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No Child LEFT BEHIND



Representing Youth and Families in Truancy Matters

By Dean Hill Rivkin and Brenda McGee

Dean Hill Rivkin
*College of Law
Distinguished Professor*

University of Tennessee College of Law
1505 Cumberland Ave.
Knoxville, TN 37996-1810
865.974.1481
drivkin@utk.edu

Brenda McGee
*Pro Bono Community
Cooperating Attorney*

UT Education Law Practicum
1505 Cumberland Ave.
Knoxville, TN 37996-1810
865.974.1481
bmcgee6608@gmail.com

Truancy is a vital issue in modern education reform.¹ Despite the centrality of good attendance to the success of students in school, the seemingly mundane nature of truancy often escapes the attention of legal services programs. The disproportionate impact of truancy on low-income children and families, however, should trigger serious consideration to make this area of practice a high priority.

In part, this relative oversight of legal services programs is understandable. Under the widely articulated view, truancy is a cultural problem that can be solved only when children and families are compelled by courts to go to school. This time-worn strategy has no proven underpinnings and no evidence of success.² The tangled roots of truancy are rarely revealed in court proceedings and are often viewed by lawyers as impenetrable and not susceptible to change through focused legal advocacy.

¹See, e.g., Robert Balfanz & Vaughan Byrnes, *The Importance of Being in School: A Report on Absenteeism in the Nation's Public Schools* (May 2012), <http://bit.ly/1aZkGwY>; Hedy N. Chang & Mariajosé Romero, *National Center for Children in Poverty, Present, Engaged, and Accounted for: The Critical Importance of Addressing Chronic Absence in the Early Grades* (Sept. 2008), <http://bit.ly/18lp4Eg>. The terminology around truancy varies. "Truancy" and "poor attendance" are often used interchangeably. "Chronic" absences and "habitual" absences are used in different but similar contexts, as are "excused" and "unexcused" absences.

²See, e.g., *NY Study Says Punishment Doesn't Solve Absenteeism*, CBS NEW YORK (Nov. 27, 2010), <http://cbsloc.al/15Poe48>; Marna Miller et al., *Washington State Institute for Public Policy, Washington's Truancy Laws: Does the Petition Process Influence School and Crime Outcomes?* (Feb. 2010), <http://1.usa.gov/18lduej> (inconclusive evidence that truancy petitions succeed in getting students back to school).

The old narrative, however, is rapidly changing. Recent legal challenges to truancy policies and practices have exposed systemic unfairness in the enforcement of truancy laws.³ As more abuses in the use of truancy prosecutions and laws to punish low-income children and families surface, now is the time for legal services programs to recognize the value of aggressive, intentional, and creative legal representation in securing adequate educational settings and services for students who incur chronic absences. Representing youth and families enmeshed in truancy, legal services lawyers and advocates can participate in education reform for disempowered clients. The stakes could not be higher.⁴

Nationwide truancy rates are distressingly high.⁵ The consequences of truancy are well documented.⁶ Several states are attempting to link receiving welfare benefits to student attendance and performance.⁷ Strict testing regimes under federal and state laws encourage schools to “push out” students who struggle to attend school and consequently can-

not perform adequately on tests.⁸ Educational neglect proceedings against parents continue to be a default strategy for “correcting” chronically poor school attendance.⁹ Around the country the war against truancy mimics the worst of the strategies and rhetoric of the war on drugs. The militaristic ring to campaigns ostensibly designed to reduce truancy—“sweeps” and “crackdowns”—often use get-tough language associated with antigang measures or serious criminal behavior.¹⁰

Here we propose a counternarrative to the war on truancy, one that focuses more on the systemic defects of school systems, juvenile courts, and child welfare systems than on the blameworthiness of children and families. First, we detail the turbulent national landscape involving truancy and school attendance.¹¹ Second, we canvass state laws on truancy and show the myriad approaches among the states to the truancy problem and introduce lawyers to selected state and local schemes whose use can forestall court involvement. Third, we develop the key

³See, e.g., *Boyer v. Jeremiah*, No. 2010-1858, 2010 WL 4041812 (R.I. Super. Ct. Oct. 8, 2010), quashed and remanded for dismissal as moot sub nom. *Boyer v. Bedrosian*, 57 A.3d 259 (R.I. 2012); Letter from Michael Harris & Hannah Benton (National Center for Youth Law) et al. to Anurima Bhargara, Chief, Educational Opportunities Section, Civil Rights Division, U.S. Department of Justice (June 12, 2013), <http://bit.ly/1fuHOX3>.

