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User Notes

This deskbook on *Juvenile Law (3rd ed. November 2021)* represents the Texas Justice Court Training Center's ongoing commitment to provide resources, information and assistance on issues of importance to Texas Justices of the Peace and Constables and their court personnel, and continues a long tradition of support for judicial education in the State of Texas by the Justices of the Peace and Constables Association of Texas, Inc. It is intended to offer a practical and readily accessible source of information relating to issues you are likely to encounter in various juvenile proceedings in justice court.

This resource is not intended to replace original sources of authority, such as the Family Code or the Code of Criminal Procedure. We strongly recommend that you refer to the applicable statutory provisions and rules when reviewing issues discussed in this book.

Please note that all references to "Rule __" are to the Texas Rules of Civil Procedure. The topic of **Juvenile Magistration** is discussed in Chapter 4 of the *Magistration Deskbook*.

Rather than including the citations to cases in the text of the deskbook, we have listed only the case name in the text but have included the entire citation in the appendix of cases.

Please do not hesitate to contact us should you have any questions or comments concerning any of the matters discussed in this deskbook. We hope you will find it to be a valuable resource in providing fair and impartial justice to the citizens of Texas.

Texas Justice Court Training Center
November 2021

Chapter 1: Truancy Cases

A. What is a Truancy Case?

A **truancy case** is a **civil** proceeding filed in a "truancy court" alleging that a child (which for truancy cases is defined as a person who is 12 years of age or older and younger than 19 years of age) engaged in truant conduct by failing to attend school. *Family Code §§ 65.001(a), 65.002(1).* "Truancy courts" include justice courts. *Family Code § 65.004(a)(2).*

HB 2398: Truancy is Not A Criminal Offense

The Legislature rewrote the law in 2015 so that truancy is ***not*** a criminal offense and can only be filed as a **civil case** in truancy court.

In 2015 the Legislature completely revised the way cases involving failure to attend school are handled. Rather than treating those cases as Class C misdemeanor criminal cases, with the child named as a defendant, the Legislature decided that truancy cases "may be prosecuted only as a civil case in a truancy court." *Family Code § 65.003(b).*

The child is a **respondent** rather than a defendant and is entitled to an **adjudication hearing** with many of the protections of a criminal case. ***See page 11.*** If the child admits the allegations of the petition, or is found to have engaged in truant conduct, then the court should impose a **remedial order** that attempts to address the underlying causes of the truant conduct. ***See page 24 for more information on remedial orders.***

The purpose of the law "is to encourage school attendance by creating simple civil judicial procedures through which children are held accountable for excessive school absences." *Family Code § 65.001(b).*

"The best interest of the child is the primary consideration in adjudicating truant conduct." *Family Code § 65.001(c).*

B. What is Truant Conduct?

KEY POINT

A child engages in truant conduct if the child is required to attend school under Section 25.085, Education Code, **and** fails to attend school on 10 or more days or parts of days within a six-month period in the same school year. *Family Code § 65.003(a).* A child who is required to attend summer school is required to attend school.

Truant Conduct Elements

- A child (at least 12, not yet 19 years old),
- who is required to attend school,
- fails to attend school without an excuse,
- on 10 or more days or parts of days,
- within a six-month period,
- in the same school year.

Who is Required to Attend School?

The following persons are **required** to attend school:

- A child who is at least six years old (or less than six and has previously been enrolled in first grade), and who has not yet turned 19, is required to attend school unless specifically exempted. *Education Code § 25.085(b).*
- A child who has been enrolled in prekindergarten or kindergarten. *Education Code § 25.085(c).*
- A person who voluntarily enrolls in school or voluntarily attends school after their 19th birthday. *Education Code § 25.085(e).*

Who is Exempt From Attending School?

A child is **exempt** from compulsory school attendance if the child:

- Attends a private or parochial school;
- Is eligible for a special education program and cannot be properly served by the school district;
- Has a temporary physical or mental condition that makes the child's attendance not feasible;

- Is expelled from school;

- Is at least 17 years old and is attending a course for the G.E.D. (if certain conditions are met) or has received a high school diploma or G.E.D.;

- Is at least 16 years old and is attending a course for the G.E.D. (if certain conditions are met) or is enrolled in a high school diploma program;

- Is enrolled in certain Texas Academies; **or**

- Is exempt under another law.

Education Code § 25.086. ***Please see page 43 for the full text of the exemption statute.***

1. Exceptions to Truant Conduct

COMMON PITFALL

A school district **may not** refer a student to truancy court if the school determines that **the student's truancy is the result of**:

- pregnancy,
- being in the state foster program,
- homelessness,
- severe or life-threatening illness or related treatment, **or**
- being the principal income earner for the student's family.

Education Code § 25.0915(a-3).

2. Affirmative Defenses to Allegations of Truant Conduct

It is an affirmative defense to an allegation of truant conduct that:

- One or more of the absences required to prove truant conduct has been **excused** by a school official or by the court;
- were **involuntary**, **or**
- were due to a voluntary absence from the home because of abuse, as defined by Family Code Section 261.001.

This affirmative defense **does not** apply if there are still enough absences remaining after subtracting the above absences to constitute truant conduct. *Family Code § 65.003(c), (d).*

The burden is on the child to show by a preponderance of the evidence that the absence has been or should be excused, was involuntary, or the result of a voluntary absence from home due to abuse. *Family Code § 65.003(e).*

When Should an Absence be Excused?

The court **must** excuse an absence for any reason listed in Education Code Section 25.087(b). The court **may** excuse an absence for **any** reason the court feels is sufficient justification. A decision by the court to excuse an absence for purposes of this subsection **does not** affect the ability of the school district to determine whether to excuse the absence for another purpose. *Family Code § 65.003(c).*

Excused Absence Example

The school alleges the child had 12 unexcused absences in a six-month period and the child claims three are excused. If the court excuses three absences, then the affirmative defense is valid because now there are only nine unexcused absences.

But if the child only claims one absence is excused, then even if the court excuses that absence, it is not a valid affirmative defense because there are still 11 unexcused absences.

Does Tardiness Count as an Absence?

In a 1993 opinion, the Attorney General concluded that absences generally do not include tardiness to class, especially if the student is present on the campus but late to class. The particular circumstances of a child's tardiness on a certain day may be sufficiently egregious to constitute an absence, but school districts should not routinely classify each instance of tardiness as an absence for purposes of truancy. *Attorney General Opinion DM-200 (1993).* This would also apply to parent contributing to nonattendance cases. ***See Chapter 3***.

C. Filing a Truancy Case

1. Where May a Truancy Case be Filed?

KEY POINT

A truancy case must be filed in a truancy court. *Family Code § 65.003(b).* The following courts are designated as truancy courts:

- justice courts,
- municipal courts, **and**

- a constitutional county court in a county with a population of 1.75 million or more.

Family Code § 65.004(a).

A truancy court has exclusive original jurisdiction over cases involving allegations of truant conduct. *Family Code § 65.004(b).* This means that a truancy case may not be heard by any court other than a truancy court. For example, if a truancy case were filed initially with a district court, the case would have to be dismissed for lack of jurisdiction since a district court is not a truancy court.

Does a truancy case have to be filed in the precinct where the school is located or the child lives?

No. A truancy case may be filed in **any** justice court in the county in which the school in which the child is enrolled is located **or** the county in which the child resides. *Family Code § 65.006.*

A truancy court retains jurisdiction over a person, no matter how old they are, until final disposition of the case, as long as they were referred to the court for engaging in truant conduct before their 19th birthday. *Family Code § 65.004(d).*

Truancy Cases Are Not Precinct Specific

A truancy case is not like an eviction case, which must be filed in the precinct where the property is located.

A truancy case may be filed in **any** justice court in the county in which the school is located **or** the county in which the child resides.

2. Step-by-Step Procedure for Filing a Truancy Case

Step 1 – The School District Files a Referral with a Truancy Court

The first step in a truancy case is the filing of a **referral** by the school district with the truancy court. *Education Code § 25.0951(a); Family Code § 65.051.*

A school district **may not** file a truant conduct referral unless it has already tried other truancy prevention measures (beginning when the student had three or more unexcused absences in a four-week period) and those measures have not been successful. By filing the referral with the truancy court, the school district is alleging that the student has ten or more unexcused absences within a six-month period within the same school year. *Education Code § 25.0915.*

The referral is to be filed "within **10 school days** of the student's 10th absence." *Education Code § 25.0951(a).* However, a school district may delay a referral, or may choose not to refer a student for truant conduct, if the school district has applied truancy prevention measures to the student and determines that the truancy prevention measures are succeeding and that it is in the best interest of the student that a referral be delayed or not be made. *Education Code § 25.0951(d).*

Step 2 – The Court Forwards the Referral to the Prosecutor

The only thing the court does upon receiving a referral from a school district is to "forward the referral to a truant conduct prosecutor who serves the court." *Family Code § 65.051.*

Who is the Truant Conduct Prosecutor?

The "attorney who represents the state in criminal matters in that court." *Family Code § 65.052.* If you are not sure who the truant conduct prosecutor is in your court, you should speak with your county attorney (or if your county does not have a county attorney, then speak with your district attorney).

COMMON PITFALL

The court **does not** review the referral at this point for defects or any issues that might require dismissal of the case. The court simply serves as a conduit and forwards the referral to the truant conduct prosecutor for that court.

Step 3 – The Prosecutor Decides Whether or Not to File a Petition

Once the truancy court forwards the referral to the truant conduct prosecutor, the prosecutor must promptly review the referral and decide whether or not "to file a petition with the truancy court requesting an adjudication of the child for truant conduct." *Family Code § 65.053(b).*

Steps in Filing a Truancy Case

- School district files a referral.
- Court forwards the referral to the prosecutor.
- Prosecutor decides whether to file a petition.
- If petition is not filed, court orders records relating to allegations of truant conduct destroyed.
- If petition is filed, court reviews and dismisses the petition if certain requirements are not met.
- If petition is filed and requirements are met, court sets hearing and proceeds with the case.

KEY POINT

A petition may not be filed more than **45 days** after the date of the last absence that constitutes the truant conduct. *Family Code § 65.055.*

A petition may also **not** be filed if the referral:

- Is not accompanied by a statement from the school certifying that the school applied the truancy prevention measures required under Education Code Section 25.0915, and that those truancy prevention measures failed to meaningfully address the student's school attendance; **or**
- Does not specify whether the student is eligible for or receives special education services.

Family Code § 65.053(c); Education Code § 25.0915(b).

If the truant conduct prosecutor decides not to file a petition after reviewing a referral, the prosecutor **must** inform the truancy court and the school district of that decision. *Family Code § 65.053(b).*

Step 4a – If the Prosecutor Decides Not to File a Petition

COMMON PITFALL

If the truant conduct prosecutor decides not to file a petition for adjudication of truant conduct after reviewing a referral, then the court **must** order the "destruction of records relating to allegations of truant conduct that are held by the court or the prosecutor." *Family Code § 65.203.*

BEST PRACTICE

The simplest way to do this is for the court to attach an order at the time it forwards the referral to the truant conduct prosecutor stating that any records relating to allegations of truant conduct must be destroyed in the event the prosecutor decides not to file a petition.

