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Truancy Lawyering in Status Offense Cases: An Access to Justice Challenge

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ARTICLES

Truancy Lawyering in Status Offense Cases: An Access to Justice Challenge

By Dean Hill Rivkin and Brenda McGee

Nationwide, status offense systems are rapidly unraveling. Despite the systemic reforms advocated by projects such as the Vera Institute for Justice's Status Offense Reform Center, the Coalition for Juvenile Justice, the Texas Public Policy Foundation, the National Center for School Engagement, Dignity in Schools Campaign, and others, which are still in nascent stages, juvenile courts (and, in some states, lower adult criminal courts) will remain the vortex where aggressive lawyering can make a difference in speeding changes to these dysfunctional systems and ensuring justice for children and youth. *Keeping Kids In School and Out of Court*, the title of a May 2013 study by the New York City School-Justice Partnership Task Force, should be the byword that animates lawyers to appear in this neglected realm of juvenile justice.

The Bleak Landscape of Status Offense Cases

The latest available data demonstrate that, in 2010, 137,000 status offense petitions were filed nationally. Charles Puzzanchera & Sarah Hockenberry, National Center for Juvenile Justice, *Juvenile Court Statistics 2010* (June 2013). Of this number, 49,300 (36 percent) were for truancy; 30,100 (22 percent) were for underage consumption of liquor; 16,100 (12 percent) were for "ungovernability"; 14,800 (11 percent) were for running away; 14,300 (10 percent) were for violating curfew; and 12,330 (9 percent) were listed as miscellaneous. It is important to note that10,400 status offense cases involved secure detention, with 2,300 of those (just over 22 percent) listing truancy as the most serious charge.

As troubling as these figures are, there is good reason to believe that they do not fully represent the degree to which status offenders are "criminalized." In 2010, in Tennessee alone, 8,327 juvenile court truancy petitions were filed. Tennessee Council of Juvenile & Family Court Judges, *Annual Juvenile Court Statistical Report* (Sept. 2011). When compared with the 2010 national data, Tennessee's reported data would constitute a full 16 percent of the national total—reported as 52,000 truancy petitions. Given Tennessee's relatively small population, that percentage is questionable. Equally dubious is that the State of Texas, just two years later, reported that 112,000 youths were summoned into *adult* courts on truancy charges (a low-level misdemeanor in that state)—more than twice the 2010 national total. Deborah Fowler, Texas Appleseed, *Criminalization of Truancy in Texas: Prosecution of "Failure to Attend School" in Adult Criminal Courts*. These two examples cast serious doubt on whether the existing data credibly portray the full picture of the number of court actions involving status offenses that enmesh children and youth in court systems that have little ability to serve their needs.

Although better data will lead to a better understanding of this historically neglected corner of juvenile justice, other considerations have impeded needed reform in this realm. One is the

profound lack of understanding about status offenses, the laws that govern them, and the potential remedies available to resolve these cases. These cases are often lost in the lacuna between the juvenile justice system and the child welfare regime in each state. Because relatively few lawyers regularly inhabit this *terra incognito*, few appeals make it to courts of record. This reality largely insulates juvenile courts from critical scrutiny and accountability. Even in those states where there is a right to counsel in status offense cases, children and youth routinely waive their right to counsel and systematically plead guilty to the charged offense. As with the ineffectiveness of appointed counsel systems for adults—part of the *Gideon* movement—status offense cases lie well under the radar for reform advocates. Because lawyers potentially can play a pivotal role in achieving effective outcomes for court-involved juveniles, why hasn't the right-to-counsel movement gained more traction in status offense cases?

The obvious first reason is cost. In times of fiscal stringency, funding for the appointment of counsel in a new arena is unlikely to be a legislative priority, despite the argument that the appointment of counsel would be cost-effective. Weighing the quantifiable additional costs of providing appointed counsel against the difficult-to-quantify benefits that would flow from reducing juvenile court involvement and obtaining better educational and economic outcomes for youth accused of status offenses is a one-sided calculus: The costs of appointed counsel will invariably block reform. Matt Lakin, "End to Practice of Locking Up Truants Sought," *Knoxville News Sentinel*, Oct. 7, 2012.

A second reason is the constitutional paradox that, because status offenses theoretically do not carry a sentence of confinement, no attorney is mandated. What makes this justification ring hollow is that status offenders are often saddled with intrusive sanctions and conditions that, for all practical purposes, are as severe as those faced by juveniles in delinquency cases, where there is a right to counsel. As described below, these conditions often tether a juvenile to the court system indefinitely, a harsh consequence for children who are not committing "crimes."