⁴Keeping children and youth out of the juvenile system is a worthy goal in itself (see generally Uberto Gatti et al., *Iatrogenic Effect of Juvenile Justice*, 50 JOURNAL OF CHILD PSYCHOLOGY AND PSYCHIATRY 991 (2009) (court involvement, even for minor offenses, increases odds of future court involvement); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUSTICE QUARTERLY 462 (2006)).

⁵See, e.g., David Jackson & Gary Marx, *A Challenge Unmet*, CHICAGO TRIBUNE, NOV. 13, 2012, <http://bit.ly/19u3IVB>; Peter Winograd et al., University of New Mexico Center for Education Policy Research, *Truancy in New Mexico: Attendance Matters* (Dec. 18, 2012), <http://bit.ly/19u4528>.

⁶A New York court recently catalogued the serious consequences of truancy (*In re Jamol F.*, 878 N.Y.S.2d 581, 594 n.7 (N.Y. Fam. Ct. 2009)) (“High rates of truancy have been linked to high daytime burglary and vandalism rates, as well as higher rates of substance abuse, auto theft, and gang involvement. Students with the highest truancy rates are at the greatest risk of dropping out of school. Adults who do not complete high school are two-and-one-half times more likely to support themselves with public assistance than high school graduates and almost twice as likely to be unemployed as those who graduated from high school. Adults who were truant as juveniles, tend to have lower paying jobs and an increased likelihood of incarceration.”) (citations omitted).

⁷This strategy is often called “learnfare” (see, e.g., S.B. 132, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013), <http://1.usa.gov/15mNRuV>; Michigan Department of Human Services, *School Attendance and Student Status*, BRIDGES ELIGIBILITY MANUAL (July 1, 2013); *Ri Bill: No Welfare for Families of Truant Kids*, PROVIDENCE JOURNAL, June 10, 2013, <http://bit.ly/1fclO4z>).

⁸See Diana Tate, American Civil Liberties Union of Northern California, *Schools for All Campaign: The School Bias and Pushout Problem* (Nov. 2008), <http://bit.ly/17eeC5X>.

⁹See Sara Mogulescu & Gaspar Caro, Vera Institute of Justice, *Making Court the Last Resort: A New Focus for Supporting Families in Crisis* (Dec. 2008), <http://bit.ly/18nF9cq>.

¹⁰See, e.g., *County Cracking Down on Truancy*, WAVE3 News (Nov. 29, 2012), <http://bit.ly/15qqUgZ> (Harrison County, Indiana, prosecutor, noting “truancy is rampant,” will prosecute parents through “Get ‘Em in the Classroom” program).

¹¹Truancy prosecutions have become a staple in the “school-to-prison pipeline” (see Complaint, *United States v. City of Meridian*, No. 4:12-cv-168 (S.D. Miss. Oct. 24, 2012), <http://1.usa.gov/18nmwYc>).

common issues in the truancy process. And, fourth, we propose strategies for legal representation and reform to engage students meaningfully in education.

The Abuses of Truancy Systems

Since the enactment of compulsory attendance laws in the 1880s, truancy has been an under-the-radar phenomenon of concern largely to the attendance staff of school systems, juvenile and family courts, and law enforcement agencies.¹² The main incentive for school systems to ensure that students attended school was the link between attendance and per-pupil school funding. Filling empty desks brought more funding to schools.¹³

An influential 1997 Federal Bureau of Investigation report on truancy drew a link between attendance at school (or, conversely, dropping out of school) and future criminal activity.¹⁴ Through this connection, the “school-to-prison pipeline” emerged. To combat truancy, the federal government improvidently funded district attorneys to set up dedicated units to prosecute students for truancy, instead of funding school systems to develop effective interventions and strategies. The means of these prosecutorial

programs were not as sharply defined as their ends. District attorneys aggressively sought to prosecute away the truancy problem and paid little attention to the educational, social, and psychological underpinnings of why students fail to attend school.¹⁵