Step 4b – The Prosecutor Files a Petition

If the prosecutor decides to request an adjudication of a child for truant conduct, then the ***prosecutor*** files a petition alleging that the child has engaged in truant conduct. *Family Code § 65.054(a).*

The petition is styled "In the matter of _____, Child," identifying the child **only** by his or her initials. *Family Code § 65.054(b).*

There is no filing fee when a petition is filed in a truancy case. *Family Code § 65.054(e).*

The prosecutor may state that the allegations in the petition are based on "information and belief," which simply means the prosecutor has good reason to believe the allegations are true. *Family Code § 65.054(c).*


KEY POINT

Contents of the Truancy Petition

The petition must contain:

- The time, place and manner of the acts alleged to constitute the truant conduct;
- The child's name, age and residence address, if known; **and**
- The names and residence addresses, if known, of at least one parent, guardian or custodian and of the child's spouse, if any; **or**
    - If the child's parent, guardian or custodian does not live or cannot be found in the state, or if their place of residence is not known, then the name and residence address of any adult relative residing in the county; **or**
    - If there is no adult relative in the county, then the name and residence address of the relative residing nearest to the court.

Family Code § 65.054(d).


KEY POINT

Step 5 – The Court Reviews the Petition

Once the petition is filed by the prosecutor (rather than when the referral is initially filed), the truancy court reviews the petition and **shall** dismiss the petition if the school district's referral:

- Does not certify that the school applied the required truancy prevention measures and that those measures failed to meaningfully address the student's school attendance;

- Does not specify whether the student is eligible for or receives special education services;

- Does not satisfy the elements required for truant conduct;
- Was not filed timely (that is, the referral must be filed within 10 school days of the student's 10th absence, unless the school district delayed the referral because it

determined that the truancy prevention measures were working, see ***page 7***); **or**

- Is otherwise substantively defective (for example, it is clear from the referral that the child is exempt from compulsory school attendance, see ***page 3***).

Education Code § 25.0915(c).

The petition **must** also be dismissed if it was filed more than 45 days after the date of the last absence that constitutes the truant conduct. *Family Code § 65.055.*

D. Issuance and Service of the Summons

1. Setting the Date and Time for the Adjudication Hearing

COMMON PITFALL

After a truancy petition is filed, the truancy court must set a date and time for an adjudication hearing. *Family Code § 65.056(a).* The "hearing may not be held **on or before the 10th day from the filing** of the petition." *Family Code § 65.056(b).* So, the first day on which an adjudication hearing may be set is **the 11th day after the petition is filed.**

2. Issuance of the Summons

After setting the date and time of the adjudication hearing, the truancy court must direct the issuance of a summons to:

- The child named in the petition;
- The child's parent, guardian or custodian;
- The child's guardian ad litem, if any ***(see page 17 explaining what a guardian ad litem is)*****; and**
- Any other person who appears to the court to be a proper or necessary party to the proceeding.

Family Code § 65.057(a).

The summons **must** require the persons served to appear before the court at the place, date and time of the adjudication hearing to answer the allegations of the petition. A copy of the petition **must** be served with the summons. *Family Code § 65.057(b).*

KEY POINT

The truancy court may endorse on the summons an order directing the person having physical custody of the child to bring the child to the hearing. *Family Code § 65.057(c).* As discussed below, this is an important step to have taken in cases in which the child does not appear in response to the summons. ***See page 14.***

3. Service of the Summons

If the person to be served with a summons is in Texas and can be found, the summons must be served at least **five days before the date of the adjudication hearing**:

- By personal delivery to the person; **or**
- By registered or certified mail, return receipt requested.

Family Code § 65.058(a).

Order to Bring the Child to the Hearing

The **best practice** is to endorse on the summons an order directing the parent or other person having physical custody of the child to bring the child to the adjudication hearing.

Who Can Serve a Truancy Summons?

The summons may be served by "any suitable person under the direction of the court." *Family Code § 65.058(b).* A "suitable person" would certainly include a constable or deputy constable, but it could also include a school resource officer or other person who could serve the summons on the child and/or the parent or guardian under the court's direction. TJCTC strongly recommends that the summons is **not** served by any school officer or employee who may be offering testimony or evidence at the adjudication hearing.

BEST PRACTICE

E. The Adjudication Hearing

As discussed above, after a petition is filed, the court sets a date for an adjudication hearing and a summons is served on the child and their parent or guardian requiring them to appear before the truancy court. ***See page 10 of this volume.***

1. Child's Answer

After the petition has been filed, the child may answer the allegations of the petition, either orally or in writing, at or before the commencement of the adjudication hearing. *Family Code § 65.060.*

If the child **admits** the allegations of the petition, then the court proceeds directly to the remedial order. ***See page 24.***

If the child **denies** the allegations of the petition, then the court proceeds with the adjudication hearing. Also, if the child does not answer the petition, then "a general denial of the alleged truant conduct is assumed." *Family Code § 65.060.* In that case the court also proceeds with the adjudication hearing, provided the child is present.

The court may **never** proceed with an adjudication hearing if the child is not present.

2. Nature of the Hearing

COMMON PITFALL

A truancy case is **not** a criminal case. Therefore, an adjudication of a child as having engaged in truant conduct is not a conviction of a crime. *Family Code § 65.009(a).*

An order of adjudication in a truancy case does not subject the child to any civil disability that ordinarily results from a conviction of a crime (for example, not being able to vote) or disqualify the child in any civil service application or appointment. *Family Code § 65.009(a).*

Extra Procedural Protections

Although a truancy case is a civil case, the child is given many of the procedural protections provided in a criminal trial, such as the standard of "proof beyond a reasonable doubt." ***See page 19 for more on conducting the adjudication hearing.***

The adjudication of a child as having engaged in truant conduct may not be used in any subsequent court proceedings other than for the purpose of determining an appropriate remedial order or in an appeal. *Family Code § 65.009(b).*
Even though a truancy case is a civil case, an adjudication hearing has many of the protections that are typically afforded to defendants in criminal cases. For example, a jury

verdict must be unanimous and the burden of proof is beyond a reasonable doubt. These heightened procedural protections for the child and other aspects of the adjudication hearing are discussed below.

3. Who Must be Present at the Adjudication Hearing?

KEY POINT

The child must be personally present at the adjudication hearing. The truancy court **may not** proceed with the adjudication hearing in the absence of the child. *Family Code § 65.062(a).*

A parent or guardian of a child, or any court-appointed guardian ad litem of a child is required to attend the adjudication hearing. *Family Code § 65.062(b).* However, they are not required to attend the hearing if:

- The court excuses their attendance, for good cause shown;
- They are not a resident of Texas; **or**
- They are the parent of a child for whom a managing conservator has been appointed and the parent is not a conservator of the child.

Family Code § 65.062(c).

If a person, other than the child, fails to appear for the hearing after being summoned, the court may still proceed with the hearing **(provided the child is present)**. *Family Code § 65.057(b).* So, the court may proceed with the hearing without the parent there but the parent may face consequences, such as contempt, for not appearing.

Employment Protection for Attending a Hearing

An employer may not terminate the employment of a permanent employee because the employee is required to attend a truancy hearing. *Family Code § 65.063(a).*

A person whose employer violates this law is entitled to reinstatement to their former position, damages, and reasonable attorney's fees. *Family Code § 65.063(b),(c).*

a. What if the Child Was Served with the Summons but Fails to Appear?

BEST PRACTICE

If the child is served with the summons but fails to appear for the adjudication hearing, the court may take the following steps in an effort to bring the child before the court:

- The court may send a summons to the parent, guardian, or person having physical custody of the child, with an order to bring the child to the adjudication hearing. *Family Code § 65.057(c).*

- If the parent or guardian (or person having physical custody of the child) does not appear, the court may issue a **writ of attachment for that person** which will be executed in the same manner as in a criminal proceeding under Chapter 24 of the Code of Criminal Procedure. *Family Code § 65.254.*

  Note: An "attachment" is a writ commanding a peace officer to "take the body of a witness and bring him before such court…." *Code of Criminal Procedure Art. 24.11.* This means the person **must** be brought directly to the court and **not** to jail. See Chapter 6 of the *Criminal Deskbook.*

- When the person is brought before the court by means of the writ of attachment, the court may ask the person why they have not complied with the court's order to bring the child to the court.

If the Child Fails to Appear For the Hearing…

Order the parent to bring the child to the hearing.

If the parent does not appear, issue a writ of attachment to have the parent brought before the court to explain why they have not brought the child.

As a last resort, the court may issue a writ of attachment for the child but only to have the child brought directly to the judge.

- If a parent, guardian or guardian ad litem fails to appear for an adjudication hearing, the court may enforce an order that they appear by contempt. *Family Code § 65.253(a).* The penalty for a finding of contempt for failing to appear is a fine of $100. *Family Code § 65.253(b).* ***See page 35 concerning the procedure required to hold a parent in contempt.***

- If all other measures fail, and the court has been unable to obtain the child's attendance by ordering the parent or guardian (or person having physical custody) to bring the child to the court, TJCTC believes the court may, as a last resort, issue a **writ of attachment against the child**. *Government Code § 21.001.*

- The writ of attachment must require the child to be brought immediately and directly to the court. **Under no circumstances** may the child be held in a place of non-secure custody under Article 45.058 of the Code of Criminal Procedure.

b. What if the Child or Parent Appear but Were Not Served At least Five Days Before the Hearing?

COMMON PITFALL

As discussed above, an adjudication hearing must be set after a petition is filed. But what if the child and parent or guardian are not served with the summons at least five days before the hearing as required by the statute? ***See page 11.*** Sometimes this occurs because the summons must be served personally or by registered or certified mail.

Some courts have addressed this problem as follows:
After setting the date and time of an adjudication hearing, the court issues a summons but also sends a **courtesy letter** by first class mail to the child and parent or guardian notifying them of the adjudication hearing and enclosing a copy of the summons. If the child appears in response to the courtesy letter but has not been served with the summons personally or by registered or certified mail, the child is served personally at the time they appear in court.

The adjudication hearing could then be postponed for at least five days in order to comply with the five-day waiting period of Family Code Section 65.058(a). But this would require the child and parent or guardian to come back to court a second time for the actual adjudication hearing.

As an alternative to postponing the adjudication hearing, once the child is served personally with the summons in court, the child could waive the five-day waiting period under Family Code Section 65.008 and answer "true" or "not true" to the allegations of truant conduct. (It is up to the child, not the court, to decide whether to waive the five-day waiting period.) If the child waives the five-day waiting period and answers "true," the court may proceed to the remedial order stage without requiring the child and parent to come back for another hearing at least five days later.

Waiver of the Five-Day Waiting Period

A child may waive the five-day waiting period between the service of the summons and the adjudication hearing as long as the requirements of Section 65.008 of the Family Code are met.