Finally, in jurisdictions where there is a right to counsel, attorneys who vigorously defend their clients in status offense cases can be viewed as outliers in a system where conformity to the status quo is highly prized. Mainly viewed from the lens of child welfare litigation, status offense case representation often defaults to a model of "best interests" lawyering. This model yields results that are not in the best interests of the juvenile (e.g., recursive court involvement) and fails to generate any pressure toward changing a dysfunctional status quo.

A final factor that cannot be ignored in considering the case for legal representation in status offense cases is the legacy of *In Re Gault*, 387 U.S. 1 (1967). The luminous language in *Gault* about the paternalistic origins of the juvenile court, the constitutional importance of cabining the discretion exercised by juvenile courts, and the pivotal role that lawyers should play in juvenile court proceedings applies equally well in status offense cases. Yet, courts have been almost dismissive in rejecting the application of the framework in *Gault* to status offense cases. *See, e.g.*, *In the Interest of A.G.R. Juvenile Officer v. A.G.R.*, No. WD 73007 (Mo. Ct. App. 2011). The distinction cited by the few courts that have considered the issue is that, because

incarceration is theoretically not constitutionally legitimate in status offense cases, due process safeguards are not as important. As seen below, however, this distinction can be a cruel hoax. Other courts, recognizing the flawed justifications for punishing status offenders, have called for a heightened standard of due process. *See, e.g.*, *Doe v. Norris*, 751 S.W.2d 834 (Tenn. 1988).

The Role of Lawyers in Truancy Representation

Despite the variation in the state-by-state handling of status offense cases—termed, in some jurisdictions, CHINS (Children in Need of Services) or PINS (Persons in Need of Supervision) cases—there are common elements that can be identified. This article focuses on representation in truancy cases, the largest category of status offense petitions filed. Because runaway cases compose a separate, specialized arena of practice, this article does not deal with the equally important role of lawyers in these cases. In runaway cases, lawyers can play a critical role in representing the disproportionate number of girls who become court-involved. Cynthia Godsoe, "Contempt, Status, and the Criminalization of Non-Conforming Girls," 34 *Cardozo L. Rev.* 1091 (2014). Lawyers in these cases will confront such complex issues as trafficking, homelessness, and, as in truancy cases, educational neglect by school systems.

Truancy cases provide lawyers with rich opportunities to develop strategies that counter the received narrative that chronic absences are exclusively the product of intentional actions by the youth or the family. They allow the lawyer an opportunity to demonstrate that a juvenile should not be saddled with a truancy adjudication because of the provision of an inadequate education, whether through poor educational programming, a lack of social services, push-out through misguided school discipline, bullying, trauma, homelessness, poverty, or any other number of causes of absences. The goal of all representation in this arena is to keep and re-engage kids in meaningful educational programs.

On a broader plane, lawyers in truancy cases should be familiar with the "right to education" constitutional litigation that has occurred in many states. The right to an "adequate" education arguably should include an educational program tailored to the unique needs of students who are chronically absent. Dean Hill Rivkin, "Truancy Prosecutions of Students and the Right [to] Education," 3 *Duke Forum for L. & Soc. Change* 139 (2011). Litigating this claim in case after case will elevate the argument that a court must first look to the school system for resolution of the underlying causes of absences.

At the outset, representation in status offense cases is not unplowed territory. In 2010, the American Bar Association published *Representing Juvenile Status Offenders*, an excellent introductory resource to the field. The same year, Team Child in the state of Washington published a detailed practitioner's manual, *Defending Youth in Truancy Proceedings*, on representing children and youth in truancy cases. This manual can serve as a model for lawyers in other states, who will benefit from the practice and strategy protocols described in the book.

Building on these resources, this section catalogues a range of issues that frequently arise in truancy cases. Because many of these cases are adjudicated without counsel representing the

student, the issues are rarely raised. This section assumes the presence of counsel following the filing and service of a petition. The issues include:

Notice of the charges. The instruments used to invoke the jurisdiction of the court in status offense cases vary widely. Typically, a petition is filed that includes minimal information about the charged offense. In truancy cases, the number of days absent invariably is included in the petition. Beyond this number, petitions should include the elements of the offense as defined in the juvenile code of the state. For example, if the offense requires allegations of habitual absence without justification, the latter should be included in the petition. It is important for lawyers to explain to clients from the outset the nature of the status offense process. Rarely will children and youth on their own comprehend the exact charges leveled against them. If the petition is defective in material respects, a lawyer can and should file to dismiss the case.

