

WALSH, ANDERSON,
GALLEGOS, GREEN
and TREVIÑO, P.C.
ATTORNEYS AT LAW

ATTENDANCE
AND SPECIAL
EDUCATION

Presented by Kelly Shook

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South Dakota Truancy
Laws

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Truancy Law

- SDCL 13-27-1: Responsibility for person controlling child for school attendance—General education preparation program—Kindergarten—Transfer from another state. Any person having control of a child, who is not younger than five or older than six years old by the first day of September, or has not exceeded the age of eighteen, shall cause the child to regularly attend some public or nonpublic school for the entire term during which the public school in the district in which the person resides, or the school to which the child is assigned to attend, is in session, until the child reaches the age of eighteen years, unless the child has graduated or is excused as provided in this chapter. However, the requirements of this section are met if a child who is at least sixteen years of age enrolls in a general education development test preparation program that is school-based or for which a school contracts and the child successfully completes the test or reaches the age of eighteen years.

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When May a Child Be Excused?

- SDCL 13-27-6: Child excused because of illness in family. A school board may excuse a child from school attendance, pursuant to Section 13-27-2, because of serious illness in his immediate family, making his presence at home an actual necessity, or his presence in school a menace to the health of other pupils. The school board may require the submission of medical evidence as a condition of granting an excuse pursuant to this section.

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Other Excused Absences

- SDCL 13-27-6.1 Students excused from attendance—Events of state, youth programs, and work as precinct election official. An elementary and secondary student is eligible to be counted for school attendance up to five days in a school term if an excuse from actual school attendance is requested by a parent or guardian for the purpose of attending events of state or nationally recognized youth programs of educational value or for the purpose of working as a precinct election official if the student is at least eighteen years old.

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Penalties for Noncompliance

- SDCL 13-27-11. Failure to send child to school as misdemeanor. Any person having control of a child of compulsory school age who fails to have the child attend school as required by the provisions of this title, is guilty of a Class 2 misdemeanor for the first offense. For each subsequent offense, a violator of this section is guilty of a Class 1 misdemeanor.

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Penalties for School District

- SDCL 13-27-18. Neglect of duty by superintendent, president of board, school board, or truancy officer—Harboring or employment of truant child—Hindering attendance by child—Misdemeanor. Any superintendent or school board president who fails to make prompt reports on attendance as required by law; any person who harbors or employs a child of compulsory school age not legally excused during the school term; the members of any school board who neglect or refuse to provide school facilities for children of their school district for at least nine months during the school year, or neglect to perform any other duties enumerated under the compulsory school attendance laws of this state; any truancy officer who neglects to perform the duties of his office; or any person who hampers or hinders a child of compulsory school age from attending a school which meets all legal requirements, who interferes or attempts to interfere with a child's attendance is guilty of a Class 2 misdemeanor.

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Who Enforces Truancy?

- SDCL 13-27-14. Truancy officer employed by district—Duties—President of board acting where no officer employed. The school board of each school district shall annually appoint and provide for the remuneration of one or more truancy officers, to enforce, under the school board's direction, the compulsory attendance laws within the district. In a school district failing to provide a truancy officer, the president of the school board is the truancy officer and is responsible for the enforcement of the compulsory attendance laws within the school district.

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Are there procedures prior to filing?

- SDCL 13-27-6. Warnings by school boards to send children to school—Report to truancy officer. Each school board shall warn parents or persons in control of children of compulsory school age that the children must enter school and attend regularly, and shall report the parents or persons in control of the children to the truancy officer for the district if the warning is not heeded. All school board members, superintendents, and teachers shall cooperate in the enforcement of school attendance laws.

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Who may file for truancy?

- SDCL 13-27-20. Complaints against persons responsible for truancy—Contents of complaint--Verification. Each truancy officer shall make and file truancy complaints, and any teacher, school officer, or any citizen may make and file a truancy complaint, before a circuit court judge, against any person having control of a child of compulsory school age who is not attending school or whose regular attendance is irregular. The complaint shall state the name of the parent, guardian, or person responsible for the control of the child. The complaint shall be verified by oath upon belief of the complainant.

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May South Dakota Schools Enforce Additional Procedures?