Note that the child is not waiving **service** of the summons, which might create an issue under Section 65.057(d) ("A party, other than the child, may waive service of summons by written stipulation or by voluntary appearance at the hearing."). The child is only waiving **the five-day waiting period**, which is permissible as long as the requirements of Section 65.008 are met.

COMMON PITFALL

According to Section 65.008, a child may waive a right if:

- The right is one that may be waived;
- The child and the child's parent or guardian are informed of the right, understand the right, understand the possible consequences of waiving the right, and understand that waiver of the right is not required;
- The child signs the waiver;
- The child's parent or guardian signs the waiver; **and**
- The child's attorney, if any, signs the waiver.

BEST PRACTICE

So, if a child appears for an adjudication hearing in response to a copy of the summons mailed by first class mail, the child could be served with the summons personally at that

time and sign a waiver of the five-day waiting period (if they choose to do so) after the court complies with Section 65.008.

c. Attorney Representation and Appointment

A child may be, but is not required to be, represented by an attorney in a truancy case. *Family Code § 65.059(a).* A child is not entitled to have an attorney appointed, but the court **may** appoint an attorney if the court determines it is in the best interest of the child. *Family Code § 65.059(b).*

If the court appoints an attorney to represent the child, the court may order the child's parent or other responsible person to pay for the cost of an attorney appointed by the court provided that the court determines the person has sufficient financial resources. *Family Code § 65.059(c).*

d. Appointment of a Guardian ad Litem

A "**guardian ad litem**" is a person appointed by a court to represent the best interests of a child. *Family Code § 107.001(5).* A "guardian ad litem" is **not** the same as an "**attorney ad litem**," which means an attorney who provides legal services to a person, including a child, and owes the person the duties of undivided loyalty, confidentiality and competent representation. *Family Code § 107.001(2).*

Guardian ad Litem

A truancy court may appoint a guardian ad litem if it appears that the child's parent is incapable or unwilling to make decisions in the best interest of the child with respect to the truancy proceedings.

KEY POINT

If a child appears before a truancy court without a parent or guardian, or it appears to the court that the child's parent is incapable or unwilling to make decisions in the best interest of the child with respect to truancy proceedings, then the court may appoint a guardian ad litem to protect the interests of the child in the proceedings. *Family Code § 65.061(a).*

COMMON PITFALL

A truancy court **may** appoint an attorney for the child as the child's guardian ad litem. But the court **may not** appoint a law enforcement officer, a probation officer or an employee

of the truancy court as a guardian ad litem. *Family Code § 65.061(b).*

If a truancy court appoints a guardian ad litem, it may order the child's parent or other person responsible for supporting the child to reimburse the county for the cost of the guardian ad litem. But before issuing such an order the court must first determine that the parent or other responsible person has sufficient financial resources to offset the cost of the child's guardian ad litem wholly or partly. *Family Code § 65.061(c).*

4. The Court *Must* Explain the Child's Rights

KEY POINT

At the beginning of the adjudication hearing, the truancy court must explain to the child, and to the child's parent, guardian or guardian ad litem:

- The allegations made against the child;
- The nature and possible consequences of the proceedings;
- The child's privilege against self-incrimination;
- The child's right to trial and to confront witnesses;
- The child's right to representation by an attorney if the child is not already represented; **and**
- The child's right to a jury trial.

Family Code § 65.101(b).

a. The Child Has a Right to a Jury Trial

A child alleged to have engaged in truant conduct is entitled to a jury trial. *Family Code § 65.007(a).* The right to a jury trial may only be waived using the procedures required by Section 65.008. *Family Code § 65.101(c).* ***See page 16.***

The number of jurors in a truancy case is **six**. *Family Code § 65.007(a) and (b).* A jury verdict must be unanimous. *Family Code § 65.101(c).*

The state and the child are each entitled to three **peremptory challenges**. *Family Code § 65.007(c).* See Chapter 6 of the *Civil Deskbook* and Chapter 4 of the *Trial Notebook* for more on "peremptory challenges."

There is **no jury fee** for a jury trial in a truancy case. *Family Code § 65.007(c).*

b. The Child Cannot be Ordered to Testify

KEY POINT

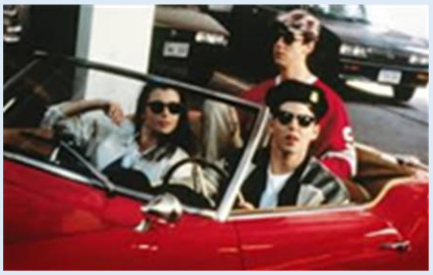
The child may not be ordered to testify and does not have to be a witness at an adjudication hearing or otherwise incriminate themselves. *Family Code § 65.101(e).*

An out of court statement that was obtained in violation of the Texas or United States Constitutions **may not** be used in an adjudication hearing. Also, an out of court statement made by the child is insufficient to support a finding of truant conduct unless it is supported wholly or in part by other evidence. *Family Code § 65.101(e).*

For example, if a child posts a message on Facebook bragging about how they "took a Ferris Bueller day off," a copy of that message by itself is not sufficient to support a finding of truant conduct.

The Facebook message would have to be supported by other evidence – which could be simply the school's attendance records showing that the child did not attend school that day.

Ferris Bueller: Truant?



5. Conducting the Adjudication Hearing

a. Child Alleged to be Mentally Ill

KEY POINT

A party may file a motion to dismiss the petition because the child has a mental illness. *Family Code § 65.065(a).*

If such a motion is filed, the truancy court must temporarily stay the proceedings (that is, suspend the hearing) to determine whether probable cause exists to believe the child has a mental illness. *Family Code § 65.065(a).* In making that determination the court may:

- Consider the motion, supporting documents, professional statements of counsel, and any witness testimony; **and**
- Observe the child.

Family Code § 65.065(a).

Stay of Case if Mental Illness is Alleged

If a child is alleged to have a mental illness, the court must stay the case to determine whether probable cause exists to believe the child has a mental illness. If yes, then the case is dismissed. If no, then the case proceeds.

"Mental illness" means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior. Health & Safety Code § 571.003(14)

If the court determines that probable cause exists to believe the child has a mental illness, the court **must** dismiss the petition. *Family Code § 65.065(b).*

If the court determines that evidence **does not** exist to support a finding that the child has a mental illness, the court **must** continue with the truancy proceedings. *Family Code § 65.065(b).*

b. The Rules of Evidence Do Not Normally Apply

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The Texas Rules of Evidence **do not** apply in an adjudication hearing unless:

- The judge hearing the case determines that a particular rule of evidence applicable

to criminal cases must be followed to ensure that the proceedings are fair to all parties; **or**

- Otherwise provided by Chapter 65 of the Family Code.

Family Code § 65.101(d).

c. The Proceedings May Not be Recorded

If the truancy court is not a court of record, then the proceedings **may not** be recorded. *Family Code § 65.016(a).* Justice courts are not courts of record. Therefore, the proceedings where the truancy court is a justice court must not be recorded. (Some municipal courts are courts of record and where the truancy court is a municipal court of record, the proceedings are recorded.)

d. Public Access to the Proceedings

A truancy court hearing is open to the public **unless** the court, for good cause shown, determines that the public should be excluded. *Family Code § 65.015(a).* For example, the court might find there is good cause to exclude the public if there will be testimony of a sensitive or personal nature that might be harmful to the child if publicly disclosed.

Even though the proceedings are open to the public, the court **may** still exclude a person from attending a hearing if the person is expected to testify at the hearing and the court determines that the person's testimony would be materially affected if the person hears other testimony at the hearing. *Family Code § 65.015(b).* This is the same procedure known as "invoking the rule" in the trial of a civil or criminal case. See Chapter 6 of the *Civil Deskbook* and Chapter 3 of the *Trial Notebook.*

e. When is an Interpreter Required?

KEY POINT

If the court determines that the child, the child's parent or guardian, or a witness does not understand and speak English, an interpreter **must** be sworn to interpret for that person. Any party may move for the appointment of an interpreter, or the court may do so on its own motion. *Family Code § 65.013(a).* The appointment and payment of the interpreter is

done as described in Art. 38.30, Code of Criminal Procedure. See Chapter 6 of the *Criminal Deskbook***.**

If an interpreter is not available to appear in person before the court, then a qualified telephone interpreter may be sworn to provide interpretation services. *Family Code § 65.013(a).*

If a party notifies the court that the child, the child's parent or guardian, or a witness is deaf, then the court **must** appoint a qualified interpreter to interpret the proceedings in any language, including sign language, which the person can understand. *Family Code § 65.013(b).* See Chapter 6 of the *Criminal Deskbook.*

f. Findings by the Court or Jury

At the end of the adjudication hearing the court or the jury must find whether the child has engaged in truant conduct. This finding must be based on competent evidence admitted at the hearing. *Family Code § 65.101(f).*

The child is **presumed to have not engaged in truant conduct**. A finding that the child has engaged in truant conduct may not be made unless the state has proved the conduct beyond a reasonable doubt. *Family Code § 65.101(f).*

Jury Must be Instructed

The jury must be instructed that a finding that a child has engaged in truant conduct may not be made unless the state has proved the conduct beyond a reasonable doubt.

KEY POINT

In all jury cases, **the jury must be instructed** that the burden is on the state to prove that a child has engaged in truant conduct beyond a reasonable doubt. *Family Code § 65.101(f).*

g. The Burden of Proof is Beyond a Reasonable Doubt

The court or a jury **may not** return a finding that a child has engaged in truant conduct unless the state has proved the conduct **beyond a reasonable doubt**. *Family Code § 65.010.*

h. Dismissal or Judgment

If the court or the jury finds that the child **did not** engage in truant conduct, the court **must** dismiss the case with prejudice (meaning the same case may not be filed again). *Family Code § 65.101(g).*

If the court or the jury finds that the child **did** engage in truant conduct, then the court **must** issue a judgment finding the child has engaged in truant conduct. *Family Code § 65.101(h).*

If the court issues a judgment finding the child engaged in truant conduct, the court proceeds to enter an appropriate remedial order for the child and may also enter orders against parents or other persons. See ***page 24*** and ***page 29*** for information on these orders. The jury is **not** involved in ordering remedies for a child who is found to have engaged in truant conduct. *Family Code § 65.101(g).*

F. Motion for New Trial and Appeal

1. Motion for New Trial

The judgment of a truancy court may be contested by filing a motion for a new trial. Rules 505.3(c) and (e) apply to a motion for a new trial, meaning that the motion must be filed within **14 days** of the judgment, and if the judge has not yet ruled, the motion is automatically denied at 5:00 pm on the **21st day after the judgment** (not after the filing of the motion). The judge should grant the motion if it is determined that justice was not done in the original trial. *Family Code § 65.109.* See Chapter 7 of the *Civil Deskbook*.

2. Appeal

Any order of a truancy court may be appealed by the child, the child's parent or guardian, or by the state. *Family Code § 65.151(a).*

A person who is subject to an order under Section 65.105 ("Orders Affecting Parents and Other Persons" - ***see page 29***) may also appeal that order. *Family Code § 65.151(a).*

Where is the Appeal Filed?