Exhaustion. A growing number of states require school systems to exhaust a series of steps prior to referring the case for filing in juvenile court. *See, e.g.*, S.C. Code Regs. R 443-274 (2014).These steps often include mandatory communications and meetings with students and parents and other vehicles—such as mediation or youth courts—to ensure that complete information about the reasons for a student's absences are uncovered. Other practices require school social workers to document the steps that that they have taken to communicate with the student and the family and to resolve the problem of absences. These steps might involve realistic "attendance contracts," coordinated referrals to community health or mental health agencies, assistance with clothing or transportation, provision of homebound services, and, for students who have few earned credits for graduation, referral to a General Educational Development program. Following or contemporaneous with this information-gathering stage, a common intervention is a screening by a multidisciplinary team to determine whether the student may be suspected of having an educational disability under the Individuals with Disabilities Education Act (IDEA) or section 504 of the Rehabilitation Act of 1973. States and individual school districts vary on the depth of inquiry required to determine the underlying causes of the absences. If the actions taken by the school system do not comport with the exhaustion requirements, or the school system has failed to comply with its Child Find or Individual Education Program (IEP) obligations under IDEA or section 504, a motion to dismiss the case would be warranted.

Discovery. Discovery of the State's documents and all school system files is an indispensable step in truancy cases. These documents should specify the lineage of the case prior to the filing of a petition, the interactions between the school system and the prosecuting authority, and the involvement of the juvenile court staff, if any, in seeking to divert the petition before it progresses to the courtroom for adjudication. The notes of the key players can reveal motivations for filing the petition. Often these motivations—for example, the parent(s) didn't respond to communications—can readily be rebutted by showing that the school system was not using the family's current address or telephone

number for communications, despite updated information being available in the school's emergency files.

Pre-Adjudication. If the defense lawyer is diligent in pre-adjudication discovery, plea bargaining may resolve the matter before it comes to trial. Even hardened prosecutors or state officials will recognize that continuing the court case is not in the best interests of the child, the family, or any of the state players, including the court. The defense lawyer should be vigilant not to accept any disposition other than a complete dismissal without prejudice. *Nolle pros*, a conditional plea, or an agreement to participate in and pay for an unproven community program are dispositions that can entangle the student in further court involvement. As is discussed below in the section on conditions of probation, it is naïve to believe that a student with chronic absences will immediately attend school on a regular basis; re-engagement into a meaningful educational program is a painstaking process that can take time and patience.

Adjudication. If the case goes to trial, it is critical that counsel be prepared to put the State to its usually high burden of proof—either beyond a reasonable doubt or by clear and convincing evidence. Counsel should make clear from the outset that the State has the burden to prove each element of the offense. This burden is a difficult one for the State to shoulder. Although there is a dearth of reported cases, one of the few vividly illustrates that aggressive lawyers can successfully put the State to its burden of proof in truancy cases. *In re J.H.*, No. 2012-316 (Vt. 2013).

If the case involves health-related or mental health–related documents or testimony, counsel should request that, under the authority of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the courtroom be cleared of all individuals who are not part of the case. As in most cases, the rule on exclusion of witnesses should also be invoked to prevent the State's witnesses from a last-ditch effort to coordinate their testimonies. It is beyond the scope of this article to deconstruct all the trial strategies and tactics available to lawyers in truancy defense. Beyond the competent defense of an individual student, the long-term deterrent effect of taking a case to trial cannot be understated. Making it hard on the State in truancy cases should prompt rational school system personnel and prosecutors to reconsider the value of invoking the court system in the first place. Disrupting the status quo by fulfilling the lawyer's role as defense attorney in cases that so often are informally handled is one way to stimulate the "system" to rethink its time-worn practices.

Post-Adjudication—appeal. If the student is adjudicated guilty of the status offense, the first critical decision will be whether to appeal the adjudication. Appeal procedures vary widely. In considering an appeal, lawyers must be alert to truncated time periods specified for appeals, whether the standard of review on appeal is de novo or a standard that gives deference to the decision of the juvenile court, and the experience of the court designated for the appeal. In those jurisdictions where juvenile courts are not full courts

of record and where the rules of civil procedure or evidence do not apply to the adjudication in the juvenile court, the court hearing the "appeal" should be more likely to hold a plenary hearing in the case. Although there is very little data indicating the prevalence of appeals in status offense cases for truancy (or for other status offenses), the small number of reported decisions across the states suggests that appeals are not routine. Full-fledged appeals of status offense adjudications would serve the deterrent effect that full-blown representation at trial would have and would grow a body of case law that would frame and guide subsequent cases.

