UNWILLING & DISABLED:
BALANCING COMPULSORY ATTENDANCE WITH THE RIGHTS OF STUDENTS WITH DISABILITIES

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Since taking office in 2007, one of Kentucky Governor Steve Beshear’s priorities has been to raise the high school dropout age from 16 to 18. The prior law imposed a drop out age of 16, pursuant to KRS 159.010(1). The Governor believes this legislation will prevent approximately 6,000 Kentucky teens each year from dropping out of school. The state’s focus has been solely on claimed societal benefits which are predicted to follow this change in the law. Governor Beshear says lawmakers “voted to stop allowing these students to jeopardize their future, and to stop costing Kentucky taxpayers millions of dollars in jails and social services” by passing the bill. He also asserted that “[t]his bill will help to break the cycle of poverty, close the revolving door of prison and improve the quality of life for all Kentuckians.” While the purpose may be laudable, the results of the law may be less beneficial and far less clear cut.

The Commonwealth recently joined 15 other states to bar students from dropping out of school before they are legally adults (age 18 in most states). This reform requires a multi-step process before being implemented state wide. The first step requires that 55 percent of Kentucky’s 174 school districts voluntarily vote to raise the dropout age to 18. If 55 percent of the school districts statewide amend their dropout age, the remaining districts will be required to raise this age within four years. As of July 10th, 96 of the state’s school boards had raised the dropout age to 18 — meaning the state had reached the 55 percent threshold, triggering the requirement that all other districts follow suit. Starting in the fall of 2017 all Kentucky schools will be required to raise the dropout age to 18.

Youth who drop out generally experience such negative outcomes as greater unemployment, underemployment, incarceration and welfare assistance. In 2010, the national dropout rate was 7.4 percent. Unemployment rates for youth who drop out are as high as 22 percent higher compared to youth who have completed high school. In 2009, the U.S. Census reported the median income of persons ages 25 and older who had not completed high school was roughly $20,241 ($10,386 less per year than high school graduates). More than 75 percent of incarcerated individuals are high school dropouts.

While the negative impact of dropping out of school is clear, the reasons why youth drop out of school is far less linear. The path to dropping out is complex and multidimensional. There is no single prominent risk factor which predicts dropout. Rather, there are numerous risk factors that in combination increase the probability of youth leaving high school early. According to the Center for Mental Health in Schools, these factors fall into four broad categories: (1) individual (e.g., truancy, poor school attitude); (2) family (e.g., low-income, lack of parental involvement); (3) school (e.g., negative school climate, low expectations); and (4) community (e.g., high crime, lack of community support for schools). Poverty, truancy, poor academic performance, and grade retention tend to be precursors for dropping out.

Another factor contributing to drop out rates is disability. A disproportionate number of high school dropouts are youth with disabilities. The dropout rate for students with disabilities is approximately twice that of general education students. Kentucky schools continue to struggle in providing an appropriate and safe educational support system for students who face these challenges. For many of these students, being classified as truant is a gateway to dropping out of school. Under KRS 159.051(1) a student is considered a dropout even where that student has simply been classified as “truant” by the school due to unexcused absences. Such absences do not have to be full-day absences. In the case of students with a disability, absences are frequently reported as being for one class period or less in a six or eight period regular classroom day. Schools that can adjust a student’s Individualized Education Plan (IEP) to reflect the need for required periods of absence are able to maintain enrollment. Schools which have failed to provide a flexible educational environment may inadvertently be contributing to drop out by students who have not yet reached majority.

Approximately 36 percent of youth who drop out of high school are students with learning disabilities and 59 percent are students with emotional/behavioral disabilities. KRS 159.030(1)(d) provides for a specific exemption from attendance for students “whose physical or mental condition prevents or renders inadvisable attendance at school or application to study.” Students granted that exception are subject to regular review by the Board of Education to ensure that they are being educated in the least restrictive environment.
Consider the following hypotheticals:

A teenager with a disability of severe anxiety and depression refuses to go to school. Although not physically sick, the child’s well-being may be affected if he/she attends school with such extreme levels of anxiety. In response, parents keep the child home until alternatives can be agreed upon or supports can be put into place for the child to be able to return to school.

A 17-year-old high school student with a disability has social/emotional and/or behavioral difficulties that include school refusal. The parents are doing everything they can to attempt to get the student to school, but school district officials don’t believe they are doing enough.

A high school freshman on the autism spectrum has sporadic difficulty with the noise, variety of new teachers and stimulation involved in the transition from the smaller middle school environment. The student is late to school more than seven times in a semester and is considered habitually truant even though all academic work and full day attendance is on track.