An appeal from a truancy court is heard by a juvenile court. The case is tried de novo in the juvenile court (meaning it's a new trial and not based on a record of the original hearing). The judgment of the truancy court is vacated on appeal. *Family Code § 65.151(b).*

What Rules Apply to an Appeal?

An appeal of an order of a truancy court to a juvenile court is governed by Rule 506 of the Texas Rules of Civil Procedure in the same manner as an appeal of a justice court judgment to a county court. **However, an appeal bond *is not* required**. *Family Code § 65.152.* See Chapter 8 of the *Civil Deskbook*.

Attorney for the Appeal

If the child and the child's parent, guardian, or guardian ad litem request an appeal, then the attorney who represented the child before the truancy court, if any, must file a notice of appeal with the court that will hear the appeal and inform the court whether the attorney will handle the appeal. The appeal serves to vacate the order of the truancy court. *Family Code § 65.153.*

G. Remedial Order

1. What is a Remedial Order?

KEY POINT

A remedial order is an order entered by the court requiring a child who has been found to have engaged in truant conduct to take appropriate remedial actions, tailored to the child's circumstances, designed to address the truant conduct. *Family Code §§ 65.102, 65.103.*

Remedial Order

A remedial order is determined by the court and not the jury. The court must pronounce the remedial actions orally in the child's presence and enter them in a written order.

2. Who Determines the Contents of the Remedial Order?

The court, **not the jury**, determines and orders appropriate remedial actions for a child who has been found to have engaged in truant conduct. *Family Code §§ 65.101(h), 65.102.*

The court must orally pronounce the remedial actions in the child's presence **and** enter those actions in a written order that is given to the child and the child's parent, guardian or guardian ad litem. *Family Code § 65.102(b).*

After pronouncing the court's remedial actions, the court must advise the child and the child's parent, guardian or guardian ad litem of the child's right to appeal and the procedures for sealing the child's records. See ***page 23*** and ***page 41***.

3. What May the Court Order the Child to do in a Remedial Order?


KEY POINT

A truancy court may enter a remedial order requiring a child who has been found to have engaged in truant conduct to:

- attend school without unexcused absences;
- attend a preparatory class for the high school equivalency examination if the court determines that the individual is unlikely to do well in a formal classroom environment due to the individual's age;
- if the child is at least 16 years of age, take the high school equivalency examination if that is in the best interest of the child;
- attend a nonprofit, community-based special program that the court determines to be in the best interest of the child, including:
    - an alcohol and drug abuse program;
    - a rehabilitation program;

Remedial Order: Options

The court has a wide range of options in ordering remedial actions designed to address the problems contributing to the truant conduct.

GED

The court may order a child to take the GED exam, but the court may not order the child to get their GED. In other words, the court may not order the child to pass the GED exam but only to take it.

- a counseling program, including a self-improvement program;
- a program that provides training in self-esteem and leadership;
- a work and job skills training program;
- a program that provides training in parenting;
- a program that provides training in manners;
- a program that provides training in violence avoidance;
- a program that provides sensitivity training; **and**
- a program that provides training in advocacy and mentoring;

- complete not more than 50 hours of community service on a project acceptable to the court; **and**

- participate for a specified number of hours in a tutorial program covering the academic subjects in which the child is enrolled that are provided by the school the child attends.

Family Code § 65.103(a).

4. What May the Court *Not* Order the Child to do in a Remedial Order?

The court may **not** order the child to:

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- attend a juvenile justice alternative education program, a boot camp, **or** a for-profit truancy class; **or**

- perform more than 16 hours of community service per week.

Family Code § 65.103(b).

5. Driver's License Suspension

The court may also order DPS to suspend the driver's license or permit of a child who has been found to have engaged in truant conduct. If the child does not have a driver's license or permit, the court may order DPS to deny the issuance of a license or permit to the child. *Family Code § 65.103(c).*

The period of the suspension (or order denying issuance) of the license or permit may not extend beyond the maximum time period that a remedial order is effective. *Family Code § 65.103(c).*

This suspension is imposed as punishment for engaging in truant conduct and is separate from a driver's license suspension that may be imposed as a sanction for finding a child in contempt for failing to comply with a remedial order.
See page 31.

6. How Long is the Remedial Order Effective?


KEY POINT

The remedial order is effective until the **later of:**

- The date specified by the court in the order, which may not be later than the 180th day after the order was entered; **or**
- The last day of the school year in which the order was entered.

Family Code § 65.104.

7. May the Court Modify the Remedial Order?

Yes. The truancy court may hold a hearing to modify any remedy imposed by the court in a remedial order. The remedy may only be modified during the period the order is effective (up to 180 days after the order

Remedial Order: How Long is it Effective?

Suppose a remedial order is entered on October 1, 2021, and the school year ends on May 24, 2022. The order is effective until the later of 180 days (March 30, 2022) or the last day of the school year, so the order is effective until May 24, 2022.

Now suppose a remedial order is entered on April 1, 2022. The order is effective until the later of 180 days (September 28, 2022) or the last day of the school year (May 24, 2022), so the order is effective until September 28, 2022.

was entered or the last day of the school year, whichever is later). *Family Code § 65.108(a).*

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A hearing to modify a remedy imposed by the court **must** be held if requested by the state, the court, or the child and the child's parent, guardian or guardian ad litem, or attorney. The court must give reasonable notice of the hearing to all parties. *Family Code § 65.108(c).*

In considering a motion to modify a remedy, the court may consider a written report from a school district official or employee, a juvenile case manager, or a professional consultant in addition to the testimony of witnesses. The court **must** provide the child's attorney and the truant conduct prosecutor with access to all written materials to be considered by the court.

The court **may** order counsel not to reveal items to the child, or the child's parent, guardian or guardian ad litem if the disclosure would materially harm the treatment and rehabilitation of the child or would substantially decrease the likelihood of receiving information from the same or similar sources in the future. *Family Code § 65.108(c).* For example, if the report contains information about the results of a drug test, the court may order the child's attorney not to disclose the results to the child, or the child's parent, guardian or guardian ad litem.

If the court modifies the remedial order, the court **must** pronounce the changes to the remedy in open court, and specifically state the court's changes to the remedy and the reasons for modifying the remedy in a written order. The court **must** furnish a copy of the order to the child. *Family Code § 65.108(e).*

There is no right to a jury trial on a request for modification of the remedial order. *Family Code § 65.108(b).* Any modification of the remedy is determined solely by the court.

H. Court Costs

If a child is found to have engaged in truant conduct, the truancy court **may** order the child, parent, or other person responsible for the child's support to pay a court cost of $50 to the clerk of the court. Before ordering this court cost to be paid, the court **must** give the

child, parent, or other person a reasonable opportunity to be heard and **must** find that the child, parent, or other person is financially able to pay it. *Family Code § 65.107(a).*

Can the Court Allow Community Service to Satisfy the Court Cost?
Since the court **may not** order this cost paid unless a determination of ability to pay has already been made, there is **no** provision to allow community service instead of this court cost.


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The court's order to pay the $50 in court costs is not effective unless it is reduced to writing and signed by the judge. The order may be included in the remedial order. *Family Code § 65.107(b).*

The clerk must keep a record of the court costs collected and forward the funds to the county treasurer. *Family Code § 65.107(c).*

The court costs must be deposited in a special account that must be used to offset the cost of the operation of the truancy court. *Family Code § 65.107(d).* For example, the account might be used to offset some or all of the costs of serving a summons by personal delivery. ***See page 11.***

I. Orders to Parents and Other Persons


KEY POINT

If a child is found to have engaged in truant conduct, the court may order the child's parent or other persons to do or refrain from doing a wide range of things designed to protect the child's welfare.

Court Must Hold Hearing to Impose an Order

A person subject to such an order is entitled to a hearing before the order is entered. At the hearing, the court may take any of the following actions:

- order the child and the child's parent to attend a class for students at risk of dropping out of school that is designed for both the child and the child's parent;

- order any person found by the court to have, by a willful act or omission, contributed to, caused, or encouraged the child's truant conduct **to do any act** that the court determines to be reasonable and necessary for the welfare of the child **or to refrain from doing any act** that the court determines to be injurious to the child's welfare (for example, the court could order a parent to help a child with their homework every night, or could order a friend who was playing online video games with the child until late at night to stop playing video games with the child);

- prohibit all contact between the child and a person who is found to be a contributing cause of the child's truant conduct, unless that person is related to the child within the third degree by consanguinity or affinity (meaning by blood or marriage), in which case the court may contact the Department of Family and Protective Services, if necessary;

- after notice to, and a hearing with, all persons affected, order any person living in the same household with the child to participate in social or psychological counseling to assist in the child's rehabilitation;

- order the child's parent or other person responsible for the child's support to pay all or part of the reasonable costs of treatment programs in which the child is ordered to participate if the court finds the child's parent or person responsible for the child's support is able to pay the costs;

Remedial Order v. Order Directed to a Parent or Other Person

A remedial order is directed to the child who has been found to have engaged in truant conduct. But the court may also order the child's parent or other persons to do or not do acts that the court determines are appropriate under the circumstances to address the causes of the truancy.

- order the child's parent to attend a program for parents of students with unexcused absences that provides instruction designed to assist those parents in identifying problems that contribute to the child's unexcused absences and in developing strategies for resolving those problems;

- order the child's parent to perform not more than 50 hours of community service with the child. However, on a finding by the court that a child's parents have made a reasonable good faith effort to prevent the child from engaging in truant conduct and that, despite the parents' efforts, the child continues to engage in truant conduct, the court shall waive any requirement for community service that may be imposed on a parent.

Family Code § 65.105.

Court Must Reduce Order to Writing and Serve on the Parent or Other Person
If the court imposes an order on a parent or other person, the order should be reduced to writing and served on the person at the hearing.

J. Contempt Procedure for Child

1. When May the Court Hold a Child in Contempt?

"Direct Contempt" is behavior that occurs in the presence of the court. The judge has personal knowledge of it because the judge either saw it or heard it. See Chapter 3 of the Officeholding Deskbook.


KEY POINT

If a child fails to obey a remedial order issued by a truancy court, **or** if a child is in **direct contempt** of court, the truancy court, after providing notice and an opportunity for a hearing, may hold the child in contempt of court and order **either or both** of the following:

- That the child pay a fine not to exceed $100;
- That DPS suspend the child's driver's license or permit, or if the child does not have a license or permit then order DPS not to issue a license or permit to the child, until the child **fully complies with the court's orders.**

Family Code § 65.251(a).

2. Must the Child be Present in Court to Hold Them in Contempt?

As noted above, the Family Code states that a truancy court may hold a child in contempt of court if the child fails to obey a remedial order or is in direct contempt **"after notice and an opportunity to be heard."** *Family Code § 65.251(a).*

Does this mean that the court just has to send a notice to the child and give the child an **opportunity** to be heard before holding the child in contempt, or does the child have to be physically present in court before the court may hold the child in contempt?