Post-Adjudication—disposition. Post-adjudication lawyering is crucial to positive outcomes for juveniles in status offense cases. The imposition of harsh and intrusive dispositional sanctions creates the self-fulfilling prophecy that status offense cases are the gateway to the school-to-prison-pipeline. Although state laws differ on the dispositional options available to courts, there are cross-cutting issues that must be confronted:

- ***Incarceration in secure juvenile confinement.*** The available data reflect the fact that 10,400 (of the 137,000) status offense cases petitioned to courts result in incarceration in a secure juvenile detention facility. This is a disposition that should be aggressively challenged, not only because of the emerging consensus that even short-term incarceration is harmful to children but also because of the questionable legal bases for such orders. Blueprint for Kentucky's Children, *Ending the Use of Incarceration for Status Offenses* (updated May 2012). There is no valid penological justification for incarcerating children and youth who commit non-crime status offenses; the claim that incarceration is necessary in runaway cases to protect the juvenile is belied by the negative effects of incarceration, especially alongside serious delinquency offenders—including, in some jurisdictions, mandatory shackling—and the positive prospects of placing genuinely at-risk juveniles in facilities that stress full-scale services and supports and community integration.

  Federal and state law on incarcerating status offenders, moreover, is exceptionally obscure. The federal Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) prohibits the use of secure detention of status offenders for dispositional purposes in its "Deinstitutionalization of Status Offenders (DSO)" mandate. States that violate this mandate risk the loss of federal juvenile justice funds. The narrow *pre*-adjudication exception to the DSO mandate, 28 C.F.R. § 31.303(f)(2) (allowing 24-hour incarcerations; longer if a weekend is involved), is poorly understood. Under state laws, courts also base incarcerations of status offenders on a practice called "boot-strapping," escalating the original adjudication into a "delinquency" or contempt of court for a violation of probation. *In re Shelby R.*, 2013 IL

114994 (Ill. 2013). These practices circumvent the sensible prohibition imposed in the JJDPA and should be roundly challenged.

- ***Valid court orders.*** The only permissible exception to the JJDPA DSO requirement is the imposition of a valid court order (VCO), a type of industrial-strength probation. 28 C.F.R. § 31.303(f)(3). Under governing federal regulations, the imposition of a VCO must come with "full due process," as must any proceedings that allege a subsequent violation of a condition of a VCO. "Full due process" entails the appointment of counsel to those juveniles who are not already represented by counsel, though the data currently reported by the states to OJJDP do not indicate whether the appointment of counsel is actually taking place. Called by knowledgeable commentators "the exception that swallowed the rule," VCOs are in disfavor on a national level; the U.S. Department of Justice and the National Council of Juvenile and Family Court Judges have urged Congress to abolish this loophole. Patricia J. Arthur & Regina Waugh, "Status Offenses and the Juvenile Justice and Delinquency Prevention Act: The Exception That Swallowed the Rule," 7 *Seattle J. for Soc. Just.* 555 (Spring/Summer 2009).

- ***Probation orders.*** It is imperative that counsel ensure that the conditions of any probation order are reasonable and tailored to the offense. A common condition of probation in truancy cases is that the student not miss any more days of school or be "tardy." In most cases, this condition is a guarantee from the outset that the student will be subject to a violation of probation hearing. A lawyer should advocate that this condition be removed and replaced by a realistic plan of re-engagement into an educational program. A particularly egregious, and constitutionally suspect, condition of probation that fails the reasonable nexus test is a requirement that the juvenile submit to random, suspicion-less drug testing. This condition can be driven by monetary incentives by firms that purvey the drug testing apparatus. Other onerous conditions of probation that should be challenged are the imposition of fines, drastic curfew restrictions, school disciplinary prohibitions, and enrollment in character-building programs, often at a fee, that have no evidence-based justification for status offenders.

Expunction. In those jurisdictions where expunction of juvenile records is not automatic, counsel should review the client's record in a status offense case to determine whether the records contain detrimental material. The risk of disclosure in a data-driven world is real, and a student's truancy record should not follow him or her. Also, counsel should advise the client about how to answer future inquiries from employers and others about the client's juvenile court involvement.

Post-Conviction petitions. Because of the pervasive absence of counsel at the initial adjudication, lawyers in this field will meet clients who have passed the deadline for an appeal on the merits but who wish to have their adjudications vacated and dismissed. The opportunity to obtain this type of relief varies, but lawyers should mine their state's juvenile rules and statutes to carve out relief, where warranted. In some states, a petition to vacate will resemble a Rule 60 motion under the applicable rules of civil procedure. This pinched avenue will often falter on concerns about the finality of the judgment, although the often abbreviated appeal period, combined with the absence of counsel, provide strong equitable grounds to reach the merits of the claims.