- Yes. SDCL 13-32-4.1. Attendance policy—Adoption by school board—suspension and expulsion power unaffected. The school board of every school district may adopt an attendance policy in accordance with procedural due process rules established by the South Dakota Board of Education pursuant to Section 13-32-4. Any attendance policy adopted pursuant to this section is not to be construed as limiting the powers of the school board of a school district to suspend or expel students pursuant to Section 13-32.4.

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How are Truancy Records Managed?

- SDCL 13-27-15. Attendance record maintained by superintendent or president of board—Reports required. Each superintendent, or the president of the school board in districts without a superintendent, is responsible for maintaining an accurate record of the attendance of all persons of compulsory school age. He shall, at regular intervals, report the names of all compulsory school age persons, not excused from school, who do not or who irregularly attend an accredited school to the truancy officer on blanks provided for that purpose. He shall include reasons for the absences in the report.

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Can We Report Truancy or Other Crimes of Special Education Students?

- Yes. Under the IDEA, a district reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. 34 CFR 300.535(b).
- However, a district reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent such transmission is permitted by the Family and Educational Rights Privacy Act ("FERPA"), 34 CFR 300.535(c).

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Truancy and Child Find

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Child Find

- Ongoing duty
- To **Identify, Locate, and Evaluate** all children suspected of having disabilities, who reside within the jurisdiction of the school district, and need special education
- This includes homeless children, children who are wards of the state, and children in private schools
- This includes children who are advancing from grade to grade
- School districts can be successfully challenged for the "failure to identify" a child

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Are truant students disabled?

- Truancy does not "per se" qualify a student for special education.
- Must consider reason for absences

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*Hilliard City Sch. Dist.
60 IDELR 58 (Ohio 2012)*

- Student truant for large portion of school year
- Parent provided two evaluation reports diagnosing with anxiety and depression
- Noted truancy was due to mental impairment

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- Child Find Violation
- Private reports specifically stated that a "well-defined, supervised plan is needed to boost [the Student's] school attendance; possibly to include some adjustments/accommodations, but primarily some method of oversight to substantially increase regular school attendance...will be needed."

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Southwest Indep. Sch. Dist., 39 IDELR 203 (Tex. 2003)

- 15 year old student with two kids, residing with foster parents
- Performing 2 grade levels behind
- Was administratively withdrawn from school due to absences
- Truancy proceedings were initiated

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- Student admitted that the reason for non-attendance was lack of childcare
- When in attendance, Student made A's and B's, appeared happy and did not display behavioral concerns
- Student was later tested and qualified with a minor learning disability

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- Student claimed she should have been identified earlier
- Hearing officer disagreed, stating, "Valerie's chronic absences were shown to be attributable to her problems at home, not to a disability or to any failure of [the District] to comply with IDEA...Valerie's absenteeism could have been, and probably was, the reason she failed to achieve grade advancement with her age peers. In the absence of evidence that academic or learning difficulties contributed to the retentions, the mere fact that she fell behind her age peers does not create an inference that Southwest should have suspected a disability."

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Lessons Learned

- Investigate the reason for absences
 - Health conditions?
 - Parent concerns?
 - Declining/failing performance?
 - Problem behaviors?
- Remember that a reason to "suspect" a disability is a fairly low burden of proof

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Absences and Special Education Services

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*Urban Pathways Charter Sch.,
112 LRP 27526 (Penn. 2012)*

- LD student accumulated 47 absences during school year
- IEP noted that absences affected progress
- District made phone calls and sent letters home

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- Denial of FAPE
- "The Charter School is responsible for addressing Student's attendance issues through a study of the reasons behind the truancy, followed up with a positive behavior support to assist Student in achieving expected attendance. The behavior of truancy was affecting Student's learning, as noted in the Charter School's own progress reports. Failure to address this issue was a denial of FAPE.
- Awarded 2.5 hours of compensatory services for each day Student was absent

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Pocano Mountain Sch. Dist., 12 ECLPR 14 (Penn. 2014)

- Kindergarten student with autism and seizure disorder was absent for medical and "unexplained" reasons
- IEP team met frequently

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- In Spring Semester, District offered to send a teacher to the home to provide supplementary instruction when student missed school 3 days in a row
- Another meeting was called to develop a "truancy elimination plan" and reduce school day
- In March, District filed criminal charges regarding absenteeism

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- Hearing Officer determined truancy charges were appropriate
- "The record overwhelmingly proves that the District addressed Student's absenteeism early and often, demonstrating its determination to design its educational services specially for Student, in order to make school as safe and attractive as possible, so that Student would want to come to school and Parent would find reason to trust the District with the safety and education of her child."