BEST PRACTICE

TJCTC recommends that the best practice is to have the child physically before the court before holding them in contempt. Otherwise, the child may not have actual notice that they have been held in contempt (for example, they may not receive a written notice that is mailed to them) and may not know of the sanctions imposed on them upon a finding of contempt (for example, a driver's license suspension). In addition, if they are present at the contempt hearing the court will have the benefit of any mitigating factors relating to their failure to comply with the remedial order.

KEY POINT

How can the court get the child before it for purposes of a contempt hearing?
We suggest the following steps in progression:

- Send a notice of the contempt hearing to the child and the child's parent, guardian, or guardian ad litem by first class mail.

- Issue a summons and have it served on the child and the child's parent, guardian, or guardian ad litem personally; endorse on the summons an order that the parent bring the child to the court for the contempt hearing.

- Order the parent, guardian, or guardian ad litem to appear and explain why they have not brought the child to the court; if necessary, issue a writ of attachment to bring the parent, guardian or guardian ad litem directly to the court.

- Only as a last resort, and if all of the above methods have failed, issue a writ of attachment to bring the child directly to the court.

3. May the Court Conduct a Contempt Hearing After a Remedial Order Expires?

As discussed above, a remedial order is effective until the date specified in the order, which may not be more than 180 days after the date the order is entered, or the last day of the school year in which the order was entered, whichever is later. *Family Code § 65.104.* ***See page 27.***

What if a child does not comply with a remedial order but it is now more than 180 days after the order was entered or the last day of the school year? Can the court still hold the child in contempt for failing to comply with the remedial order?

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Yes! Even though the remedial order has now expired, the child was required to comply with the remedial actions in the order while it was in effect. If the child failed to do so, the court may hold a hearing to determine whether the child should be held in contempt for not complying with the remedial order. If the court finds the child in contempt, the court may impose a fine of up to $100 or suspend the child's driver's license or permit until the child fully complies with the remedial order. *Family Code § 65.251.* ***See page 31.***

For example, suppose the court orders the child to attend an alcohol and drug abuse program as part of the remedial order, which the court signed on March 1, 2021. The court sets a contempt hearing before August 28, 2021, when the remedial order expires, but the child does not appear for the hearing. The court sets a new hearing for September 5, 2021, and the child appears. Even though the remedial order has now expired, the court may hold the child in contempt for failing to attend the alcohol and drug abuse program and impose a fine of up to $100 and/or order DPS to suspend the child's driver's license or permit (or not issue a driver's license or permit) until the child attends the course. (**Note**: even if the court did not set an initial contempt hearing before August 28, 2021, it could still set a contempt hearing after August 28 and enforce the remedial order through contempt.)

4. When May the Court Refer a Child to Juvenile Probation?

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A truancy court may refer a child to the juvenile probation department, after providing notice and an opportunity for a hearing, if the child fails to obey a remedial order or is in direct contempt of court, and the child has failed to obey an order or been found in direct

contempt of court on two or more previous occasions. *Family Code § 65.251(b).*

However, if the child failed to obey the truancy court order or was in direct contempt of court while 17 years of age or older, the court may not refer the child to juvenile probation. *Family Code § 65.251(b).*

a. How Does a Court Refer a Child to Juvenile Probation?

On referral of the child to the juvenile probation department, the truancy court **must** provide to the juvenile probation department:

- documentation of all truancy prevention measures taken by the originating school district;
- documentation of all truancy orders for each of the child's previous truancy referrals, including:
  - court remedies and documentation of the child's failure to comply with the truancy court's orders, if applicable, demonstrating all interventions that were exhausted by the truancy court; **and**
  - documentation describing the child's direct contempt of court, if applicable;
- the name, birth date, and last known address of the child and the school in which the child is enrolled; **and**
- the name and last known address of the child's parent or guardian.

The juvenile probation department may, on review of this information:

- offer further remedies related to the local plan for truancy intervention strategies; **or**
- refer the child to a juvenile court for proceedings there.

Family Code § 65.251(c) and (d).

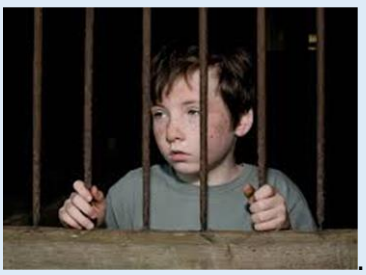
5. May a Court Confine a Child in Jail for Failing to Obey a Remedial Order?

KEY POINT

No. A truancy court may not order the confinement of a child for failing to obey a remedial order. *Family*

Jail is Not an Option…

…for a child who fails to obey a remedial order.



Code § 65.251(e).

K. Contempt Procedure for Parent or Other Person

1. When May the Court Hold a Parent or Other Person in Contempt?

KEY POINT

A truancy court may enforce the following orders by contempt:

- An order that a parent, guardian or guardian ad litem attend an adjudication hearing;
- An order that a person other than a child take a particular action that the court has ordered that person to take under Section 65.015(a) ***(see page 29)***;
- An order that a child's parent or other person responsible for supporting the child reimburse the county for the cost of the guardian ad litem ***(see page 18)***;
- An order that a parent or person other than the child pay the $50 court cost ***(see page 29)***.

Family Code § 65.253(a).

The penalty for a finding of contempt for not complying with any of these orders is a fine of up to $100. *Family Code § 65.253(c).*

A truancy court may also find a parent or other person in **direct contempt** of court. *Family Code § 65.253(b).* In addition to a fine of up to $100, the court may punish a parent or other person (**who is not the child**) for contempt by confinement in jail for a maximum of three days and/or ordering them to perform up to 40 hours of community service. *Family Code § 65.253(c) and (d).* ***See page 31 for a definition and explanation of direct contempt.***

2. Procedures for Contempt for a Parent or Other Person (Not the Child)

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Before holding a parent or other person in contempt the truancy court **must** provide them

with notice of the proposed contempt order and give them a sufficient opportunity to be heard. *Family Code § 65.255(a).*

An order holding a parent or other person in contempt **must** be in writing and a copy of the order **must** be promptly furnished to the parent or other person. *Family Code § 65.255(b).*

The truancy court may require the parent or other person to provide suitable identification to be included in the court's file. Suitable identification includes fingerprints, a driver's license number, a social security number or similar indications of identity. *Family Code § 65.255(c).*

3. Motion for Enforcement

a. What is a Motion for Enforcement?

A motion for enforcement is a motion filed by the prosecutor to enforce a truancy court order against a parent or a person **other than the child.** *Family Code § 65.257(a).*

The truancy court may also initiate a motion for enforcement and use this procedure to enforce one of its orders against a parent or person other than the child **even if** the truant conduct prosecutor does not file a motion for enforcement.

Motion for Enforcement

A motion for enforcement may be filed by a prosecutor or it may be raised by the court on its own motion. It is directed to a parent or person other than the child.

b. What Does a Motion for Enforcement Have to Say?

A motion for enforcement must, in ordinary and concise language:

- Identify the provision of the order allegedly violated and sought to be enforced;
- State specifically and factually the manner of the person's alleged noncompliance;
- State the relief requested; **and**

- Contain the signature of the person filing the motion.

Family Code § 65.257(a).

The prosecutor must allege the particular violation by the person of the truancy court order. *Family Code § 65.257(b).*

c. Setting the Hearing and Giving Notice to the Person


KEY POINT

When a motion for enforcement is filed, the court **must** prepare a written notice setting the date, time and place for the hearing and order the person against whom enforcement is sought to appear and respond to the motion. *Family Code § 65.258(a).*

The notice must be served by personal service or by certified mail, return receipt requested, on or before the 10th day before the date of the hearing on the motion. The notice must include a copy of the motion for enforcement. *Family Code § 65.257(b).*

What if the Person Objects to the Motion?

If the person moves to strike or "specially excepts" to the motion, the court **must** rule on the motion to strike or the special exception before the court hears evidence on the motion. A **special exception** is an objection to an alleged defect in the motion, for example, that it does not state how the person failed to comply with the court's order or contains some material omission. If the court sustains the special exception, the court must give the moving party an opportunity to replead and continue the hearing to a new date and time without requiring additional service on the person against whom the motion has been filed. *Family Code § 65.258(c).*

What if the Person Does Not Appear at the Hearing?

If a person who has been personally served with a notice to appear at the hearing does not appear, the court may issue a warrant for their arrest. The court **may not** hold the person in contempt for failing to appear. *Family Code § 65.258(d).*

Note: the court could also issue a writ of attachment rather than an arrest warrant to have the person brought directly to the court.

What Happens at the Hearing?

The hearing is conducted before the court without a jury. The person against whom enforcement is sought has a privilege not to be called as a witness or otherwise incriminate themselves. *Family Code § 65.259(b) and (c).*

The moving party **must** prove beyond a reasonable doubt that the person against whom enforcement is sought engaged in conduct constituting contempt of a reasonable and lawful court order. *Family Code § 65.259(a).*

COMMON PITFALL

If the person against whom enforcement is sought was not represented by counsel in any previous court proceeding involving a motion for enforcement, the person may, through counsel, assert any defense or affirmative defense to the proceeding that could have been asserted in the previous court proceeding but was not asserted because the person was not represented by counsel. In other words, if someone did not raise a defense previously because they did not have a lawyer, they may still raise that defense now if they are represented by a lawyer. *Family Code § 65.259(e).*

It is also an affirmative defense to enforcement of a truancy court order that the truancy court did not provide the person with due process of law in the proceeding in which the court entered the order. *Family Code § 65.259(f).* For example, a person is entitled to a hearing before the court enters an order against them in a Truant Conduct case. If the court entered an order without a hearing, that would be a violation of their due process rights, and a defense against enforcement of the order.

The Court's Judgment on the Motion for Enforcement

At the conclusion of the hearing on the motion for enforcement, the court is to enter a judgment that includes findings for each violation alleged in the motion for enforcement and the punishment, if any, to be imposed. *Family Code § 65.259(d).*

The punishment the court may impose includes a finding of contempt and a fine of up to $100, confinement in jail for up to three days, **and/or** up to 40 hours of community service. *See Family Code § 65.253.* ***See page 35.***

4. Appeal

A parent or other person who is held in contempt may appeal the contempt order in the same way a party appeals an order from a justice court in a civil case, except that an appeal bond is not required. This means they would have 21 days to appeal. *Rule 506*. The pendency of an appeal does not stay or otherwise affect the proceedings in the truancy court involving the child. *Family Code § 65.256.* See Chapter 8 of the *Civil Deskbook*.

L. Truancy Case Records

1. Expunction

When the current truancy laws went into effect on September 1, 2015, a court in which an individual had been convicted of the former offense of Failure to Attend School under Education Code Section 25.094 or in which a complaint for that offense had been filed, were required to order the expunction from the individual's record of the "conviction, complaints, verdicts, sentences and any other documents relating to the offense, including any documents in the possession of a school district or law enforcement agency." *Code of Criminal Procedure Art. 45.0541(c).*

All justice courts in Texas should have ordered the expunctions of these records shortly after the effective date of H.B. 2398 (the current truancy law) on September 1, 2015. If your court did not do so, please do so promptly or contact TJCTC for assistance.

