is that the GALs should act as lawyers. That includes everything from the ethics requirements of competent representation, such as filing pleadings, attending all meetings and hearings, calling witnesses, and even making opening statements and closing arguments. And, to sum up, these excerpts are from a booklet[61] that was put out by the Tennessee Youth Advisory Council, actually for children who have GALs appointed to them, and I think it's a very good summary of Rule 40 in layman's terms that the bottom line is that GALs in truancy cases, are not cops, or social workers. They do not work for the judge, they don't work for DCS, and they don't work for the school system. GALs at the end of the day are lawyers, and they are lawyers who, as these brochures really break down for the child clients, represent their clients, and those clients are the children to whom they are appointed in court. Thank you.

DEAN RIVKIN: Erin Raines is going to talk about a complicated issue that –

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[57] Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq.* (1990).
[58] Rehabilitation Act of 1973, 29 U.S.C. §701 *et seq.* (1973), §504, effectuated by 34 C.F.R. Part 104.
[59] TENN. SUP. CT. R. 40(d)(6).
[60] TENN. SUP. CT. R. 40(c)(1).
[61] TENNESSEE YOUTH ADVISORY COUNCIL, ARE YOU A YOUNG PERSON IN A CHILD ABUSE OR NEGLECT CASE IN JUVENILE COURT? YOU SHOULD HAVE A G-A-L LAWYER (Dec. 2004), *available at* http://www.tba.org/sections/JuvenileLaw/gal.pdf.

ERIN RAINES: In a short amount of time.

DEAN RIVKIN: – in a very short period of time – and that is the right to counsel or the potential right to counsel in truancy prosecutions.

ERIN RAINES: Through the research with Dean and some of our case exposure this semester, we've seen various issues with our clients where now more than ever we have realized that not having a right to counsel or counsel representation in a truancy proceeding presents a significant risk to the child and the parent. In the United States, there are forty-five states that address truancy issues, and in thirty states there is a statute that automatically provides the child with the right to counsel.[62]

Tennessee is, unfortunately, not one of those thirty states.[63] The right to counsel for children in initial truancy hearings is consistent with the prevailing trend of states nationwide and continues to guard the rights of children by ensuring them adequate legal representation in juvenile court proceedings.

So why is the right to counsel important? Denying children the assistance of counsel at their initial truancy hearing creates a substantial risk for the erroneous deprivation of a meaningful education for that child. And by giving a right to counsel to a child, the attorney can help by discovering various reasons for the child's truancy, explaining the truancy proceedings to the child and the parent, ensuring adequate procedural protections leading up to any truancy proceeding. After the fact, counsel may

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[62] Juvenile Law Center as Amici Curiae Supporting Respondent, Bellevue Sch. Dist. v. E.S., 199 P.3d 1010 (Wash. Ct. App. 2009), *available at* http://www.jlc.org/litigation/Bellevue_School_District_v._E.S._/.

[63] *Id.*

present evidence on behalf of the child, and build a record, and have the opportunity to bring an appeal should there be one or should there be an erroneous decision on behalf of the child. Also, initial truancy proceedings and not having a right to counsel jeopardizes the children's fundamental interests in physical liberty, education and privacy. The educational interests are laid out in *Goss v. Lopez*,[64] which states that any State action that potentially interferes with a child's education, such as suspension from school, requires due process protections.

The most important case, which is in the State Supreme Court of Washington, is *Bellevue School District v. E.S.*[65] This is a case where a child had a truancy petition initiated against him by the school system. He was not afforded a right to counsel at the initial truancy hearing, but he was later given a right to counsel at the contempt part of the hearing, and the trial court held that this was okay because that counsel is only appointed when a child is facing possibility of losing her liberty and the school board felt at the initial hearing phase that E.S.'s liberty was not at stake. On appeal, the issue being looked at is that the trial court entered that there was no due process right to counsel at an initial truancy hearing when the hearing engaged the fundamental right to education, and the truancy finding could possibly lead to incarceration in a later proceeding.[66]

Basically what this case will hopefully demonstrate, and what Dean is using this case to argue hopefully once it is decided by the Washington Supreme Court,[67] is that

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[64] Goss v. Lopez, 419 U.S. 565 (1975).

