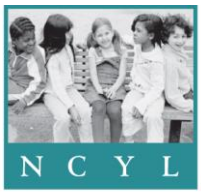
Disability Rights TEXAS

Texas APPLESEED



National Center for Youth Law

Ms. Anurima Bhargava
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Washington, DC 20004

Dear Educational Opportunities Section:

This complaint concerns a particularly harmful aspect of the "school-to-prison pipeline" in Texas – the use of adult criminal courts to prosecute youth for truancy, and the way that school districts' violations of students' civil and educational rights directly contribute to this problem. Specifically, this complaint focuses on the Dallas County truancy courts and the four school districts – Dallas, Garland, Mesquite, and Richardson Independent School Districts ("ISDs") – that funnel students into this court system. The complaint alleges violations of rights guaranteed by the United States Constitution, the Equal Educational Opportunities Act of 1974, Title II of the Americans with Disabilities Act, and Title IV of the Civil Rights Act of 1964.

Texas Appleseed, Disability Rights Texas, and the National Center for Youth Law ("NCYL") bring this complaint on behalf of seven students and all similarly situated students in Dallas, Garland, Mesquite, and Richardson ISDs. The students named in this complaint are representative of the many students who find themselves caught in this process in Dallas County:[1]

- A.B., who was suspended for being tardy to class, received a truancy case in part because her school erroneously counted those days of suspension as unexcused absences for suspensions given for being tardy to class;
- B.B., whose absences stemmed from the failure of the school to provide her necessary special education services;
- J.D., whose absences were due to a chronic respiratory disability;
- K.W., whose absences were caused by caring for her mother, who has congestive heart failure and chronic obstructive pulmonary disease;
- S.M., whose absences were caused by medical complications after delivery of her child;

[1] The information in this complaint comes from a year-long investigation of the Dallas County truancy courts conducted by Texas Appleseed, Disability Rights Texas and the National Center for Youth Law that included court observations, interviews with students, parents, and county and school officials, and data collection and analysis.

- I.J., who was referred to truancy court for being late to class because she was using the restroom; and
- L.P., whose truancy case was caused by absences due to illness, because her caregiver did not call the school on the day of her absence.

I. INTRODUCTION

In Texas, justice of the peace and municipal courts hold original jurisdiction over "Failure to Attend School" ("FTAS") Class C Misdemeanors as a result of sweeping changes by the Texas Legislature to the state's truancy laws in 2001.[2]

Prosecuting children through courts designed for adult low-level offenses has produced a host of harms to children and families. Students as young as twelve years old are subjected to an adult criminal court process despite being charged with a status offense, a "crime" only by virtue of the fact that it was committed by a child. Lacking access to an attorney, these children are almost guaranteed a criminal conviction and all the attendant consequences that follow.

Nowhere is the harm to students and families inflicted by this system more apparent than in Dallas County. Dallas County is one of two counties in the state that created specialized criminal courts solely dedicated to truancy cases in an effort to streamline prosecution.[3] While criminal prosecution of truancy is prevalent statewide, the Dallas County truancy courts prosecute the highest number of students for FTAS in the state with more than 36,000 cases filed against students in Dallas County truancy courts in Fiscal Year ("FY") 2012.

Once ensnared in the Dallas County truancy court process, children are subjected to a byzantine legal process resulting in increasingly punitive measures including arrest, handcuffing, and threats of jail time and detention. The harms of the system extend to students' families, who get caught in a cycle of workdays missed due to court hearings and debt flowing from fines, costs, and fees. At no time during the Dallas County truancy court process—an adversarial process that includes restraints of students' liberty and at times, incarceration—does the court provide counsel for the children. In the Dallas County truancy courts:

- Cases are "e-filed" by schools with students' attendance records triggering a system that electronically "pushes" cases to the courts once they have reached the designated filing date – leaving probable cause determinations to a computer.

[2] *See* SENATE RESEARCH CENTER, BILL ANALYSIS, S. 1432, 77th Leg., Reg. Sess. (Tex. 2001), *available at* http://www.legis.state.tx.us/tlodocs/77R/analysis/html/SB01432F.htm. Stakeholders and legislators reasoned that while juvenile courts might be poorly positioned to handle the volume of truancy cases, justice and municipal courts could handle truancy with the same efficiency with which they process traffic tickets. *See also* ROBERT DAWSON, TEXAS JUVENILE LAW 589 (Christian A. Hubner et al. eds., 7th ed. 2008).

[3] *See infra* section II(B). Fort Bend County, outside of Houston, has created a similar specialized truancy court system.

- Children are routinely criminalized for behavior as innocuous as being tardy to class.
- Students—even those with disabilities—are required to represent themselves with no access to an attorney or advocate, and the court does not allow their parents to help them.
- Youth are coerced and cajoled into pleading "guilty," even when they have valid excuses for school absences.
- Families already facing economic hardship are assessed high fines and court costs, with additional fees added each month that they are unable to pay in full.
- Children who miss a truancy court hearing are arrested at school, put into a police car, brought into the courtroom in handcuffs, and then charged an additional $50 to cover the arrest warrant fee.
- Youth who fail to fully comply with truancy court orders are arrested in court, handcuffed, and transferred without due process to the "Truancy Enforcement Center," an arm of the county's juvenile system, where they may face detention.
- Youth may be jailed once they turn 17 if they have not paid their fines and costs in full.
- Students are routinely threatened with jail time even before they are old enough under Texas law to be subjected to this punishment.

To sustain its specialized truancy court system, Dallas County uses the revenue from the fines paid by students and parents to pay the salaries of the truancy court judges and court staff.[4]

Opaque school attendance policies contribute to the Dallas County truancy court pipeline. Complex and confusing attendance policy structures exist in each of the four school districts that feed students to the truancy courts:

- Broad school district attendance policies are included in the student handbook or code of conduct.
- More specific school-level policies vary radically from school to school. They often include policies on the process for reporting an absence, how late a student can be to class before a tardy is counted as an absence, and the process for correcting errors on an attendance report.
- Classroom policy—particularly related to tardy behavior—also exists at some schools, and may conflict with campus or district policies.

This trifurcated maze would be difficult for any parent and student to navigate, not to mention a parent with children in the same district at different schools with divergent attendance policies. Despite state law mandating truancy prevention and

[4] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, Appendix C ($2.9 million in revenue collected from fines in FY 2012); *see also* Annette Fuentes, *The Truancy Trap*, THE ATLANTIC, Sept. 5, 2012, *available at* http://www.theatlantic.com/national/archive/2012/09/the-truancy-trap/261937 (when a student in a Dallas County truancy court asked the judge why he had to pay a fine, the judge responded, "It costs $450,000 to run this courtroom. Who's going to pay for it. . . . Do you think the taxpayers of Garland should pay for it?").

intervention programs, no meaningful intervention systems exist at either the district or school level. A parent's first warning of an attendance problem often arrives too late to be addressed outside of court.

In addition, despite the fact that Dallas County's diverse school districts include a high percentage of "limited English proficient" ("LEP") and English as a Second Language ("ESL") students, school and classroom-level policy is rarely, if ever, provided in any language other than English.

Additional civil and educational rights violations at the school and district level further serve to create a path to the truancy courts. Students who have disabilities are denied appropriate accommodations, placing them at high risk of disengagement from school resulting in attendance problems. Pregnant students are discriminated against for pregnancy-related absences.

These practices and systemic violations of students' federally-protected rights make the truancy courts in Dallas County one of the largest and most efficient "school-to-prison" pipelines in the state, if not the nation.

II. THE DALLAS COUNTY TRUANCY COURT PROCESS

A. Texas Statutory Truancy Framework: "Failure to Attend School"

In Texas, youth are subject to compulsory school attendance laws that require children to attend school from age six until their eighteenth birthday.[5] Texas's enforcement system for these compulsory attendance laws is perhaps unique among the states.

Enforcement provisions are included in both the Texas Education Code and Family Code: FTAS, a Class C misdemeanor, is located in the Education Code,[6] and shares the same elements as "truancy," a "Child in Need of Supervision" ("CINS") offense found in the Family Code.[7] A child may be charged with either the CINS offense of truancy or the Class C misdemeanor of FTAS if he or she misses three or more unexcused days within a four-week period.[8] The decision to file a FTAS complaint or refer the matter to juvenile court for CINS proceedings when a student misses three unexcused days within a four-week period is discretionary.[9] After ten unexcused days within a six-month period, school districts must file a complaint against a student or refer the matter to juvenile court.

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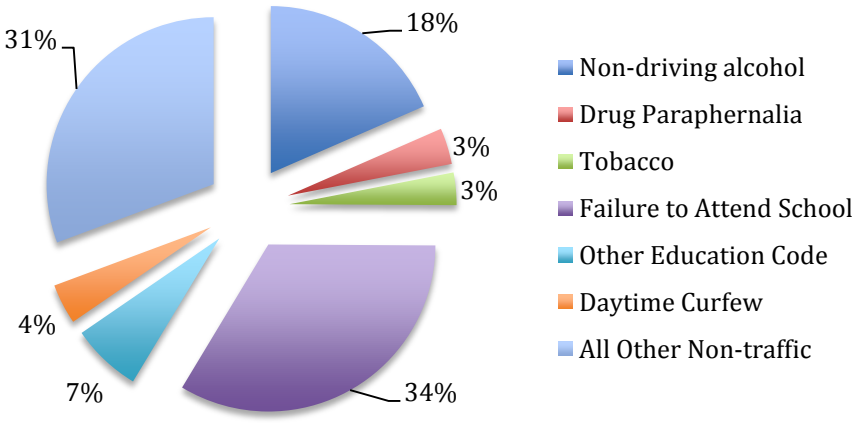
[5] TEX. EDUC. CODE § 25.085.
[6] *Id.* § 25.094.
[7] TEX. FAM. CODE § 51.03(b)(2).
[8] TEX. EDUC. CODE § 25.094; TEX. FAM. CODE § 51.03(b)(2).
[9] TEX. EDUC. CODE § 25.0951. However, the school must issue a warning letter and request a conference with parents when a student misses three unexcused days within a four-week period. TEX. EDUC. CODE § 25.095.

Although the juvenile courts process the CINS offense of truancy, municipal and justice courts—adult criminal courts—have original jurisdiction over FTAS cases.[10] Thus, children facing FTAS charges are not afforded many of the protections of juvenile court, including confidentiality provisions, appointment of counsel, and specific protections related to waiver of rights.[11] In most jurisdictions, no prosecutor reviews FTAS complaints for legal sufficiency until after a student pleads "not guilty."

There is no mechanism to determine which FTAS cases may be dismissed or diverted without court involvement, as in Texas's juvenile courts.[12] Instead, the system automatically and mechanically prosecutes all cases, regardless of the circumstances. Not surprisingly, a high percentage of the statewide Class C cases prosecuted against juveniles in municipal or justice courts are FTAS cases. In FY 2012, 34% of the non-traffic juvenile cases filed in municipal and justice of the peace courts were FTAS cases, constituting the single largest cause of referral for non-traffic juvenile cases to these courts. The total number of non-traffic juvenile Class C misdemeanor cases filed in municipal and justice courts was 229,155.[13] Of these, there were 76,878 FTAS cases: 64,997 filed in justice courts and 11,881 filed in municipal courts.[14]

Figure 1: Non-traffic Juvenile Cases Filed in Municipal and Justice Courts by Offense, FY 2012



[10] *See* TEX. CODE CRIM. PROC. ch. 45.
[11] *See* Ryan Kellus Turner, *Ticketing, Confidentiality, and Special Education Issues*, JUV. LAW SEC.'S NEWSL. (Juvenile Law Section, State Bar of Tex., San Antonio, Tex.), Dec. 2012, at 5; Ryan Kellus Turner & Mark Goodner, *Passing the Paddle: Nondisclosure of Children's Criminal Cases*, JUV. LAW SEC.'S NEWSL. (Juvenile Law Section, State Bar of Tex., San Antonio, Tex.), Dec. 2010, at 13.
[12] *See* TEX. FAM. CODE § 53.012 (prosecutor required to review case referred to juvenile system for legal sufficiency and "desirability of prosecution").
[13] *Id.*
[14] OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2012, at 83, 90 (2013). These statistics do not represent the total number of FTAS filings in the state because they do not include FTAS cases filed in specialized truancy courts, as discussed in section II(B), *infra*.

Texas processes more truancy cases through its court systems than all other states in the nation combined.[15]

While districts may opt instead to file a case against a student's parent(s), fewer cases are filed for "Parent Contributing to Nonattendance" ("PCNA").[16] In 2012, 57,360 PCNA cases were filed against parents: 53,048 in justice courts and 4,312 cases in municipal courts.[17]

The volume of juvenile cases filed in municipal and justice courts dwarfs that of the state's juvenile courts. During FY 2012, the total number of cases on Texas juvenile court dockets was 55,720 and the total number of CINS cases on Texas juvenile court dockets was 2,098.[18] Of those cases, only 23,138 total cases and 455 CINS cases were filed in FY 2012.[19] The very high volume of juvenile cases heard by municipal and justice courts in Texas has led some to refer to them as the "shadow juvenile justice system."[20]

B. Dallas County Truancy Courts

Until 2003, justice of the peace courts heard Dallas County FTAS cases, as they do in most other Texas counties.[21] In 2003, Dallas County lobbied for and obtained a change in the law that allowed the creation of a specialized truancy court system as part of the constitutional county court system.[22] Dallas County established its first three truancy courts in 2003 to hear cases filed by Dallas Independent School District ("DISD").[23] Since then, the truancy court system has grown to five courts accepting

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[15] The most recent available statistics show that in 2009, approximately 52,000 petitions alleging truancy were filed in the nation's juvenile courts. We are aware of only two other states that may process cases outside their juvenile court system, Wyoming and Pennsylvania. *See* NAT'L CENTER FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2009, at 72 (2012), *available at* http://staging.ncjj.org/pdf/jcsreports/jcs2009.pdf.

[16] *See* TEX. EDUC. CODE § 25.093. Again, these statistics do not represent the total number of PCNA filings in the state because they do not include PCNA cases filed in specialized truancy courts.

[17] OFFICE OF COURT ADMINISTRATION, *supra* note 14, at 85, 90.

[18] *Id.* at 76-77.

[19] *Id.* at 47, 77.

[20] DAWSON, *supra* note 2, at 589.

[21] Letter from Bill Hill, Dist. Attorney, Civil Div., Dallas Cnty., to Greg Abbott, Attorney Gen., State of Tex. (Sept. 28, 2005), *available at* https://www.oag.state.tx.us/opinions/opinions/50abbott/rq/2005/pdf/rq0400ga.pdf (discussing history of Dallas truancy courts and asking for guidance on legislation passed during the 2005 legislative session regarding timing of filing for FTAS complaints).

[22] SENATE RESEARCH CENTER, BILL ANALYSIS, S. 358, 78th Leg., Reg. Sess. (Tex. 2003), *available at* http://www.legis.state.tx.us/tlodocs/78R/analysis/pdf/SB00358F.pdf; JURISPRUDENCE COMMITTEE, SENATE COMMITTEE REPORT, WITNESS LIST, S. 358, 78th Leg., Reg. Sess. (Tex. 2003), *available at* http://www.legis.state.tx.us/tlodocs/78R/witlistbill/html/SB00358S.htm; JUVENILE JUSTICE & FAMILY ISSUES COMMITTEE, HOUSE COMMITTEE REPORT, WITNESS LIST, S. 358, 78th Leg., Reg. Sess. (Tex. 2003), *available at* http://www.legis.state.tx.us/tlodocs/78R/witlistbill/html/SB00358H.htm. Dallas had already created two specialized truancy courts within their municipal court system in 2002—the change in law allowed them to create additional courts within the county court structure under Texas Government Code Section 26.045. *See* BILL ANALYSIS, S. 358, *supra*; Letter from Bill Hill, *supra* note 21.

[23] Letter from Bill Hill, *supra* note 21, at 3.

cases from three other school districts—Garland ISD ("GISD), Mesquite ISD ("MISD"), and Richardson ISD ("RISD"). The truancy court system plans to create a sixth court this year to accept cases from Grand Prairie ISD.[24]

Dallas County developed a "Truancy Information System" ("TIS") which allows schools to "e-file" cases with the truancy courts.[25] Student attendance automatically triggers the e-filing of an FTAS complaint.[26] According to DISD, "[e]very thirty minutes the DISD system searches for queued cases that have reached the designated file date and electronically pushes them to TIS."[27] Electronic filing has supported the growth of the Dallas County system into the single largest court system handling truancy cases in Texas.

Remarkably, the statewide FTAS numbers, discussed in section II(A), *supra*, do not include data for Dallas County's specialized truancy courts, because the Dallas courts are not part of the justice or municipal court systems.[28] According to Dallas County data, 36,036 cases were referred to its four truancy courts in FY 2012.[29] No other county in the state reports such a high volume of FTAS cases.[30] While Harris County has a higher child population than Dallas County and includes Houston, the largest school district in the state,[31] Harris County's Justice of the Peace courts report only 12,541 FTAS cases in FY 2012, with Houston municipal courts reporting another 172 cases.[32]

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[24] *See* Herb Booth, *Grand Prairie Opens New Dallas County Government Center*, DALLAS MORNING NEWS, May 4, 2013, *available at* http://www.dallasnews.com/news/community-news/best-southwest/headlines/20130504-booth-grand-prairie-opens-new-dallas-county-government-center.ece (describing a government center that will house a new truancy court location to serve Grand Prairie ISD).

[25] COMMISSIONER CANTRELL DISTRICT 2, TRUANCY INFORMATION SYSTEM (TIS), *available at* http://www.dallascounty.org/department/comcrt/district2/pluggedin.html#tis.

[26] *Id.*; *see also* Appendix C (information provided to Texas Appleseed in response to its open records request to Dallas ISD).

[27] *Id.*

[28] Because the Dallas County truancy courts are Constitutional County Courts, the data is not reported to OCA for inclusion in the annual reports for justice and municipal courts. E-mail from Angela Garcia, Judicial Info. Manager, Tex. Office of Court Admin., to Deborah Fowler, Deputy Dir., Tex. Appleseed (Nov. 13, 2012) (on file with Texas Appleseed).