2. Destruction

As discussed above, after receiving the referral from a school district through the truancy court, the prosecutor may decide not to file a truant conduct petition. If that happens, the court must order the destruction of the referral and all documents relating to the allegations of truant conduct that are held by the court or the prosecutor. *Family Code § 65.203.* ***See page 8.***

3. Confidentiality

Truancy court records and files **must** be maintained as confidential and **may not** be

disclosed to the public. The records may be disclosed only to:

- the judge of the truancy court, the truant conduct prosecutor, and the staff of the judge and prosecutor;
- the child or an attorney for the child;
- a governmental agency if the disclosure is required or authorized by law;
- a person or entity to whom the child is referred for treatment or services if the agency or institution disclosing the information has entered into a written confidentiality agreement with the person or entity regarding the protection of the disclosed information;
- the Texas Department of Criminal Justice and the Texas Juvenile Justice Department for the purpose of maintaining statistical records of recidivism and for diagnosis and classification;
- the agency (note: there is no definition of "agency", but we assume the legislature meant to refer to TEA)**; or**
- with permission of the truancy court, any other person, agency, or institution having a legitimate interest in the proceeding or in the work of the court.

Family Code § 65.202.


KEY POINT

Note that the last exception allows the court to disclose the records to any person having a legitimate interest. This could include people such as military recruiters. This exception **does not** exist for juvenile criminal court records! ***See page 107.***

4. Sealing

a. Who is Entitled to Have Truancy Records Sealed?

A child who has been found to have engaged in truant conduct and **who fully complied**

with the court's remedial order may apply, on or after the child's 18th birthday, to the truancy court that made the finding to seal all records held by the court, the truant conduct prosecutor, and the school district relating to the allegation and finding of truant conduct. *Family Code § 65.201(a).*

b. What Does the Child Have to File?

The child must file an application that includes the following information (or an explanation as to why it is missing):

- The child's full name, sex, race or ethnicity, date of birth, driver's license or identification card number, and social security number;
- The dates on which the truant conduct was alleged to have occurred; **and**
- If known, the cause number assigned to the petition and the court and county in which the petition was filed.

Family Code § 65.201(b).

c. What Does the Court Do to Seal Records?


KEY POINT

Upon determining that the child complied with the remedies ordered by the court in the case, the court must order the records to be sealed. *Family Code § 65.201(c).* The truancy court, the clerk of the court, the truant conduct prosecutor and the school district **must** respond to a request for information concerning a child's sealed truant conduct case by stating that "no record exists with respect to the child." *Family Code § 65.201(e).*

All index references to the records of the truancy court that are ordered sealed **must** be deleted not later than the **30th day** after the date of the order to seal the records. *Family Code § 65.201(d).*

May the Sealed Records be Inspected?

The sealed records may only be inspected if the person who is the subject of the records files a petition with the truancy court requesting a court order permitting inspection. Only persons specifically named in the court's order permitting inspection are allowed to inspect the records. *Family Code § 65.201(f).*

When May the Sealed Records be Destroyed?

On or after the child's 21st birthday, on a motion by the child or on the court's own motion, the court may order the destruction of the sealed records as long as the child has not been convicted of a felony. *Family Code § 65.201(h).*

d. What Effect Does Sealing Records Have on the Child?

A person whose records have been sealed is not required in any proceeding, or in any application for employment, information or licensing to state that the person has been the subject of a truancy proceeding. Any statement that the person has never been found to have engaged in truant conduct may not be used against the person in any civil or criminal proceeding. *Family Code § 65.201(g).*

M. Forms

Forms relating to truancy cases may be found on the TJCTC website by clicking on the Truancy Forms link on the forms page.

N. Flowcharts

Click Here to Open the Truancy Filing Through Hearing Flowchart

Click Here to Open the Truancy Adjudication Hearing Flowchart

O. Exemption from Compulsory School Attendance Statute

Here is the full text of the statute concerning exemptions from compulsory school attendance (Education Code Sec. 25.086):

A child is exempt from compulsory school attendance if the child:

(1) attends a private or parochial school;

(2) is eligible to participate in a school district's special education program and cannot be appropriately served by the resident district;

(3) has a physical or mental condition of a temporary and remediable nature that makes the child's attendance infeasible and holds a certificate from a qualified physician specifying the temporary condition, indicating the treatment prescribed to remedy the temporary condition, and covering the anticipated period of the child's absence from school for the purpose of receiving and recuperating from that remedial treatment;

(4) is expelled in accordance with the requirements of law in a school district that does not participate in a mandatory juvenile justice alternative education program;

(5) is at least 17 years of age and:

(A) is attending a course of instruction to prepare for the high school equivalency examination, and:

(i) has the permission of the child's parent or guardian to attend the course;

(ii) is required by court order to attend the course;

(iii) has established a residence separate and apart from the child's parent, guardian, or other person having lawful control of the child; or

(iv) is homeless; **or**

(B) has received a high school diploma or high school equivalency certificate;

(6) is at least 16 years of age and is attending a course of instruction to prepare for the high school equivalency examination, if:

(A) the child is recommended to take the course of instruction by a public agency that has supervision or custody of the child under a court order; **or**

(B) the child is enrolled in a Job Corps training program;

(7) is at least 16 years of age and is enrolled in a high school diploma program;

(8) is enrolled in the Texas Academy of Mathematics and Science, the Texas Academy of Leadership in the Humanities, the Texas Academy of Mathematics and Science at The University of Texas at Brownsville, or the Texas Academy of International Studies; **or**

(9) is specifically exempted under another law.

Education Code § 25.086.

Chapter 2: Parent Contributing to Non-Attendance Cases

A. What is a Parent Contributing to Non-Attendance Case?

KEY POINT

While a truancy case (the case brought against the child) is now a **civil** case, a parent contributing to non-attendance case remains a **criminal** case. It is a **criminal prosecution** against a parent of a child who has failed to attend school without excuse on ten or more days or parts of days within a six-month period in the same school year. *Education Code §§ 25.093(a), 25.0951(a); Family Code § 65.003(a).*

In a proceeding based on a complaint for the offense of parent contributing to non-attendance (often referred to simply as "*parent contributing*"), the court is therefore to follow the procedures and exercise the powers authorized by Chapter 45 of the Code of Criminal Procedure, except as otherwise provided by Chapter 25 of the Education Code. *Education Code § 25.0952.* See Chapter 11 of the *Criminal Deskbook**.***

1. Where May a Parent Contributing Case Be Filed?

A school district or school official may file a parent contributing complaint in "a justice court of **any precinct in the county** in which the parent resides **or** in which the school is located." *Education Code §§ 25.093(b), 25.0951(b).*

COMMON PITFALL

The complaint therefore does not have to be filed in the **precinct** in which the parent resides or the school is located; it may be filed in **any precinct in the county** as long as the parent resides in that county or the school is located in that county.

2. When Does a Person Commit a Parent Contributing Offense?

The offense occurs if:

- a warning is issued to the parent by the school district in writing at the beginning of the school year notifying the parent that they are subject to criminal prosecution if the student is absent from school on ten or more days or parts of days within a six-month period in the same school year;

- the parent **with criminal negligence** fails to require the child to attend school as required by law; **and**

- the child fails to attend school without excuse on ten or more days or parts of days within a six-month period in the same school year.

Education Code §§ 25.093(a), 25.0951(a).

The fact that a parent did not actually receive a notice at the beginning of the school year **does not** create a defense to a charge of parent contributing, as long as the warning is **issued**. *Education Code § 25.095(c).*

Who is a Parent?

The term "parent" includes "a person standing in a parental relation." *Education Code §§ 25.093(i), 25.0951(b).*

This could include a guardian or a grandparent who is supporting the child.

COMMON PITFALL

At the time it files a complaint for parent contributing to non-attendance, the school district must provide "evidence of the parent's criminal negligence." *Education Code § 25.0951(b).* It is **not** enough "to allege merely that the accused, in committing the offense, acted . . . with criminal negligence." *Code of Criminal Procedure Art. 21.15.*

For example, a petition might allege that a parent dropped their child off at the mall instead of taking them to school; the acts that constitute the criminal negligence must be stated, not just the words "criminal negligence."

At the trial of a parent contributing case, the attendance records of the child may be presented in court by any authorized employee of the school district (or open enrollment charter school). *Education Code § 25.093(e).*

3. What Affirmative Defenses May a Parent Raise?

A parent may raise as an affirmative defense "that one or more of the absences required to be proven . . . was excused by a school official or should be excused by the court." The burden is on the parent "to show by a preponderance of the evidence that the absence

has been or should be excused." *Education Code § 25.093(h).* ***See pages 4-5 for additional discussion of excused absences.***

B. Dismissal of a Parent Contributing Complaint

1. Mandatory Dismissal

KEY POINT

A court **shall** dismiss a parent contributing to non-attendance case if a complaint filed by a school district:

- Does not comply with Section 25.0951 of the Education Code (for example, the school district fails to provide evidence of the parent's criminal negligence);
- Does not allege the elements required for the offense (for example, that the student failed to attend school on ten or more days or parts of days within a six-month period within the same school year);
- Is not timely filed, unless the school district delayed the referral of the child to a truancy court because of the implementation of truancy prevention measures; **or**
- Is otherwise substantively defective (for example, a single complaint is filed against two parents).

BEST PRACTICE

With respect to when a complaint is "timely filed," the statute is not clear. A school district must file a **referral** for a child with a truancy court "within 10 school days of the student's 10th absence." *Education Code § 25.0951(a).*

But a referral only applies to a **student**, not to a parent. The statute does not expressly state that a complaint for parent contributing must be filed

Mandatory v. Discretionary Dismissal of a Parent Contributing Case

A court **must** dismiss a parent contributing case if the complaint does not comply with the Education Code, does not allege the elements of the offense, is not timely or is substantively defective.

A court **may** dismiss a parent contributing case if the court finds there is a low likelihood of recidivism by the defendant or sufficient justification exists for failing to attend school.

within ten school days of the student's tenth absence, and the filing of a referral with a truancy court is not a prerequisite to the filing of a complaint for parent contributing.

Given this ambiguity, TJCTC believes a court **may**, but would **not** be required to, dismiss a complaint that is not filed within ten school days of the student's tenth absence.

2. Discretionary Dismissal


KEY POINT

A court also has discretion to dismiss a parent contributing case if the court finds the dismissal would be in the interest of justice because:

- There is a low likelihood of continued contributing to non-attendance by the defendant; **or**
- Sufficient justification exists for the child's failure to attend school.

Code of Criminal Procedure Art. 45.0531.

To dismiss on these grounds the court should have some evidence before it. For example, the court might find at trial that the parent has taken appropriate action and is making reasonable efforts to keep the child in school.

