STATE OF RHODE ISLAND **SUPREME COURT**

JESSICA G.

VS **C.A. #: 07-0069**

WESTERLY SCHOOL DEPT.

MEMORANDUM OF THE RHODE ISLAND AFFILIATE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF FULL REVIEW ON THE COURT'S REGULAR CALENDAR

The Rhode Island Affiliate of the American Civil Liberties Union respectfully submits this Memorandum as Amicus Curiae in support of this Court's full review on its regular calendar of the issues raised by the Appellant Jessica G.

Statement of the Case

On December 12, 2005 Jessica G. and her mother, Elizabeth G., were both served with summonses and a petition alleging that Jessica was wayward by reason of truancy, The summons ordered them to appear for a court hearing three days later, on December 15, 2005, at the child's middle school. The hearing in question took place in one of the so-called "Truancy Courts" that are now conducted by magistrates and held in numerous public schools throughout Rhode Island.

Despite the statutory mandate of R.I.G.L. 8-10-3(b) that "[t]he family court shall be a court of record," the "Truancy Courts" conducted in the public schools operate with neither stenographers nor any other verbatim recording of their proceedings. The only "record" of these proceedings are very brief notes, usually handwritten on a form entitled "Event Hearing Sheet, Truancy Court." These notes, which can be difficult to decipher and difficult to understand even when deciphered, generally do not inform anyone reviewing them of what was said by the various persons attending the hearing. One cannot tell, for example, what explanations were given by the child or parent for the child's absences. Nor can one tell whether the parent or child were given the opportunity

to be present for the full discussion of the child's circumstances or, alternatively, whether truancy court and school personnel discussed the child's situation *ex parte*, before or after the time when the child and parent were present.

Your amicus curiae submits that the absence of a record is a matter of great concern, in light of the increasing numbers of children being summonsed into truancy court, the frequency and duration of their mandated attendance in these courts long after the child's attendance has ceased to be problematic, the practice in many truancy court proceedings of pulling the child out of academic classes week after week and month after month in order to attend court sessions, the practice of ordering children to be placed in DCYF custody without an adequate record supporting such a severe deprivation of the parents' fundamental rights to the care and custody of their children, and the lack of clear standards as to when a child's school absence is "excused" and when a parent has the right to determine, without a potentially costly and difficult-to-schedule physician's visit, that a child is too sick to attend school.

The absence of an accurate record of "Truancy Court" proceedings raises numerous concerns. In the instant case, for example, there is no accurate record of what the parent, the child, the magistrate, or anyone else said at any of the hearings. One cannot tell whether, at the first hearing, the parent was allowed to offer an explanation for the child's absences, or, if she did offer an explanation, whether the magistrate made any determination in light of that explanation as to whether or not the child belonged in the "Truancy Court." One cannot tell whether the parent had any questions about the "Waiver of Rights Form," or if so, whether those questions were answered clearly or accurately.

The only record of that first hearing are (1) a "Waiver of Rights Form" which both the child and parent signed, (2) a "Treatment Reference Sheet" indicating "Advised Child/Parent of right to trial and consequences of Truancy Court, (3) an "Event Hearing Sheet" that noted that the child had had 10 absences and 18 tardies out of 67 days (but did

not note whether the "tardies" were closer to five minutes or five hours) and that contained the handwritten notation

> Child admits to [illegible] in open Ct after giving of Rts w [illegible] of Mo The Ct feels child truant based on admission;"

and (4) an extremely broad "Release of Confidential Information" in which the parent agree to release to the Family Court,

> any records concerning me and/or my children relating to educational and school records, mental health, psychological and medical/physician records, counseling, any treatment records or other related documents and/or evaluations that relate to said individuals.

Your amicus curiae understand that parents who are summonsed into Truancy Court are told that they must sign this broad release in order to avoid having the case referred to Providence Family Court (regardless of the county in which the family resides) for trial. However, because there is no verbatim record, one cannot tell what Jessica's mother was or was not told about the release.

The Waiver of Rights Form signed by the parent and child in this case is particularly problematic in light of subsequent court proceedings. Nothing in that form indicates that by signing it and continuing to appear before the magistrate, the child is agreeing that she can be placed in DCYF custody without a full hearing and clear and convincing evidence that such placement is necessary. Indeed, the Waiver form's one reference to possible DCYF placement is a phrase that has been crossed out by court personnel, clearly indicating that the phrase is not applicable. That crossed-out phrase had stated that the child understood "that I can be placed in the custody of the Department of Children, Youth and Families and be removed from my home." Even though this phrase on the Waiver Form was crossed out, on October 19, 2006, the magistrate entered an order finding the child dependent (despite the fact that no dependency petition had ever been filed or served on either the child or the parent), and ordering the child placed

in the custody DCYF. The only record reflecting this order is an Event Hearing Sheet of that date, on which a handwritten notation states:

> Ct finds child is dependent no Glass [illegible] Mom & Dad child need help! F.C. to DCYF Placement w/ Dept & plan [?] if Possible [illegible]/May.