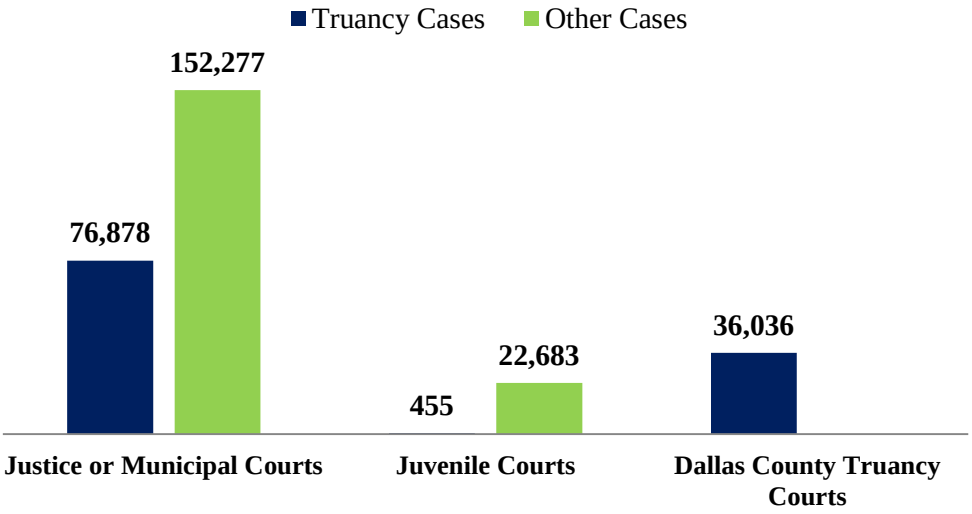
[29] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, Appendix C. This data was provided to Texas Appleseed during a meeting with Judge Clay Jenkins, Judge Boyd Richie, and truancy court staff on January 14, 2013. As is true statewide, Dallas County's truancy courts handle a volume of cases that dwarfs its juvenile court dockets. At the end of FY 2012, Dallas County's juvenile courts had only 7,407 cases pending on their dockets. OFFICE OF COURT ADMINISTRATION, *supra* note 14.

[30] OFFICE OF COURT ADMINISTRATION, *supra* note 14.

[31] *See* AMERICAN SCHOOL & UNIVERSITY, LARGEST SCHOOL DISTRICTS IN TEXAS 2012-13, http://asumag.com/top-10s/largest-school-districts-texas; ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA CENTER: PROFILES FOR DALLAS & HARRIS COUNTIES, http://datacenter.kidscount.org/data/bystate/Default.aspx?state=TX.

[32] *Id.*

Figure 2: Juvenile Cases Filed by Court for FY 2012



Because the Dallas County truancy courts are part of the County's constitutional court system, County Judge Clay Jenkins oversees all the truancy courts.[33] Five truancy court judges hear cases: Presiding Judge Chavez and Judges Rayford and Miller hear cases filed by DISD in Dallas, while Judges Sholden and Richie hear cases filed by GISD, MISD, and RISD in Garland.[34] The truancy courts employ four case managers who are tasked with assigning some of the students who appear in court to community-based classes meant to address the problems that led to their truancy.[35] However, the majority of youth do not receive case management through the truancy courts; during FY 2012, only about 22% of the youth who pleaded guilty or no contest received any case management services.[36]

A significant component of the FTAS enforcement system in Dallas County is the use of the "Truancy Enforcement Center" ("TEC"), an arm of the juvenile delinquency court managed by Dallas Challenge, Inc.[37] Students who fail to abide by the terms of their Dallas County truancy court orders may be charged with contempt of court, arrested,

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[33] *See* Dallas County Judge Clay Jenkins, Truancy Court, http://www.dallascounty.org/department/comcrt/jenkins/truancy.php.

[34] *See* Dallas County Truancy Court, http://www.dallascounty.org/department/countyclerk/truancy.php.

[35] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 2, Appendix C.

[36] This information was given to Texas Appleseed during a meeting with Judge Jenkins, Judge Richie, and truancy court staff on January 14, 2013.

[37] Letter from Bill Hill, *supra* note 21, at 2 ("Changing the culture of the local truancy community necessitated implementing several major alterations in ideology and process. The first change involved developing a way in which the new 'contempt' cases could be processed without overtaxing an already overloaded juvenile justice system, while simultaneously assigning appropriate sanctions to a new category of juvenile offender. This goal was partially achieved by creating the Dallas Challenge Contempt Enforcement Center . . . . It was brought on line in September of 1996 as a deferred prosecution program tasked with receiving contempt referrals from the JP system, stabilizing truant youth in an educational setting, and preventing their progression in the juvenile justice system. A critical agreement was reached with all concerned that gave increased credibility to the program: failures at the Contempt Center would be sent to the Dallas County Detention Center, and the District Attorney would file the contempt case in district court. This was a major step forward and lent credence to the idea that Dallas County was serious about truancy. It insured that truancy cases would not fall through any 'cracks' in the system.").

and transported to the TEC by a constable.[38] During FY 2012, 1,083 youth were sent to the TEC by the Dallas County truancy courts.[39]

Dallas County describes this transfer process as follows:

> *Once the presiding Judge decides to issue the contempt allegation, the offender is immediately taken into custody and transported to the TEC by a uniformed officer of the court. The youth's parent or legal guardian is ordered to appear at the TEC within 90 minutes of the time the youth is transported. The TEC is not a 24-hour facility and is only authorized to hold the youth in custody a maximum of 6 hours before they must appear before the Magistrate....*
>
> *Youth are booked into the TEC by a uniformed court bailiff. A background check is then conducted to find out if the youth is already active in the juvenile justice system for other, more serious offenses. If they are in the system on previous charges, the youth is transported to the juvenile detention center for further action. The next step is to use a screening instrument (MAYSI) with each eligible youth to determine if there are issues requiring immediate attention. The main thrust is to assess whether or not the youth appears suicidal or homicidal. If either risk is present, the youth is referred to a psychiatric facility or a detention center....*
>
> *A case plan is developed from the assessment process.… Once the case plan is developed and agreed to by the participants, they appear before a Magistrate who explains their legal situation, reviews the conditions of participation, and makes sure they understand the necessity of attending assigned programs. The Magistrate also allows parents and students to ask questions about the case, the process, and the court's expectations. Participants are then assigned a report back date and time.*[40]

At the TEC, the child appears before a Magistrate, a juvenile court referee, who enters another order requiring the youth to complete the developed service plan.[41] If the youth does not successfully complete the case plan, the youth is detained.[42]

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[38] *Id.; see* Appendix A for TEC forms.
[39] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 5, Appendix C.
[40] Letter from Bill Hill, *supra* note 21, at 4. This comports with the process described by TEC staff to both Texas Appleseed and NCYL attorneys during meetings at the TEC. However, the letter refers to this as a "deferred prosecution" program and TEC staff indicate that they now think of this as a "diversion program" rather than a "deferred prosecution" program. It is not entirely clear what the distinction is between the two, as there are no provisions in the Family Code related to pre-adjudication judicial diversions aside from deferred prosecution. *See* TEX. FAM. CODE § 53.03.
[41] *Id.*
[42] *Id.*

Dallas County describes this process as an attempt to avoid detaining youth in the juvenile justice system for truancy-related charges.[43] However, 2012 statewide data from the Texas Juvenile Justice Department ("TJJD") shows that Dallas County detains almost as many youth (53) through the TEC process as are detained *statewide* for the CINS offense of truancy (70).[44] In addition, TJJD data shows that 504 of the more than 1,000 youth referred to the Dallas County juvenile system on a contempt charge were placed in an Emergency Shelter, a non-secure facility licensed by the Texas Department of Family and Protective Services,[45] and Dallas County notes that another 280 youth were transferred from the truancy courts to detention for some other reason.[46]

Arrest warrants are commonly used within the Dallas County truancy court system. Warrants are used both to take youth into custody for transport to the TEC and when a youth fails to appear for an initial or review hearing. During FY 2012, the truancy courts issued 4,806 warrants and served 1,737 warrants.[47] Many of the truancy court warrants are served on students while at school, leading to their arrest and transport from school to the truancy court in handcuffs.

C. Layered Attendance Policies—District, School and Classroom—in Districts Using Dallas County Truancy Courts

The four school districts currently using the Dallas County truancy courts differ in size and demographics. DISD is the second largest school district in Texas and the fifteenth largest district in the nation.[48] GISD, MISD, and RISD are suburban Dallas districts that vary in their size and characteristics. All four districts share problems caused by an unnecessarily complex system of varying attendance policies.

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[43] During interviews with the Dallas County truancy court judges and with Judge Clay Jenkins, the County officials expressed their opinion that the TEC process was a "diversion" from the juvenile system, and was therefore preferable to detention.

[44] TEXAS JUVENILE JUSTICE DEPARTMENT, STATEWIDE STATISTICAL REPORT, at 3 (2012), Appendix D (indicating 70 youth placed in secure detention as a result of a CINS truancy charge).

[45] TEXAS JUVENILE JUSTICE DEPARTMENT, STATISTICAL REPORT BY DEPARTMENT (DALLAS), at 2 (2012), Appendix D. While it is not entirely clear whether other youth may be referred to Dallas County's juvenile department on a contempt charge, the numbers appear consistent with the number of youth referred to the TEC, according to Dallas County's estimate. Furthermore, data compiled by the Texas Office of Court Administration for Dallas County justice courts and the Dallas municipal court show that only 96 youth were referred to the juvenile system during FY 2012 for contempt, leading to the conclusion that these courts were responsible for only a fraction of contempt charges that could have resulted in an emergency shelter placement. OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2012, MUNICIPAL COURTS JUVENILE/MINOR CASE ACTIVITY BY CITY (2012), *available at* http://www.txcourts.gov/pubs/AR2012/toc.htm.

[46] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 1, Appendix C ("Number of Referrals to DCJD").

[47] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 5, Appendix C.

[48] AMERICAN SCHOOL & UNIVERSITY, LARGEST SCHOOL DISTRICTS IN TEXAS 2012-13, http://asumag.com/top-10s/largest-school-districts-texas; AMERICAN SCHOOL & UNIVERSITY, 2012 AS&U 100: LARGEST SCHOOL DISTRICTS BY ENROLLMENT, http://asumag.com/asu100/2012/enrollment.

Table 1: School District Demographics, 2011-12[49]

District	Enrollment	Percent Special Education	Percent "At Risk"	Percent Econ. Disadvantaged
Dallas	157,085	7.6%	61.8%	86.1%
Garland	57,954	9.0%	45.4%	60.6%
Mesquite	38,174	11.1%	50.2%	68.3%
Richardson	36,946	10.9%	42.7%	57.1%

DISD, GISD, MISD, and RISD (the "Districts") all have broad district-wide attendance policies that allow each school to add specific school-wide policies. Further complicating matters, some schools allow teachers to implement their own classroom attendance policies.[50] What results is a complex and confusing maze of policies that parents complain are unclear and divergent. These complaints were born out by our review of district and school attendance policies.

Policies related to tardy behavior and the process for getting absences excused vary between the districts but also between schools. Parents and students commonly described policies and practices such as:

- Refusal to accept a note from a parent, doctor or other healthcare professional to excuse an absence if it is turned in to the office more than three days after the absence;
- Refusal to accept an excuse note from a parent for any reason after the child had missed a certain number of days during the school year;[51]

[49] Data taken from Texas Education Agency's Academic Excellence Indicator System. TEX. EDUC. AGENCY, 2011-12 ACADEMIC EXCELLENCE INDICATOR SYSTEM, http://ritter.tea.state.tx.us/perfreport/aeis/2012/district.srch.html.

[50] Classroom policies reported by parents usually focused on tardy behavior. For example, one parent (whose son was referred to truancy court for arriving to classes tardy) reported that one of her son's teachers counted students tardy even if they were in the classroom, but they were not seated at their desk when the bell rang.

[51] School-level policy expands on district-level policies by noting the number of handwritten excuses that would be accepted from a parent in a semester or school year, and the proper procedure for a parent to report a student's absence. For example, on John D. Horn High School's website (in Mesquite ISD), the parent information page indicates that any time a student is sick, a parent must "call in" to report the absence. It also notes that a parent may only excuse an absence by calling in three times—after the third call, "proper documentation" must be provided to excuse the absence. *See* JOHN D. HORN HIGH SCHOOL, http://www.mesquiteisd.org/jhhs/parents/. Similarly, in Garland ISD, Garland High School's "policies and procedures" page notes that "an attendance form must be filled out and stapled to the absence note" that a student turns in after being out of school. Garland High School allows six notes for personal illness during the semester – after which, "an official doctor's note" is required. *See* GARLAND HIGH SCHOOL, POLICIES AND PROCEDURES, http://www.garlandisdschools.net/page.cfm?p=54. Some schools specify that a student

- Counting students absent if they arrive at class after the time has elapsed during which they may simply be considered "tardy;"
- Counting a specified number of tardies as an unexcused absence; and
- Lack of communication between the school nurse and the attendance office when the school nurse sends a student home for illness. As a result, parents were required to send an excuse note to school the following day to tell the attendance office that the school nurse sent their child home.

Frustrated parents indicated that the school did not adequately describe their policies before it was "too late" and students had already been referred to court. Students and parents agreed that there was little-to-no effort to clarify the school's or district's policies for turning in notes or getting an absence excused before it became a problem. One parent noted the most useful part of the truancy court process was attending a court-ordered class on district truancy policies; however, this class was only offered after her child was convicted for FTAS.

Many of the youth we met at court were absent due to extended illnesses and, in some cases, even hospitalizations. They often found that an FTAS complaint had been filed either due to the district's mistake[52] or the student's failure to turn in excuse notes on time. While truancy court judges tell parents and students that the school "must" accept a doctor's note at any time, families reported that schools refused doctor's notes, telling students they would not accept the notes because too many days had passed after the absence. When parents reported this to the judge, they were often told that they needed to return to the attendance office with the doctor's note and insist the school accept the note. However, judges often refused to allow students to present doctor's notes directly to the court and told students that the court could not dismiss the FTAS charge unless the school corrected the student's attendance record.[53]

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needs a doctor's note if they miss as few as three consecutive days of school—or, alternatively, that only three handwritten excuses from a parent will be accepted per semester. *See* WILMER-HUTCHINS HIGH SCHOOL, ATTENDANCE (DISD), Appendix B; ZAN WESLEY HOLMES, JR. MIDDLE SCHOOL, STUDENT ATTENDANCE POLICY 2012-2013 (DISD), Appendix B. Others allow five to ten absences before a doctor's note is required.

[52] We met a number of students and parents who complained that they were in court due to an error on the part of their school or attendance office. In a couple of cases, an error in a student's schedule led them to be marked absent for a class the student was never attending. Several parents complained about another type of error: the school counting a student's absence for a suspension as unexcused. The information from one DISD high school, provided in response to Appleseed's open records request, suggests these may not be isolated incidents. The Faculty and Staff Handbook for North Dallas High School includes "[n]o inaccurate court referrals due to attendance mistakes by teachers" as one of its attendance office goals for 2012-2013. NORTH DALLAS HIGH SCHOOL, 2012-2013 FACULTY AND STAFF HANDBOOK (DISD), Appendix B. Another DISD high school's faculty handbook seems to either discourage correcting attendance reports, or making mistakes (it isn't clear which) – it states, "Correcting absences after a truancy case is filed may be considered as 'filing false criminal charges.' Offenders may be prosecuted by the district attorney's office. Board Policy DF (LOCAL) #4 states that a teacher may be terminated for 'failure or refusal to timely submit or account for all grades, reports, school equipment, or other required items.' This does include attendance reporting." W.T. WHITE HIGH SCHOOL, FACULTY/STAFF HANDBOOK (DISD), Appendix B.

[53] One judge went so far as to tell students, during admonishments, that no judge "anywhere in the country" could dismiss a case absent motion of one of the parties. The judge went on to explain that the parties were

All of the district and school policies received refer to the three-day limit for parental excuse notes, but none distinguish between notes from parents and those from doctors.[54] Some of the school-wide policies indicate the three-day limit will be strictly enforced, noting "no exceptions" to this policy.[55] Many of the school policies indicate that an unexcused absence is "automatically" entered if a note is not received within three days.[56] Several schools define "truancy" to include the failure to turn in a note within three days.[57] Some schools require parents to call the day the student is absent and follow up with a letter, others allow faxed or e-mailed excuses, but others will only accept a written letter.[58] For example, a MISD high school requires the parent to call by 10:00 a.m. on the day of the absence or it is considered unexcused; the school does "not accept" parent notes.[59]

In the districts, school-level policies vary considerably from district-level policy. For example, while DISD policy notes that students may violate compulsory attendance

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the school and Dallas County and made no mention of how a student could file a motion to request dismissal of an FTAS case.

[54] As part of the research for this complaint, Texas Appleseed requested and received both district-level policy related to attendance and school-level policy, where it deviated or expanded on district policy. One DISD school requires a specific form for class time missed due to a doctor or dentist appointment, which is kept by the school's attendance office. W.W. SAMUELL HIGH SCHOOL, ATTENDANCE AND TARDY PROCEDURES, CAMPUS LEVEL PROCEDURES 2012-2013 (DISD), Appendix B. Another school requires students who have been absent due to "critical illness or emergency care" to see the nurse upon returning to school. JUSTIN FORD KIMBALL HIGH SCHOOL, STUDENT ATTENDANCE POLICY (DISD), Appendix B.

[55] GEORGE BANNERMAN DEALEY MONTESSORI VANGUARD & INTERNATIONAL ACADEMY, ATTENDANCE POLICY (DISD), Appendix B ("If a note is not received by the third day after the absence, an excused note cannot be accepted."); ROSIE SORRELLS EDUCATION & SOCIAL SERVICES AT TOWNVIEW CENTER, ESSM ATTENDANCE (DISD), Appendix B ("Late notes are not accepted.").

[56] *See* J.J. PEARCE HIGH SCHOOL, 2011-2012 STUDENT HANDBOOK 17 (RISD), *available at* http://www.edline.net/files/_WWBww_/e8d8dc38674c6a033745a49013852ec4/11_12_student_hdbk.pdf; MOISES E. MOLINA HIGH SCHOOL, 2012-2013 TARDY PROCEDURES 9 (DISD), Appendix B; HILLCREST HIGH SCHOOL, ATTENDANCE POLICY (DISD), Appendix B. David Carter High School's guidance on this issue is the only guidance that appears to distinguish between a parent and doctor's note, but it is extremely confusing, stating "Within three days of an absence, the student must give the Attendance Office clerk a written note from a parent/guardian stating the date and the reason for the absence. After three days, a note must come from the physician releasing the student back to school. Students not turning in a note within the three days will be counted as an unexcused absence." DAVID W. CARTER HIGH SCHOOL, ATTENDANCE AND TARDY PROCEDURES 2012-2013 (DISD), Appendix B. One DISD high school's school level policy indicates, "[d]iscrepancies in attendance must be noted within the six weeks. (No changes will be made after the six weeks ends unless the absence was school related or a teacher error)." JUSTIN FORD KIMBALL HIGH SCHOOL, STUDENT ATTENDANCE POLICY (DISD), Appendix B.

