



October 10, 2013

Marin Housing Authority Board of Commissioners
c/o Marin Housing Authority, Kimberly Carroll
4020 Civic Center Drive
San Rafael, CA 94903-4173

Dear Marin Housing Authority Commissioners:

Thank you for this opportunity to comment on the proposal by Marin Housing Authority (MHA) for its "School Attendance Policy and Procedures" (Truancy Policy), which would subject public housing families to eviction based on the school attendance of their children. We submit these comments jointly on behalf of the seven undersigned legal services and civil rights organizations.¹

Quality education and stable housing are keys to economic and social opportunity and success, basic rights for which our organizations all advocate.² For that reason, many of our organizations have been involved in advocating for a more inclusive Marin – one that welcomes residents of all races and provides access to the County's excellent educational opportunities and resources. Similarly, the proposed Truancy Policy's stated purpose "is to support local public school programs by improving community involvement that has been proven to result in higher academic performance and better quality schools."³

Unfortunately, the proposed Truancy Policy will do little, if anything, to promote education, but instead it threatens to evict some of the County's most disadvantaged community members. MHA operates six public housing developments – only one of which is available to families with children – Golden Gate Village (GGV) in Marin City. GGV is home to almost 75 percent of MHA public housing residents and virtually all residents under age 18.⁴ Fifty-seven percent of GGV residents are African-American,

¹ A description of these organizations is provided as Attachment 1.

² A growing body of research affirms the correlation between housing stability and educational achievement. For example, a recent research summary explains "[n]umerous studies document that children who change schools frequently experience declines in educational achievement." The Positive Impacts of Affordable Housing on Education: A Research Summary, Center for Housing Policy at 2 (2007).

³ Proposed Revision to Admissions and Continued Occupancy Plan, Chapter 18, MHA School Attendance Pilot Program - Policy and Procedures 1 (Sept. 25, 2013).

⁴ MHA Resident Characteristics Reports, 2012.

compared to about 10 percent at the other sites. Further contrast this with 2010 Census data that shows that a scant 2.8 percent of Marin County is Black/African American. Moreover, MHA’s residents are among the County’s most disadvantaged. For example, the poverty rate in Marin City is over 30 percent – more than four times the average for Marin County. Punitive measures, such as the evictions threatened by the Truancy Policy, do not promote school attendance, they simply cause homelessness and more stigmatization of an already vulnerable population.⁵

Even if the proposed Truancy Policy did not have a negative impact on the community, it would remain illegal. California state law fully occupies the field of school attendance and truancy policy and has implemented a detailed framework to address the problem. Further, federal law prohibits lease requirements that are unrelated to housing purposes, and it prohibits evictions for anything other than serious or repeated lease violations – which truancy is not. Moreover, any eviction carried out through MHA’s proposal would violate privacy rights of public housing families. Finally, the proposed Truancy Policy has a disproportionately adverse impact on African-American families.

Accordingly, we urge the Board of Commissioners to reject Marin Housing Authority’s proposed Truancy Policy.

I. State law preempts the MHA proposed Truancy Policy.

A. State truancy framework.

California law provides a comprehensive framework, involving multiple agencies and educators, to monitor and assist with ensuring student attendance. The Education Code defines the three progressive stages of truancy – truancy, habitual truancy, and chronic truancy – and establishes notice and reporting requirements for each stage with regard to parents, administrators, and local officials.⁶ It further establishes a scheme of successive interventions on a graduated scale for the student based on the number of reported trancies.⁷ The most severe interventions include declaring the student a ward of the court and requiring him or her to complete community service, pay a fine, or attend a truancy prevention program.⁸ He or she may also have driving privileges restricted, suspended, or revoked until age 21.⁹ As a last resort, local prosecutors may also file infraction or misdemeanor charges against the parent(s) or guardian(s) of a truant student. If an investigation indicates that “any parent, guardian, or other person having control or charge of any child” has violated any of the provisions of the truancy laws set forth in the Education Code, such as by failing to participate in mandatory student interventions, that person will be referred to a student attendance review board (SARB) which may direct

⁵ See California Administrative Office of the Courts, *Truancy and School Discipline: An Overview of the Literature and Statistics*, at 11 (November 2012)(stating “[i]nterventions should be supportive and involve the least punitive responses available).