The abuses of this prosecutorial campaign have been revealed in recent litigation. Although the data are not deep, a recent article showed that 57,000 truancy petitions were filed in juvenile courts in 2007, a 67 percent increase in petitions filed since 1995.¹⁶ The stories behind these petitions show that “truancy court” is a dumping ground for low-income children and families who do not have the means to hire counsel or secure alternative educational programming.¹⁷

State Truancy Systems: A Patchwork Quilt

States handle truancy through myriad approaches.¹⁸ A compilation of the truancy laws in the 50 states and Washington, D.C., shows the differential treatment of truancy both before and after court involvement.¹⁹ A charge of truancy is denominated a status offense in some states, a delinquency offense in oth-

¹²See PAT CARLEN ET AL., *TRUANCY: THE POLITICS OF COMPULSORY SCHOOLING* (1992).

¹³See, e.g., John G. Morgan, *Teaching to Empty Desks: The Effects of Truancy in Tennessee Schools* (Jan. 2004), <http://1.usa.gov/16xZn00>.

¹⁴Tom Gavin, *Truancy: Not Just Kids' Stuff Anymore*, FBI LAW ENFORCEMENT BULLETIN, March 1997, at 8.

¹⁵See Irene M. Rosenberg & Yale L. Rosenberg, *Truancy, School Phobia and Minimal Brain Dysfunction*, 61 MINNESOTA LAW REVIEW 543, 599 (1977) (criticizing use of juvenile courts as “bludgeons” to compel students to attend school).

¹⁶Laura Faer & Catherine Krebs, American Bar Association, *Counting All Children: ABA Conference Focuses on Truancy* (Nov. 12, 2010), <http://bit.ly/16lCCYB>. This national figure may undercount the number of cases actually filed. In 2012, in Tennessee alone, 9,634 truancy petitions were filed in juvenile courts statewide (Tennessee Council of Juvenile and Family Court Judges, *State of Tennessee Annual Juvenile Court Statistical Report* 35 (May 2013), <http://bit.ly/1b5MO1m>).

¹⁷See Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASHINGTON UNIVERSITY JOURNAL OF LAW AND POLICY 53 (2012), <http://bit.ly/16ql8Vv>. See, e.g., *Rivera v. Lebanon School District*, No. 1:11-CV-147, 2012 WL 5875011 (M.D. Pa. Nov. 20, 2012) (mother fined more than \$10,000 for her children's absences, despite their subjection to bullying); *De Luna v. Hidalgo County, Texas*, 853 F. Supp. 2d 623 (S.D. Tex. 2012) (student with attention deficit hyperactivity disorder sentenced to pay \$257 to \$383 per month and then serve 18 days in jail); *In re Benjamin A.*, 946 N.Y.S.2d 65 (N.Y. Fam. Ct. 2011) (truancy court found that school could have taken additional steps to assist student with Asperger syndrome in his attendance); *Boyer*, 2010 WL 4041812 (stress, anxiety, and humiliation experienced by special education student and his mother in truancy proceedings); *Bellevue School District v. E.S.*, 199 P.3d 1010 (Wash. Ct. App. 2009), rev'd, 257 P.3d 570 (Wash. 2011) (student in English language learning classes sentenced to two days on work crew and then to alternative school); Harris & Benton, *supra* note 3 (use of adult criminal courts to prosecute youth for truancy violates U.S. Constitution and federal law).

¹⁸See, e.g., LYNN BYE ET AL., *TRUANCY PREVENTION AND INTERVENTION: A PRACTICAL GUIDE* 61–109 (2010).

¹⁹Dean H. Rivkin, University of Tennessee, Footnote Online Supplement: State Truancy Law Compilation (Oct. 2013), <http://bit.ly/1b4KpDq>. This compilation is an updated version of the laws listed in the Juvenile Law Center's excellent amicus curiae brief in *Bellevue School District v. E.S.* (Brief of Juvenile Law Center et al. as Amicus Curiae on Behalf of Respondent, *Bellevue School District*, 257 P.3d 570 (No. 83024-0)).

ers, and a child welfare case in yet others.²⁰ Students are afforded a right to appointed counsel in 34 of the 46 states that bring truancy within the jurisdiction of the juvenile court.²¹ In the other states, students are not entitled to appointed counsel.²² In those states that do have a right to counsel, the adjudication of truancy cases is the province of public defenders and appointed private counsel. For our purposes here, therefore, we do not focus on the adjudicatory stage of truancy matters.²³

Instead we focus on the prepetition stage, before court involvement, where legal services programs can help divert truancy matters from ever reaching juvenile or family courts.²⁴ Even within states, school districts vary widely in how they handle students with chronic or habitual absences before invoking the jurisdiction of a court. Despite being a national problem, truancy policy is a fractured and uneven morass.