[57] JUSTIN FORD KIMBALL HIGH SCHOOL, STUDENT ATTENDANCE POLICY (DISD), Appendix B; GARZA EARLY COLLEGE HIGH SCHOOL, 2012-2013 GUIDELINES FOR STUDENT ATTENDANCE AND PUNCTUALITY 1-2 (DISD), Appendix B.

[58] For example, Garland High School requires an "attendance form" to be filled out and stapled to an absence note, and states that e-mails, faces, and phone calls" are not acceptable documentation. Garland High School, *supra* note 53.

[59] NORTH MESQUITE HIGH SCHOOL, ATTENDANCE GUIDELINES FOR NORTH MESQUITE HIGH SCHOOL 2012-2013 (MISD), *available at* http://www.mesquiteisd.org/nmhs/information/policies.html. John Horn High School, also in MISD, requires parents to call the day the student is absent and does not accept parent notes. JOHN D. HORN HIGH SCHOOL, http://www.mesquiteisd.org/jhhs/parents/.

laws if they are "absent from class" or "absent from school…for days or parts of days,"[60] it does not establish when a student who is late to class will no longer be considered "tardy" and instead is marked absent.[61] School-level policies determine this distinction and they vary considerably from school to school.[62] Some schools mark a student who is more than five minutes late to class absent,[63] while others give students a twenty-five minute window before marking them absent.[64] This is also true for GISD, MISD, and RISD school policies. Because the FTAS statute allows prosecution for "parts of days" as well as whole days, many students find themselves in Dallas County truancy courts not for missing whole days—or even whole classes—but simply for being late to class.

To complicate matters, parents report that tardy policies can vary between classrooms, with one parent noting her son was counted "tardy" when he was in the classroom, but not seated at his desk, because his teacher adopted a classroom-specific rule.

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[60] DALLAS ISD, CODE OF CONDUCT *AND* STUDENT HANDBOOK 2012-2013, at 8 (2012), *available at* http://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/159//StudentHandbook/studenthandbook_English.pdf.

[61] *Id.* at 8-9.

[62] It is not clear that these policies conform with either Texas Education Agency ("TEA") guidance or a 1993 Attorney General ("AG") opinion on this subject. Texas Attorney General Dan Morales opined that tardiness was not an unexcused absence because it signifies the youth is "present in the school building" and simply late getting to class, whereas the term "unexcused absence" signifies "a child is not present in the school building for a certain period of time." Tex. Att'y Gen. Op. No. DM-200 (1993), *available at* https://www.oag.state.tx.us/opinions/opinions/48morales/op/1993/htm/dm0200.htm. A 2001 TEA guidance letter citing this opinion states that "school districts should not routinely classify each instance of tardiness as an absence for purposes of truancy." Letter from David A. Anderson, Gen. Counsel, Tex. Educ. Agency, to Administrators (Nov. 13, 2001), *available at* http://ritter.tea.state.tx.us/taa/legal011113.html. Both the AG Opinion and the 2001 TEA letter are cited in a 2012 TEA guidance letter noting, "Tardies are generally not considered absences for purposes of compulsory attendance enforcement." Letter from David A. Anderson, Gen. Counsel, Tex. Educ. Agency, to Administrators (Aug. 2, 2012), *available at* http://www.tea.state.tx.us/index4.aspx?id=2147508100. Texas school districts bypass this guidance by defining a window within which youth are "tardy" and another within which they are counted absent.

[63] *See* ZAN WESLEY HOLMES, JR. MIDDLE SCHOOL, STUDENT ATTENDANCE POLICY 2012-2013 (DISD), Appendix B ("If a student is 5 minutes late to class without a pass, her or she may be marked absent. If the student has a pass, the teacher will submit an attendance correction form to the attendance office in order for it to be changed to a tardy."). Wilmer-Hutchins High School in DISD indicates a student will be marked absent if they are more than eight minutes late to class. WILMER-HUTCHINS HIGH SCHOOL, ATTENDANCE (DISD), Appendix B.

[64] *See* NORTH MESQUITE HIGH SCHOOL, ATTENDANCE GUIDELINES FOR NORTH MESQUITE HIGH SCHOOL 2012-2013 (MISD), (indicating twenty-five minutes is considered "excessively late" for first period classes and will be counted as an unexcused absence), *available at* http://www.mesquiteisd.org/nmhs/information/policies.html. North Mesquite's policy indicates, incorrectly, that "The State of Texas does not distinguish between a student being tardy and being absent. It is a courtesy that NMHS does provide a tardy policy which provides some flexibility for the times that students are a few minutes late to class." One DISD high school allows students to have an "absence" from a class changed to a "tardy" if they attend Saturday school. EMMETT J. CONRAD HIGH SCHOOL, ATTENDANCE POLICY 2012-13 (DISD), Appendix B.

1. Policies Inaccessible to Non-English Speakers

The complexity of the system of district, school-level, and classroom attendance policies is further exacerbated by schools' failure to ensure policies are provided to students and parents in languages other than English. In each of these school districts, LEP students and those enrolled in Bilingual or ESL classes comprise a significant portion of the student body:[65]

Table 2: Students Who Are LEP or Bilingual/ESL Enrolled, 2011-2012

School District	Percentage of Student Body LEP	Percentage of Student Body Bilingual/ESL Enrolled
Dallas ISD	39.2%	36.5%
Garland ISD	21.7%	20.7%
Mesquite ISD	18.5%	18.2%
Richardson ISD	23%	23%

Despite this, while district-level policies are provided in English and Spanish, very few schools provide their school policies in any language other than English:[66]

- In DISD, more than seventy middle and high schools provided school-level policy in response to our open records request,[67] but only five schools provided them in any language other than English.[68]
- In response to our open records request, RISD referred us to their website, which includes links to district policy as well as individual school sites. The District's handbook is provided in English and Spanish; however, none of the school-level handbooks were available in any language other than English.
- MISD provided its district-level policy in English and Spanish. While it also provided school-level policy for two high schools, those policies were not provided in any language other than English.[69]

[65] Data in table taken from Texas Education Agency's Academic Excellence Indicator System. TEX. EDUC. AGENCY, 2011-12 ACADEMIC EXCELLENCE INDICATOR SYSTEM, http://ritter.tea.state.tx.us/perfreport/aeis/.
[66] As part of our research for this complaint, Texas Appleseed sent open records requests to Dallas, Garland, Mesquite, and Richardson ISDs, asking for copies of their district and campus attendance policies in all languages in which they are made available to students and parents. *See* Texas Appleseed, Open Records Requests, Appendix B. Appleseed requested the district- and campus-level attendance policies in any language in which it was provided. The failure to provide a copy in any language other than English in response to the request is presumed to mean that it is provided only in English.
[67] For purposes of this section, middle and high school policies were the only campus-level policies considered, since children under the age of twelve may not be prosecuted for "failure to attend school." TEX. EDUC. CODE § 25.094.
[68] The schools that included a Spanish version of their policy were W.H. Adamson High School, Thomas Jefferson High School, Lincoln High School, Gilliam Middle School, and Robert T. Hill Middle School. *See* policies of the aforementioned schools in Appendix B.
[69] This is consistent with what we found through the district and campus websites.

- The GISD student handbook is provided in English and Spanish on the District's website. However, we were unable to find any GISD school-level policy in any language other than English and GISD did not respond to our open records request.

2. Minority Students Are Disproportionately Referred

Data shows that African American students are over-represented in FTAS referrals in DISD and Hispanic students are over-represented in RISD referrals, suggesting that these policies have a disparate impact on minority students.[70] GISD and MISD did not respond to our requests for disaggregated FTAS data.

Table 3: Student Body and FTAS Cases by Race/Ethnicity, 2011-12

		African-American	Hispanic	White	Other	Total # of Students
DISD	Student Population	38,381 (24%)	107,990 (69%)	7,417 (5%)	2,664 (2%)	157,085
	# of FTAS Cases	5,890 (40%)	8,436 (57%)	372 (2%)	204 (1%)	14,902[71]
RISD	Student Population	8,559 (23%)	14,312 (39%)	10,485 (28%)	3,590 (10%)	36,946
	# of FTAS Cases	233 (26%)	463 (52%)	139 (16%)	59 (6%)	894

III. COMPLAINANTS

The following students have been or are currently involved in the Dallas County truancy court system. They respectfully request the U.S. Department of Justice to investigate the unlawful practices and processes to which they and other students in Dallas County have been subjected.

[70] Data in table taken from Texas Education Agency's Academic Excellence Indicator System. TEX. EDUC. AGENCY, 2011-12 ACADEMIC EXCELLENCE INDICATOR SYSTEM: DISTRICT REPORTS, http://ritter.tea.state.tx.us/perfreport/aeis/2012/district.srch.html. Data related to FTAS cases provided in response to open records request from Texas Appleseed. *See* DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, Appendix C.

[71] In its breakdown by race and ethnicity, DISD categorizes 3,952 students as "no ethnicity selected by parent/guardian on enrollment form," even though other records from DISD suggest fewer than 10 students district-wide did not report their race/ethnicity. The numbers in the table do not include these students so as not to skew the results, but it should be noted that the total number of cases filed in 2011-12 by DISD is 18,854. *See, e.g.*, DALLAS ISD, DATA PACK FOR 2012-2013 PLANNING (2012) at 6, *available at* https://mydata.dallasisd.org/docs/CILT2013/DP1000.pdf ("Dallas ISD 2011-12 Group Summary Statistics").

A.B.

A.B. is a 16-year-old student who is finishing her sophomore year at South Oak Cliff High School ("SOC") in DISD. A.B. has always excelled academically, and was salutatorian of her middle school. She has recently been chosen for a prestigious internship with a national corporation.

However, despite her academic success, A.B. has been unable to avoid truancy court. During the current school year, A.B. accumulated ten absences that the school inaccurately marked as unexcused:

- A.B. was absent for four days after the death of her grandmother, whom she was very close to, and the school marked these absences as unexcused even though her mother turned in her grandmother's obituary.
- A.B. was suspended for three days and the school marked these absences as unexcused.
- A.B. received another suspension for three days after she was tardy to one class period, and these absences were again marked as unexcused.

A.B. described SOC's practice regarding tardy students: When the bell rings, SOC locks classroom doors. Students who cannot enter their classrooms have to go to the cafeteria and turn in their student badge. They are then sent to the disciplinary office where they receive a suspension. A.B. described that students sometimes receive in-school suspensions and sometimes receive out-of-school suspensions; she did not know what determined whether a student would receive an in-school or an out-of-school suspension. A.B. estimates that about ten to fifteen students are caught tardy every period at SOC and consequently receive suspensions for being tardy.

A.B. received an FTAS charge for these absences, including the suspensions, although suspensions are excused absences under Texas law. When her mother called the school to correct the attendance record, she was told that she had to go to the school in person to do so. She had to wait over one-and-a-half hours before she spoke to someone who could correct the record. During that time, she was passed from person to person with no one helping her. Finally, she spoke to the Assistant Principal who was able to excuse the absences.

Because A.B. had a corrected attendance record, her FTAS charge was dismissed. However, she acutely felt the injustice of receiving a criminal charge for mistaken record-keeping by the school, particularly the school's failure to record a suspension given to her for being tardy to one class period as an excused absence. Moreover, A.B. had to miss school to go to truancy court before her charge was dismissed.

Additionally, A.B. reports that there are continually mistakes on her attendance record, which makes her feel like the teachers do not pay attention to the students. In one class, A.B. reports that her teacher marked her absent because another student with her last name was absent. In another class, she is the shortest student in the class, so the

teacher marked her absent because the teacher did not see her. After A.B. was referred to court, her mother has followed up on these mistakes immediately to ensure that A.B. does not receive another FTAS charge based on errors like these. However, her mother also points out that it is difficult to take the time to correct the school's records given her other obligations.

B.B.

B.B. is an 18-year-old senior at Dallas CAN Academy, a charter school for youth who are at risk of dropping out. Before enrolling at Dallas CAN in May 2013, B.B. was a student at SOC High School in DISD. Her truancy cases are related to attendance at SOC.

B.B. was identified as having Attention Deficit Disorder ("ADD") when she was in third grade. While her mother describes B.B. as "the most creative and naturally talented" member of the family, both B.B. and her mother acknowledge that her ADD made it difficult to learn without assistance through special education services. When she received appropriate help, B.B. was able to progress and enjoyed school.

B.B. started high school at A. Maceo Smith High School ("Maceo"), where she had "teachers that helped and encouraged her." At Maceo, under her Individualized Education Program ("IEP"), B.B. received access to resource room support as well as push-in special education support. She had to transfer to SOC her junior year because DISD converted Maceo to a magnet program. B.B. immediately had problems at SOC – B.B. and her mother report that the school did not provide any special education services and failed to implement her IEP. B.B. reports that she had no one to help her at SOC, which led to academic problems for B.B.

She received her first truancy court referral when she was a junior at SOC. By her senior year, B.B.'s academic problems had led SOC to place her in "Reconnect" classes that offered a one-size-fits-all computer-based credit recovery program with insufficient teacher support for B.B. to learn. Moreover, B.B. reports that there were more students assigned to the "Reconnect" classroom than there were available computers so students regularly were unable to even work on the computer program in the classroom. B.B. reports that students who could not use one of the computers received no schoolwork to complete in the classroom.

In the absence of appropriate supports, B.B. finally gave up, became depressed, and stopped going to school regularly. Going to school seemed pointless to her because she was not learning. B.B.'s mother said that when she raised these problems in a meeting at SOC, school officials became defensive instead of working to appropriately improve and implement her IEP. The school completed no evaluations to consider the functional cause of the school attendance problem, and the school offered no additional academic or positive behavioral supports to improve her attendance.

As a result, during the 2012-13 school year, three truancy cases were filed against B.B.[72] During her first hearing at court, B.B. and her mother tried to explain to the judge what happened—that B.B. was a special education student, her school was not providing the help she needed, and that she gave up hope when she was placed in the "Reconnect" classes because she could not understand the material and was not learning. Initially, the judge told her that he "would have DISD look into it," but nothing happened.

At subsequent hearings, the judge was not interested in an explanation. Despite the repeated court filings, B.B.'s status as a special education student, and her conversation with the judge about her disability, she never received assistance from the court's case managers. Nor did the judge ever inquire into her capacity to represent herself, or her ability to understand the rights she waived or the pleas she entered. At one review hearing, the case manager who met with her said, "I don't even want to see you – you are a senior who is not going to graduate. Get out of here."

B.B. was convicted of "failure to attend" in all three cases, and has been ordered to pay fines in excess of $1300, which B.B. and her family have no way of paying. Since B.B. is eighteen, the court will not allow her mother to assist her during court appearances, despite her disability. B.B.'s mother says she has "never felt more helpless as a parent because she knows that there's nothing she can do to protect her." She also said that students and parents at truancy court are like "sheep led to the slaughter" because the truancy courts are "making criminals" out of normal students.

Recently, B.B.'s mother persuaded her to enroll at Dallas CAN, a charter school. When she transferred to Dallas CAN, the school told B.B. that she could conceivably earn enough credits to finish her high school degree and graduate in June. B.B. loves Dallas CAN, and is excited about learning—she says she finally got the help she needs. Her mother reports that B.B. "came alive again…it is like a light came back on in her." B.B had perfect attendance at Dallas CAN, and is scheduled to graduate on June 15, 2013.

Nonetheless, the three truancy cases remain pending, with B.B. in court every month for a review hearing. Texas Appleseed was able to find pro bono representation for B.B., who was able to convince the judge to substitute community service for some of her fines and court costs. However, she still has other fines pending, and, since she is an adult, she risks arrest and jail until she can pay her fines.

J.D.

J.D. is a 15-year-old student, finishing her sophomore year at Richardson High School in RISD. J.D. has had chronic respiratory problems, including asthma and allergies, since she was a small child. J.D.'s mother, K.D., reports that when J.D. gets a cold or allergies, she often ends up with an infection that can keep her out of school for days, and sometimes even weeks, at a time.

[72] After the first case was filed, DISD began to more aggressively pursue truancy charges against B.B., filing subsequent cases when she missed three days, or parts of days, rather than waiting until she reached the mandatory 10-day filing.

J.D. loves school, and gets upset and frustrated when her health prevents her from going. During one recent illness, J.D. insisted on going to school, but felt so badly that when she got there, she could not stay. J.D.'s mother reports that J.D. began crying out of frustration.

Despite J.D.'s chronic health problems and her repeated excused absences, RISD never provided J.D. with 504 services, accommodations or modifications to address her respiratory disability.

During the 2011-2012 school year, J.D. forgot to turn in two notes from K.D. for absences due to illness, and an FTAS case was filed. Because she was sick on the days that she missed school and believed that the absences should not be considered for truancy purposes, J.D. plead "not guilty." From that point forward, the court and school engaged in an attempt to pressure J.D. into changing her plea.

At court, the RISD attendance officer gave them a form, "Understanding your Not Guilty Plea," as soon as J.D. entered her plea (this form has since been amended, but still includes several misstatements of law). The form indicated that if they could not get RISD to correct J.D.'s attendance record, they would have to change her plea to "guilty." At the pre-trial, both K.D. and J.D. felt the prosecutor and court officers were very curt and abrupt. J.D. and K.D. described their demeanors as "bullying," and "offensive, intimidating." They started the pre-trial by shoving the attendance report in front of J.D. and asking her "if it looked correct." J.D., who didn't have time to look at it carefully before it was pulled away, said she "guessed it did." K.D. felt that they were trying to get J.D. to admit that she was guilty, so she told the prosecutor that she planned to hire an attorney and did not want J.D. to answer any more questions. The prosecutor became very angry, his "face turned very red," and he stormed out of the room.

After the pre-trial, K.D. received a call from the prosecutor asking "what they could do to get [J.D.'s] case resolved out of court." K.D. responded by asking why the prosecutor called to ask her this question, noting the prosecutor was "the only one who [could] do anything." J.D. was pulled into the office at school. Her principal asked her whether her mother "had any ideas about how [they] could get [the case] solved out of court" and "how [J.D.'s mother] was going to respond to the charges." Despite this, when they were in court, the judge would not allow J.D.'s mother to speak on her behalf. Every time she tried to respond to a question or help J.D., the court instructed her that she was not allowed to do so.