A high school junior with <insert race, gender, sexual orientation, etc.> has been seriously harassed or bullied by other students because of <insert race, gender, sexual orientation, etc.>. Parents reported the bullying to school officials who have done nothing in response to prevent further bullying. Parents do not feel the school is a safe environment because of the potential for physical harm to the child. The parents want to be able to keep their child home until safety is insured.

These hypotheticals are based on scenarios that parents, education attorneys, and advocates see and experience on a regular basis. Instead of addressing the problems within the educational environment, some schools may simply consider the students absent without excuse, file truancy charges against the students and hand the problem off to the court system. According to KRS 159.150(1), a student is considered truant in Kentucky if the student’s record reflects as few as three unexcused days of school or three unexcused tardies in the same school year.19 A student may be classified as tardy as few as fifteen minutes into the school day in some cases. The Uniform Juvenile Code defines a truant as a student who is “found by the court to have been absent from school without valid excuse for three (3) or more days during a one (1) year period or tardy for three (3) or more days on at least three (3) occasions during a one (1) year period.”20 Truants under the juvenile code may be hauled into court as status offenders.

More sustained absences may even lead to charges of habitual truancy, exposing the youth to removal from the family and alternate and more restrictive placement. A habitual truant who can be charged is “any child who has been found by the court to have been reported as a truant as defined in KRS 159.150(1) two (2) or more times during a one (1) year period.”21 Students who are found to be in need of care or supervision that is not being provided by the parent or guardian can be removed from the home on grounds of truancy.22 Courts can commit a child to the Department of Juvenile Justice for truancy, for contempt under KRS 600.060, or as a probation revocation for failure to attend school as the court requires.23

KRS 159.130 grants the Director of Pupil Personnel duties similar to those of law enforcement. These individuals are charged with investigation of “any case of nonattendance at school of any child of compulsory school age or suspected of being of that age. They may take such action in accordance with law as the superintendent directs. They may under the direction of the superintendent of schools and the board of education or the Kentucky Board of Education, institute proceedings against any person violating any provisions of the laws relating to compulsory attendance and the employment of children.”24 Under KRS 159.140(2), the Director of Pupil Personnel must “[a]cquaint the school with the home conditions of a habitual truant...and the home with the work and advantages of the school; and [a]scertain the causes of irregular attendance and truancy, through documented contact with the custodian of the student, and seek the elimination of these causes.”25 “In any action brought to enforce compulsory attendance laws,” the director of pupil personnel must also “document the home conditions of the student and the intervention strategies attempted.”26

While some courts insist that the school district document these reasonable efforts to determine the cause of any claimed truancy and to reach a non-judicial solution to the problem,27 others treat disabled or emotionally and behaviorally challenged youth within the rubric of the juvenile justice system and simply resort to incarceration or removal from the home. In A.J. v. Commonwealth, the court permitted a finding of truancy without requiring the school to attempt to determine the cause or address the underlying social and behavioral factors involved in the truancy.28 The court stated “in our view the student discipline report in the record fulfills the requirements of KRS 600.020. The statute does not demand an exhaustive psychological analysis of the student, nor does it even demand that the intervention strategies described be wide ranging or effective.”29 Courts have no clear standard that requires them to determine the contributing nature of a disability in a case where truancy is claimed by a school.30 Thus, Kentucky courts have struggled with the duties imposed by statute and the need to balance a student’s rights and the burden imposed on the school in dealing with students who have difficulty maintaining attendance.31

Other states have taken a more proactive stance, requiring the school district to make itself aware of the services available to a child with a physical, mental or social disability and to provide those support services to parents. In In re Benjamin A., a New York court held that a student with a documented autism spectrum disorder could not be
committed to juvenile justice system but had to be assisted in receiving aid so that continued school attendance was possible and beneficial. Similarly, in *Lexington County School Dist. One v. Frazier*, a South Carolina court recognized that the autism disability faced by the student was a contributing factor in the charged absences and affirmed the duty of the district to reflect that disability in the student's IEP and to continue to provide a Free Appropriate Public Education (FAPE) to the youth.\(^{33}\)

Families, administrators, teachers and other school staff must be committed to ensuring that all students, including those with disabilities, are provided a safe environment that promotes academic success and wellness. Additionally, students (such as those described above) should have the same educational opportunities as there nondisabled peers. However, the older a student gets, the more challenging it becomes to keep that child in school.