[65] Bellevue Sch. Dist. v. E.S., 199 P.3d 1010 (Wash. Ct. App. 2009). The Supreme Court of Washington ruled on *Bellevue* in June 2011, holding that students do not have a right to counsel at truancy hearings. Bellevue Sch. Dist. v. E.S., No. 83024-0, 2011 Wash. LEXIS 392 (Wash. June 9, 2011).

[66] *Bellevue Sch. Dist.*, 199 P.3d at 1013.

[67] *Contra* Bellevue Sch. Dist. v. E.S., No. 83024-0, 2011 Wash. LEXIS 392 (Wash. June 9, 2011).

failure to provide counsel and to require proper notice or a sufficient petition resulted in the denial of due process and the order should be set aside, therefore providing a potential change in the law in other states that do not have a right to counsel, Tennessee included, for the ultimate goal of protecting the fundamental interests of the child during any truancy proceeding.

DEAN RIVKIN: Great. Thank you. Has there been change? There has been change. And it's not only because of our work. The school system has become much more aware, maybe because of our work, that there is a need to prescreen before petitions are filed. Change also may be coming because we filed several petitions to vacate clients' convictions or adjudications from juvenile court. There's a very generous post-adjudication statute for juveniles in Tennessee that is elaborated on in the Rules of Juvenile Procedure,[68] and we're raising issues that we hope will help improve the system even further for the court-involved children and youth who are there. So thanks, everybody.

ROBERT SCHWARTZ: Thank you, Dean, and Jackie, and all the students. I'd like to spend a few minutes talking about our experience in litigation around children's issues at Juvenile Law Center where I've been since 1975. And I'll discuss a little more of our history and some recent work during the lunch talk that I'm scheduled to give about the Kids-for-Cash Scandal, which also implicates some of the right to counsel issues clearly that you heard about this morning.

I think that we, over the years, have struggled to find the appropriate place for the affirmative class action litigation, the damages litigation, the appellate practice, and law reform vehicle, because litigation in the wrong hands can be a pretty powerful and destructive tool. In the right

[68] TENN. R. JUV. P. 36; *see also* TENN. CODE ANN. §37-1-139 (2011).

hands, with the right defendants, it can be quite effective, but the fact is that lawyers for kids don't run anything, so we're only as good at the end of the day as the people who run the systems for children. In a way, the strategy of litigation from beginning to end, including the discovery, the demand letters, the follow-up, and implementation is about figuring out a way to use this vehicle to help people who run the system for a living succeed, and then trying to figure out what success means in the child welfare system. I think it's the difficulty of figuring out what that means that has plagued child welfare litigators as well as child welfare administrators probably for the last thirty or forty years since litigation has taken hold.[69]

I thought it would be useful to get some examples of some juvenile justice litigation that we've been involved in to show the contrast between litigating in juvenile justice and litigating in child welfare. One I think is relatively straightforward and easy; the other is an example of litigation, as Jackie described, that begins with investigations twenty years ago, continued with the filing of a lawsuit in 2000, and ends up with a Pentagon-paper-sized document of the technical assistance team in 2011 and how you find the right balance in the course of litigation.

One of the major differences between litigating juvenile justice versus child welfare is that juvenile justice litigation is often about discrete actions to prevent harm, like the use of isolation, physical abuse of kids in facilities, or overcrowding of State training schools or juvenile detention centers. So, we have brought and we continue to bring at Juvenile Law Center those kinds of lawsuits that are targeted to a particular problem. While we often have hurdles in making sure that we've identified the rights that are at stake to overcome the motions to dismiss as well as

[69] *See generally In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

motions for summary judgment, if we get relief, the remedy is pretty easy and straightforward. You have isolation, you end isolation, or you provide that it's of very limited use with people coming by the door looking in every ten or fifteen minutes, and you define the purposes and you solve the problem. If you have overcrowding, it's fairly straightforward to get a cap on an institutional size so the children are safe inside a building. The issue of kids being hurt by staff is a thing that can be dealt with in numerous ways that are fairly straightforward.