Finally, when J.D.'s case was set for trial, the court failed to have prospective jurors available. J.D.'s principal, who had also appeared for court, was very upset at having to take time away from campus to be at court. The case was re-set, and when they appeared for the second trial date, the prosecutor's witnesses were not in court. In the meantime, J.D. had missed multiple days of school for court. Her mother noticed that J.D. (who is very shy) was uncomfortable representing herself. J.D. changed her plea to "guilty" on the day that the prosecutor's witnesses were not in court for trial, because at that point, she just wanted to move on and get the case over with.

J.D. reports that she was "overwhelmed" and "scared" by the whole process and felt she was "encouraged to say [she] was guilty."

J.D. was convicted of "failure to attend school," and ordered to pay a $100 fine and $77 in court costs. She asked to do community service but the judge did not allow it. She was also required to complete twenty-two hours of tutoring. J.D. has had trouble scheduling enough tutoring hours, between her illnesses and problems getting tutoring appointments with the appropriate teachers. Most of her teachers do not have tutoring hours in the morning, or their lunch is scheduled at a different time than J.D.'s lunch. Though she only lacks five-and-a-half hours of tutoring before she is finished, until she completes all her hours, J.D. has to continue to appear in court for review hearings.

At this point, J.D. has missed almost as much school for court as she missed for the illness that brought her to court.

I.J.

I.J. is a 16-year-old student who is finishing her sophomore year at Namaan Forest High School in GISD. She has had a total of three FTAS cases since starting high school. The first case, filed when she was a freshman, was filed after she accrued twenty-seven class period absences over the course of three days. I.J. acknowledges that when she started high school she "was hanging out with the wrong crowd" and "made bad choices." For her first case, she was ordered to pay fines and court costs of $200, had to complete twenty hours of community service, and was ordered to attend a four-hour life skills course, which cost an additional $40.

This year, she has had two cases filed against her. The first case was filed as the result of fifteen absences that were entered as the result of a scheduling mix-up with her block schedule. The copy of the schedule she was given was different from the school's attendance rolls. When I.J.'s mother received a call about the absences, I.J. went to talk to the school's attendance clerk, but she was told it was too late to correct the errors for all but two of the absences.

I.J. pleaded "no contest" in court, was convicted of "failure to attend," and was ordered to pay a $200 fine and $80 in court costs. She had to complete twenty hours of tutorials, and a truancy trivia quiz. I.J. and her mother were ordered to complete a 500-piece jigsaw puzzle together, and to bring proof of completion of the puzzle to court, along with pictures showing them working on the puzzle together.

Another case was filed against I.J. largely as the result of being tardy to class. I.J.'s mother reports that she was tardy because, after lunch, she always has to use the restroom. Her mother has a note from her doctor indicating that this is a medical issue that I.J. cannot control, however, the school still filed an FTAS case against I.J.

This case is still pending because I.J. pleaded "not guilty." When the judge accepted her plea, he told her that it was her "lucky day" because, if she had pleaded guilty, she would have spent her summer in jail. He told her that, because she had pleaded not guilty, she would spend August and the first month of school in jail instead. I.J. recalled that this made her feel like it was inevitable that she would be convicted and locked up for truancy: "It's like the court system and the judges are bullying the kids." She does not think that the court system is designed to help students improve their attendance, because all it does is put additional stress on students who fear that they will go to jail because of truancy.

K.W.

K.W. is a 17-year-old student who just finished her junior year at Wilmer-Hutchins High School in DISD. K.W. likes school and wants to continue her education after she graduates next year, with hopes of someday attending Spelman College. K.W.'s sister, S.M., is also a complainant, *infra*.

K.W.'s mother, C.M., has congestive heart failure and chronic obstructive pulmonary disease ("COPD"). C.M. has been very ill since K.W. was about ten years old, when C.M. had her first heart attack. C.M. had to quit working soon after due to her chronic health problems, and the family's sole source of income is her Supplemental Security Income ("SSI") check.

K.W. often helps care for her mother, who has been in and out of the hospital on a regular basis for about seven years. C.M.'s hospitalizations sometimes include long stays in intensive care—with the family noting that in 2011, she was in the hospital "every month." Because C.M. had a good job before she fell ill, her SSI income puts the family above the threshold that would qualify her for Medicaid. Thus, her access to care and services is limited. While K.W. has an older sister who also helps to care for C.M., she has her own family and a job that restrict her ability to provide care for her mother. While her sister can help to give K.W.'s mother a ride home from the hospital sometimes, she is not in a position to stay home with her mother when she is sick.

K.W. sometimes stays home to care for her mother when she is ill – even though her mother tells her to go to school. K.W. is the only person in the household who can drive, and she has become familiar with her mother's symptoms. K.W. reports that she knows when her mother's symptoms indicate she needs to go to the hospital, and when she is so critically ill that she needs to call an ambulance. She assists in giving her mother her medications, and is proud of the role she plays in helping care for C.M.

K.W. also has asthma, and has had some hospitalizations and illnesses related to her respiratory problems. A first FTAS case was filed against K.W. during the 2011-2012 school year when K.W. missed school as the result of her own hospitalization; however, because the notice and summons was delivered to her school rather than her home, the family was not aware of it. The County did not pursue prosecution of that case.

This school year, C.M. noticed that K.W.'s school has been less willing to work with her when she misses school. Last year, knowing of C.M.'s medical problems, the school allowed K.W. to "buy back" missed credits and did not aggressively pursue truancy cases. This year, Wilmer-Hutchins told K.W. they would no longer accept written excuses for absences from C.M. They told K.W. that when she was absent, she would need a doctor's note to excuse her absences, although a new attendance clerk at Wilmer-Hutchins has accepted some handwritten notes.

This school year—due to a combination of her own illnesses and her mother's illnesses—K.W. has had two FTAS cases filed against her. At the hearing on her first case, K.W. pleaded "no contest," was convicted of FTAS, and ordered to pay a $100 fine plus court costs of $80. K.W. reports that she felt as though she had no other option because of the burdensome process described for pleading "not guilty." She says that while she "kind of understood" what her rights were because she has seen them discussed on television, she didn't feel that the judge "broke it down enough." K.W. said, "[the judge] has to understand there are little kids in there."

Knowing her family's difficult financial situation, K.W. asked the judge if she could complete community service in lieu of the fine and court costs. He told her that he would consider her request at her first review hearing. When she appeared for her first review hearing, K.W. again asked to be allowed to complete community service in lieu of her fines and costs. The judge allowed her to complete eight hours of community service in lieu of the $100 fine, but told her he could not waive court costs. At her review hearing, the family could not afford to pay the $80 in court costs and another $25 late fee was added.

A second case was filed as the result of days missed when K.W. was on a field trip that her teachers had approved, and an illness for which she did not turn in a doctor's note on time. Appleseed was able to find an attorney to assist K.W. with the second case. K.W. pleaded "not guilty." The judge also waived the remaining court costs for K.W.'s first case. K.W. has to go back to court in August to turn in the doctor's note, when hopefully the second case will be dismissed.

Like her sister, S.M., and their mother, K.W. felt that having an attorney represent her in the second case made a big difference in the way the adults at court responded to her.

S.M.

S.M. is a 15-year-old student who just finished her freshman year at SOC High School in DISD. She is a good student and likes school; S.M. dreams of applying to the military or entering college after she finishes high school. S.M. is K.W.'s younger sister.

S.M. gave birth to a child on December 29, 2012. She had a number of complications with delivery and was in the hospital for a week. She was released on January 5th. However, because of the complications and difficult delivery, her doctor

told her he would not release her to return to school until after her first follow-up visit, scheduled for January 29, 2013, a month after the baby was born.

While S.M. was in the hospital, a family friend called SOC to ask what she needed to do to get her absences from school excused. The school official said that she would simply need to bring her hospital discharge papers to school when she returned.

On January 7, as soon as school resumed after S.M.'s release from the hospital, she called the school to ask how she could get school assignments while absent. S.M. was told that because she had not "registered with the nurse" while she was pregnant, she could not receive any of her assignments or homebound instruction while she was out. S.M. had never been told about this policy while she was pregnant, despite the fact that "all her teachers knew" about the pregnancy, particularly once her stomach became too large to sit facing forward in her desk. The policy is not in the school or district handbooks.

Once her doctor told her that she could return to school, S.M. brought her doctor's note and hospital records to get her absences excused. The attendance officer told her she had brought the documentation in too late—that she should have brought it before she returned to school. Consequently, all the days she missed were "unexcused" and resulted in a truancy court filing.

Though S.M. knew she had an excuse for her absences, she did not fully understand the process at court and felt she had "no choice" but to plead guilty or no contest. When asked if she understood the waiver of rights and plea form that she signed at court, S.M. said that she did not – she just heard the judge explain to "sign here" on the forms. S.M. pleaded "no contest," believing that "no contest" meant that "[she] did it, but she did not meant to do it – it wasn't on purpose." When he called her to the bench, the judge asked S.M. why she was in court. S.M. told him that she had a baby and "they gave me truancy." The judge asked if she had "proof" and S.M. showed him her discharge papers from the hospital. Nonetheless, S.M. was convicted of "failure to attend" and was ordered to pay a $100 fine and $80 in court costs. Her mother, who has a disability and can no longer work, supports the family on her SSI check. The $180 in fines and court costs is beyond the family's means.

When a DISD attendance officer was made aware of S.M.'s situation by an Appleseed attorney, she was allowed to engage in credit recovery for the classes she missed while she was out of school. Appleseed also found S.M. a pro bono attorney to help with her truancy case; the attorney was able to convince the judge to waive her fines and court costs at her first review hearing. The judge also indicated that if S.M. paid the $30 fee, he would immediately expunge her record. S.M. has not yet paid the $30 to get the case expunged because she has to wait for her mother to get another SSI check.

S.M. noticed that having an attorney made a "huge" difference in the way she was treated at court. Her mother said the judge's "whole attitude changed."

L.P.

L.P. is a 15-year-old special education student who is in eighth grade at Vanston Middle School in MISD. L.P. lives with her grandmother, M.C.

L.P.'s first FTAS case was filed against her this year when she missed school due to the flu. L.P. was staying with her mother while M.C. was out of town. The school called L.P.'s mother to come pick her up when the nurse determined that she had a fever. When L.P.'s mother arrived at school, the nurse walked them to the attendance office to inform the attendance staff that L.P. was too sick to remain in school. At that time, L.P.'s mother told the attendance staff that if L.P. was still sick tomorrow, she would keep her home. L.P. was still sick the following day and L.P.'s mother did not call the school to let them know this. When M.C. returned to town, she was told that the absence could not be excused because no one had called the school on the day of the absence.

Though L.P. had only three absences that MISD alleged were unexcused—two of which were related to the illness described above—the District filed both a FTAS case against L.P., and a "parent contributing to non-attendance" case against M.C. Knowing she could not afford to pay fines in both cases, M.C. planned to plead "not guilty" in her case, and "guilty" for L.P. When she was called to the bench, M.C. thought they were asking her about L.P.'s case and pleaded "guilty." The judge ordered M.C. to pay $120 in fines, and $80 in court costs.

The judge then called L.P.'s case. Confused, M.C. asked the judge if she had just pled guilty in her own case. He indicated she had. Rather than clarifying her plea, the judge asked L.P. how she intended to plead, and L.P. told him she pleaded "guilty." Although L.P. is a special education student, which should have been included on the FTAS complaint and should have alerted the judge that she might need extra assistance to understand the court process, the judge made no inquiry into her capacity to waive her rights or enter a plea.

The judge also ordered L.P. to pay $120 in fines and $80 in court costs. M.C. tried to ask the judge how to appeal, but he said that he could not discuss anything with her. At the clerk's window, M.C. asked how to appeal her plea and was told to "write a letter" explaining why she wanted to appeal. M.C. has paid L.P.'s fine and L.P. has completed tutoring.

M.C. reports that the school has marked L.P. absent on days when she has been assigned to in-school suspension. One day, M.C. received a call that L.P. was absent, which made her frantic because she knew that L.P. had gone to school and she was worried that something had happened to her.

IV. DISTRICT AND SCHOOL ATTENDANCE POLICIES AND PRACTICES VIOLATE STUDENTS' CIVIL AND EDUCATIONAL RIGHTS

A. The Districts Violate the Equal Educational Opportunity Act by Not Ensuring School-Level Attendance Policies Are Provided in Languages Other than English

The Districts allow individual schools to establish their own attendance policies that are different from the overall district policy, confusing, and difficult to obtain. In addition to these barriers, the Districts do not compel schools to issue the policies in languages other than English, particularly Spanish.[73] Because the school attendance policies are not provided to LEP students or parents in languages other than English, they cannot know what rules apply and how to abide by the rules. As a result, the Districts create a significant language barrier for LEP students that results in FTAS cases against these students in truancy court.

Despite the Districts' hands-off approach in allowing schools to set attendance policy, the Districts[74] have an obligation under the Equal Educational Opportunities Act ("EEOA") to take affirmative steps to prevent a language barrier from interrupting LEP students' participation in public education. The Districts allow a language barrier to impede LEP students' access to education.

The EEOA states:

> *No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by …*
>
> *(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.*
>
> 20 U.S.C. § 1703(f).

A school district violates § 1703(f) when: (1) language barriers exist; (2) the district fails to take appropriate action to overcome these barriers; and (3) LEP students consequently cannot have equal participation in instructional programs.[75] The Districts have created a language barrier for LEP students by implementing attendance policies so confusing that LEP students have virtually no chance of understanding them.

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[73] Although the Districts have LEP students and families who speak languages other than Spanish, the majority of LEP families within the districts are Spanish-speaking. We focus in this section on Spanish language because, during numerous truancy court observations of initial appearances, there were always a significant portion of students and parents who received Spanish translation and we did not observe translation for any other language. For the most part, very few schools provide these policies in Spanish; only five of seventy DISD schools that responded to a Texas Appleseed open records request translated school-level policies into Spanish.

[74] School districts are local educational agencies covered by the terms of the Act. 20 U.S.C. § 1720(a)-(b); *see also* Idaho Migrant Council v. Bd. of Educ., 647 F.2d 69 (9th Cir. 1981).

[75] *See* Daniel v. Bd. of Educ. for Ill. Sch. Dist. U-46, 379 F. Supp. 2d 952, 960 (N.D. Ill. 2005).

The Districts create this language barrier through two interrelated mechanisms. First, the Districts allow individual schools to issue attendance policies that often differ significantly from the district-level policy, but do not require the schools to translate them into Spanish.[76] Thus, LEP students or families cannot find individual school policies in Spanish, but the local school policies most likely determine whether a student receives an FTAS charge.[77] Second, because school-level attendance systems are so complicated and confusing, they are incomprehensible for families without access to written policies. For example, many students and parents had no idea what the attendance policies were until they experienced the truancy court process. In schools that do not translate policies, it is prohibitively difficult for LEP students and parents to find out what they must do to avoid violating school-level attendance policies that differ from the district's policies.

Moreover, this language barrier impacts a significant portion of students within the Districts, which all have substantial LEP student populations, from almost 40% in DISD to almost 19% in MISD.[78] Preventing only one student from participating in public education due to a language barrier would violate the EEOA, but the barrier created by the Districts here is especially significant because it impacts a substantial portion of the student body of the Districts.[79]

The EEOA obligates schools to make a genuine and good faith effort to eliminate language barriers.[80] In two important ways, the Districts fail to take appropriate action to remove the language barrier. First, they have not required the schools to issue Spanish-language student handbooks and codes of conduct. As a result, an overwhelming percentage of schools within the Districts have only issued English-language student handbooks. Second, the Districts have not taken affirmative steps to inform LEP students and parents about the complicated and confusing attendance rules and how both district- and school-level policies may affect them.

Due to the Districts' creation of and failure to eliminate this language barrier, LEP students receive FTAS charges for not complying with policies that they cannot understand. Consequently, these students are prevented from fully participating in the educational program. As discussed above, students inevitably miss instructional time at school for truancy court appearances. At the very least, a student and his or her parent must attend court for the initial appearance.[81] However, students often must return to court for multiple review hearings so each FTAS case usually requires several trips to

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[76] *See supra* note 73.

[77] A prime example of such a trap is North Mesquite High School, which has not translated its policies into Spanish. North Mesquite High School requires a parent to call the school by 10:00 am on the day the student is absent; if the parent does not call, the absence is considered unexcused and no note from home is accepted. *See* NORTH MESQUITE HIGH SCHOOL, ATTENDANCE GUIDELINES FOR NORTH MESQUITE HIGH SCHOOL 2012-2013 (MISD), *available at* http://www.mesquiteisd.org/nmhs/information/policies.html.

[78] Data taken from Texas Education Agency's Academic Excellence Indicator System. TEX. EDUC. AGENCY, 2011-12 ACADEMIC EXCELLENCE INDICATOR SYSTEM, http://ritter.tea.state.tx.us/perfreport/aeis/2012/district.srch.html.

[79] *See* Heavy Runner v. Bremner, 522 F. Supp. 162, 164 (D. Mont. 1981).

[80] *See* Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. Unit A June 1981).

[81] TEX. CODE CRIM. PROC. art. 45.0215 (requiring parent to accompany youth under 17 for FTAS cases).

truancy court. And each time a student must go back to truancy court—for an initial appearance, to pay a fine, or for a review hearing—that student loses more school instructional time. LEP students suffer particular harm from lost instructional time because they require additional instructional time to develop English language skills. It is even worse for indigent LEP students. Once convicted, if students cannot pay their fines and court costs within thirty days, they must ask the truancy court for extra time. If the court grants them extra time, they not only have to pay more money for that extra time,[82] but they also have to return to court at least once, if not more, to pay the fines and costs, thereby missing more school.

B. The Districts Violate Title II of the Americans with Disabilities Act by Failing to Modify Programs and Activities to Afford Students with Disabilities Equal Educational Opportunities

Under Title II of the Americans with Disabilities Act ("ADA"), a public entity is prohibited from excluding a "qualified individual with a disability" from "participation in or... the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[83] The Districts are public entities that are prohibited from discriminating against individuals with disabilities by the ADA.[84]

As part of our investigation, we spoke to a number of families of students who qualified for protections under the ADA: (1) students with a disability under the ADA, as amended, because they had physical or mental impairments that substantially limit one or more major life activities[85] who were (2) "qualified individuals" by virtue of meeting age and residency requirements for public school.[86] Despite these students' protections under the ADA, students and families repeatedly reported that the Districts failed to make reasonable modifications and accommodations to attendance policies to ensure that students did not receive FTAS charges for absences related to their disabilities.