Federal and state legislatures have enacted laws to combat educational issues which often lead to youth dropping out. These laws work to protect students with disabilities and their families against discrimination, set out the legal responsibilities of the school and ensure that students with disabilities have a right to a "free, appropriate public education" without discrimination.\(^{34}\) Schools are required to develop a written plan, either a Section 504 Plan or Individualized Education Program (IEP) for students with disabilities detailing accommodations and educational goals. These are designed to ensure the academic needs of students with disabilities are met in a way that maximizes safety, health, learning and participation. Federal disability laws provide parents and guardians with the following rights:

- To have their child assessed under IDEA and/or Section 504.
- To hold an IEP or a Section 504 meeting with school to better understand the student's disability.
- To develop an IEP or a Section 504 plan specifically tailored to their child's needs and any accommodations necessary to meet these needs.
- To receive notification of suggested changes to the child's plan, to attend meetings regarding any changes to the plan and to approve all changes.\(^{35}\)

Even though the legal safeguards are in place, schools must make affirmative efforts to ensure that all at risk populations are aware of these protections. A student's willingness to avail him/herself of these accommodations often decreases over time. When issues begin to surface, often at the time of the transition to middle or high school, the schools must promptly and non-judgmentally afford every student the necessary support services. Practitioners find that truancy and absence concerns for behavioral, social or physical disability reasons must be addressed early in the educational process. If such timely intervention does not take place, the odds increase that the student will shut down, tune out, and lose hope. Those students become drop out statistics and go unserved by our schools.

Diagnoses of autism spectrum disorder and other challenges to a student's social abilities and functioning are growing rapidly. This student population impacts the educational system due to the mental and behavioral supports required to keep these students engaged and in school.\(^{36}\) Studies find that socio-economic factors also increase the financial and personnel difficulties faced by schools who are struggling to retain students.\(^{37}\) Guidelines for ensuring adequate student placement and care are necessary to reduce drop outs and truancy, and to meet the requirements of federal education law.\(^{38}\)

The expectation is that if students are engaged and are learning, they will successfully complete high school with the academic and social skills they need to be successful adults. Ensuring an appropriate education for today's youth is critical in society. Education is the most important tool for ensuring financial, social and individual security. Increased high school dropout rates threaten students' future by minimizing the number of qualified applicants entering the workforce. If our students are not academically successful, we will continue to fall further behind in global competitiveness. Therefore, schools should focus on educating every student to become informed, contributing, and community-conscious adults.\(^{39}\)

Given the understanding that there is no one clear predictor or reason for dropping out, increasing the compulsory attendance age is not sufficient in and of itself to meet the goals of the law. The law's purpose cannot simply be to retain students in high school until they reach 18. Rather, the goal must be to provide all youth under 18 with the FAPE that is their right. In the absence of addressing the foundational concerns, simply legislating an increase in the permissible dropout age is taking a *Field of Dreams* mentality of “raise the age and they will stay.” Unmotivated students are likely to be more truant, have lower grades, and score lower on standardized testing, which will impact school districts under No Child Left Behind and adversely affect state and federal funding levels. The approach to implementing an increase in the dropout age must be multi-faceted and focused on the needs of the most at-risk student populations.

Youth with disabilities may require new alternative opportunities to achieve academic success. Diverse and engaging alternative programs assisting youth who learn differently will become even more important in keeping students in school. “Children from low-income and minority families disproportionately populate the juvenile court…. Less obvious, but equally intense, is the concentration in the juvenile system of children with undiagnosed and unmet special education needs.”\(^{40}\) It has long been recognized that access to education is of central importance to the future of students.\(^{41}\) Criminalizing the inability of certain students to have their educational needs met by their local school district effectively denies these students the education mandated by law and further clogs an overburdened juvenile justice system. Kentucky must ensure a high quality education for all children regardless of race, socioeconomic status or disability by ensuring that families, the educational institutions and the courts work together to provide a framework for success.
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2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
11. Increasing the High School Graduation Rate, Blueprint for Kentucky’s Children (January 2011) and Kentucky KIDS COUNT 2012 County Data Book (January 2013).
29. Id.
37. Elise Hyman, Dean Hall Rivkin, and Stephen Rosenbaum, How IDEA Fails Families Without Means: Causes and Corrections From the Frontline of Special Education Litigation, 20 Ann. U. J. Gender Soc. Pol’y & L. 107, 137 (2011) (noting that without appropriate funding, the law does not provide a support system adequate for ensuring truancy and dropout prevention).