⁶ CAL. EDUC. CODE § 48260(a); CAL. EDUC. CODE § 48262; see also CAL. EDUC. CODE §§ 48260-48261; CAL. EDUC. CODE § 48263.6; see also CAL. EDUC. CODE §§ 48260-48263, 48291.

⁷ See CAL. EDUC. CODE §§ 48260.5, 48260.6, 48262, 48263, 48263.5, 48264.5.

⁸ CAL. EDUC. CODE § 48264.5; see also STATE SCHOOL ATTENDANCE REVIEW BD., *A ROAD MAP FOR IMPROVED SCHOOL ATTENDANCE AND BEHAVIOR 36-37*, available at <http://www.sbcss.k12.ca.us/stuServe/SARB/StateSARBHandbook.pdf> (last visited Sep. 27, 2013).

⁹ CAL. EDUC. CODE § 48264.5; CAL. VEH. CODE § 13202.7.

the school district to bring in the probation department to investigate the matter; to request that the Department of Social Services file a petition on behalf of the minor; or to file a complaint against the parent(s) or guardian(s).¹⁰ All of these steps are carefully and strictly prescribed by California law for other properly qualified agencies to administer.

B. State law occupies the field of school attendance and truancy policy.

The “implied preemption” doctrine defines the criteria by which a local law or regulation is invalid because it “enters” an area that is “occupied” by state law.¹¹ The courts have delineated three criteria, under each of which state (or general) law preempts local law:

(1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action, or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.¹²

Here, MHA’s proposed Truancy Policy is clearly preempted by the state’s comprehensive legislative framework for education in general, and for school attendance and truancy in particular. In California, it has long been established that “management and control of the public schools [is] a matter of state[, not local,] care and supervision . . .” *Butt v. California*, 4 Cal. 4th 668, 681 (1992).¹³ Local entities cannot supplement the Education Code with their own education policies or procedures – in this case with local policies and procedures relating to school attendance and truancy.

As discussed above, the Education Code is extraordinarily detailed and inclusive with respect to school truancy – from defining the violations and levels of the offense with great specificity, to providing a carefully calibrated series of remedial measures and adverse consequences for truant students and their families. In *O’Connell v. City of Stockton*, the California Supreme Court relied on “the comprehensive nature” of the state drug laws and the “thorough and detailed” treatment of this field in holding that a local drug forfeiture ordinance was preempted.¹⁴ Similarly, the complex and uniform state-wide machinery that is engaged when a student is deemed truant illustrates the Legislature’s “thorough and detailed” treatment of school attendance and truancy, and provides clear evidence that this field has been fully occupied by state law.

¹⁰ STATE SCHOOL ATTENDANCE REVIEW BD., *supra* note 8, at 24; CAL. EDUC. CODE §§ 48291, 48450, 48452; CAL. WELF. & INST. CODE § 601.2.

¹¹ See Article XI, Section 7 of the California Constitution; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993).

¹² *Morehart v. County of Santa Barbara*, 7 Cal.4th 725, 751(1994), *see also* *Sherwin-Williams*, 4 Cal. 4th at 897-98.

¹³ *See also* *Harrhill v. Monrovia*, 104 Cal. App. 4th 762, 764 (2002), quoting *Piper v. Big Pine School Dist.* (1924) 193 Cal. 664, 669; *San Francisco v. Patterson*, 202 Cal.App.3d 95, 101-102 (1988).

¹⁴ *O’Connell v. City of Stockton*, 41 Cal. 4th 1061, 1071(2007).