Students and families also repeatedly reported that the Districts failed to provide appropriate educational services to enable them to achieve an equal educational opportunity. Thus, several students reported that their absences occurred because they did not understand their classes due to their disabilities. The impact of the Districts' failure to make reasonable modifications or provide appropriate educational services resulted in students with disabilities losing the benefit of a public education to which they were entitled.

[82] *See* section I, *supra*.
[83] 42 U.S.C. § 12132.
[84] *Id.* § 12131(1)(B).
[85] Students who have a record of such impairment, or regarded as having such impairment, are also protected by the ADA. *Id.* § 12102(1)(A).
[86] *Id.* § 12131(2).

1. The Districts Violate the ADA by Failing to Make Reasonable Modifications in Their Attendance Policies, Practices, or Procedures

Under the ADA, the Districts are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[87] Despite this legal requirement, the Districts routinely apply their attendance policies, practices and procedures without regard to students' disabilities and potential necessary modifications. Many students would not have faced an FTAS charge but for the Districts' failure to modify their attendance policies, practices, and procedures to prevent charges against students for disability-related absences.

- Complainant J.D. is a student in the RISD. She has chronic respiratory problems, including asthma and severe allergies, which substantially limit the major life activities of, among other things, breathing and respiratory function. Although J.D. had a doctor's note excusing her absences because of her respiratory disability, the school filed FTAS charges. Because the school would not accept the note after the FTAS charges were filed, J.D. had to go to court where she eventually pleaded "no contest" and was fined for FTAS. Had the school modified its attendance policies to accept J.D.'s doctor's note and correct J.D.'s attendance record to reflect excused rather than unexcused absences, she would not have had to go to court nor pay a fine for an FTAS conviction.
- Complainant K.W., a student in the DISD, has been hospitalized and unable to attend school because of her asthma, which substantially limits major life activities, including her breathing. However, her school refused to accept excuse notes from her doctor because too many days had passed since her absence. Had the school modified its attendance policies to accept K.W.'s doctor's excuse note and correct K.W.'s attendance record to reflect excused rather than unexcused absences, she would not have faced FTAS charges due to absences related to her disability.
- A student from GISD with a learning disability—which causes particular difficulties in organization and substantially limits the major life activity of learning—first received an FTAS case because he was confused about the location of his classes in his high school, because the locations changed daily. Because of this confusion, he did not arrive at class on time and consequently accumulated enough tardies to receive an FTAS charge. He subsequently received other FTAS charges because he misplaced and forgot to turn in excuse notes, and the school refused to extend its timeline for accepting notes to accommodate his organizational difficulties. Only after he had accumulated four FTAS cases over the period of four years did his IEP team meet and modify his schedule to allow him additional time between classes. With the increased time, he has been able to get to class on time and has not had additional FTAS cases.

[87] 28 C.F.R § 35.130(b)(7).

However, GISD's initial failure to provide this student with this modification resulted in his accrual of significant FTAS fines.

- A student in the MISD received an FTAS case because she was tardy to school after asthma attacks. Her school did not modify its policies around excuse notes in response to the student's disability-related tardies.

Because the Districts apply their attendance policies, practices, and procedures without regard for students' disabilities, they fail to consider whether modification of those policies would prevent discrimination against students with disabilities. Critically, because the Districts use the TIS automated "e-filing" system for FTAS charges, they exercise no review of charges filed against students with disabilities to determine if modification is appropriate to avoid discrimination against these students.

For many of the students with disabilities that counsel interviewed, the sole modification necessary would have been for the Districts to excuse disability-related absences even if an excuse note was provided after their policies' limit for acceptance of timely excuse notes. Such a modification is hardly a fundamental alteration of the nature of public education and, indeed, could help students remain more engaged in instructional time because they would not have to attend court hearings for FTAS charges or feel that they had unfairly received a charge due to absences beyond their control.

2. The Districts Violate the ADA by Failing to Provide Students with Disabilities Services as Effective as Those Provided to Non-Disabled Peers

Under the ADA, the Districts must provide qualified students with disabilities educational "service[s] that [are]... as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as [those] provided to others."[88] However, a number of students did not receive appropriate educational services to assist them in obtaining equal educational opportunity or achievement, resulting in their absences from school and FTAS cases. Yet the Districts did not review these students' services prior to or after filing the FTAS cases to determine whether the student was receiving sufficient services to obtain equal educational opportunities as compared to their non-disabled peers. Indeed, in some cases, the Districts reduced educational services to students because of their truancy. Consequently, students with disabilities did not receive educational opportunities equal to that of their non-disabled peers.

- Complainant B.B., a student in DISD, has a learning disability that substantially limits the major life activity of learning. She was moved into the "Reconnect Classroom," where students completed online credit-recovery, without access to her IEP-mandated services. Absent these services, she floundered academically and became depressed. Her attendance suffered as a result, and when her family tried to address these issues through her IEP team, the school refused to provide

[88] 28 C.F.R. § 35.130(b)(1)(iii).

appropriate services. Because of the lack of appropriate services available to her within DISD, B.B. recently transferred to a charter school where she is now receiving appropriate educational services and has perfect attendance.

- A student from GISD who has dyslexia, which substantially limits the major life activity of reading, described how her teachers refused to implement her Section 504 Plan despite many requests from her family, and the school eliminated her dyslexia instruction in response to her truancy, rather than evaluating whether the school was providing appropriate educational services to her.[89] The school made no effort to fully implement her Section 504 Plan, determine whether she needed additional services, or determine whether she needed special education services under the Individuals with Disabilities Education Act ("IDEA"). This student also has a medical condition that makes walking painful but the school would not provide her with an elevator pass to help her get to class quickly when she was in pain. This student has accumulated six FTAS cases and over $2000 of fines and court-costs.

3. The Districts Violate the ADA by Denying Students with Disabilities the Benefits of Public Education Through Missed Instructional Opportunities Due to FTAS Charges

Under the ADA, the Districts are not allowed to deny the benefits of a public education to students with disabilities on the basis of their disability, either through their own actions or through their arrangements with the truancy courts.[90] However, students with disabilities who have absences related to their disabilities must attend truancy court hearings during the school day and consequently miss instructional time for FTAS charges. Additionally, the Districts deny students with disabilities the benefit of a public education by using the truancy court's e-filing system to file charges against students for disability-related absences and the Districts facilitate the execution of truancy court warrants at district schools. Consequently, the Districts deny these students access to instructional time because of absences related to their disabilities.

For example, one DISD school refused to accept a student's doctor's note to excuse her absences from school due to chronic pain from a medical condition. Even though her school knew of her condition and previously provided homebound tutoring for a semester after a surgery to address the condition, the school would not accept her doctor's note. Because the school refused to excuse her absences, the truancy court charged her with FTAS. Although the court eventually dismissed the student's FTAS charge (largely on account of pro bono counsel at her pre-trial hearing), this student still had to attend truancy court during two school days and missed additional instructional time. Had the school accepted her doctor's documentation of her disability, this student could have attended school and received the same instructional time as her non-disabled peers.

[89] In addition to dyslexia instruction, her Section 504 Plan also required teachers to provide her with various supports within the classroom environment, such as copies of the overheads.
[90] 28 C.F.R. § 35.130(a), (b)(1)(i).

Once students with disabilities receive FTAS convictions, they often miss additional days of educational instruction for truancy court review hearings. The truancy courts appear to make no effort to consider a student's disability prior to entering a court order and often order students with disabilities to complete terms made more difficult because of their disability. For example, the truancy court ordered a student with dyslexia to complete a book report on *A Tale of Two Cities* even though she reported she could not understand the book. When a student's disability makes such an order unreasonably difficult to complete, the student will often need to return to court for additional review hearings. As a result, students with disabilities miss even more instructional time than their non-disabled peers for FTAS proceedings because it may be more difficult for them to complete the truancy court orders.

C. DISD Violates Titles IV and IX of the Civil Rights Act by Discriminating Against Female Students for Pregnancy-Related Absences

Title IV of the Civil Rights Act ("Title IV") prohibits discrimination against students in public schools based on race, color, religion, sex or national origin.[91] DISD violated this statute by discriminating against S.M. on the basis of her gender. DISD's discrimination negatively impacted S.M., causing her to fall behind in her schoolwork, requiring her to enroll in a Credit Recovery program, and ultimately leading to criminal charges based on absences related to her pregnancy.

DISD first violated Title IV by failing to enroll S.M. in its Homebound Services program, or even advise her of its existence and of her eligibility, after pregnancy complications prevented her from attending school. S.M. was visibly pregnant for many months before her delivery and subsequent absence from school.[92] When she was released from the hospital after her delivery, she explained to a school representative that she would be absent from the school for an extended period of time under her doctor's orders, and requested that she be provided with school assignments during her absence.

The school made no effort to provide S.M. with Homebound Services for which she would have been eligible, or to even inform her about the program. Nor did they allow S.M. to get assignments from her teachers that would have allowed her to keep up with her schoolwork while she was out. There is no information about services for pregnant students in the DISD or her school's handbooks—except with respect to a separate school for pregnant and parenting students.[93] Finding district policy allowing homebound instruction on the District's website is difficult.[94]

[91] 42 U.S.C. §§ 2000c *et seq*.
[92] In fact, teachers remarked on her inability to sit facing forward in her desk as her pregnancy progressed. Her Assistant Principal was also aware of her pregnancy.
[93] DALLAS ISD, CODE OF CONDUCT *AND* STUDENT HANDBOOK 2012-2013, at 8 (2012), *available at* http://www.dallasisd.org/cms/lib/TX01001475/Centricity/Domain/159//StudentHandbook/studenthandbook_English.pdf.
[94] Texas Appleseed finally located the district's homebound policy by entering "Dallas ISD" and "homebound" into a Google search.

Furthermore, the school actually misled S.M. about her eligibility for homebound instruction. When she called the school to request her schoolwork, S.M. was informed that this option was foreclosed because she had not registered with the school nurse while pregnant. There is nothing in the District's published policy suggesting that a student who fails to register with the nurse during pregnancy will be ineligible for homebound instruction should pregnancy complications cause extended absences following delivery. Imposing this extra requirement on pregnant students, as opposed to other students, violates Title IV because it discriminates against female students. It also places students like S.M. in an impossible position. She could not have possibly known, before her delivery, that she would suffer complications that would keep her out of school for a month. Instead, S.M. should have been informed about and allowed to enroll in the Homebound Services program when she explicitly asked for help with her schoolwork during her absence. Rather than doing so, DISD refused to even provide S.M. her schoolwork. While S.M. has since been allowed to participate in a credit recovery program, it is more difficult to regain credits lost during her absence than it would have been to keep up with assignments while she was out of school.[95] S.M., at a bare minimum, should have been given the opportunity to get and complete assignments during the month she was home. The school's failure to allow S.M. to do so violates federal law.

DISD additionally violated the protections of Title IV by punishing S.M. for pregnancy-related absences. S.M. informed her school promptly that she would be absent for an extended period of time due to doctor's orders and complications associated with her pregnancy. When S.M. returned to school, she provided documentation of her illness, including the hospital discharge and a note from her doctor. The school refused to excuse her absences and charged her with FTAS. She was convicted and fined by the court; only after being assisted by a pro bono lawyer was she able to get the court to waive her fines and court costs.

DISD's actions violate the protections of Title IV, which prohibits discrimination in public schools on the basis of sex.[96] S.M.'s absences were related to her pregnancy, and she provided the school with documentation of her illness. By punishing S.M. on the basis of her gender, DISD violated her Title IV rights.

Our truancy court observations indicate that S.M.'s case is not an isolated one. During our investigation, we observed several students plead guilty or no contest to FTAS charges flowing from pregnancy-related absences. In one student's case, the school clearly had notice that the absences were pregnancy-related—the school had called the student's father to pick her up from school because she was "having pains." The student's father told the judge that his daughter's absences were all related to her pregnancy, so she would have no other attendance issues now that her baby had arrived. Yet the DISD attendance officer made no effort to review these claims and consider whether the absences ought to be excused. Instead, when the student pleaded "no contest," the judge found her guilty and fined her $200 plus court costs. We witnessed

[95] S.M. was allowed to participate in the credit recovery program only after advocacy by Texas Appleseed.
[96] 42 U.S.C. §§ 2000c *et seq*.

other pregnant students report to court that an unexcused absence was related to a "doctor's appointment" with a similar result—no further inquiry into whether the appointment was related to the pregnancy nor whether the student had documentation to support her claim that the absence was due to a doctor's appointment.

While we have not observed this pattern in all the courts, we have observed this pattern in the Dallas County truancy courts that serve DISD students, creating concerns regarding DISD's systemic compliance with Title IV for all students who are pregnant or who have absences related to pregnancy.

DISD's actions also violate protections within Title IX of the Civil Rights Act. 20 U.S.C. § 1681(a) provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Furthermore, recipients of federal funding must "treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability."[97]

V. THE DALLAS COUNTY TRUANCY COURTS VIOLATE STUDENTS' CONSTITUTIONAL RIGHTS

A. Prosecuting Children for Truancy Is Cruel and Unusual Punishment in Violation of the Eighth Amendment

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual" punishment. The prohibition is made applicable to the states by the due process clause of the Fourteenth Amendment. This constitutional provision "guarantees individuals the right not to be subjected to excessive sanctions."[98] As recently reiterated by the United States Supreme Court, "punishment for crime must be 'graduated and proportioned' to the offender and the offense."[99] And the "distinctive attributes of youth" additionally "diminish the penological justifications" for exceptionally harsh punishment.[100]

To punish children for missing school or being late to class with criminal prosecutions and convictions in adult court is grossly disproportionate to the offending behavior and the children who engage in it. Indeed, the imposition of criminal punishments on children for behavior that would not even be a crime if committed by an adult categorically constitutes cruel and unusual punishment in violation of the Eighth Amendment.

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[97] 34 C.F.R. § 106.40(b)(4).
[98] Roper v. Simmons, 543 U.S. 551, 560 (2005).
[99] Miller v. Alabama, 132 S. Ct. 2455 (2012) (citing *Roper*, 543 U.S. at 560, quoting Weems v. United States, 217 U.S. 349, 367 (1910)).
[100] *Miller*, 132 S. Ct. at 2458.

Categorical bans have been imposed on excessive punishment based on "mismatches between the culpability of a class of offenders and the severity of a penalty."[101] The following factors are weighed in considering whether a categorical ban restricts a form of punishment: (1) the culpability of the offenders at issue in light of their crimes and characteristics; (2) the severity of the punishment in question; and (3) whether the challenged sentencing practice serves legitimate penological goals.[102]

Applying this standard compels the conclusion that the criminal punishment of a child by Dallas County—for an act that is criminal only by virtue of the minor's age—is inherently disproportionate. Indeed, any criminal punishment at all is too severe if no crime has been committed.[103]

And, as is true here, "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[104] Finally, both legislative enactments and state best practices show a clear national consensus against the criminal punishment of children for truancy—a status offense that cannot be committed by an adult.[105]

For these reasons, the criminal prosecution of children for failing to attend school categorically violates the right of students protected by the Eighth Amendment to the United States Constitution, to be free of cruel and unusual punishment.

B. Dallas County Violates Children's Rights by Failing to Appoint Counsel for Truancy Court Proceedings

Children prosecuted in the Dallas County truancy court are entitled to the protection of appointed counsel under the Sixth and Fourteenth Amendments to the U.S. Constitution. Despite the harm that an FTAS conviction poses for a child, including risk of incarceration and restraint of liberty, Dallas County does not appoint counsel for indigent children charged with this criminal offense. Without sufficiently understanding their legal rights or the court proceedings, children defendants are almost always incapable of protecting their rights and defending themselves against the FTAS charges.

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[101] *Id.*; *see also* Graham v. Florida, 130 S. Ct. 2011 (2010) (life without parole sentences imposed on children for non-homicide offense categorically banned); Kennedy v. Louisiana, 554 U.S. 407 (2008) (imposing death penalty on four non-homicide crimes categorically cruel and unusual); Roper v. Simmons, 543 U.S. 551 (2005) (Eighth Amendment bars capital punishment for children); Atkins v. Virginia, 536 U.S. 304 (2002) (imposing death penalty on mentally retarded defendants violates the Eighth Amendment).
[102] *Graham*, 130 S. Ct. at 2026.
[103] *See* Robinson v. California, 370 U.S. 660, 666-67 (1962) (holding that a statute subjecting a drug addict to prosecution and imprisonment of at least 90 days in county jail was unconstitutional).
[104] *Graham*, 130 S. Ct. at 2029.
[105] *See* section VI, *infra*; Appendix E; Louisiana State University School of Public Health's "Sustaining Juvenile Justice System Reform – A Report to the Louisiana Juvenile Justice Implementation Commission," January 2013, *available at* http://publichealth.lsuhsc.edu/iphj/sustainingreform.html; Vera Institute of Justice's "Making Court the Last Resort: A New Focus for Supporting Families in Crisis," December 2008, *available at* http://www.vera.org/sites/default/files/resources/downloads/status_offender_finalPDF.pdf; National Conference of State Legislatures, "Trends in Juvenile Justice State Legislation 2001-2011," August 2012, *available at* http://www.ncsl.org/documents/cj/TrendsInJuvenileJustice.pdf.

One student's trial demonstrates how difficult it is for children to defend their rights in the truancy court proceedings. The 17-year-old student defendant was not represented by counsel because his family could not afford to hire an attorney. Despite the student's disability, which rendered him incapable of articulating his defense, the judge would not let the student's mother help her son with his defense, even after the student's mother pleaded with the judge. The judge not only forbade the mother from helping, but also never inquired about the student's disability or whether the student needed any accommodations for his disability.

Throughout the trial, the student's lack of understanding concerning court procedures and legal terms was obvious. For example, the student did not understand what it meant to "cross-examine" the State's witness nor what it meant to "call [a] witness" or "pass the witness." After the student's mother reminded the judge that her son had a disability and did "not understand what is going on in the case," the judge responded, "this [case] is about attendance, that is what this is about" and instructed her to refrain from helping her son question the witness. The student struggled throughout the trial, exhibiting physical signs of stress and mental anguish such as pacing and rocking back-and-forth. As a witness, the student struggled to remain focused on the judge's questions and respond to them.

This student was indigent, disabled, unable to adequately represent himself, and barred from receiving assistance from his mother. All of these circumstances would alert a judge that this student required appointed counsel for a fair and just court proceeding. However, the judge never once mentioned appointing counsel and instead chastised the family for failing to hire counsel.