We have done work on slightly more complicated issues, for example, around school re-entry, which is I think a corollary to the truancy issue since many kids are truant after returning from delinquency placements and much of the truancy is related to school policies. An example is in 2002, the Pennsylvania General Assembly passed a law[70] saying that students in the school districts of the first class in Pennsylvania were not allowed to be in Philadelphia public schools if they were adjudicated delinquent. They weren't allowed to be in school if they were adjudicated delinquent. It was a generalized law that applied only to one county and one school district in Philadelphia. We at Juvenile Law Center share space with Education Law Center, which is a happy collaboration, and together we filed a lawsuit[71] and the legislature changed the law to say, "Okay, you can stay in school if you're in school, but you're not allowed to return to school if you've been in a delinquency placement." That, again, was a fairly narrow targeted issue that we could take on that turned out to be more complicated than we thought it should have been in

[70] Act 187 of December 9, 2002, No. 187, § 12, 2002 Pa. Laws 1472 (amending the Pennsylvania School Code, 24 PA. STAT. ANN. § 21-2134 (West 2011)); H.B. 2644, 186th Gen. Assem., Reg. Sess. (Pa. 2002); 24 PA. STAT. ANN. §21-2134 (West 2011).

[71] *See generally JLC Working in Partnerships to Ensure Quality Education for Returning Delinquents* (Juv. L. Ctr., Philadelphia, Pa.), Dec. 2004, *available at* http://www.jlc.org/enewsletter/19.

terms of the right to relief. We managed to get an appellate court,[72] but not a trial court, to agree that by having a complete ban for all kids on return to school, that there was a violation of due process. There was no hearing or judgment. As you mentioned about *Goss v. Lopez*[73] earlier, this was related not to the suspension or expulsion way, but in a return to school way, and we were able to at least get kids back into a transitional school that would evaluate where they should be, because we didn't want kids going back to a school in which they were involved with gangs or likely to be victims of crime and where they might not succeed academically. But that was an example of a discrete piece of litigation that had an impact and where we could pull something off. It was also pretty clear to the public what was at stake; we could tell the story pretty clearly.

Major class action child welfare litigation has had mixed results in the country. I think you've had movement here in Tennessee. I think there's been some good movement in New Jersey. New York City, a state unto itself, had its own child welfare litigation that has changed things quite considerably, particularly after the recent commissioner came in several years ago, including a reduction of the foster care population from about 50,000 to about 15,000 in New York City alone.[74] It was done in a way that made the system more manageable through placement prevention as well as permanence and it gave the caseworkers a fighting chance to success.

But it hasn't succeeded everywhere. In Philadelphia, in 1990, Children's Rights came in and we had lots of

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[72] D.C. v. SDP, 879 A.2d 408 (Pa. Commw. Ct. 2005).

[73] *Goss*, 419 U.S. 565 (1975).

[74] Press Release, New York City Administration for Children's Services, Administration for Children's Services Unveils Major Initiative to Strengthen New York City's Child Welfare System (Feb. 3, 2005), *available at* http://www.nyc.gov/html/acs/html/pr/pr05_02_03.shtml.

debates about class action, but we declined to participate in the litigation that Children's Rights brought[75] that lasted I think for the next nine years in the state because we felt that targeted litigation would be more effective, and Children's Rights has a history of comprehensive litigation. The debate basically is whether or not targeted litigation is the leverage point that many of us think it is, or merely a way to displace the problem. You get targeted solutions in your narrow litigation, but the argument is that every other part of the system suffers. Children's Rights, supported by many others in the field, believes that you really need a comprehensive approach; otherwise, you end up with a shifting of resources and you always have a part of the system that ends up doing a disservice to children and families.

There are others of us who think that comprehensive litigation is too big to manage in the child welfare system and ends up having the lawyers as well as the judges try to balance competing values. Because kids' rights change overtime, the issue of permanency is complex. When does it really kick in? The Adoption and Safe Families Act of 1997[76] added requirements for states to do permanency reviews after kids are in placement for fifteen months out of a twenty-two-month period. Courts are still reluctant to do that when siblings are involved and it turns out that it's been much more complicated in implementation. When does a kid's right change from reunification to placement? How does that get enforced? How does it get implemented? All of these things are part of the overall massive comprehensive litigation equation, and I would say that there have been some unresolved philosophical debates about the merits of this kind of litigation.