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Lessons Learned

- Convene IEP Team meetings to discuss absences. Determine if related to disability
- Incorporate interventions to encourage attendance
 - Counseling
 - FBA/BIP
 - Alternative Scheduling
 - Home visits
 - Increased academic support
- Monitor effectiveness and try again!

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Truancy and Homebound

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What is Homebound?

- Educational placement/instructional arrangement on LRE continuum
- DOE has cautioned "home instruction is, for school-aged children, the **most restrictive type** of placement because it does not permit education to take place with other children. For that reason, home instruction should be relied on as the means of providing FAPE to school-aged children with a disability **only in those limited circumstances when they cannot be educated with other children** even with the use of appropriate related services and supplementary aids and services, such as when a child is recovering from surgery."

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High Tech High, 113 LRP 878 (Cal. 2013)

- 19-year old student missed more than 1/3 of school year
- Diagnosed with selective mutism, LD, Aspergers, and Major Depressive Disorder
- IEP team discussed that student was stressed and overwhelmed and this led to missing school
- Anxiety disorder meant student was frequently unable to go to school

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- IEP team tried interventions by eliminating homework and increasing time in resource class. Goals were added.
- Anxiety increased. Student occasionally was unable to leave the car in the morning due to panic attacks
- No further modifications or assessments were ordered

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- IEP Team eventually recommended the student be educated at home due to anxiety
- "Given the restrictive nature of home instruction, the District should have considered lesser restrictive placements such as a small, structured classroom. Yet...there was no discussion regarding a continuum of lesser restrictive placements, nor did the District discuss how home-instruction would reduce Student's school phobia. The District also failed to obtain an assessment or statement from a treated physician which recommended home instruction..."

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Continued...

- "The homebound program was also not therapeutically or educationally indicated in view of Student's severe anxiety and school avoidance...[homebound] would reinforce Student's school avoidance and exacerbate her anxiety, instead of remediating...homebound program was also contradicted by evidence that Student progressed while in...small, structured classes, coupled with direct on-campus counseling, while utilizing a grade level curriculum. Consequently, the District's offer for home instruction denied Student a FAPE."

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What if parent requests homebound?

- Always IEP team decision
- "Although it is certainly desirable and commendable for a school district to take seriously parental input and to try to accommodate parental desires, schools cannot circumvent their legal responsibility to provide FAPE by deferring to parental choices about education. Where, as here, school personnel know that a student's placement is inappropriate to meet his or her needs, schools have a legal obligation to change that placement to provide FAPE despite parent disagreement." *Student v. Lake Travis ISD*, 050-SE-996 (1997).

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*Francis Howell R-III (MO) Sch. Dist.,
110 LRP 59000 (Missouri 2010)*

- Student suffering from leukemia was properly placed on homebound instruction after undergoing surgery to remove the mass from his chest and undergoing chemotherapy for which his doctors noted that he experienced notable fatigue and that his sleep/wake cycle was disrupted
- Ultimately, student received intermittent homebound dependent on chemo schedule

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Lessons Learned

- Get consent to speak to doctor if homebound is requested
 - Nature of condition
 - Expected duration
 - Nature of medical needs
 - Tests conducted to arrive at conclusion
 - Can needs be met in school setting?
 - Does student have communicable illnesses?
 - Medical concerns related to reintegration into school setting?

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Lessons Learned

- Speak to teachers about student's ability to make progress in educational environment
- Consider if homebound is requested for bullying or school phobia
 - Address effects of these disorders in the IEP

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Truancy and Residential Placement

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Residential Placement

- Highly restrictive setting
- DOE Commentary:
 - In situations where a child's educational needs are inseparable from the child's emotional needs and an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to "benefit from special education," these therapeutic and habilitation services may be "related services" under the Act. In such a case, the SEA is responsible for ensuring that the entire cost of that child's placement, including the therapeutic care as well as room and board, is without cost to the parents.