C. The MHA proposed Truancy Policy is an impermissible supplemental education regulation under California law.

The proposed Truancy Policy is plainly and explicitly a measure to provide additional enforcement mechanisms and procedures to promote school attendance and to discourage truancy for Marin County students and families who reside in public housing. These regulatory add-ons include: 1) an expanded and more intrusive privacy release waiver to allow MHA access to school attendance records; 2) an additional “School Intervention Meeting” in which MHA staff can participate along with school officials; and 3) a new and serious sanction – i.e., the threat of eviction from public housing – that would be used against students and families who the MHA (in its sole discretion) deems to be in violation of the state truancy law and its local policy.

Whether these supplemental local regulations are sound public policy, well-intentioned, and/or harmonious with the state legislative scheme are not the relevant questions with respect to the preemption doctrine. The state has adopted a comprehensive legislative program for school truancy, one that leaves no gaps or authority for individual local cities or agencies in the state to decide to create their own attendance and truancy rules and procedures to engraft onto the state law and impose within their local jurisdiction. MHA’s efforts to add additional punishment for truancy, including loss of housing for the student’s entire family, lack any valid basis under California law.

II. The MHA proposed Truancy Policy is prohibited by federal public housing regulations.

Even if the proposed Truancy Policy were not preempted by state law, it would run afoul of federal rules and regulations governing the public housing program. The proposal lacks the reasonable relationship to housing required for any term incorporated into the lease. Moreover, failing to ensure that a child attends school does not constitute good cause for eviction.

A. Federal law prohibits MHA from including a lease term requiring compliance with state truancy law because such a term is “unreasonable.”

MHA is expressly prohibited from including “unreasonable terms and conditions” in its leases.¹⁵ A lease term requiring compliance with state truancy law is precisely the kind of “unreasonable term or condition” that is prohibited by federal law. The basic test for identifying an “unreasonable” lease term is whether it is “rationally related to a legitimate housing purpose.”¹⁶ Courts have given meaning to this standard by noting that “[w]hatever else ‘unreasonable’ may mean, it would appear that granting managers the power to terminate leases for felonies irrelevant to any legitimate housing purposes would fall within its scope.”¹⁷ MHA’s proposed Truancy Policy is *completely unrelated* to any housing purpose. The Housing Authority has noted that “[t]he purpose of this

¹⁵ 42 U.S.C.A. 1437d(1)(1).

¹⁶ *Richmond Tenants Org., Inc.*, 751 F. Supp. at 1205, *Sager v. Housing Com’n of Ann Arundel County*, 2013 WL 3943497 (D. Md. July 30, 2013).

¹⁷ *Cabrini-Green Local Advisory Council*, 2007 WL 294253 (N.D. Ill. Jan. 29, 2007) (concluding that a lease term permitting eviction upon any felony conviction was “unreasonable”).

School Attendance Policy is to support our local public school programs,” “support the enforcement of school-based intervention and prevention initiatives, help the community understand the consequences of their child’s absence from school...and help or prevent the need for any school based truancy mediation.” Conspicuously absent from this description is any mention of a legitimate housing purpose – because none exists. Since the Policy is plainly directed at an educational objective, a lease term requiring compliance with truancy law is “unreasonable.” Therefore, MHA cannot require compliance with such a policy.

B. MHA cannot evict a family for violation of state truancy law.

The proposed Truancy Policy would impermissibly make a child’s truancy potential grounds for eviction from public housing. Federal law prohibits MHA from evicting public housing tenants without “good cause.”¹⁸

In public housing, good cause exists where a tenant engages in “serious or repeated violation of material terms of the lease” or criminal activity that “threatens the health, safety, or right to peaceful enjoyment of the premises by other residents.”¹⁹ Under California law, charges may be filed against a parent for failure to comply with state truancy law only as the last of a series of proscribed actions. However, even if a parent were charged under that statute, it would not rise to the level of criminal activity for which MHA could evict a family.