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[75] Baby Neal v. Casey, 43 F.3d 48 (3rd Cir. 1994).

[76] The Adoption and Safe Families Act of 1997, 42 U.S.C. § 629a (1997).

The other problem is that it's hard for litigators to create good systems. I think we are much better as lawyers at preventing harm to kids by stopping things like overcrowding than at creating good social work practice. An example I think that Jackie used so well was the difficulty we have now in Tennessee of improving the individual caseworker's work on individual cases. That's a chronic problem everywhere in the country, in part because turnover is high, supervision is lousy, pay is low, and the mission is impossible. The individual case work figuring out whether decisions are good or bad ends up being quite difficult unless you have something tragic happen. When something tragic happens, that elevates these systems back into the limelight and you have yet another either bit of litigation, another blue ribbon commission, or another set of newspaper exposés to deal with as litigators.

We've had some mixed success; I think we've had some targeted success as well with the right administrators at the right place at the right time. You described that in correcting the change in administration here in Tennessee it really did help and it mattered; having somebody who's welcomed the technical assistance matters. I always thought that as a litigator and somebody who uses a whole range of strategies for social change, I always needed to have really good defendants in place in order to succeed, so that executive search became part of our change strategy so that we could help states find people we could sue who could succeed in the job. You need people who can actually deliver and make the changes in their systems. I mentioned that we've brought litigation around kinship care to improve certification and payments of kinship care. Many relatives take on a role of foster parents, agree to be supervised, participate in case planning and court reviews, but have not been compensated for their *per diems* for food and clothing. We've litigated, and others have, over sibling visits where siblings have been kept apart, and I think some targeted litigation has some merit as well. I think it depends

on context; it depends on resources. Comprehensive is inevitably a decade's worth of litigation. If you're going into it, you should be ready for it, whereas the other stuff can be a little more targeted.

There are I think opportunities for appellate practice to be a social change vehicle, an assist-in-improvement vehicle, if you have lawyers in these cases that build a body of law that regulates systems and can be quite effective as well. Of course, for that to work, you need a couple of things in place to happen. One, you actually need lawyers representing clients in the case. What we heard from the students and from Dean about truancy is an example of the perils of not having attorneys in place at the beginning of a case because – and we see this, I'll talk about this in my discussion of the Kids-for-Cash Scandal – the idea that a kid is not being placed at the beginning but agrees to conditions that lead to placement later based on facts that are wrong to begin with are reasons pretty clearly that lawyers are necessary at the outset of these cases.

Even with lawyers, however, we in our field have done a terrible job of building a body of appellate case law in the child welfare system or the juvenile justice system, for example. You take a look at most case law in the large umbrella of family law and, for the most part, it's in domestic relations: termination of parental rights cases are the kinds of cases in which parents are actively involved. There is not a culture of appeal in our practice, and I think that our failure to build that culture has hurt kids and families across the country. There are a lot of reasons for that. One, the time-line for appeals doesn't really match kids' life cycles and the case cycles, so at least – and I don't know how it is here in Tennessee – but in Pennsylvania you're not going to have an appeal decided before the next six-month case review, or in Allegheny County, the western part of Pennsylvania. They review cases in foster care every three months. There's no appellate process that can work in that field.

There's a culture. You have a lot of very good judges who care about kids deeply and who are really insulted when their views about best interest are challenged on appeal. I find the most difficult judges I've ever had to deal with are judges who cared the most because they often took the most liberties with the law, though not always as you'll hear. The appeal process changes the relationship and judges often did not like those of us in their courtrooms when we challenged their efforts. But we need an appellate body of law because, for example, "without justification" needs a definition. In every other area of the law, appellate courts help define what those words mean and give guidance to trial courts so that we don't have to make this up every case. Our law is particularly bereft of that.