There is also a troubling special education aspect to this case. In the fall of 2005, Jessica's mother had asked school personnel to evaluate her child for special education eligibility and services. Such services are federally-mandated for children with emotional as well as other disabilities that significantly interfere with school performance. Instead of complying in a timely manner with its child-find obligations, however, the school district brought truancy proceedings. Only several months later did it acknowledge that Jessica was, indeed, a child with a disability, and begin the process of developing, through a team of qualified professionals, the federally-mandated individualized education program ("IEP") to which the child was entitled. Even after the IEP Team had developed the program, however, the magistrate's orders included a requirement that Jessica attend detention every day after school in order to receive support in homework completion. Such an order, for a child with a disability, is within the province of the child's IEP Team, and should be decided that that Team as part of the child's overall special education program.

An additional concern is the lack of any clear procedure or substantive guidance as to when a child's truancy case should be closed. This is a matter of great significance, because while the case is open, the child, and usually the parent as well, must attend truancy court sessions on a regular basis, sometimes as frequently as weekly. The parent may miss work or have difficulty caring for the child's siblings due to the attendance requirements of truancy court. In some cases, truancy court is held during the school day,

and the child is pulled from academic classes to attend court. Once the child's attendance has improved consistently, the family may still be required to continue attending court sessions, with no clear guidance on what they must do in order for the case to be closed. This was the case with Jessica; even after the "Event Hearing Sheets" indicated good (and in some cases "perfect") attendance, she was required to continue attending truancy court.

Nor does there appear to be any procedure, once she entered the system, for her to have a trial to determine whether the case should be closed. Her mother finally hired an attorney, who initially requested that the magistrate close the case. On the day that this request was denied, the Event Hearing Sheet of January 18, 2007 contains the entry "Case transferred to Family Court Judge: Chief Judge." Thus, rather than having the case transferred to the court in Washington County, the parent and child had to travel from Westerly to Providence for their court hearing. At the hearing in Providence Family Court on February 16, 2007, however, no witnesses were sworn, and no testimony taken. Despite the child's improved attendance, and despite her academic improvement (acknowledged by truant officer, T. of 2/16/07, p. 7), the school district continued to oppose dismissal of her case, as the truant officer argued:

> And when we look at our students at the middle school, we not only look at the attendance; we look at academics, we look at behavioral issues, we look at social service needs. And if the student meets all those prognosis and is doing successful [*sic*] we graciously graduate them from the program. We don't want them in the program. But we really believe that we can provide more services for her and her family.
> Testimony of Mr. Iacoi, Truant Officer T. 2/16/07, p. 8.

The district never made clear, however, *what* additional services it could provide, or why those services had to be provided through the truancy court, rather than through the child's Individualized Education Program. Indeed, DCYF submitted a letter indicating that the parent was working with the school department to implement the

recommendations of a DAS evaluation, that the child had an active IEP, that she was medication compliant, that the family was engaged in ongoing counseling covered by their insurance, and that "no additional supports are provided or necessary by the department [of Children Youth & Families] at this time." Letter of DCYF to Chief Judge, February 16, 2007.

Despite the child's improved attendance and academics, and despite the information from DCYF that the family did not need its services, the trial judge denied the motion that the matter be dismissed, ruling:

> The motion to not be in Truancy Court is denied.
> She's referred back to Truancy Court.

As a result of this ruling, Jessica is once again required to attend the "Truancy Court" in Westerly, where once again she must attend hearings for which there is no verbatim record, where she will again be at risk of being placed in DCYF custody with no record from which a meaningful appeal is possible, and where she and her parent have no guidance as to what they must do in order to have the case closed.

Summary of Issues

A parent's right to raise a child is a fundamental, constitutionally protected liberty interest. The United States Supreme Court has long held that a parent's right to the "care, custody and management of his or her children" is an interest "far more precious" than any property right. May v Anderson, 345 U.S. 528, 533 (1952). In Lassiter v Dept. of Social Services, 452 U.S. 18, 27, the Court emphasized that the parent-child relationship "is an important interest that 'undeniably warrants deference and absent a powerful countervailing interest protection,'" quoting Stanley v Illinois, 405 U.S. 645, 651 (1972).