Where a tenant’s criminal conduct does not pose a threat to other residents, courts have consistently refused to permit public housing authorities to evict the tenant. *See e.g., See Housing Auth. of City of Bangor*, 2001 WL 1719230 (Me. Super. Ct. Feb. 2, 2001) (public housing tenant may not be evicted for illegal removal of a stop sign near the premises because there was no evidence the removal actually injured other residents); *Boston Housing Auth. v. Bryant*, 693 N.E.2d 1060 (public housing tenant may not be evicted for stealing the property manager’s credit card because the manager did not actually suffer pecuniary loss). While increasing school attendance is a valuable goal, school truancy is not the type of serious or repeated lease violation that would constitute good cause for MHA to evict a family.

C. MHA’s Truancy Policy violates state and federal school privacy laws.

To effectuate any eviction under the proposed Truancy Policy, MHA would have to violate important educational privacy laws, despite its belatedly inserted provisions claiming participation for some families may be “voluntary.” The policy provides for “mandatory participation” if a child is truant once during a school year, but this presumably means MHA would obtain evidence of truancy by examining school attendance records. To do so would be an improper and unjustified invasion of family privacy under the federal Family Educational Rights and Privacy Act (FERPA)²⁰, which protects the privacy of student education records and information.

¹⁸ 24 CFR § 966.4(1)(2).

¹⁹ *Id.*

²⁰ 20 U.S.C. § 1232g; 34 CFR Part 99.

State law mirrors FERPA and affirms the privacy of student record information including truancy related information.²¹ MHA has no right to access student information absent a valid parental consent (or a court order), and may not disclose the information received without specific parental consent authorizing disclosure.²² A consent to release confidential school records, like any other consent, must be both informed and voluntary.²³ Yet even if a parent were to consent to sharing school records, it is hard to fathom a way in which the Housing Authority could prove that the parent was also not reasonably encouraging his or her child's school attendance. MHA cannot make "mandatory" the involuntary waiver of these important educational privacy laws as proposed in its Truancy Policy.

III. MHA's Proposed School Attendance Policy Violates Fair Housing Laws.

MHA's proposed policy would have a disproportionately negative impact on African-American families and thus violate fair housing law. The federal Fair Housing Act prohibits discrimination both on the basis of race and familial status, among other categories.²⁴ The California Fair Employment and Housing Act also protects individuals against racial and familial status discrimination, and additionally prohibits housing discrimination based on a person's source of income.²⁵ Housing policies, such as the proposed school attendance policy, that disproportionately impact, regardless of intent, members of these protected classes are prohibited.²⁶

Here, MHA is proposing a rule that would result in a ground for eviction that would only apply to families with children in public housing. As stated above, these families are overwhelming more likely to be African American than those without children. Even if, as required under fair housing law, MHA could justify the practice as necessary to achieve a substantial, legitimate, nondiscriminatory interest, it could not demonstrate that it has no less discriminatory alternatives.²⁷ MHA cannot justify its proposed Truancy Policy as legitimate because it is preempted by state law and has no housing related purpose. However, even if MHA could promulgate such a policy state law has already laid out numerous less discriminatory alternatives to increase school attendance – alternatives that do not result in homelessness.

Further, the proposed policy contradicts MHA's duty to affirmatively further fair housing because it would exclude, through eviction, a historically significant part of the Marin community and increase segregation. Similar fair housing concerns resulted in the county's Voluntary Compliance Agreement with HUD that requires collecting and reporting of fair housing issues – another reason why this unlawful policy should not be implemented in Marin City where it will have a severe and discriminatory effect.

²¹ See CAL. EDUC. CODE §§ 48060 *et seq.*

²² CAL. EDUC. CODE §49075.

²³ At a minimum, any consent or release must be entered into knowingly and voluntarily in order for it to be valid. See e.g., *Salmeron v. United States*, 724 F.2d 1357, 1361 (9th Cir.1983) (release of federal claim for violations of civil and constitutional rights requires consideration and must be informed and voluntary).

²⁴ 42 U.S.C § 3600 *et seq.*

²⁵ CAL. GOV. CODE § 12900 *et seq.*

²⁶ See 24 C.F.R. § 100.500; 42 U.S.C. 3600 *et. seq.*; CAL. GOV. CODE §12900 *et. seq.*

²⁷ See 24 C.F.R. § 100.500 (describing burden-shifting analysis of disparate impact theory).