The predominant model prior to court involvement is a process, mandatory in a few states, in which school systems communicate with parents to learn the underlying reasons for a student's absences and develop a plan to remedy the problem. This approach usually requires sending successive letters, a typically ineffective approach, followed by telephone calls and home visits. This "screening" varies in depth and intensity. In some school systems, the screening mirrors the approach for evaluating stu-

dents for potential eligibility under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act and requires the direct involvement of families.²⁵ In other systems the approach is more superficial, and parents are not a meaningful part of the process.

Following the screening, many systems require a plan of intervention designed to return the student to regular school attendance. Such plans vary in depth, intensity, and monitoring. Given the resource-intensive commitment required to provide many chronically absent students with wraparound supports and services, school systems may try to circumvent the process and divert the matter to juvenile court. Lawyers and advocates can hold school systems accountable for following the prepetition steps.

Common Issues in Truancy Matters Before Court Involvement

The primary goal for legal services lawyers and advocates in truancy representation should be to keep children out of, or immediately extricate them from, a juvenile court system that is pervaded with abuses. No hard evidence has shown that court intervention, on balance, ensures that a child will attain a more stable education and a more successful experience at school.²⁶ Indeed, evidence indicates the contrary: court involvement can be a motivating factor in a student's decision to drop out of school and engage in escalating antisocial behavior.²⁷

²⁰Rivkin, *supra* note 19.

²¹See Brief of Juvenile Law Center et al. as Amicus Curiae on Behalf of Respondent, *supra* note 19.

²²Tennessee, the jurisdiction in which we practice, does not afford students a right to counsel in truancy prosecutions. Legislation to provide a right to counsel was defeated in 2012.

²³For an excellent manual for attorneys representing students in the adjudicatory stage, see ROSE SPIDELL ET AL., TEAM CHILD & AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, DEFENDING YOUTH IN TRUANCY PROCEEDINGS: A PRACTICE MANUAL FOR ATTORNEYS (Oct. 2009), <http://bit.ly/16EQrNM>.

²⁴See generally HANNAH BENTON ET AL., REPRESENTING JUVENILE STATUS OFFENDERS (Sally Small Inada & Claire S. Chiamulera eds., 2010), <http://bit.ly/19UdBA8> (valuable guide for attorneys representing juvenile status offenders at all stages of truancy process).

²⁵Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1409 (2013); Rehabilitation Act, 29 U.S.C. §§ 794–794f (2013).

²⁶See Miller et al., *supra* note 2.

²⁷See New York City School-Justice Partnership Task Force, Keeping Kids in School and out of Court: Report and Recommendations 12 (May 2013), <http://bit.ly/1fDj3lb>.

Here we focus on issues that legal services programs are most likely to encounter in their work with children and families. Getting a handle on these problems early is especially important because of the increasing threats that states will link eligibility for public benefits on a child's school attendance and performance. Even in the majority of states where "learnfare" has yet to become an issue, representation in truancy matters can make a pivotal difference in assisting children and their families successfully navigate an increasingly complex educational system.

As part of interview protocols, legal services programs that choose to represent families in this area of unmet legal need can readily determine whether a child is in jeopardy of court involvement. A few targeted questions about a child's attendance and performance in school can yield sufficient information about exposure to court involvement for either the child or the parent. Once this proactive, intentional approach determines that attendance is a concern, legal services programs can identify the underlying issues and bring needed services and supports to the student. Advocates can identify and develop alternative educational opportunities and, for older students, realistic exit strategies from school.²⁸