C. What is the Fine Amount in a Parent Contributing Case?


KEY POINT

A parent contributing to non-attendance offense is a misdemeanor, punishable by fine only, in an amount not to exceed:

- $100 for a first offense;
- $200 for a second offense;
- $300 for a third offense;
- $400 for a fourth offense; **or**
- $500 for a fifth or subsequent offense.

Education Code § 25.093(c).

Each day the child remains out of school may constitute a separate offense. The school district would need to file a new complaint for each separate offense, but two or more offenses may be consolidated and tried in a single action. *Education Code § 25.093(c-1).*

A new absence after the first ten absences could be grounds for a new offense. For

example, offense 1 is based on absences 1-10; offense 2 is based on absences 2-11; offense 3 is based on absences 3-12, etc. The absences **must** all be within a six-month period in the same school year. If there is one new absence and within the prior six months there are not ten absences, then the school district does not have grounds to file a new complaint.

Disposition of Parent Contributing Fines

COMMON PITFALL

The above fine assessed in a parent contributing case is to be deposited with one-half going to the credit of the operating fund of the school district (or open enrollment charter school or juvenile justice alternative education program) and one-half going to the general fund of the county. *Education Code § 25.093(d).*

Child Safety Fund Fine

Additionally, the court must impose a $20 Child Safety Fund fine, which **is not** split with the school district, charter school, or alternative education program, and which **does not** count against the above-described maximum fines. See Chapter 2 of the *Fines, Fees, and Costs Deskbook* for information.

D. What Other Remedies May the Court Impose?

BEST PRACTICE

In addition to a fine, the court may order the parent to attend a program (if one is available) designed to assist parents in identifying problems that contribute to unexcused absences and in developing strategies for resolving those problems. *Education Code § 25.093(f).* The court may order this whether the parent is convicted of the offense or given a deferred disposition under Art. 45.051 of the Code of Criminal Procedure.

If the court orders a deferred disposition under Art. 45.051, then the court may also "require the defendant to provide personal services to a charitable or educational institution as a condition of the deferral." *Education Code § 25.093(c-1).* This **does not** limit any other conditions of deferral the court may impose under Art. 45.051(b).

Contempt is Available…

…if a parent refuses to obey a court order entered **on conviction** in a parent contributing case, such as an order requiring the parent to attend a program to assist parents in resolving the issues causing the child's non-attendance.

KEY POINT

If a parent refuses to obey a court order entered **on conviction** in a parent contributing case, the court may punish the parent for contempt of court under Section 21.002 of the Government Code. *Education Code § 25.093(g)*. Section 21.002(c) provides: "The punishment for contempt of a justice court . . . is a fine of not more than $100 or confinement in the county . . . jail for not more than three days, or both such a fine and confinement in jail."

However, as in any other criminal case, contempt is **not** an option for failing to comply with conditions of deferral. Instead, a show cause hearing should be scheduled. See Chapter 5 of the *Criminal Deskbook*.

Chapter 3: Processing Juvenile Criminal Cases

A. Jurisdiction of Justice Court v. Juvenile Court

1. What Cases Do Justice Courts Hear?

As discussed in Chapter 1, a "child" for purposes of a truancy case means someone who is 12 years of age or older but younger than 19 years of age. ***See page 2***. But for purposes of juvenile criminal cases, a child often means a person who is ten years of age or older but under 17 years of age, or 17 years of age or older but under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. *Family Code § 51.02(2).* And as discussed in subsequent chapters, other ages apply depending upon the nature of the offense (such as with alcohol or tobacco offenses). *See* ***Chapter 4*** *and* ***Chapter 5.***

Generally, a child **cannot** face criminal charges for their conduct. Instead, if a child engages in conduct that violates a criminal law, a juvenile court hears the case as either delinquent conduct or conduct indicating a need for supervision (the two categories of conduct over which a juvenile court has jurisdiction). *Family Code § 51.04(a).*

KEY POINT

But a child **can** be criminally charged with a fine-only misdemeanor offense, such as speeding. And a justice court **does** have jurisdiction over fine-only offenses committed by a "child." *Art. 45.058(h); Family Code § 51.02(2).*

Juvenile criminal offenses that are heard by justice courts include:

- Alcohol offenses ***(see Chapter 4),***
- Tobacco offenses ***(see Chapter 5),***
- Non-truancy school offenses ***(see Chapter 6),***
- Traffic offenses *(*see ***Chapter 7*** of this volume and Chapter 11 of the

Criminal Deskbook),

- Other fine-only misdemeanors, such as public intoxication, disorderly conduct, and graffiti.

2. Transfer of a Case from Justice Court to Juvenile Court

a. Discretionary Transfer

KEY POINT

A justice court **may** transfer any case filed against a child **other than a traffic offense** to a juvenile court. *Family Code § 51.08(b)(2).*

If a complaint is filed in a justice court against a child alleging a fine-only offense other than a traffic offense, and the justice court **does not** transfer the case to the juvenile court, then the justice court **must** notify the juvenile court of the pending complaint and furnish it with a copy of the final disposition of the case. *Family Code § 51.08(c).*

b. Mandatory Transfer – Two Prior Non-Traffic Convictions

If a fine-only offense is filed against a child in justice court and the child has two prior convictions of fine-only offenses other than traffic offenses, then the justice court **must** transfer the case to juvenile court. *Family Code § 51.08(b)(1).*

A prior case that was dismissed under the deferred disposition procedures of Art. 45.051 or under the teen court procedures of Art. 45.052(d) of the Code of Criminal Procedure **does not** count as a prior conviction and therefore does not trigger the mandatory transfer requirement.

KEY POINT

If the justice court has implemented a juvenile case manager program under Art. 45.056, Code of Criminal Procedure ***(see Chapter 9)***, then the mandatory transfer provisions **do not** require transfer and the justice court may retain the case. *Family Code § 51.08(d).*

c. Mandatory Transfer – Mental Illness, Developmental Disability, or Lack of Capacity

A justice court **must** transfer a fine-only offense other than a traffic offense filed against a child to the juvenile court if any court has previously dismissed a complaint against the child on grounds of mental illness, developmental disability, or lack of capacity under Section 8.08, Penal Code. *Family Code § 51.08(f).*

d. Procedure for Transfer to Juvenile Court

If the justice court transfers the case to the juvenile court, then it **must** issue a written order and forward the complaint and all other case documents to the juvenile court. *Family Code § 51.08(a).*

B. Procedural Protections in Juvenile Cases

As a general matter the procedures in Chapter 45 of the Code of Criminal Procedure apply to the prosecution of juveniles in justice court criminal cases. See the *Criminal Deskbook* for more information. However, special requirements apply with respect to pleas, parental presence, notification, and other matters discussed below.

BEST PRACTICE

TJCTC recommends applying these protections based on the age of the defendant **at the time of the offense**, not the current age of the defendant.

1. Pleas in Open Court

KEY POINT

The judge **must** take the defendant's plea in open court if the defendant has not had the disabilities of minority removed **and**:

- Is younger than 17 years of age if they are charged with an offense other than a sexting offense under Penal Code § 43.261; **or**
- Is younger than 18 years of age if they are charged with a sexting offense under Penal Code § 43.261.

Code of Criminal Procedure Art. 45.0215(a).

A justice of the peace may not accept a plea of guilty or plea of nolo contendere from a

defendant in open court unless it appears that the defendant is mentally competent, and the plea is free and voluntary. *Code of Criminal Procedure Art. 45.0241.*


COMMON PITFALL

May an attorney appear without the child present in open court and enter a plea on behalf of the child? **No.**

May the child simply mail in the fine amount or mail in a guilty, nolo contendere or not guilty plea? **No.**

Does a prosecutor have to be present when they enter their plea in open court? **No.**

What if the defendant lives in another county? Can they enter a plea in front of a judge in that county? **Yes,** with permission from the judge of the court with original jurisdiction. *Art. 45.0215(c).*

In the case of an alcohol offense by a minor under the Alcoholic Beverage Code the defendant may not plead guilty or nolo except in open court before a judge. Alcoholic Beverage Code § 106.10. In this case "minor" means less than 21 years old. ***See page 80.***

2. Parental Presence


KEY POINT

The judge **must** also issue a summons to compel the defendant's parent, guardian or managing conservator to be present during the taking of the defendant's plea and all other proceedings relating to the case if the defendant has not had the disabilities of minority removed and:

- Is younger than 17 years of age if they are charged with an offense other than a sexting offense under Penal Code § 43.261; **or**
- Is younger than 18 years of age if they are charged with a sexting offense under Penal Code § 43.261.

Code of Criminal Procedure Art. 45.0215(a).

When the court issues the summons to the parent, the court **must** endorse on the summons an order directing the parent to appear in court personally with the child. The

summons **must** also include a warning that the failure of the parent to appear may result in their arrest and is a Class C misdemeanor. *Code of Criminal Procedure Art. 45.0215(d).*

KEY POINT

If the court is not able to secure the presence of the parent, guardian or managing conservator through the issuance of a summons, then the court may still take the child's plea in open court and proceed against the child without the child's parent, guardian or managing conservator present. *Code of Criminal Procedure Art. 45.0215(b).* If necessary, the court could consider appointing an attorney for the child.

3. Does a Child Have a Right to Have Counsel Appointed?

COMMON PITFALL

No! Every defendant has a right to have counsel **represent** them in justice court; however, this does not mean they have a right to have the court **appoint** counsel. They do not have a right to have counsel appointed to defend a charge in justice court because justice courts can only hear fine-only offenses, meaning non-jailable offenses. Even if the defendant is indigent, or a minor, they do not have a **right** to have counsel appointed to represent them in justice court. ***In the Matter of B.A.M.*** However, the court **does** have the ability (although **not** the duty) to appoint an attorney if needed in the best interest of the child.

4. Notifications Required by the Judge

a. Expunction Rights

The judge **must** inform the child and any parent in open court of the child's expunction rights and give them a copy of Art. 45.0216 of the Code of Criminal Procedure concerning expunctions (see ***page 108*** of this volume and Chapter 10 of the *Criminal Deskbook).*

b. Obligation to Provide Current Address to the Court

KEY POINT

The judge should also inform the child and any parent of their obligation to provide the court in writing with the current address and residence of the child. This obligation **does not** end when the child reaches age 17. If the child or parent change their residence, they have an obligation to inform the court of their new address on or before the seventh day after the date their residence changed.