CONCLUSION

Marin County public housing residents have overwhelmingly and vehemently objected to this punitive and oppressive proposal for a Truancy Policy. Although MHA has claimed to be working with other agencies and organizations in the development of this Policy, none of these agencies or organizations have been identified in the public records. On behalf of our seven organizations, we urge the Board of Commissioners to reject MHA's proposed Truancy Policy in its entirety because it is unwise, unlawful, and discriminatory. Instead of seeking to penalize public housing families, community agencies should work collaboratively toward positive support of educational success for all of our students. Thank you in advance for your careful attention to these important issues.

Sincerely,

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ATTACHMENT ONE: ORGANIZATIONAL DESCRIPTIONS

American Civil Liberties Union of Northern California

The ACLU of Northern California is an enduring guardian of justice, fairness, equality, and freedom, working to protect and advance civil liberties for all Californians. For most of the last century, the ACLU of Northern California has been at the heart of many of the most major – and sometimes controversial – struggles for civil liberties in our state. It’s a matter of principle. The ACLU makes sure that our basic Constitutional rights – to free speech, to privacy, to be innocent until proven guilty – don’t just exist on paper, but also practice. The ACLU enforces the vision that these freedoms be guaranteed to every person in this country. These are our American values.

Bay Area Legal Aid

Bay Area Legal Aid (BayLegal) is the largest provider of free legal services to low income bay area residents. BayLegal’s seven regional offices provide legal assistance regardless of our clients’ location, language, or disability. BayLegal assists many thousands of people each year with their problems of housing, public benefits, health access, and domestic violence. BayLegal’s mission is to provide meaningful access to the civil justice system for all of our clients through quality legal assistance regardless of our client’s location, language or disability.

Lawyers’ Committee on Civil Rights, San Francisco

Combining direct legal services, policy advocacy, and impact litigation strategies, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area advances the rights of immigrants, refugees and communities of color, with a specific focus on low income communities and a long-standing commitment to African Americans. We provide leadership and expertise in identifying legal issues and cases that are critical to the advancement of minority and immigrant communities, and we marshal the resources of the private bar to help effect structural change.

Legal Aid of Marin

Legal Aid of Marin’s mission is to provide access to the civil justice system to low-income, vulnerable and otherwise underserved residents of Marin County. We strive for practical solutions to client problems through quality legal service. Our goals are to help tenants and low income homeowners, families, and older adults in Marin County.

Public Advocates

Public Advocates Inc. is a nonprofit law firm and advocacy organization that challenges the systemic causes of poverty and racial discrimination by strengthening community voices in public policy and achieving tangible legal victories advancing education, housing and transit equity. We spur change through collaboration with grassroots groups representing low-income communities, people of color and immigrants, combined with strategic policy reform, media advocacy and litigation, “making rights real” across California since 1971.

Western Center on Law and Poverty

Western Center on Law & Poverty leads the fight in the courts, counties and capital to secure housing, health care and a strong safety net for low-income Californians. Western Center on Law & Poverty, California’s oldest and largest legal services support center, was created in 1967 by a passionate group of attorneys and legal scholars from USC, UCLA and Loyola law schools. Our founders sought to create a unique organization, driven by the belief that low-income Californians deserve the finest possible legal representation before every institution that shapes their lives.

Youth Law Center

The Youth Law Center is a San Francisco based public interest law office that has worked nationally since 1978 to protect vulnerable children, with a particular focus on the problems of children at risk of involvement, or involved, in the juvenile court system. The goal of the Youth Law Center’s work is to ensure that vulnerable children are provided with what they need to grow into healthy, productive adults. Youth Law Center attorneys have represented children in civil rights litigation and other advocacy efforts and have brought about extensive changes and improvements in child serving systems throughout the country. Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues and are widely recognized as leading legal advocates in children’s law.