The procedures to which Jessica G. and her parent have been subjected since being summonsed to appear in "Truancy Court" have deprived the parent of the right to both the custody and the care and management of her child, without the opportunity to a full and fair hearing.

Both parent and child have been denied the right to full and accurate notice of the rights being waived when the State, in the form of the "Truancy Court," presented them with the Waiver of Rights Form which did not inform them (and indeed implied to the contrary) that the truancy court magistrate might, without a hearing on the record from which a meaningful appeal could be taken, take custody of the child from the mother and place the child in DCYF custody.

The absence of any stenographic or other verbatim record of Truancy Court proceedings violates the statutory mandate of R.I.G.L. 8-10-3(b) that the Family Court shall be a court of record. In addition, with no true record reflecting what was said at these proceedings, there is no meaningful basis on which an appeal can be taken in the event of a magistrate's erroneous or wrongful decision. Without a record of the hearing, it is impossible for a reviewing court to determine whether the magistrate's decisions, including an order placing a child in DCYF custody, an order affecting the educational services of a child with a disability, or an order requiring the child to continue submitting to truancy court proceedings even when that child's school attendance is good, were made on good legal grounds or on grounds that would constitute reversible error.

The absence of such a record, in light of the significant powers wielded by the Truancy Court magistrates to affect parent-child and school-child relationships, thus deprives both child and parent of the right to a meaningful appeal process, as mandated by the due process requirements of both the Rhode Island and the United States Constitutions,

Your amicus curiae submits that there are, indeed, many possible bases for erroneous rulings that children who have missed more school than the average child are "willfully and habitually absent" from school and thus "wayward." Some of the potentially erroneous bases include children who have been bullied and are too fearful to attend school, children with chronic medical conditions whose parents do not have the financial ability to bring the child to a physician each time the child must be out of school, and children with other disabilities, whether medical, physical or psychological, that interfere with regular school attendance.

In some cases a school district may, and your amicus submits, sometimes do, bring truancy charges as a cost-avoiding substitute for its legal obligations under state and federal special education law. School districts' have a legal "child-find" obligation under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 *et seq.* (IDEA 2004), which is the duty to identify, locate and evaluate all disabled children residing within the school district, including children with emotional disabilities, and to develop IEPs that will provide those children with the special education and related services they need. In cases where a district refers such a child, instead, to Truancy Court, there may, as in this case, assume responsibilities that special education law places on other entities, including IEP Teams and special education hearing officers.

Children whose absences from school are caused by psychiatric conditions such as severe depression, severe anxiety disorder or obsessive compulsive disorder may be unable school on a regular basis if such a condition is sufficiently severe. In such cases, it is the obligation of the public school district, under federal and state special education law, to appropriately evaluate the child's needs and provide the child with the services and school placement that will allow the child to make educational progress. This

includes, when needed, placing the child in an out-of-district therapeutic placement including, if necessary for the child to function, a residential therapeutic placement.

The parents of children with such needs may well have attempted to explain to a "Truancy Court" magistrate their struggles with the child's disabling medical or psychological condition. However, with no record of what was said at the hearing, there is no meaningful ability for a reviewing court to determine whether the magistrate's considered such evidence, gave it any weight, or addressed it in a manner that complied with the child and family's rights under state law, federal law or constitutional provisions. And as the case before the Court illustrates, a subsequent referral to a Family Court judge is no guarantee that the child and parent will have an evidentiary hearing that will address these issues.

Conclusion. By reason of the above points and authorities, this Court should assign this matter for full briefing and argument, to address the statutory and constitutional rights that are violated by the procedures followed by magistrates in the Family Court's "Truancy Courts."

Respectfully submitted,

AMY R. TABOR, # 1682
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION
RHODE ISLAND AFFILIATE
HARDY TABOR & CHUDACOFF

24 Spring Street
Pawtucket, R.I. 02860
Tel. 401-727-1616

CERTIFICATION

I certify that on April 23, 2007, copies of the within Memorandum were mailed, postage pre-paid, and sent by facsimile to H. Jefferson Melish Esq., 74 Main Street, Wakefield, R.I. 02879, facsimile # 782-2490 and to Leo Manfred Esq., P. O. Box 1996, Westerly, R.I. 02981, facsimile # 596-7740 this 23rd day of April, 2007.

_____