Unfortunately, the difficulties experienced by this student are not unique. Routinely, students report lacking an understanding of their rights, an inability to explain to the judge why they were absent, and fear of proceeding to trial without a lawyer. The failure of the truancy courts in Dallas County to appoint counsel for indigent children in these cases clearly violates children's constitutional rights.[106]

1. Dallas County's Failure to Appoint Counsel for Children Facing Criminal Proceedings Violates Children's Sixth and Fourteenth Amendment Rights

Children have a due process right to appointed counsel when their loss of liberty is at stake.[107] Moreover, under the Sixth Amendment, indigent defendants, including

[106] The truancy courts appear to disregard indigent students' statutory rights to appointed counsel under Texas law, which requires counsel if "the interests of justice require representation." TEX. CODE CRIM. PROC. art. 1.051(c). Yet the truancy courts do not inquire whether appointing counsel is necessary in the interests of justice, with judges going so far as to tell students that the judge "could not appoint counsel" if the student decided to plead not guilty. Second, under Texas law, indigent defendants have a right to appointed counsel in contempt proceedings, but the truancy courts do not examine whether students older than 17 who are charged with contempt have the right to appointed counsel. *Ex Parte* Gonzalez, 945 S.W.2d 830, 835-36 (Tex. Crim. App. 1997).

[107] *See In re* Gault, 387 U.S. 1, 36 (1967) (juvenile in a delinquency proceeding has right to the "guiding hand of counsel" to "cope with problems of the law, to make skilled inquiry into the facts, to insist upon the

children, have a right to appointed counsel in criminal misdemeanor proceedings where incarceration is possible.[108] Assistance from counsel is especially important for children as they are particularly vulnerable to the complicated and coercive nature of the criminal justice process.[109] The United States Supreme Court recently reiterated that children will most certainly respond differently to the authority of the judicial system than adults.[110]

In Dallas County, children prosecuted in criminal court for FTAS misdemeanors may be incarcerated when they turn 17 years old, if they have not been able to pay fines imposed as a sanction for their conviction.[111] Indeed, according to information provided by Dallas County, 67 youth who had turned seventeen were incarcerated in adult jail during FY 2012 as a direct result of failure to pay fines from an FTAS conviction.[112]

In addition, these children are routinely subjected to the risk of immediate restraint and detention, upon transfer of jurisdiction to juvenile court, which frequently occurs as a direct consequence of an FTAS conviction. During FY 2012, the Dallas County truancy courts sent 53 youth to juvenile detention through the contempt process and 280 children to juvenile detention for other reasons.[113] Additionally, during FY 2012, 1,083 students were referred to juvenile court and transported to the TEC in handcuffs as described in section V(D), *infra*.[114]

When a Dallas County truancy court judge determines a child has failed to comply with a truancy court order, under Texas law, the judge can either refer the child to "the appropriate juvenile court for delinquent conduct for contempt of the justice or municipal court order" or "retain jurisdiction of the case, hold the child in contempt... and order [an additional fine and/or the suspension of the child's driver's license or permit]."[115] If the judge decides to transfer jurisdiction for delinquency proceedings, he orders the child to the TEC, an arm of the Dallas County juvenile court. The judge's order states that the case is referred to "juvenile court for contempt enforcement" and that the child must appear at a "hearing before the Juvenile Court and the Dallas County Juvenile Court Interim Referee."[116] The truancy court judge also issues a warrant for the

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regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it."); *see also* Kent v. United States, 383 U.S. 541 (1966) (constitutionally requiring effective assistance of counsel in proceedings transferred from juvenile to adult court).

[108] Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

[109] *Gault*, 387 U.S. at 39 n.65 (noting "[t]he most informal and well-intentioned of judicial proceedings are technical; few adults without legal training can influence or even understand them; certainly children cannot.").

[110] J.D.B. v. North Carolina, 131 S. Ct. 2394, 2397 (2011) ("…children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

[111] TEX. CODE CRIM. PROC. arts. 45.045, 45.046.

[112] DALLAS COUNTY TRUANCY COURT, DALLAS COUNTY TRUANCY COURT SYSTEM: OUTCOME MEASURES SUMMARY REPORT FOR FISCAL YEAR 2012 (2013) at 5, Appendix C.

[113] Conversation between Judge Jenkins and Deborah Fowler, Texas Appleseed Deputy Director (January 14, 2013).

[114] DALLAS COUNTY TRUANCY COURT, *supra* note 112.

[115] TEX. CODE CRIM. PROC. art 45.045.

[116] DALLAS COUNTY TRUANCY COURT, TEC Referral Packet, Order Referring Case to Juvenile Court for Contempt Enforcement, Appendix A. The judge also orders the child's parent to appear before the "Dallas County Interim Referee." *See id.*, Order Requiring Parents to Appear Before Interim Referee, Appendix A.

child's apprehension and transport to the "Dallas County Interim Referee located at the Truancy and Class C Enforcement Center."[117]

After the Truancy Court judge issues these orders, children are handcuffed and transported to the TEC by a uniformed court officer.[118] When a child's parents arrive at the TEC, the family appears before the Dallas County Interim Referee.[119] The Interim Referee is a judge appointed by the Dallas County Juvenile Board to preside over the on-site courtroom at the TEC.[120] Once jurisdiction is transferred, a TEC case manager creates a case plan, and the "Interim Referee" issues "new court orders" for the child "to adhere to the service plan."[121] The child may be required to attend regular review hearings before the Interim Referee, with some children returning to court monthly and others within the week to monitor their progress.[122] Detention is a legally permissible sanction in juvenile court for violations of these court orders.[123]

Despite the ongoing risk of incarceration, Dallas County does not at any time during any of the complicated proceedings that flow from an FTAS charge afford an indigent child the protection of appointed counsel.

2. Dallas County's Failure to Appoint Counsel for Children in Truancy Court Proceedings Violates Due Process Under *Lassiter* Analysis

Even if the truancy court proceedings did not risk children's incarceration as they do, the Due Process Clause of the Fourteenth Amendment requires a case-by-case determination of whether counsel should be appointed for indigent individuals who risk a deprivation by the court.[124] Such a determination requires courts to consider three factors to determine whether a child has a due process right to appointed counsel: the private interests at stake, the risk of an erroneous result absent appointed counsel, and the government's interests in the proceeding.[125] The Dallas County truancy courts, however, refuse to consider these factors and determine which indigent children require appointed counsel in FTAS proceedings, denying children access to due process.

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[117] DALLAS COUNTY TRUANCY COURT, TEC Referral Packet, Directive to Apprehend—Warrant, Appendix A.
[118] Letter from Bill Hill, *supra* note 21.
[119] *Id*.
[120] Conversation with Judge Robert Herrera and Marquita Fisher, Director of the Truancy Enforcement Center (March 13, 2013).
[121] DALLAS CHALLENGE, INC., TRUANCY ENFORCEMENT CENTER, www.dallaschallenge.org/dc_tec.html.
[122] Conversation with Judge Robert Herrera and Marquita Fisher, Director of the Truancy Enforcement Center (March 13, 2013); *see also* Letter from Bill Hill, *supra* note 21, at 5.
[123] TEX. FAM. CODE §§ 53.02, 54.01.
[124] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); *see also* Tennessee v. Lane, 541 U.S. 509, 532-33 (2004) (describing the duty of providing counsel to "certain criminal defendants" as arising from "the well-established *due process principle* that, 'within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard.'") (emphasis added).
[125] *Lassiter*, 452 U.S. at 31 (applying Mathews v. Eldridge, 424 U.S. 319 (1976)).

a. Children Have Significant Private Interests at Stake in Truancy Court Proceedings

Dallas County's truancy courts subject children to a variety of forms of restraint which harm significant liberty and property interests.[126] All children face potentially insurmountable truancy court fines and court costs, which present serious burdens for their families and for many also include the risk of incarceration:

- One student risks incarceration due to his inability to pay his outstanding fines of approximately $1,600 from three cases dating back to 2007.
- One student accumulated seven different fines over the course of three years, of which he has only been able to pay two.
- One student had five pending cases dating from 2010, with no fines yet paid. He told the court that his family advised him to get a job and quit school so he could pay the outstanding fines.
- Truancy court judges suggest that children obtain jobs "off the books" so they can fulfill their fines and court costs. A truancy court judge told one student that a "creative work opportunity" would pay students in cash so would not require payment of "social security or taxes."

As detailed above, a child who turns seventeen may be incarcerated by the truancy court and children can be placed in juvenile detention if the truancy court refers them to the juvenile court for a contempt of court allegation. In addition, a child may be taken into nonsecure pre-trial custody for up to six hours after being charged with FTAS.[127] Children are also regularly arrested while at school to be brought to the truancy courts.

Children's sentences may include a variety of other forms of restraint. The truancy courts often impose attendance at "special program[s]" and can require early youth intervention services, including "emergency short-term residential care."[128] According to 2012 data from the Texas Juvenile Justice Department, 504 of the more than 1,000 children referred to the Dallas County juvenile system on a contempt of court charge were placed in an emergency shelter.[129] The truancy courts can also order tutorials, community service, assessments, counseling, and treatment programs, such as drug treatment programs.[130] If a student is held in contempt by a truancy court, the court can suspend the student's driver's license or permit.[131] For many families, it is nearly, if

[126] TEX. CODE CRIM. PROC. art. 45.058.
[127] *Id*.
[128] *Id*. arts. 45.054, 45.057(b)(1).
[129] TEXAS JUVENILE JUSTICE DEPARTMENT, STATISTICAL REPORT BY DEPARTMENT (DALLAS), at 2 (2012), Appendix D. While it is not entirely clear whether other youth may be referred to Dallas County's juvenile department on a contempt charge, the numbers appear to be consistent with those given to us by Dallas County for youth referred to the TEC.
[130] TEX. CODE CRIM. PROC. arts. 45.049, 45.054.
[131] *Id.* art. 45.050(c)(2)(B). Although Texas statutes only permit the Truancy Courts to suspend students' driver's licenses or permits after they have been found in contempt, counsel observed the Truancy Court suspending students' driver's licenses without a formal finding of contempt on multiple occasions.

not completely impossible, to complete the court's requirements within the ordered timeframes:

- A student was unable to schedule tutoring hours with her teacher in the court-ordered subject despite repeated efforts by her family to do so.
- A student was ordered to complete 30 hours of tutorials, but her school would only allow students to complete one hour of tutorials per day and there were fewer than 30 school days before her review hearing.
- A student was unable to attend court-ordered programs in Dallas because he lived in Mesquite and did not have access to necessary transportation to get there.
- Families repeatedly reported that children under sixteen struggled to find locations that would let them complete community service.

Although the truancy courts do offer some students extended time to complete these requirements, such extensions increase the court-ordered fines for the student and require an additional appearance in court.

Finally, because the truancy courts are adult criminal courts, a FTAS conviction goes on children's adult criminal records. Some children are eligible to have their FTAS records expunged, but others do not meet the statutory criteria or are unable to pay the additional fee for expunction.[132] These criminal convictions can make obtaining admission to college or the military more difficult as well as barring them from career advancement and public benefits.

b. Absent Counsel, the Risk of Erroneous Deprivation is High

Because children prosecuted for FTAS face significant challenges in presenting their defenses due to their limited understanding of the law as well as their unique developmental stage, absent counsel, Dallas County's truancy courts are very likely to erroneously deprive children of their liberty and property interests.

As discussed in section V(C), *infra*, children prosecuted in the Dallas truancy courts lack an adequate understanding of their rights in the criminal court process. As a result, many children do not know they must plead "not guilty" to preserve their rights. For example, one student reported that he pleaded "no contest" to FTAS charges stemming from a substitute teacher inaccurately marking him absent when he was present. He told counsel that he had pleaded "no contest" because he was at school, but he did not plead "not guilty" because he "didn't understand what 'not guilty' or 'no contest' meant so [he] just said 'no contest'." Because he pleaded "no contest," he was unable to challenge the school's erroneous attendance report.

Limited understanding of the law also reduces the likelihood that children will protect their rights to present an affirmative defense to FTAS charges. Under Texas law, it is an affirmative defense to FTAS that the absences at issue were excused by the school

[132] *Id.* art. 45.055.

or court or were involuntary.[133] However, many children reported that they were unaware they had to plead "not guilty" to present an affirmative defense. Instead, these children attempted to provide the excuse notes or explanations for their absences to the court after already pleading "guilty" or "no contest." For example, one student with valid excuses such as medical appointments and illness pleaded "guilty" because she did not understand that this plea would prevent her from presenting evidence about why she was absent. Even in cases where an absence was involuntary, children reported not understanding how to protect their rights to present a defense to FTAS charges.

Children facing FTAS charges are unique developmentally from adults who face similar Class C misdemeanor charges. Compared to adults, children are less capable of handling stressful situations. Instead of considering a range of options, children in stressful situations are more likely to believe that they have only one option, such as pleading guilty.[134] The Supreme Court recognizes that this developmental difference results in children's greater impulsivity and increased difficulty weighing the long-term consequences of their actions.[135] Children are less able to assess the costs-and-benefits of pleading guilty to an FTAS charge or of disclosing sensitive information to the court to avoid an FTAS conviction than adults in similar situations. For example, complainant J.D. initially pleaded "not guilty," but was too terrified to proceed to trial because she would have been required to present evidence on her own to the judge about her health problems.[136]

Although parents are present in court when children face charges of FTAS, they often cannot prevent the erroneous deprivation of their children's rights.[137] Many parents do not understand the court process themselves. Parents described the court process as "scary" and few understood that children would have to plead "not guilty" to present an affirmative defense. Some parents are hampered by language barriers.[138] While parents must attend court for children under 17, they are prohibited from representing their children or presenting arguments on their children's behalf should they plead "not guilty." Even parents knowledgeable or familiar with the court process have trouble assisting their children. In addition, some parents may have incentives to encourage their children to plead guilty or no contest. Time at court can be very costly to a family: one family reported that the child would have pleaded "not guilty," but instead the child pleaded "no

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[133] TEX. EDUC. CODE § 25.094(f)-(g).
[134] Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RIGHTS J. 16, 17 (1999).
[135] Roper v. Simmons, 543 U.S. 551, 569-571 (2005).
[136] The Supreme Court has recognized that children will respond differently to the authority of the judicial system than adults: The *J.D.B. v. North Carolina* court stated that it was "self-evident" that a child would react differently to law enforcement and judicial proceedings than an adult and that "[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B.*, 131 S. Ct. 2394, 2403 (2011).
[137] Parents are only regularly present in Truancy Court for students under 17. Although the truancy courts are open courts under Texas law, parents of students who had turned 17 were told that they could not enter the courtroom with their students.
[138] Although the truancy courts do usually provide translation, counsel has observed that translation rarely occurs for all relevant information, translation is sometimes provided by school employees, and students are sometimes required to translate for their parents.

contest" because the judge said a trial would possibly require multiple additional days in court and the parent could not afford to miss work on multiple occasions for court appearances. Additionally, many parents face simultaneous PCNA charges so they may benefit from portraying their child as responsible for any alleged truancy.

c. Children's Interests Significantly Outweigh Dallas County's Interest in Denying Appointed Counsel

None of Dallas County's interests in truancy court proceedings outweigh children's significant personal interests and high risk of erroneous deprivation absent counsel. Moreover, many of the County's interests are better served by the appointment of counsel to indigent children. Erroneous FTAS convictions do not serve the County's interest in preventing truancy.[139] As the court discussed in *Lassiter*, the adversarial system assumes that "accurate and just results are most likely to be obtained through the equal contest of opposed interests."[140] Absent counsel for the child, children are overwhelmingly disadvantaged, resulting in a highly unequal contest—one with a high risk of inaccurate outcomes. Thus, Dallas County's interest in accurate and just decisions is best served by appointing counsel for children who cannot afford representation.

The cost of appointed counsel to the County does not outweigh the risk of the erroneous deprivation of children's interests.[141] Additionally, appointed counsel may actually decrease the amount of court time necessary for FTAS cases as fewer children may be erroneously convicted resulting in fewer review hearings.

Even if children did not risk incarceration in truancy proceedings as they do, because Dallas County's interests in truancy proceedings do not outweigh the interests of children charged with FTAS and their high risk of erroneous deprivation, truancy courts should appoint counsel for indigent children. Currently, the Dallas County truancy courts do not even examine these factors to determine whether appointing counsel is necessary to protect children's rights to due process.[142]

In summary, the failure of Dallas County to appoint counsel to children facing an FTAS criminal charge, who risk detention and are subject to a multiple jurisdictional court process, runs afoul of rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. The constitutional entitlement to appointed counsel is particularly compelling in light of the defendants' unique status as children unable to fully understand the truancy court's convoluted process that is seemingly structured in an attempt to circumvent the constitutional protections guaranteed to children post-*Gault.*

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[139] Moreover, there is no evidence that even accurate convictions of truant children reduce truancy. Indeed, Dallas County reports that only 28% of children comply with court orders at the time of their review hearing. DALLAS COUNTY TRUANCY COURT, *supra* note 112. Additionally, no research suggests that court appearances and fines reduce truancy. *See* section VI(A), *infra*.

[140] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 28 (1981).

[141] *See, e.g.*, *Lassiter*, 452 U.S. at 27-28; Pasqua v. Council, 186 N.J. 127 (2005) (holding the cost of providing appointed counsel did not outweigh private interests in civil contempt proceedings).

[142] Truancy court judges regularly tell children the court "cannot appoint counsel" to represent them. Due to this misinformation, it is not surprising that youth do not independently request appointment of counsel.

C. Dallas County Violates Children's Due Process Rights by Not Adequately Admonishing Them of Their Constitutional Rights

Before a defendant enters a plea in a criminal proceeding, the record must show that the defendant made an "intentional relinquishment or abandonment of a known right or privilege."[143] Moreover, because a guilty or no contest plea involves an admission that the state could prove all the elements of a formal charge, to be truly voluntary the defendant must possess an understanding of the law in relation to the facts.[144] A guilty plea is valid only if done "with sufficient awareness of the relevant circumstances and likely consequences."[145] When children appear in Dallas County truancy court proceedings, they are not properly admonished regarding their constitutional rights so their waivers are not knowing and intelligent.