There's also the issue of what our role is as lawyers that also prevents us from often taking appeals. I have been an opponent of the best interest lawyering for kids since the first time I screwed up a kid's life by arguing for her best interest rather than what she wanted me to do and discovered that she had no reason to talk to me a second time: when she got in trouble on the delinquency side and I was her best interest lawyer on the dependency side, why she would trust me not to sell her down the river on the delinquency side as well? But one of the other things is that when we're arguing for best interest, we're putting ourselves in a position of offering evidence usually not subject to cross-examination. We pretend to be experts that were not. I've been around for thirty-six years doing this, and I would find it very dangerous to consider me as an expert on a child's life not subject to cross-examination, but many judges want me to be exactly that: "What do you think should be done in this case?" and have that unchallenged. Then when I say it and it's paid attention to and my client doesn't like it, I'm supposed to appeal my own judgment. We're put in a position that is bizarre and untenable. We are trained as lawyers and I think it's important that we listen to our clients and put on the best

case we can and, where appropriate, appeal errors of law or abuses of discretion, but not pretend to be something that we're not.

I would say that in Pennsylvania, where we have ten definitions of dependent child, we have actually the worst of all worlds. In some cases of a dependent child the lawyers are expected to be best interest attorneys, and in some instances, which are the old status offender cases of truancy and ungovernability that were once in the delinquency side but are now, since the mid '70s, in the dependency side, we're supposed to be client-directed lawyers.[77] So we would solve your problem in a pure truancy case by being client-directed, but if the truant was also abused, we would have a really hard time of figuring out what exactly we are. In terms of law reform in the individual case level, the role matters as well as being around; ninety percent of this is showing up, and figuring out the right litigation vehicle at the appropriate time is important on the broader system reform litigation side. I'll leave it there because I know you probably have questions for the students, for Jackie, Dean, and me.

SALLY GOADE: I'm Sally Goade, and I'm the clerk for the Court of Criminal Appeals but I'm interested in practicing in this area of law. In an earlier life I was a middle school English teacher in Nevada and Idaho and I raised a child in those states, and I supervised student teachers in upstate New York. I don't know quite what the policy was there, but I was flabbergasted to learn that they have to have a doctor's note for every absence. I know it sounds like a little thing, but I'm thinking this has got to be a nightmare for the schools to enforce that. As a parent, it

[77] SUSAN SNYDER, PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN'S RIGHT TO COUNSEL IN DEPENDENCY HEARINGS IN PENNSYLVANIA n. 18 (2001), *available at* http://www.jlc.org/publications/promises_kept_promises_broken/.

would have driven me crazy. I realize that there are probably a lot of Knox County parents here and I'm just out of the loop, but to have to have a doctor's note for every day that my son was sick, and he wasn't sick a lot, but I always thought that was my judgment, whether to keep him home. And for the students I had, that they would have had to have that, if they were sick three days, a note every day. I just wondered is this something that's common throughout Tennessee, how long has it been in place, and am I overreacting or is it a real problem with the truancy laws that people just can't get the doctor's notes? It seems like a huge tax on the health care system.

DEAN RIVKIN: My colleague, Barbara Dyer, who is an adjunct member of the faculty who helps supervise our students, she can answer that question for us.

BARBARA DYER: They do have to have a medical excuse once they have exhausted their ten parent notes.[78]

SALLY GOADE: Okay. Thank you.

BARBARA DYER: The parent can make that judgment ten times during a school year. But after those ten times, then any absence should be a medical note from a doctor.

SALLY GOADE: Thank you for that clarification. Now I'm not as flabbergasted.

COLLEEN STEELE: But in following up on that, I had a client seventeen years old, just at the age where she was still compelled to be in school, and she was undiagnosed. She had had several absences where Mother took the option and said, "No, I'm not sending her to school today, she just

[78] KNOX COUNTY SCHOOLS PROCEDURES HANDBOOK: ATTENDANCE (May 2003).

can't function in school." And then they started getting her to the doctor; they did all the diagnostics. Doctors would write an excuse for one day, even though some of the treatment and diagnostic tools that the doctors were actually using kept the child out of school for two days. So we have one day of unexcused absence even though on one of those two days she was actually at Children's Hospital of East Tennessee taking follow-up tests that had been ordered by her doctor. Do we not have a uniform policy for excused versus unexcused medical absences so that the parents know to ask for a two-day absence slip? Because, otherwise, it gets to the point where we're litigating it and the parents don't know. We could actually prevent a lot of this if they knew what the policy was. I don't think we even have a uniform policy throughout Tennessee that go from one county to the next, do we?