Access to Justice

There are two paths for providing heightened access to justice for children and youth with serious attendance problems. In keeping with the theme of this article, one path is to ensure that all children and youth who are petitioned to court for truancy (or any other status offense) have access to an independent, competent attorney. In those states where counsel is already appointed, more robust training in education advocacy can equip these lawyers with an array of arguments to remove truancy cases from the courts. These lawyers—whether juvenile public defenders or private appointed counsel—should be encouraged to collaborate with lawyers who possess expertise in special education law and poverty law and, in select cases, public interest lawyers who do civil rights and civil liberties cases. Representation in truancy cases is an ideal vehicle for pro bono work, especially in large firms where conflict issues often prevent the firms from taking consumer, housing, and similar cases. The Truancy Intervention Project in Atlanta is a proven model for pro bono representation in truancy cases.

The second path of reform lies in projects that seek to reduce the overall number of truancy petitions that are filed. Legal services programs, for example, can proactively screen their clients to ascertain whether attendance issues might be a concern for the family. Dean Hill Rivkin & Brenda McGee, "No Child Left Behind? Representing Youth and Families in Truancy Matters," 47 *Clearinghouse Review* 276 (Nov.–Dec. 2013). If so, these programs can undertake the education advocacy necessary to resolve the problem or refer the clients to nonprofits, pro bono, or law school clinical programs that specialize in education issues. *See, e.g.*, University of Baltimore School of Law Truancy Court Program.

Other prominent projects seek to provide decision makers and communities with solid evidence that court-based approaches are inefficient and expensive and to promote school-justice partnerships. The Vera Institute of Justice's Status Offense Reform Center (SORC) provides a wealth of resources to policy makers and practitioners who are interested in creating effective alternatives to juvenile justice involvement for affected youth. SORC's website contains comprehensive resources for lawyers and advocates interested in transforming status offense systems:

Toolkit: This step-by-step guide can help you bring stakeholders together to plan, implement, and monitor reforms that keep youth charged with status offenses in the community and out of court.

Library: This growing library includes resources on status offense behaviors, system responses, and reform efforts.

Notes from the Field: This collection of profiles provides an insider's look at jurisdictions that have undertaken status offense system reform and serve youth in a variety of ways.

Blog: This space offers quick recaps about recent news stories, webinars, and events, as well as commentary from experts in the field regarding policy and practice developments related to status offenses.

The Coalition for Juvenile Justice (CJJ), through its Safety, Opportunity and Success Project, has also been a leader in status offense reform, developing the National Standards for the Care of Youth Charged with Status Offenses, a set of concrete policy and practice recommendations for avoiding or limiting court involvement for youth charged with non-delinquent offenses. Other resources from the CJJ include publications by its SOS Project, a model policy guide, a forthcoming 50-state survey on state status offense laws, webinars, and numerous other publications, including the following:

- Use of the Valid Court Order: State-by-State Comparisons
- Making the Case for Status Offense Systems Change: A Toolkit
- Exercising Judicial Leadership to Reform the Care of Non-Delinquent Youth: A Convenor's Action Guide for Developing a Multi-Stakeholder Process
- Juvenile Defense in Status Offense Cases
- Addressing Truancy and Other Status Offenses
- Running Away: Finding Solutions that Work for Youth and Their Communities
- Disproportionate Minority Contact and Status Offenses
- LGBTQ Youth and Status Offenses

CJJ also works directly with states that are considering reforming their status offense law and policy, by providing advice, training, and technical assistance.

Conclusion

The lawyering reforms urged in this article, when coupled with the systemic reforms being adopted in smart jurisdictions, will challenge juvenile courts to reexamine their historical missions. No doubt, in some places, these reforms threaten the power of entrenched community institutions. In status offense cases involving truancy, school systems will be asked to diversify their programs profoundly to accommodate children and youth who regularly are unable to attend school for a host of reasons beyond their or their family's control. District attorneys will

be asked to screen petitions with rigor to ensure that the school system has exhausted all alternatives to juvenile court involvement. Most important, juvenile judges will be called on to abandon their role in adjudicating individual status offense cases and to assume leadership roles in building new systems for more efficiently and effectively serving children. The solid outcomes of these initiatives are becoming clearer by the day. In today's climate, lawyers have a singular opportunity to make this change happen.

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