The Texas Code of Criminal Procedure requires that before a court may accept a plea of guilty or no contest, it must admonish a defendant regarding the range of punishment for the offense.[146] Admonishments can be oral or written; if written, the court must obtain a signed statement by the defendant and the defendant's attorney.[147] The Code also requires the court to determine that a defendant pleading guilty is mentally competent and that the plea is free and voluntary.[148]

Properly admonishing a defendant requires more than simply handing out a "form waiver" for the defendant to read and sign.[149] A defendant must be capable of understanding the waiver; a defendant's ability to read and sign a form does not indicate whether the defendant is in fact capable.[150] However, this is precisely the practice in the Dallas County truancy courts: youth are given a form waiver that is cursorily explained before they are asked to sign it.

When students arrive for their initial appearance in the Dallas County truancy courts, they are handed a form describing their rights and immediately asked to sign the form to waive those same rights.[151] The form includes very limited definitions of the different pleas available to students. In some cases, the form directs students to the school attendance officer should they have any questions related to their pleas.

The common practice among all the Dallas County truancy court judges appears to be a "group admonishment" at the beginning of the docket by simply reading or summarizing the form that the youth are given listing their Constitutional rights without

[143] Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
[144] *Johnson*, 304 U.S. at 464-65.
[145] Brady v. United States, 397 U.S. 742, 748 (1970); *see* Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005).
[146] TEX. CODE CRIM. PROC. art. 26.13.
[147] *Id.*
[148] *Id.*
[149] Williams v. State of Texas, 925 S.W.2d 272, 274 (1996) (interpreting standard for waiver of counsel set out in Farretta v. California, 422 U.S. 806, 835 (1975)).
[150] *Id*. at 275.
[151] *See* Appendix A.

further clarification or meaningful explanation. However, during one court observation, the judge's entire group admonishment was stating that "the students [had] all the same rights…that they would in any court in the United States." The quality of the admonishments tended to vary from court-to-court and even from day-to-day.

After the group admonishment, youth are asked to sign the form indicating they are waiving their rights, without the judge discussing the consequences of the waiver in practical terms or plain language.[152] During our interviews, most youth could not describe what rights they had in truancy courts, often shrugging embarrassedly and answering that they were not sure. S.M. said as far as she knew, she could have been "signing her life away" because she did not understand her rights. In one initial hearing, the judge told students, even those who were planning to plead "not guilty," to sign the waiver of rights form because it would be "shredded" if the student ultimately went to trial on a "not guilty" plea. The students seem more intent on following instructions – signing where they were supposed to sign – and did not seem to truly understand the consequences of their plea.

After the students sign their pleas, the judge calls them up to the bench one-by-one. If students attempt to offer explanations as to their absences, the judge stops them and tells them that he cannot consider any explanations unless they instead plead "not guilty," at which point they will be scheduled to meet with a prosecutor. Most often, the students simply hand the judge their signed waiver and plea form and plead "guilty" or "no contest." We have rarely, if ever, seen any of the judges inquire about the individual circumstances of a student's guilty plea.

The judge may—but does not always—ask if the student understands their rights and their plea, but this is the extent of the inquiry before the judge determines their fine, court costs, and other sanctions. Throughout all of our court observations, we have never witnessed a judge ask questions focused on a student's capacity, despite the Education Code's requirement that schools notify the court of a students' special education status when a complaint is filed.[153] For example, even though B.B. and L.P. are both special education students—and Judge Rayford explicitly knew of B.B.'s disability—the court never inquired about their capacity to waive their rights or enter pleas.

Many students felt they were actively discouraged from pleading "not guilty." This active discouragement is most vividly illustrated by J.D.'s story, which included pressure from the prosecutor and a school official to J.D. and her mother to change her "not guilty" plea. Another parent, who was charged with PCNA because her elementary school-aged children were tardy on several occasions, described being bullied after

[152] *See* TEAMCHILD AND THE JUVENILE INDIGENT DEFENSE ACTION NETWORK, WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION AND UNDERSTANDING JUVENILE COURT, at 6 (2012), *available at* http://www.teamchild.org/docs/uploads/JIDAN_Judicial_Colloquies_FINAL.pdf (noting that "[t]he jargon, abstract language and complex terminology frequently used in the courtroom can be impossible to navigate, especially for young people.").
[153] TEX. EDUC. CODE § 25.0915(b)(2).

attempting to plead "not guilty." She described the school attendance officer, whom she believed to be the prosecutor, taking her to a room after her initial plea of "not guilty" and pressuring her until she finally changed her plea.

During our court observations, we noted the courts' description of the process for pleading "not guilty" makes such a plea seem extremely onerous. Students and their parents are told that if they choose to plead "not guilty," they will have to return to court to meet with the prosecutor, who will examine any evidence they bring and "decide" whether to set the case for trial. Students and parents often said that, even if there was a valid explanation for their absences, they opted to plead guilty because the process sounded so burdensome and they could not afford an attorney to assist with it. At one docket, the judge told students that if they opted to plead "not guilty," pursuing their case without an attorney would be like they were "on roller skates going up against an 18-wheeler" because the state would be represented by a prosecutor who had gone to law school and understood the law and the rules of evidence.

The pressure on children during the plea process is amplified by the truancy court's threat of jail. During our investigation, families regularly reported that judges threatened to send children to jail, even children who were too young to be sent to jail. For example, after complainant I.J. pleaded "not guilty," the judge told her that it was her "lucky day" because, if she had pleaded guilty, she would have spent her summer in jail. He told her that, since she had pleaded not guilty, she would spend August and the first month of school in jail instead. I.J. reported that this made her feel like it was inevitable that she would be locked up for truancy, no matter what she pleaded. I.J. felt like this even though, as she is sixteen, she is too young to be sent to jail in Texas and the truancy court does not have the authority to send her to juvenile detention directly.

Our court observations also reflected that this threat impacted students' pleas, calling into question whether they were knowing or voluntary.[154] Whether students are themselves threatened with jail, or just witness other students being threatened, many students are fearful that the truancy court will send them to jail. During one court proceeding, a judge told a student that he would be "happy to take two days out of [the student's] life" by sending him to jail and that the student would "never get [those days] back again." He told the same student to "[l]ook at that jail over there. There are people in there who are a lot smarter than [the student]. And they didn't plan on getting caught either." Another judge told another student that he "had to come back at 8:00 tomorrow morning, and [he was] going to be arrested." The judge told him that he might be jailed for "a day, a week or a month" and that the judge couldn't know which would happen.[155]

[154] Although we did not always know the age of children we observed in court, many families reported that, like I.J., their children had been threatened with jail even though they were too young to be sent to jail.

[155] On the same day, in the same courtroom, a parent was present on PCNA charges. There were three warrants out for her arrest. The warrants all stemmed from her child's failure to attend school and the mother's failure to have her child attend court. The mother had over $3,000 outstanding in fines, court costs and penalties. She explained that she had just gotten a job and was sleeping on her mother's couch in order to save money to pay the court fees. She asked if she could have until the following day to come in with money. The judge said he would "make it easy on her" by allowing her to pay the case with the least fines first; she owed about $500 on that case. He told her that the constable would probably not come

Because these proceedings happen in open court, students witness these threats even if they do not experience them individually. Witnessing these threats is a source of anxiety for students and parents: several asked us whether other children were really "going to jail." Consequently, these threats are another source of pressure on students to comply with the judge and plead "guilty" or "no contest."[156]

Whether the truancy court admonishments are sufficient for an adult is questionable, but it is wholly insufficient for children defendants—particularly given that they lack access to counsel before entering a plea.[157] When determining whether children defendants have properly understood and therefore waived their constitutional rights, a growing body of Supreme Court jurisprudence recognizes that the developmental differences between children and adults should be considered. Recognizing the relevance of age, the Supreme Court reasoned that juveniles cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.[158]

Due to their lack of maturity, children may have difficulty understanding the nature of their rights in a criminal proceeding. Yet the trial judges in the Dallas County truancy courts do not make case-specific inquiries into the defendants' understanding of their rights. In *J.D.B vs. North Carolina*, the Supreme Court recognized that children lack the capacity to exercise mature judgment and have an incomplete ability to understand the world around them.[159] Children are generally less mature and responsible than adults such that children often lack the experience, perspective, and judgment to recognize choices that could be detrimental to them.[160]

Children are more susceptible to interrogative pressure and negative feedback from authority figures and have a greater orientation towards their immediate predicament rather than their long-range consequences.[161] Yet children who may have difficulty understanding the truancy court proceedings are directed to seek advice from

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arrest her on the warrants before the next day, but she would be arrested if she didn't pay the fine by the following day.

[156] Children who have not yet entered a plea are also sometimes present when review hearings occur. In those situations, they may very well see other children go into custody and witness the judge's treatment of those children. For example, a judge told one student, "[t]here's a balance [of fines due] and Dallas County wants its money. Take him to jail."

[157] Indeed, the Texas Family Code appears to anticipate this, requiring a child's counsel in juvenile cases to join in any waiver of constitutional rights. TEX. FAM. CODE § 51.09. The Family Code places additional protections around the admission of a child's incriminating statement and a child's waiver of the right to counsel. *Id.* §§ 51.095, 51.10(b).

[158] *See* Gallegos v. Colorado, 370 U.S. 49, 54 (1962) (noting kids are less likely to know how to protect their own interests or how to get the benefits of their constitutional rights); *see also* Graham v. Florida, 560 U.S. 48, 55-56 (2010) ("[T]he features that distinguish kids—a lack of maturity and an underdeveloped sense of responsibility—from adults also puts them a significant disadvantage in criminal proceedings.").

[159] J.D.B v. North Carolina, 131 S. Ct. 2394, 2403 (2011).

[160] *Id.*

[161] *See In re* Gault, 387 U.S. 1, 36 (1967); Haley v. Ohio, 322 U.S. 596, 599 (1948) (noting that events that "would leave a man cold and unimpressed can overawe and overwhelm a teen."); *see also* Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 545 (2005).

the school attendance officer who represents the school district's interests before the court. The truancy court judges provide only cursory explanations of the child's rights before asking them to sign a form waiving those rights.[162]

When considered in the context of the growing body of information surrounding child development and Supreme Court jurisprudence, the quality of the admonishments given during the criminal proceedings in Dallas County truancy courts are insufficient to ensure that children's waiver of their constitutional rights is "knowing and intelligent."

D. Dallas County Violates Children's Due Process Rights in Its Unnecessary Use of Restraints in the Courtroom

At all of the Dallas County truancy court locations, Texas Appleseed and NCYL attorneys saw youth in court in handcuffs who had either been arrested at school or arrested in court on contempt charges. Youth arrested at school are brought into the courtroom cuffed, must walk to the front of the courtroom before the cuffs are removed, and are seated apart from the other youth who are in court for that day's docket. Similarly, youth arrested in court are cuffed and required to sit in the jury box until they are transported to the TEC by the constable, which can mean sitting in the jury box, cuffed, for an extended period of time.

One youth who was arrested at school described sitting in class when another student asked him to come to the principal's office, where an officer was waiting. When the youth arrived, the officer arrested him, along with two other students, and transported them to court. This was done in the middle of the school day, and the students all missed classes as a result of being arrested at school.

Once at court, the three students were told to call their parents to ask them to come to court. Two of the students were 17 and did not have to wait for their parents to arrive before their cases were called. These two students—a young man and his pregnant girlfriend who both reside with his mother—reported to the judge that they were not in court for their review hearings because they could not get a ride to court. Both students had been charged with truancy after missing school to go to her doctor appointments. The other student, a 15-year-old, waited in the jury box for her mother to arrive while the judge called other cases scheduled for that day's docket.

This scene is not uncommon. On the same day that the above students were brought to one court location, a larger group of children—including a 13-year-old—were brought in handcuffs to a different truancy court location. Many students report that they have seen other students arrested at school or that they themselves have been arrested at school.

[162] Additionally, the judges vary widely in their explanations of students' truancy court orders, with some judges describing these orders cursorily to students and other judges not explaining students' truancy court orders at all.

One parent described how her son was called to the principal's office where the county constable then handcuffed him and transported him to the truancy court. Since her son had missed school due to a surgery, his FTAS charge was eventually dismissed. However, having never been in trouble at school before, the experience of being removed from school and brought to the court in handcuffs shocked him.

Similarly, numerous youth are handcuffed in connection with a contempt charge when they appear at review hearings. At review hearings, if a youth has not paid his or her fine or completed community service or tutorial hours, the judge can extend or modify the previous orders or the judge can charge the children with contempt and take them into custody. When children are charged with contempt, they are immediately handcuffed.

The truancy court judges do not uniformly explain to children why they are being taken into custody. The fact that children are being charged with "contempt"—a new charge of delinquent conduct—is seldom explained. Nor are they always told where they are being taken. During some observations, counsel witnessed the truancy court judges explain to the youth that they would be transported to the TEC. During other observations, the judges did not give children any explanation regarding where they would be taken and instead, the judge simply told the constable to "take [the child] into custody" and tell the family to "get everything out of [the child's] pockets" with no additional explanation to the child or family. Upon one parent asking where her son was going after being taken into custody, the judge did not directly answer but told her that "they'll tell you."

After being handcuffed by the constable, youth then sit in the courtroom—often in the jury box—while the docket continues and they wait to be transported. Appleseed and NCYL staff have seen youth wait, handcuffed, for an hour or more before the constable takes them out of the courtroom for transport.[163]

These arrests often take place in front of youth who are in court for their initial appearance, causing concern and fear that the judge can send children "to jail." One student reported that she was scared that she was about to be arrested—she had been suspended from school after another student hit her and she hit the student back. The suspension violated the order in her truancy case, so the caseworker told her that because she had been suspended, she would have to see the judge and it was possible she would be arrested.

In another case, the parent brought her son back to court early for a review hearing. She remembered that the judge told parents at their initial appearance that if they had "any trouble" with their children prior to their review hearings and they wanted

[163] It is unclear why a constable is routinely required to take students into custody and transport them to the TEC, since they appear in court with a parent who is required to follow the youth to the TEC. Yet Texas Appleseed and NCYL have yet to see a judge determine that a youth could be transported to the TEC by his or her parent. Incidentally, each of these incidents comes with an additional $50 fee for the issuance of the warrant for the youth.

to bring them back to court early, they could do so. This parent was frustrated with her son's continued truancy, so she brought him in for his review hearing early. The judge had him arrested on the spot. His mother said she did not realize her son would be arrested when she brought him to court.

When Texas Appleseed inquired about the handcuffing of youth during a meeting with Dallas County officials, court staff indicated that youth had to be handcuffed for transport to the court and TEC. We pointed out that youth often sat in the courtroom for some time waiting to be transported to the TEC, and staff responded that youth were restrained for "safety reasons" because some youth become agitated when they are charged with contempt.[164] However, during our court observations, Texas Appleseed and NCYL never saw youth appear to present a safety or flight risk. In fact, students often simply stood quietly at the bench when the constable walked behind them and handcuffed them. The handcuffing requirement appears to be a "blanket rule"—in other words, the courts do not make an individualized determination regarding a flight or safety threat before youth are handcuffed.

1. Blanket Rules Requiring Restraints Are Unconstitutional

The U.S. Supreme Court has long recognized that a blanket rule requiring defendants to be restrained during the guilt phase of trial violates due process.[165] In *Deck v. Missouri*, 544 U.S. 622 (2005), the Supreme Court discussed the history of the rule prohibiting shackling of defendants, noting that it dates back to English common law.[166]

The *Deck* court explained that blanket rules requiring shackling during the guilt phase violate the Fifth and Fourteenth amendments' due process guarantees because restraints undermine the presumption of innocence and impartiality of the fact finder as well as interfere with a defendant's ability to communicate with counsel and meaningfully participate in his own defense.[167] The *Deck* Court also found that a blanket rule requiring restraints interferes with the "dignity" of the judicial process:

> *The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and affect the behavior of a general public whose demands for justice our courts seek to serve…As this Court has said, the use of shackles at trial "affronts" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold."*[168]

[164] Meeting with Judge Jenkins, Judge Richie, and truancy court staff on January 14, 2013.
[165] *See* Deck v. Missouri, 544 U.S. 622, 624 (2005).
[166] *Id*. at 626.
[167] *Id*. at 630.
[168] *Id*. at 631.

Deck extended the prohibition on blanket rules requiring shackling to the sentencing phase of trial, holding that the use of restraints during this phase could imply the court's opinion that the defendant "a danger to the community" and "adversely affects…the perception of the character of the defendant."[169]

2. Children Are Particularly Susceptible to the Collateral Harm Caused by Restraints

The harm caused by unnecessary use of restraints in court is particularly acute for children, who are more susceptible than adults to the kind of distraction and embarrassment described in the criminal cases cited above. In Florida, the Miami-Dade public defender filed a lawsuit seeking to overturn the routine shackling of detained youth in that county's juvenile courts. The University of Miami's Children's Law Clinic filed an amicus brief in support of the public defender's position with an affidavit from a child psychologist who described the harms associated with restraint use on children:

> *Being shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself. Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults.…*
>
> *In the midst of their identity and moral development, demeaning treatment by adults may solidify adolescents' alienation, send mixed messages about the purpose of the justice system, and confirm their belief that they are bad, all of which undermine the rehabilitative goal of court intervention.*
>
> *Many court-involved young people have experienced severe trauma, including the death of family members, physical and sexual abuse, exposure to domestic and street violence, and school failure due to learning disabilities. Some have been additionally traumatized by multiple placements in the foster care system. Their depression, difficulties trusting others, fearfulness, aggression, substance abuse and school concentration problems are often caused by untreated trauma.*
>
> *For those who have been physically or sexually abused, handcuffs and shackles are likely to flood the young person with painful memories and may be experienced by him/her as re-victimization.…*

[169] *Id*. at 633. Texas has long followed the principles set forth in *Deck*, with one court going so far as to note not only the harm to the dignity of the court proceedings, but also the "harmful collateral effects" of unnecessary use of restraints including "the distraction and embarrassment they cause the defendant." *See* Rainey v. State, 20 Tex. Ct. App. 455, 472-73 (1886); *see also* Wiseman v. State, 223 S.W.3d 45, 52 (Tex. Ct. App. 2006); Long v. State, 823 S.W.2d 259, 282-83 (Tex. Crim. App. 1991). This language is similar to language in a California case cited by the *Deck* court, which noted that shackles "tend to confuse and embarrass [defendants'] mental faculties." People v. Harrington, 42 Cal. 165, 168 (1871) (quoted in *Deck*, 544 U.S. at 631).