DEAN RIVKIN: No. The Tennessee Department of Education has a very, very skimpy sort of discussion of what are excused absences, and it comes from the attendance statutes.[79] But what we've heard articulated about this day-for-day need for notes is that it's not administrable. It's so difficult to administer by school people and to determine, they say, whether the note is for one day and the child is absent for three or four after that. Are those three days excusable or justified? This is an area, one of many in attendance and truancy, which is of course a key issue these days under No Child Left Behind[80] and with the whole drop-out phenomenon and push-out phenomenon. This is just one of many areas that we've identified that really need statewide consistency; the education statutes say these policies should be consistent, and they're not, and there are all these conundrums in there that make this system, frankly one of the least transparent

[79] *See* TENN. CODE ANN. §37-1-102(b)(25)(A)(i).
[80] No Child Left Behind Act of 2001, 20 U.S.C. §6301 *et seq.* (2001).

and accountable systems that I've ever encountered in four decades of a legal career. I've said to a number of people, after forty years of being a lawyer I'm in truancy court and yet the issues are as complicated any I've encountered in any other court.

JAMES CARNEY: I had the privilege of sitting on a campus court in Anderson County and we see these cases in detail with a panel with school and DCS present and I can tell you that every one of these is different, and a lot of this problem would be resolved if the school administration had a counselor with the authority to review these things. You get a parent who takes over custody halfway through the year, doesn't know what the rules are, doesn't know what the kid has done before, and doesn't realize that in some jurisdictions if you bring the note in three days late and has got a kid who doesn't know to drop it off, it's an unexcused absence. Five times, automatically prepare a citation. We don't do this with traffic citations. If you're driving down the road, you've got your pregnant wife in the right seat, and you're going to the hospital, the officer has the ability to say, "Well, maybe I'll give you an escort." Here, you have a kid dragged through this process, the parents dragged through the process, because of a rule. So we maybe need to look at it systemically and say, "Maybe as a last resort, yes, you may need access to an attorney to represent you, but you shouldn't have got there, your door shouldn't have been knocked down."

DEAN RIVKIN: You're raising a really important aspect of this system. There are screens built in, there are procedures that school systems are obligated to have and go through; fairly substantial obligations for interventions. That is one of the issues that we're raising on appeal, failure to follow those. And then of course there is Rule 8

and 12 of the Juvenile Rules[81] that are screens basically, where court officials are obligated to look at cases to determine whether they should go forward and where there is an opportunity there to say, "Wait, there is justification outside of the sort of number of absences that might exist." But, you're right, at the front end of the process is where a lot can and should happen. Because at the back end of the process, as we all know, the juvenile court, as much good intention as exists, doesn't have the resources to make things happen for a child.

JAMES CARNEY: Just to follow up, the idea of gatekeepers at each point – so a school counselor or a teacher could investigate this first and possibly write an exception that could be reviewed before it goes to the judge, the YSO, the youth services officer, to have the ability to review this and decide if we need – should be statutory. There should be some way to prevent in effect what is abuse of privilege when you have these things running forward.

DEAN RIVKIN: There are in our practice a lot of cases that we know are ultimately screened out. We may be the victim of seeing the really hard cases. But in most of the cases that we've seen, these cases could and should have been screened out also earlier. And, as I said before, there has been change. Bob's point is right, in the administration, for example, of the special education program here in this county, which is a bellwether for a lot of East Tennessee, there has been a promising change to live up to, for example, what's called the Child Find obligation under IDEA,[82] which obligates school systems to identify students who potentially have educational disabilities. All the figures show that kids with educational disabilities

[81] TENN. R. JUV. P. 8; TENN. R. JUV. P. 12.
[82] 20 U.S.C. §1412(a)(3) (2010).

represent forty to seventy percent of the number of court-involved children and youth. That's critical.

JAMES CARNEY: And this is great in Knox or in Anderson where you have resources and a well-funded school system. You get into Scott and Campbell and some of the counties where they have very little resources, I sit in court on those days and watch these poor juvenile judges deal with these and they're getting them cold.

DEAN RIVKIN: Yeah.