Special Education. The precise prevalence of special education needs among children and youth with chronic absences is unknown. The data that show high rates of disabilities among children who become court-involved strongly suggest that

children who are chronically absent from school should be screened by school systems for education disabilities under both the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act.²⁹ Both laws contain omnibus Child Find mandates directing school systems to determine whether at-risk students are eligible for services, supports, and accommodations.³⁰ This screening should be sensitive to the often-undetected mental health issues of children in low-income communities. The screening, for example, should be "trauma-sensitive," carefully consider a range of "anxiety disorders," and meaningfully understand the behavior associated with attention deficit hyperactivity and bipolar disorders.³¹ A school system's obligations should be triggered by significant absences, reason to believe that the absences are linked to a disability, and a need for services.³²

If a child with multiple absences becomes or is already eligible for special education services, the school must deal with the student's absences in an individualized education program.³³ The program should contain positive behavioral supports and other strategies to reengage the student to attend school.³⁴ If a student's truancy is severe and is bound up with complex mental health and learning issues, home-bound education, online education, or, as a last resort, placement in a residential facility is an option under the Individuals with Disabilities Education Act.³⁵

The challenge of counseling families about the benefits of a special education

²⁸The issues in this section represent the broader set of concerns. There is also a more specific route to resolve a truancy matter: show that the "unexcused absences" were, in fact, for good cause. Lists of "excused absences" used by local school systems are often exceedingly narrow and may conflict with a broader list of excused absences at the state level.

²⁹See National Center on Education, Disability and Juvenile Justice (April 30, 2007), www.edjj.org.

³⁰Compare 34 C.F.R. § 300.111 (2013) (Individuals with Disabilities Education Act) with 34 C.F.R. § 104.35 (Section 504).

³¹See, e.g., RAY W. CHRISTNER ET AL., ANXIETY DISORDERS IN THE CLASSROOM: AN ACTION PLAN FOR IDENTIFICATION, EVALUATION AND INTERVENTION (2011); SUSAN F. COLE ET AL., MASSACHUSETTS ADVOCATES FOR CHILDREN, HELPING TRAUMATIZED CHILDREN LEARN: SUPPORTIVE SCHOOL ENVIRONMENTS FOR CHILDREN TRAUMATIZED BY FAMILY VIOLENCE (2005), <http://bit.ly/1aoZkrR>.

³²See, e.g., *Department of Education, State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190 (D. Haw. 2001); *Hamilton (Ohio) Local School District*, 58 IDELR 82 (U.S. Dep't of Educ. Office for Civ. Rts. Sept. 16, 2011) (student's medical problems and excessive absences should have prompted school to evaluate student for 504 eligibility).

³³See 34 C.F.R. § 300.324(a)(2)(i).

³⁴See, e.g., *Lakeland School District*, 58 IDELR 150 (Pa. State Educ. Agency 2011).

³⁵See 34 C.F.R. § 300.104. Though justified in extremely serious cases where a student is not able to be served in the home and school with a thick regime of services, advocating residential placement for students who are truant should be the rare exception.

strategy to resolve truancy issues can be formidable.³⁶ The blurry line that separates legitimate special education needs and questionable perceptions that label difficult behavior as being pathology-based has led to overrepresentation of youth of color in special education programs.³⁷ This phenomenon has fueled an understandable reluctance on the part of some families to have their child “labeled” a special education student. Despite this reluctance, the services and protections available for students who do meet the certification criteria under the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act may be the only safeguards available to prevent court involvement and the adverse consequences of not attending to health and mental health issues early in a student’s life.³⁸

The specialized nature of special education law should not prevent legal services attorneys from representing children who are chronically absent. If a legal services program does not have staff with special education expertise or experience, organizations within each state’s Protection and Advocacy system are potential resources for lawyers and advocates new to the field. Excellent written resources are available for lawyers new to this practice area.³⁹

School Discipline. Unjustified school discipline can push a student down the path of extended absences and ultimate school exclusion.⁴⁰ Punishments include expulsion, out-of-school or in-school suspension, and a variety of lower-level measures that can lead students to con-

clude that attending school in an unfriendly environment is not conducive to their learning or growth.⁴¹

Legal services programs should involve themselves in school disciplinary proceedings when truancy may be an issue. Although school disciplinary hearings under *Goss v. Lopez* serve as a weak check on a school administrator’s discretion whether or not to suspend a student, the presence of a lawyer can curb severe abuses of the process.⁴²

Bullying. Until recently the phenomenon of bullying remained below the radar. Explicit discussion of bullying as an underlying cause of extended absences has been absent from the public discourse about truancy. Bullying is complex because of the stigma attached to it and because of the need for total trust among a student, the student’s family, and those who can help resolve the situation.⁴³ Often bullying is not disclosed to school personnel, even to school social workers, and students continue to mount absences without explanation. Lawyers can serve as an independent voice and advocate, a person whom the family can explicitly trust. Once the story is told and the family and student feel supported, the truancy process can be halted and measures instituted to ensure that the student will feel safe and protected in school.