> *[H]andcuffs are physically painful, not just for younger and smaller youth, but for any typical teenager who wiggles restlessly when seated or who is being moved around the courthouse.*[170]

Florida has since prohibited the use of shackles in juvenile courts, except in cases involving safety or flight risk.[171] And Florida is not alone. Several states have extended the prohibition on a blanket rule requiring restraints to juvenile courts, either through legislation, court rules, or state appellate court rulings.[172] Most of the appellate court rulings extended the prohibition even though their juvenile court proceedings did not include a jury.[173] Several of these decisions note the affront that restraints present to the dignity of court proceedings as well as the inherent conflict posed by the use of restraints with the rehabilitative purpose of the juvenile courts.[174] For example, in *State ex. rel. Juvenile Dep't of Multnomah County v. Millican*, an Oregon appellate court found:

> *[E]xtending the right to remain unshackled during juvenile proceedings is consonant with the rehabilitative purpose of Oregon's juvenile justice system.…Allowing a young person who poses no security hazard to appear before the court unshackled, with the dignity of a free and innocent person, may foster respect for the judicial process.*[175]

In *Tiffany A. v. Superior Court of L.A. County*, a California appellate court overturned the juvenile court's policy requiring the use of physical restraints on minors during *all* delinquency proceedings—without limiting the ruling to adjudication hearings.[176] The court noted that because California courts had applied the rule prohibiting blanket rules requiring shackling to preliminary hearings in criminal cases, juveniles should be afforded the same protections.[177] Similar to the *Millican* court, the *Tiffany A.* court also held that the blanket shackling of juveniles conflicted with the rehabilitative purposes of the juvenile system:

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[170] Dr. Marty Beyer Aff. ¶ 10, 17, 18, 20, Aug. 2006, *cited in* Brian D. Gallagher & John C. Lore III, *Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone's Interest*, 12 U.C. Davis J. Juv. L. & Pol'y 453, 461 (2008), *available at* http://www.pdmiami.com/unchainthechildren/AppendixDBeyer.pdf.

[171] Fla. R. Juv. P. 8.100 (2011).

[172] In addition to Florida's judicial rules, North Carolina, New York, and Pennsylvania have prohibited blanket restraint through legislation. *See* N.C. GEN. STAT. § 7B-2402.1 (2010); N.Y. COMP. CODES R. & REGS. tit. 9, §168.3(a) (2011); 237 PA. CODE § 139 (2011). Massachusetts and New Mexico courts have enacted court rules limiting use of restraints on juveniles. *See* Trial Court of the Commonwealth Court Officer Policy & Procedures Manual, ch. 4, § 6 (2010); *In re* Use of Restraints on Respondent Children, No. CS-2007-01 (N.M. Sept. 19, 2007). California, Illinois, North Dakota, Oregon, and Washington appellate courts have prohibited blanket rules requiring restraints in juvenile courts. *See* Tiffany A. v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363, 364 (Cal. Ct. App. 2007); *In re* Staley, 364 N.E.2d 72, 73 (Ill. 1977); *In re* R.W.S., 728 N.W.2d 326, 327 (N.D. 2007); State *ex. rel.* Juvenile Dep't of Multnomah Cnty. v. Millican, 906 P.2d 857, 860 (Or. Ct. App. 1995); *State v. E.J.Y.*, 55 P.3d 673, 674 (Wash. Ct. App. 2002).

[173] *Tiffany A.*, 59 Cal. Rptr. 3d at 1344; *Staley*, 364 N.E.2d at 73; *R.W.S.*, 728 N.W.2d at 329; *Millican*, 906 P.2d at 860.

[174] *Tiffany A.*, 59 Cal. Rptr. 3d at 370; *R.W.S.*, 728 N.W.2d at 328; *Millican*, 906 P.2d at 860.

[175] *Millican*, 906 P.2d at 860.

[176] *Tiffany A.*, 59 Cal. Rptr. 3d at 372.

[177] *Id*. at 375.

> *The objectives of the juvenile justice system differ from those of the adult criminal justice system, and thus justify a less punitive approach to those who stand accused (and not yet to be found criminally culpable) before the court. The United States Supreme Court has acknowledged the objectives of the juvenile justice system "are to provide measures of guidance and rehabilitation for the child…not to fix criminal responsibility, guilt and punishment."*
>
> *…The use of shackles in a courtroom absent a case-by-case, individual showing of need creates the very tone of criminality juvenile proceedings were intended to avoid.* [178]

These decisions are consistent with the recent line of Supreme Court cases, discussed elsewhere in this complaint, which recognize the inherent differences between juveniles and adults, including the capacity for rehabilitation.

Indeed, the use of handcuffs in the Dallas County truancy courts provides another example of the difficulty of reconciling the use of criminal court proceedings to handle a status offense like truancy. Just as the appellate courts in California, North Dakota, and Oregon have all recognized that shackling is inconsistent with the rehabilitation of juveniles, the use of criminal court proceedings for truants is at odds with how the overwhelming majority of states handle truancy.[179]

Whatever the forum for trying truancy, routinely handcuffing youth whose only "crime" is being truant from school poses significant concerns regarding the constitutionality of the truancy courts' policies regarding the use of restraints. Using restraints in this way "affronts…the dignity and decorum of judicial proceedings," and threatens to embarrass and distract the youth in ways that may harm their ability to effectively defend themselves against a truancy or contempt charge.

Whether there is sufficient justification for the use of restraints on youth who are transported to or from court, the routine use of handcuffs in Dallas County's truancy courts, without an individualized showing of a flight or safety risk, violates long-standing law prohibiting blanket rules requiring restraints.

VI. DALLAS COUNTY TRUANCY COURTS PRODUCE POOR OUTCOMES[180]

The Dallas County model is ineffective in intervening in truancy. Studies of truancy show that factors influencing school attendance range from poor school climate and inadequate identification of special education needs to teen pregnancy, negative peer

[178] *Id*. (citing Kent v. United States, 383 U.S. 541, 554 (1966)).
[179] *See* NAT'L CENTER FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2009, at 72 (2012), *available at* http://staging.ncjj.org/pdf/jcsreports/jcs2009.pdf (report showing truancy petitions processed through juvenile courts nationwide).
[180] *See* Appendix E for an extended discussion of this topic.

influence, child abuse or neglect, poor academic performance, low school attachment, and students' lack of self-esteem.[181] The most successful truancy interventions combine school-based, community-based, and family-based interventions.[182] Model interventions attempt to keep low-risk youth from court involvement, since overly punitive sanctions and fines are not effective in reducing truancy.[183]

The Dallas County truancy courts, however, do not model these evidence-based practices in their handling of truant students. For the majority of students who have contact with the Dallas County Truancy Courts, the primary intervention is a fine.[184] Of particular concern is Dallas County's use of arrest and jail or detention with students who are considered to be in "contempt" for failing to pay fines. Research disproves such "get tough" approaches to adolescent misbehavior.[185] Most importantly, several studies now link arrest and court involvement as placing a student at heightened risk of dropout.[186]

Dallas County's own data reflect that the truancy courts are not effective truancy interventions.[187] For example, 59 percent of the 36,000 students referred to the truancy courts did not appear for their initial hearing, undermining the claim that a summons to court compels students to re-engage with school. Furthermore, of the students who do

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[181] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (OJJDP), U.S. DEP'T OF JUSTICE, TRUANCY LITERATURE REVIEW (2009), *available at* http://www.ojjdp.gov/dso/Truancy%20Literature%20Review.pdf.

[182] CHANELLE GANDY & JENNIFER LEE SCHULTZ, INCREASING SCHOOL ATTENDANCE FOR K-8 STUDENTS (2007); Charles L. Johnson et al., *Transitions of Truants: Community Truancy Board as a Turning Point in the Lives of Adolescents*, OJJDP J. JUV. JUST., Vol. 1, Issue 2, Spring 2012, at 34-51.

[183] MODELS FOR CHANGE, SUMMARY OF NATIONAL MODELS, POLICIES, AND PRACTICES OF SERVICE NEEDS OF STATUS OFFENDING YOUTH 1 (2011); GANDY & SCHULTZ, *id.* at 5 (financial sanctions ineffective); OJJDP, *supra* note 181, at 13; EDUCATIONAL SUCCESS AND TRUANCY PREVENTION WORKGROUP, REPORT TO THE PENNSYLVANIA STATE ROUNDTABLE (2012) (recommends against fines as ineffective); SCHOOL ATTENDANCE TASK FORCE, A COMPREHENSIVE APPROACH TO IMPROVING STUDENT ATTENDANCE IN LOS ANGELES COUNTY 4 (2012) ("Although the prosecution of students and parents may be appropriate in extreme cases . . . the Task Force was not able to identify any research supporting the efficacy of prosecution as a primary means to improve student attendance on a large scale.").

[184] Dallas County indicates that while the truancy courts collected $2,960,081 in fines from parents and students in FY 2012, only about 22% of students who pleaded "guilty or "no contest" received assistance from a caseworker. DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 1, Appendix C; meeting with Judge Jenkins, Judge Richie, and truancy court staff on January 14, 2013.

[185] *See* Models for Change, *Research on Pathways to Desistance* (2009), *available at* http://www.macfound.org/media/article_pdfs/PATHWAYSREPORT.PDF (longitudinal study showing incarceration increases chances of juvenile re-offense and substance abuse and that community based treatment more effectively promotes pro-social attitudes and behavior).

[186] David S. Kirk & Robert J. Sampson, *Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood*, 86 SOC. OF EDUC. 36 (2012) (arrested students substantially more likely to drop out of school); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473, 478-79 (2006) (finding one school-based arrest doubles the likelihood that the student will drop out; if the student appears in court, the likelihood nearly quadruples); Jon Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 Criminology 1287 (2003) (juvenile justice involvement increases likelihood of dropping out by 3.6 times).

[187] DALLAS COUNTY, DALLAS COUNTY TRUANCY COURT SYSTEM, at 5, Appendix C.

appear, an even smaller percentage (28 percent) were compliant with the court's order by the time of their review hearing.[188]

Although Dallas County truancy court staff cites a "90 percent graduation rate,"[189] this statistic is too flawed to reflect an actual improvement in educational outcomes:

- The "90 percent graduation rate" appears to include only students eligible to graduate during FY 2012, so it is merely a snapshot of students who were truancy court-involved during their senior year.
- This statistic includes only children who actually appeared in court after a complaint. Of students referred to truancy court, those who respond to the complaint are already more expected to graduate than those who do not.
- The truancy court's comparison of this "90 percent" figure to a district overall graduation rate of 74.6 percent is not fair.[190] The district rate is a four-year graduation rate, so it provides the number of students who complete their degrees within four years, not the number of seniors eligible to graduate who complete their degrees during the year they are truancy court-involved. Moreover, unlike the truancy court data, the DISD overall graduation rate also includes the 59 percent of students against whom a complaint was filed but who never showed up in court – students who likely have the highest risk of dropping out.

VII. REMEDIES

Based on the Dallas County truancy court's violation of students' constitutional rights, we respectfully request that the Department of Justice protect students from further violations by:

1. Declaring that the practice of criminally prosecuting children as adults for truancy categorically violates the federal rights of students guaranteed by the Eighth Amendment to the United States Constitution.

Based on the violations of the EEOA, Title II of the ADA, and Title IV of the Civil Rights Act, DISD, GISD, MISD, and RISD must modify their policies and practices related to student attendance and referrals to court for truancy. We respectfully request that the Department of Justice require DISD, GISD, MISD, and RISD to hire consultants, approved by all parties, to assist in developing and implementing a plan, including objectives, strategies, and timelines, which will require the Districts to:

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[188] *Id.*
[189] *Id.*
[190] Presumably the 74.6% figure cited by the truancy courts is Dallas ISD's graduation rate, although this is not the most recent graduation rate. *See* TEX. EDUC. AGENCY, 2011-12 ACADEMIC EXCELLENCE INDICATOR SYSTEM: DISTRICT REPORTS (DALLAS), *available at* http://ritter.tea.state.tx.us/perfreport/aeis/2012/district.srch.html (showing a 74.6 percent graduation rate for DISD for the Class of 2010 – it rose to 77.3 percent for 2011).

2. Use a response to truant behavior that envisions court referral as a last resort, to be used only when school and community-based interventions have failed and no other option is available. A redesigned approach to truancy will provide an immediate, individualized intervention in the least restrictive setting appropriate. It will create a continuum of services that:

    - Identifies youth at risk of reaching the 10-day or parts-of-days mandatory filing, so that an intervention may be made before the mandatory filing deadline is reached.
    - Makes use of existing school-based interventions, and identifies and fills existing gaps in school-based programs.
    - Makes use of existing programs in the community for students who do not respond to school-based interventions. The Districts and County should go through the process of identifying or "mapping" all appropriate community-based programs that are available, determining where gaps exist, and how those gaps may be filled.
    - Draws upon lessons learned in jurisdictions that use court as a last resort to status offenses, and embraces research- or evidence-based approaches to truancy.

    This redesigned approach will ensure that no court filing for truancy ever occurs without district certification that:

    - School-based and community interventions for the student have been exhausted;
    - The student and parent had actual knowledge of district-level, school-level and classroom-level policies, including access to written copies in a language that they understand;
    - The absences were not caused by a student's disability, the district's failure to provide appropriate services for a student's disability, or the district's failure to modify attendance policies as necessary to accommodate a student's disability;
    - The absences were not caused by pregnancy, childbirth, or related medical conditions; other temporary medical conditions; or events required under Texas law to be counted as excused absences, such as suspensions; and
    - The absences were actual absences, rather than tardies.

3. Make all district, school, and classroom attendance policies and procedures accessible to LEP students and parents. This includes requiring that district, school, and classroom level policies are provided in the languages spoken by students and parents in each district. It also includes providing interpreters when there is a need to communicate orally with an LEP student or parent about any attendance problems or truancy policies and processes.

4. Modify their programs and activities and make reasonable accommodations so that the Districts do not discriminate against students with disabilities. This includes modifying attendance policies to ensure that disability-related absences are properly excused and do not lead to court referral and that any requirements for submitting excuses accommodate students with disabilities. Staff should be trained on how to determine accommodations in a flexible and interactive manner, based on a student's individualized needs. Common accommodations would include allowing additional time for excuses to be provided to the attendance office and providing reminders when excuse notes are needed. Districts should also be required to determine if truancy is related to the student's disability before any criminal referral, by determining if the absence was caused by student's disability or school's failure to provide appropriate academic or behavioral programming to meet the educational needs of a student with a disability.

5. Modify their programs to ensure that students with disabilities have opportunities equal to their nondisabled peers. This includes ensuring that schools provide supportive aides and services including individualized positive behavior supports and interventions to assist students with disabilities in improving their school attendance. This requirement also includes not requiring that students with disabilities miss additional school for court appearances because of disability-related absences.

6. Train school-level staff, including administrators, teachers, and attendance officers, in the requirements of Title IV for pregnant and parenting students, and the supports and services available for students in the district and community.

7. Develop a "Bill of Rights" for pregnant and parenting students for inclusion in the district's student handbook and/or code of conduct. This will include a complaint process for students to assert their rights.

8. Provide information that is readily available to pregnant and parenting students about any available homebound services during medical leaves and the process for getting assignments for days missed due to pregnancy or childbirth.

9. Review policies and programs available to pregnant and parenting students to determine what changes can be made to incorporate research- or evidence-based practices that have been shown to improve educational outcomes for pregnant and parenting students.

10. Provide complainants and similarly situated students the opportunity to receive compensatory education to make up for missed educational opportunities due to truancy referral and inappropriate suspension.

11. Rewrite attendance policies so that exclusionary discipline is not allowed for truant or tardy behavior except under limited and enumerated circumstances. The rewritten policies shall require documentation of at least three separate interventions, including, but not limited to, student conferences, parent conferences, changes to class schedules and locker locations, child welfare and attendance intervention, reflective activities, and problem solving activities, prior to considering any exclusionary discipline consequences. These interventions will take place before the student has reached the 10-day mandatory court referral.

12. Rewrite attendance policies so that tardy and truancy policy shall require teachers and school discipline administrative teams assign tardies or truancies flexibly, including by taking into account reasonable explanation of why the student was late, and by providing temporary or permanent accommodation for certain reasons for tardiness or truancy (e.g. family member's health crisis, pregnancy & parenting responsibilities) to be reviewed by the school PBIS coordinator.

13. Review the causes for racial and ethnic disparities in the referral of FTAS cases to determine how they will bring about a reduction in disparities. The consultant used for this purpose shall have expertise in assisting school districts in reducing racial and ethnic disparities in referrals to court. The Districts' plan to reduce disparities shall require data analysis, periodic review, and reporting at least quarterly: including, but not limited to, data on all referrals by the Districts to truancy court disaggregated by race and/or ethnicity, age, gender, LEP status, disability status and by school. The plan shall also set a specific annual numerical goal by which the racial and ethnic disparities for referrals to truancy court will be reduced by each district.

    The consultant engaged for this purpose shall also participate in the design and implementation of Schoolwide Positive Behavioral Supports ("SW PBIS") as described below to create a system that will be structured to reduce racial and ethnic disparities in referrals to court (along with other Positive Behavioral Supports objectives).

14. Implement SW PBIS in their schools, starting with those that have the highest rates of referral to the truancy courts, by hiring a consultant, approved by all parties, specifically to assist in planning and implementation of SW PBIS. The Districts will designate a person as a SW PBIS coordinator, and provide sufficient resources and training to fully and effectively implement SW PBIS with fidelity.

    In designing the SW PBIS model, each district should determine what programs already exist within the district that are appropriate for inclusion

within the model, and determine where gaps exist that must be filled for an effective continuum. Truancy prevention and intervention should be included within the SW PBIS model.

15. Discontinue use of the three-day discretionary court referral for FTAS except in cases involving chronic truants and only after district and school administrators document that they have tried other intervention strategies, targeting the underlying reason for the truancy, that have failed.

When a youth fails to respond to the above interventions and court is the last resort for an effective intervention, we respectfully request that the Department of Justice require Dallas County to comply with students' federally-protected rights by providing a court response that:

16. Provides a system of appointed counsel, either through the local public defender or via a contract with another legal services non-profit.

17. Never uses school-based arrests for truancy as a part of the system.

18. Eliminates the use of handcuffs in court, and avoids law enforcement transport of students to court unless the student presents a flight or safety risk.

19. Trains judges and court staff in: adolescent brain development; trauma-informed responses; implicit bias; common causes of truancy and effective responses; title IV as it relates to school absences; mental health issues and symptoms in children; developmental disabilities; and special education requirements.

Given the ongoing constitutional violations and harm to students within the Dallas County truancy courts, we respectfully request that the Department of Justice require Dallas County to reimburse complainants and similarly situated students referred to Dallas' truancy courts over the past academic year for court costs and fines.

Respectfully submitted,

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