ADRIAN BOHNENBERGER: Adrian Bohnenberger from the Montgomery County Bar. What I'm running into and what baffles me beyond all belief is the situation I had with a child with a chronic illness that caused nausea every so often. If the child got sick at school, the school system, because of the lack of school nurses, called the parents to take her home, and she had to be taken home even though the nausea was something that passed relatively quickly. If the child had nausea, she had to go home. But if they didn't take the child immediately to the doctor and get a doctor's note, it was an unexcused absence even though the school was the one who sent her home. They know what caused the problem, it's been well-documented, well-treated, it's not something that is going to go away, and she's on whatever medication she can be on, it was still an unexcused absence. And it took a substantial threat of litigation to get the school to back off. It just baffled me.

GARY FOX: Gary Fox from Loudon County Bar. Are there any requirements for providing transportation for kids that are placed in the alternative schools if it's located a distance away from their home? I've got a case right now where I'm a guardian ad litem for a young man who's been doing very poorly in school, not doing homework, and is in alternative setting – he can either receive three hours of

homebound instruction a week with an assignment or go to the alternative school, and is really doing a very good job with that. He's about fifteen minutes away, eight miles from his home to this, and they don't provide transportation for that.

DEAN RIVKIN: We litigated a case from 2004 to 2008 called *C.S.C. v. Knox County Board of Education.*[83] There are a couple of appellate court decisions. One of the issues we raised after we established the entitlement to alternative education, and the school system set up a night program for all students who were suspended or expelled for over ten days was transportation. We felt there needed to be an entitlement to transportation that went along with the entitlement to some type of alternative education. We lost that issue in the court of appeals, but we think it could be maybe revisited in the right kind of case. But I'm afraid the same is true here in Knox County; a night program that goes from 4:30pm to 7:30pm really does exclude a number of students who are not on transportation lines, and even if they are, in the wintertime, going home at night. It's part of this reform that needs to take place in terms of looking at issues of attendance and continuing education. There's been a heightened awareness of the need to keep kids in school because of No Child Left Behind.[84] Whatever one may think of that statute overall, there certainly has been a much more focused attention on every kid. These are systemic problems.

ROBERT SCHWARTZ: It's also an example of where lawyers for kids working with others ought to be working to get the legislation changed. I mean, there is one area in federal law where kids do have a right to transportation is

[83] C.S.C. v. Knox County Bd. of Educ. et al., No. E2006-00087-COA-R3CV, 2006 WL 3731304 (Tenn. Ct. App. 2006).
[84] 20 U.S.C. §6301.

when they're homeless, and the McKinney-Vento Act[85] gives kids a right to go to their home school and have transportation provided. There have been a number of states that have been giving similar rights to foster youth: when they change foster homes they leave different boundaries to be able to stay in their home school. States are divided on whether they provide transportation so kids can get back to their own school. If you have a multi-tier strategy as an advocate to change the legislation and then litigate over the legislation that you've helped enact it's easier than trying to create a right through litigation in the first place.

DEAN RIVKIN: One of the reasons we advocate so strongly for evaluations for students for potential special education services is that if a student comes under that umbrella, there's no cessation of education allowed, and, as a related service, there is transportation. Obviously not every student is going to be eligible, but that's another aspect of this issue. I'd be glad to revisit this with you at some time.

RENEE DELAVE: My name is Renee DeLave and I worked in a rural school county for a number of years, and if I may offer an observation and then a question connected it. It really seems to me that the schools are very, very ambivalent about whether they want to create an educational environment, a beloved community type of environment, or create really a kind of school-to-prison pipeline. The type of power models that I certainly saw in our schools resulted in a lack of evenhandedness in terms of who actually got sent to the juvenile justice system. To have a truancy charge against a child who already was in alternative school is a very serious and compounding factor in whether or not that child would get sent off or given

[85] McKinney-Vento Act of 1987, 42 U.S.C. §11301 (1987).

other pretty serious impairment to their freedom. That would be the observation. My deepest concern though was the bullying that I observed and the lack of a coherent policy or an enforced policy, if there even was one, inside of schools and the known correlation between that and truancy. There's limitless documentation. I wondered if you might talk a little bit about that issue.