Access to Health Care. A staple of the school attendance system is doctor notes that give students an “excused” absence. When families lack reliable transportation or cannot afford to buy gas or ride

³⁶See Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW 107 (2011), <http://bit.ly/18XbYRx>.

³⁷See Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WISCONSIN LAW REVIEW 1237.

³⁸See generally Ruth Colker, *The Learning Disability Mess*, 20 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW 81 (2011), <http://bit.ly/19FMeX>.

³⁹See, e.g., MATTHEW COHEN, A GUIDE TO SPECIAL EDUCATION ADVOCACY (2009); Council of Parent Attorneys and Advocates (2012), www.copaa.org.

⁴⁰See Dean Hill Rivkin, *Legal Advocacy and Education Reform: Litigating School Exclusion*, 75 TENNESSEE LAW REVIEW 265 (2008), <http://bit.ly/1fnC57S>.

⁴¹School discipline can have a more direct, perverse impact on truancy (see, e.g., *In re Brandi B.*, 743 S.E.2d 882 (W. Va. 2013) (student suspended for six days; those days later counted in her truancy adjudication)).

⁴²See *Goss v. Lopez*, 419 U.S. 565 (1975) (students facing suspension entitled to due process).

⁴³See Billie Gastig, *School Truancy and the Disciplinary Problems of Bullying Victims*, 60 EDUCATIONAL REVIEW 391 (2008).

available public transportation, however, students often stay at home without a doctor excuse for the absences. In some school systems, parents are permitted to send a limited number of parent notes that will be accepted as excused absences.

Because most families at risk for truancy are Medicaid-eligible, legal services lawyers should determine the availability of transportation options paid for by Medicaid. Generally emergency transportation is available for serious health issues or trauma, and transportation to scheduled appointments is given with advance notice. Same-day transportation to a doctor's office or urgent care is a Medicaid benefit that may be hidden in the fine print of a family's plan.⁴⁴ Legal services lawyers can advocate making this transportation more accessible and can educate clients with school-age children on how to access a ride to the doctor's or dentist's office.

Access to Community Mental Health Services. Access to user-friendly community mental health services can prevent excessive absenteeism.⁴⁵ These services often require a sophistication in scheduling and maneuvering within the mental health system. These skills are often beyond the grasp of many families grappling with basic needs or whose children are suffering from serious mental health issues. Mental health case management programs can be intrusive and often require sharing family information with school systems with little regard for confidentiality mandates. Access to nuanced medication management for children is a hit-or-miss proposition and can impede a student's school attendance and proper functioning.

The Substance Abuse and Mental Health Services Administration funds programs for children and youth with diagnosed mental health impairments.⁴⁶ These "systems-of-care" are in theory designed to give seamless coordination of services, medication, and mental health support. In reality, however, these well-meaning programs often engage in practices that violate confidentiality safeguards, ostensibly to channel a student into the juvenile court system in an attempt to gain more intensive services. Such a referral by a mental health worker can occur without simultaneously urging the school system to fulfill its prepetition responsibilities and can lead to the transfer of legal custody or placement in foster care "to receive appropriate services."⁴⁷ Legal representation can challenge these maneuvers by holding the responsible agencies accountable and ensuring that the student remains with the student's family or at least in the local community.

Other Poverty Law Issues Affecting Truancy. Needless to say, children in low-income families that struggle with housing, food, and clothing should not be thrust into a truancy system that does not account for these circumstances, which are beyond the student's control. Substandard housing conditions often contribute to a student's health problems. Evictions disrupt a family's razor-thin equilibrium, making school attendance a lower priority. Although continued schooling is governed by provisions of the McKinney-Vento Act, homelessness similarly disrupts a family's very existence.⁴⁸ The same holds true for food insecurity and the lack of clean and well-fitting clothing, especially in school systems that require school uniforms.