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DOE Continued...

- "However, the SEA is not responsible for providing medical care. Thus, visits to a doctor for treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care." 71 Federal Register No. 156, page 46581, August 14, 2006.

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Dale M. v. Bradley-Bourbonais,
237 F.3d 813 (7th Cir. 2001)

- Student was truant and disruptive in class
- Student abused drugs and alcohol and was hospitalized for depression
- Committed two burglaries and stole a car
- Parent placed student in residential facility and then initiated lawsuit

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Continued...

- Parent alleged boarding school was only way to prevent truancy
- "Dale's problems are not primarily educational. He has the intelligence to perform well as a student and no cognitive defect or disorder such as dyslexia that prevents him from applying his intelligence to the acquisition of an education, without special assistance."

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Continued

- "[Student's] problem is a lack of proper socialization, as a result of which, despite his tender age, he has compiled a significant criminal record."

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*Indep. Sch. Dist. No. 284
v. AC, 35 IDELR 59 (8th Cir. 2001)*

- 15 year old ED student with continual truancy issues and problems with walking off campus, as well as alcohol and drug use
- IEP team agreed that past educational strategies were ineffective and student needed a highly structured program to make progress.

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Continued

- District recommended day treatment program, and claimed that truancy issues were separable from educational needs
- "IEP team should address the behavior...This does not mean that the IDEA has obliterated the concept of personal responsibility, or that children with disabilities cannot be punished for simple misbehavior...sometimes, with certain children, what looks like simple misbehavior is actually a more complicated problem."

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- Hearing Officer ruled that truancy issues were a sign of significant emotional turmoil and "were a result from a genuine emotional disturbance rather than from a purely moral failing" and that residential placement was appropriate
- "The record here does not permit the conclusion that A.C.'s behavior problems are separable from the learning process...The IEE evaluator made quite clear that A.C. will not receive educational benefit unless her emotional and behavioral problems are dealt with."

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Lessons Learned

- Is residential the least restrictive environment?
- Is residential necessary for delivering special education and related services?
- Are the services at the residential facility for medical care?

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Retaliation and Truancy

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Retaliation

- Four-Part Analysis for retaliation:
 - Did the individual engage in a protected activity, *i.e.*, asserting or protecting a right or privilege secured by Section 504?
 - Did the recipient have knowledge of the individual having engaged in the activity?
 - Did the recipient take adverse action against the individual contemporaneously with or subsequent to the protected activity? And,
 - Was there a causal connection between the adverse action and the activity?

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Retaliation

- If the four-part analysis is established, then OCR investigates whether the district had a legitimate, nondiscriminatory reason for its actions sufficient to rebut the inference of discrimination created by the prima facie case. OCR will also determine whether any reason presented by the district is merely a pretext to discriminate

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Fall Rivers Public Schools 114 LRP 36314 (Mass. 2014)

- 8 year-old autistic student had over 70 absences during school year, without excuse
- Numerous interventions attempted:
 - Informal encouragement from teachers;
 - Formal meetings
 - Written transition plans to re-introduce student to the adults in the classroom and re-integrate him into the classroom environment
 - Counseling to support anxiety and other interfering behaviors

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Continued...

- Transition plan included "home visits, picture introductions, after-school visits to a staffed classroom, social stories, partial day visits and flexible day merging into full-day attendance over the course of four weeks."
- Parents attended IEP meetings and agreed with supports, but failed to bring him to school

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Continued...

- District requested permission to conduct home and health assessments. Parent declined
- After student was absent from December 2013 to April 2014 with no attendance, truancy was filed

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- Hearing Officer determined that there was no evidence to support that the truancy charges were a pretext for retaliation, and that instead, there was "ample independent support" for the truancy complaint, in the form of 70 days of absences without any excuse or alternative educational services.

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Contact

- Kelly Shook
- Walsh, Anderson, Gallegos, Green & Treviño, P.C.
- 505 East Huntland Drive, Suite 600
- Austin, Texas 78752
- Phone: 512-454-6864
- Email: kshook@wabsa.com
- Web: www.walshanderson.com

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