ROBERT SCHWARTZ: You're raising the issue that is now the hot issue in the United States, as states have seen students commit suicide. You know, the Massachusetts case[86] was a catalyst for that. In every school district in the country right now they are trying to address bullying curriculum. But it's going to be a transformation. I think people are seeing the connection but that hasn't yet affected the way schools are responding to the truant part of it. What we are seeing is the introduction of bullying prevention curricula at elementary school levels. The Olweus Bullying Prevention curriculum[87] is in the blueprint for violence prevention models out of the University of Colorado Center on Violence Prevention.[88] So there are some examples that have risen to the top but they're pretty slow to put in. But it's the hot issue in the country now.

DEAN RIVKIN: And as lawyers in this field there is a good anti-bullying statute in Tennessee that imposes certain

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[86] *See* Rick Hampson, *A "Watershed" Case in School Bullying?*, Apr. 5, 2010, *available at* http://www.usatoday.com/news/nation/2010-04-04-bullying_N.htm?csp+obnetwork.

[87] *See* Olweus Bullying Prevention Program: Safer, More Positive Schools, *available at* http://www.olweus.org/public/bullying_prevention_program.page.

[88] *See* Center for the Study and Prevention of Violence: Blueprints for Violence Prevention, *available at* http://www.colorado.edu/cspv/blueprints/.

requirements on school systems[89] and it's up to us to enforce them in the right cases or to raise those issues.

JESSICA VAN DYKE: I'm Jessica Van Dyke, and I had a question actually for Ms. Dixon, and that is there are a lot of students in here today, young attorneys; can you relate any of your experiences serving as local counsel for a major class action lawsuit? There's a lot of people here that want to get involved, especially in the upcoming years. Do you have any suggestions or lessons learned from that experience?

JACQUELINE DIXON: Wow. Like I said, I really feel like I was just fortunate. I was in the right place at the right time. My former partner, David Raybin, is really well-known as a legal scholar and well-known in the criminal law area. I'm not sure how they got his name, but they contacted him and then he pulled me into it I think because he knew I did a lot of domestic relations and some juvenile court custody kinds of stuff. You know, I wish I knew. I think if you just are aware of what's going on. I think people that do this kind of work are very approachable. Once they got us involved, we sort of sat and brainstormed about other people to be involved. I think if you do a good job in court, you get to know the judges, you maybe become active in a Bar association where you make a lot of contacts with people in different areas of the law, then your name is out there. And don't hesitate to raise your hand or speak up and say, "Hey, I want to be a part of that."

DANIEL ELLIS: Hi. I'm Daniel Ellis from the Anderson County Bar. My question is about business records and the three-day rule. Couldn't the three-day rule for doctor's notes be used to invalidate just a STAR report or something where you've got truancy, they're absent, but you don't

[89] TENN. CODE ANN. §49-6-1016 (2011).

have anyone there to testify? Because if the three-day rule says if you don't turn in that doctor's note within three days, you can't turn it in, and if the business records exception to hearsay says that it isn't trustworthy, or if there are circumstances to indicate that it's not trustworthy, then you shouldn't be able to rely on it. So if I have a note, it's four days later, I'm not allowed to turn it in, well, then your business records shouldn't be admissible because your policy makes it not trustworthy.

DEAN RIVKIN: You see what happens when you have the fertile minds of lawyers take on these issues? Terrific.

JESSICA VAN DYKE: At this point we're going to wrap up this panel. They've all been fantastic. Thank you so much for being here today. We have small tokens of our appreciation for each panelist for being here. And I'll just say it's so exciting, every person that's commented has been from a different county in East Tennessee and Middle Tennessee, and it's so fantastic to hear that we have so many different represented counties here today.

(A break was taken)

DEAN RIVKIN: Welcome back, everybody. Austin Kupke, who is a second-year student at the College of Law and a student in our education law practice, got a very coveted internship this summer with the Juvenile Law Center in Philadelphia. I'm going to let Austin introduce Bob for his keynote talk.

AUSTIN KUPKE: Robert Schwartz co-founded Juvenile Law Center in 1975 and has been its executive director since 1982. With over thirty years at Juvenile Law Center, Mr. Schwartz is a national leader in advocating for children's rights and has extensive experience in all areas of juvenile law. In his career at Juvenile Law Center, Mr.