⁴⁴E.g., Tennessee's Medicaid program supplies transportation within three hours, a provision not widely known among recipients (TennCare Urgent Care Transportation Amendment (Sept. 2008) (unpublished manuscript) (in our files)).

⁴⁵See, e.g., Danielle Arndt, *Truant Officer: Mental Health Issues Are Surprising Cause of Many Chronic Truancy Cases*, ANN ARBOR NEWS, Dec. 16, 2012, <http://bit.ly/1blytpj>.

⁴⁶Substance Abuse and Mental Health Services Administration, *Juvenile Justice and Systems of Care: We Work Together* (n.d.), <http://1.usa.gov/194SSDe>.

⁴⁷The practice of using state custody to obtain services for youth with complex mental health issues should be carefully scrutinized because it often serves as a circumvention of the responsibilities of community agencies, including school systems.

⁴⁸McKinney-Vento Act, 42 U.S.C. §§ 11431–11435 (2013).

Strategies in Representation: Crafting Alternative Educational Programming

Once the underlying circumstances behind a student's absences become clearer through client interviews, document review, and discussions with school or medical personnel or others involved with the student, the legal representation shifts to developing strategies to reengage the student in school activities. Developing alternative school strategies puts a premium on creative problem solving to craft a commonsense plan to present to the school on behalf of the student. Advocates first must understand the student's needs and the alternatives available (or potentially available) within the school system.

Special Education. Guiding the family through special education eligibility is the first order of business. Requesting an evaluation automatically places the student under the protections of the Individuals with Disabilities Education Act during evaluation and should delay a truancy filing.⁴⁹ Such a request can be based on medical or mental health records, observations of the student's behavior by the family or teachers, academic failure, or any other basis that might lead to a conclusion that the student meets the requirements for eligibility under either the Act or Section 504 of the Rehabilitation Act.

Following the evaluation, an individualized education program or 504 team meeting considers the question of eligibility. The team, which must include either the parent or the student or both, either certifies the student under one or both of these statutes or denies certification. If a student is not certified, appeal procedures are available and may be a basis for arguing that appeal should be

exhausted before a truancy petition is filed. If the team certifies the student as eligible, both the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act offer a nearly limitless number of possible services, supports, interventions, and accommodations—such as psychological counseling, meaningful social work services, a modified school schedule, or a behavioral plan designed to help the student feel safer and more successful in school—directly targeted to a student's chronic absences. The proper mix of services, supports, and accommodations often will stabilize a student sufficiently so that attendance will improve in both the short and the long run.

Alternative Education. Responding to high dropout rates, pressure to improve student test scores, and the recognition that some students require alternative education programming to have any decent chance of engaging in an educational program, school systems are increasingly creating programs for students who need greater flexibility and whose interests do not match the subject matter in the traditional curriculum.⁵⁰ Examples are some schools in convenient locations such as malls where students can set their own schedules and work on computer-based programming; virtual education programming; and more extensive offerings in what was termed "vocational education" but now is often called "career and technical education."

No Child Left Behind Act Transfers. If a student is assigned to a state-designated low-performing school, the student is entitled to transfer to another school in the system.⁵¹ Transportation must be provided. Transferring might stabilize a student whose absences can be attributed to academic failure or lack of safety. Such transfers require due diligence to

⁴⁹See generally Dean Hill Rivkin, *Decriminalizing Students with Disabilities*, 54 NEW YORK LAW SCHOOL LAW REVIEW 909 (2009–2010). Under the Individuals with Disabilities Education Act, a student being evaluated is entitled to be treated as a student "suspected" of having a disability and therefore entitled to all the safeguards contained in the Act, including that a school not circumvent the Act by filing a juvenile court petition except for commission of a crime (see Individuals with Disabilities Education Act, 20 U.S.C. § 1415(k)(6) (2013)).

⁵⁰See Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFFALO LAW REVIEW 615, 625–31 (2012) (classifying types of alternative schools).

⁵¹No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6316(b)(1)(E)); 34 C.F.R. § 200.44(a)(1).

ensure that the new school will meet the student's needs better than the current placement.

General Educational Development Degrees. Some students who are chronically absent have earned so few credits toward graduation that the only realistic option to achieve a timely formal exit from school is to obtain a General Educational Development (GED) degree. These students are so far behind in earning course credits that credit recovery programs are insufficient to accelerate a student's progress toward a timely graduation. GED programs are often tailored to students who need individualized instruction and flexible programming. Many GED programs offer job counseling and assistance. Depending on the state and the student's age, GED programs will waive the compulsory education requirement. This waiver often resides in the discretion of the school system, but legal advocacy can help formulate a strategy for enrolling a student in a GED program without permission of the school system and for working with the GED program to

assist the student in gaining permission to take the GED test.⁵²

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Our intent here is to open up this relatively eclectic field of poverty law practice to legal services programs. The expertise to develop an intentional practice in this realm is obtainable from legal and advocacy resources available in most states and from the growing literature on the importance of education advocacy, especially the growing body of work demonstrating the harms of the school-to-prison pipeline. Embedded in their communities, legal services programs are well situated to represent students in this arena. We encourage them to embrace truancy practice, knowing that the next generation of children in their communities can have a better chance of staying out of court and succeeding in life through higher education and decent employment.

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We want to acknowledge the skillful research and editing assistance of Anna Swift, a 3L at the University of Tennessee College of Law.

⁵²See, e.g., Tennessee's Compulsory School Attendance Requirement, Op. Tenn. Att'y Gen. No. 12-63 (June 13, 2012), <http://1.usa.gov/16CNCFY>.

The University of Tennessee College of Law Education Law Practicum

The University of Tennessee College of Law Education Law Practicum was created in 2009 as a clinical course to give law students supervised experience representing students who are prosecuted for truancy in the Knox County Juvenile Court and to engage in reform of the existing truancy system. A thousand truancy cases were coursing through the juvenile court at that time. Tennessee law does not afford a right to appointed counsel to students prosecuted for status (“unruly”) offenses.

The practicum received selected appointments from the juvenile court in truancy cases that had been adjudicated but were subject to recursive “reviews.” As the law students and lawyers with the practicum established trust with their clients, stories emerged from the clients about their reasons for missing school: sexual abuse, serious mental health issues, chronic health problems, no transportation to doctors, and other problems that afflict children and families without adequate resources. The students inevitably pleaded guilty without a proper waiver of rights or plea colloquy. Several of the clients were shackled and incarcerated in the secure juvenile detention facility. All were placed under onerous orders of probation and ordered not to miss any more days of school and to return for a review hearing in several months.

Using a provision of the juvenile code that had never been applied in appeals of unruly cases, the practicum filed petitions in the juvenile court to vacate and dismiss the cases of selected clients. The petitions argued that the process of adjudication and disposition was systemically flawed. The juvenile court denied the petitions, and appeals were taken to the circuit court, a court of general trial jurisdiction. The circuit court dismissed the appeals as untimely, but the court of appeals reversed and remanded the circuit court’s dismissal. The circuit court again rejected the petitioners’ claims, and these cases are on appeal.

While litigating, the practicum aggressively represented its clients in school issues such as special

education identification, services, and accommodations. The practicum developed exit strategies, such as early enrollment in GED (General Educational Development) programs and alternative programs. The practicum referred clients to apply for social security disability benefits, obtain appropriate mental health services, and secure safe housing. The Practicum compelled managed care organizations under the state’s Medicaid program to offer same-day (urgent care) transportation to medical appointments.

On the policy front, practicum students urged the Tennessee Board of Education to initiate long-overdue rulemaking on truancy to compel school systems to engage in rigorous screening and to offer meaningful interventions prior to filing a juvenile court petition. The board unanimously passed a far-reaching set of rules in the summer of 2013; these rules tracked the original recommendations from the practicum students to the board.

The practicum is working to halt the illegal use of incarceration as a punishment in truancy cases. The practicum made open records requests and communicated condemning data to the state agency responsible for overseeing the federal Juvenile Justice and Delinquency Prevention Act and to the federal Office of Juvenile Justice and Delinquency Prevention; the practicum urged these agencies to enforce their mandates to halt the persistent practice of locking up status offenders.

The practicum’s overall campaign has yielded positive local results. In the Knox County school system, only 65 truancy petitions were filed in the 2012–2013 school year, a dramatic decrease. The incarceration of truants has been vastly reduced. A final, more intangible consequence is 40 law students’ awareness now of the role of law and lawyers in reforming unjust systems.

—DEAN HILL RIVKIN and BRENDA MCGEE