The obligation to provide this notice of their current address only terminates upon discharge and satisfaction of the judgment or a final disposition that does not require a finding of guilt (such as a dismissal following a deferred disposition or driving safety course). A violation of this obligation may result in arrest and is a Class C misdemeanor. *Code of Criminal Procedure Art. 45.057(h).*

If a county court accepts an appeal from a justice court for a trial de novo, the child and parent must provide the notice of their current address to the county court. *Code of Criminal Procedure Art. 45.057(i).*

The child and parent are entitled to a **written** notice of their obligation to provide the court with their current address. This may be satisfied by giving them a copy of Art. 45.057(h) and (i) of the Code of Criminal Procedure during their initial appearance before the court, or by a peace officer when they give the child a citation or release the child to their parent on the parent's promise to bring the child before the court. *Code of Criminal Procedure Arts. 45.057(j), 45.058(a), 45.058(g-1).*

5. Interpreters

An interpreter **must** be appointed for any party or witness who does not understand and speak the English language or is deaf. *Code of Criminal Procedure Arts. 38.30(a), 38.31.* See Chapter 6 of the *Criminal Deskbook.*

Does the court have to appoint an interpreter for a parent who is summoned to court when the child is a defendant? The Attorney General has said the court **does not** have to do so **unless** the parent is a witness, or the court contemplates imposing an order on the parent ***(see page 69)***. *Attorney General Opinion JC-0584 (2002).*

BEST PRACTICE

The Office of Court Administration (OCA) offers free licensed Spanish interpreters in certain situations and they and interpreters for other languages are available through the Texas Court Remote Interpreter Service (TCRIS). See Chapter 6 of the *Criminal Deskbook.*

6. Mental Capacity of a Child

KEY POINT

The issue of whether or not a child has the mental capacity to commit an offense can be

raised by the defendant, a parent, a prosecutor, **or** by the court on its own motion. If this issue is raised, the judge **must** determine whether probable cause exists to believe the child lacks capacity to:

- understand the proceedings,
- assist in their defense,
- appreciate the wrongfulness of their conduct, **or**
- conform their conduct to legal requirements.

Penal Code § 8.08(a).

If the judge determines that there is probable cause to believe the child lacks mental capacity, the judge may dismiss the complaint after providing notice to the state. *Penal Code § 8.08(b).*

Defendant Under the Age of 15

If a defendant is under the age of 15 years old, they are **presumed** to lack mental capacity except for juvenile curfew or traffic offenses. In such a case the prosecutor **must** prove to the court by a preponderance of the evidence (meaning it is more likely than not) that the child had sufficient capacity to understand that the conduct was wrong at the time the conduct was engaged in. The prosecutor does not have to prove that the child knew the conduct was a criminal offense or the legal consequences of it. The prosecutor may prove the child's capacity by alleging it in the complaint if the child pleads guilty or nolo contendere or by offering evidence at trial. *Penal Code § 8.07(e).*

BEST PRACTICE

If a defendant under the age of 15 charged with an offense other than juvenile curfew or a traffic offense wants to plead guilty and the complaint **does not** contain proof of capacity, then the most cautious approach is to enter a plea of not guilty for the defendant and set the case for trial where the required proof may be presented.

In such a case, if the defendant wants to plead guilty and the complaint **does** contain proof of capacity, then the judge should admonish the defendant to make sure they understand that they are admitting that they understood their conduct was wrong; the court may then proceed with sentencing including any remedial orders or deferred disposition.

C. Appearance and Trial

1. What if the Defendant Fails to Appear and Enter a Plea?

What happens if a juvenile to whom a citation has been issued fails to show up as required by the citation?

a. If the Defendant is Under 17 Years Old

If the defendant is under 17, then the court may take the following steps:


BEST PRACTICE

Summon the Parent and Order Them to Bring the Child
The court may summon the parent and include on the summons an order to appear personally at the hearing with the child. The summons **must** include a warning that the failure of the parent to appear may result in arrest and is a Class C misdemeanor. *Code of Criminal Procedure Art. 45.057(e).*

If the parent fails to appear with the child, **and** a sworn complaint is filed charging the parent with failure to appear, then a warrant may be issued for the parent's arrest. Before issuing a warrant, the court should follow the notice procedures required by Art. 45.014(e) of the Code of Criminal Procedure. See Chapter 3 of the *Criminal Deskbook.*

Issue a Capias to Have the Child Arrested and Brought Directly to the Judge
The court may issue a capias under Arts. 23.01 and 23.04 of the Code of Criminal Procedure to have the child arrested and brought directly to the judge. See Chapter 3 of the *Criminal Deskbook.*

If the judge is not present at the time the child is brought to the court, the child should be released. Before issuing a capias, the court should also follow the notice procedures required by Art. 45.014(e) of the Code of Criminal Procedure. See Chapter 3 of the *Criminal Deskbook.*

What if the Offense is an Education Code Offense?
Note that an arrest warrant **may not** be issued for an Education Code Class C misdemeanor committed when the defendant was under 17 years old. *Education Code §*

37.085. While this statute doesn't expressly prohibit issuance of a capias for these offenses, the procedure for a justice court arrest warrant and a capias are the same.

BEST PRACTICE

Therefore, the most prudent course of action would be to not issue a capias if the offense was an Education Code Class C misdemeanor committed when the defendant was under 17 years old.

Report to Omni if Defendant has a Driver's License

The court may also report the child to Omni if they have a driver's license as with any defendant who fails to appear in response to a citation. See Chapter 3 of the *Criminal Deskbook.*

b. Once the Defendant Turns 17 – Notice of Continuing Obligation

Once a defendant turns 17, the court has additional options to bring the defendant before the court using the notice of continuing obligation procedures explained below. *Code of Criminal Procedure Art. 45.060.*

KEY POINT

What is a Notice of Continuing Obligation?

A notice of continuing obligation is a notice the court may send to a defendant on or after their 17th birthday "to secure the individual's appearance to answer allegations made before the individual's 17th birthday." *Code of Criminal Procedure Art. 45.060(b).*

Provided the court has tried to secure the defendant's appearance before their 17th birthday using "all available procedures," the court may issue a notice to appear by personal service or by mail to the last known address and residence of the defendant. The notice **must** order the individual to appear at a designated time, place, and date to answer the allegations stated in the notice. *Code of Criminal Procedure Art. 45.060(b).*

Warning Contained in the Notice of Continuing Obligation

The notice of continuing obligation **must** contain the following warning in boldfaced type or capital letters:

REQUIRED LANGUAGE

"WARNING: COURT RECORDS REVEAL THAT BEFORE YOUR 17TH BIRTHDAY YOU WERE ACCUSED OF A CRIMINAL OFFENSE AND HAVE FAILED TO MAKE AN APPEARANCE OR ENTER A PLEA IN THIS MATTER. AS AN ADULT, YOU ARE NOTIFIED THAT YOU HAVE A CONTINUING OBLIGATION TO APPEAR IN THIS CASE. FAILURE TO APPEAR AS REQUIRED BY THIS NOTICE MAY BE AN ADDITIONAL CRIMINAL OFFENSE AND RESULT IN A WARRANT BEING ISSUED FOR YOUR ARREST."

What if the Defendant Fails to Appear After Issuance of the Notice?

Failure to appear as ordered by the notice of continuing obligation is a separate Class C misdemeanor. So, if the defendant (who is now 17) fails to appear after receiving the court's notice, they may be charged with a new offense. This offense is in addition to any other FTA ("failure to appear") or VPTA ("violate promise to appear") offense they may be charged with, and it is in addition to the underlying offense. See Chapter 3 of the *Criminal Deskbook* for more information on FTA and VPTA.

Upon the filing of a sworn complaint charging the defendant with the commission of this new offense, a warrant may be issued for their arrest. Since the offense was committed when the defendant was 17, regular criminal procedures would apply. But before issuing a warrant, the court should follow the notice procedures required by Art. 45.014(e) of the Code of Criminal Procedure. *Code of Criminal Procedure Art. 45.060(c).*

2. What if the Defendant Appears and Pleads Not Guilty?

If the defendant appears and pleads not guilty, then the judge should set the case for trial. In a criminal case a defendant is entitled to a jury trial unless they waive their right to a jury in writing. *Code of Criminal Procedure Art. 45.025.*

A prosecutor must be present for trial. The case cannot be prosecuted by a school official, a law enforcement officer or the court. If the prosecutor does not appear for trial when the case is called, the judge may postpone the trial, appoint an attorney pro tem to represent the state or proceed to trial (in which case the defendant will be acquitted because no evidence will be presented by the state). *Code of Criminal Procedure Art. 45.031.*

3. What if the Defendant Doesn't Appear for Trial?

BEST PRACTICE

The court should issue a summons to the child and the child's parent to appear for the trial. The summons should be served either personally or by certified mail. If they do not appear for trial in compliance with the summons, the court may issue a capias under Arts. 23.01 and 23.04 to have the defendant arrested and brought directly to the court for trial. ***See page 58.***

4. What if the Defendant Pleads Guilty or Nolo Contendere or is Convicted After Trial?

If the defendant appears and pleads guilty or nolo contendere, or they are convicted after a trial, then it is the court's obligation to impose a sentence and any orders the court deems appropriate or that are required for certain offenses, such as alcohol and tobacco offenses. See ***page 93*** and ***page 98***.

The court also has the option of suspending the sentence and ordering a deferred disposition which may result in a dismissal of the charge if the defendant fully complies with the conditions of deferral. *Code of Criminal Procedure Art. 45.051.* And in the case of traffic offenses the defendant may have a right to take a driving safety course, or the court may allow a driving safety course, which if completed will also result in the dismissal of the offense. *Code of Criminal Procedure Art. 45.0511.* See Chapter 5 of the *Criminal Deskbook.*

D. Orders of Deferral

When a juvenile pleads guilty or nolo contendere or is convicted of an offense, the judge has several options with respect to the next stage of the proceedings.

The judge may order one of the following which will result in dismissal of the offense if the defendant fully complies with the terms of the court's order:

- A deferred disposition;
- A driving safety course (DSC) if requested by the defendant*;* **or**
- A teen court program if requested by the defendant.

It is always important to understand and keep in mind whether the court's order is for a deferred disposition, driving safety course, teen court program, or an order following a conviction. The consequences and procedures are different in each case as discussed below.

1. Deferred Disposition

a. What is a Deferred Disposition?

KEY POINT

A deferred disposition is a procedure that the court may use for almost any fine-only offense following a plea of guilty or nolo contendere, or upon conviction, in which the court defers further proceedings for up to 180 days and imposes conditions that the defendant must comply with.

If the defendant shows the court that they have complied with the conditions within the time allowed by the court, then the court dismisses the offense. If the defendant fails to show the court that they have complied with the conditions within the time allowed, then the court enters a final conviction and imposes a fine and, in the case of a juvenile, possibly other remedial orders. *Code of Criminal Procedure Art. 45.051.*

Why Allow a Deferral?

A deferral gives the court an opportunity to impose conditions that the defendant must comply with in order to obtain a dismissal of the offense. Having the defendant do the things the court orders often result in a better outcome than simply having the defendant pay a fine. For example, if a person was driving without insurance the court may require as a condition of a deferral that they maintain insurance for the period of the deferral (180 days).

The general procedures for deferred disposition apply to juvenile criminal cases. See Chapter 5 of the *Criminal Deskbook*. See below for some considerations specific to juvenile cases.

b. Examples of "Reasonable Conditions" of Deferral in Juvenile Cases

BEST PRACTICE

While "reasonable conditions" of deferral may vary depending on the offense involved and the defendant's situation and circumstances, reasonable conditions for a juvenile may include:

- Attending a tutoring program;
- Performing community service;
- Lunch detention or lunch tutorial;
- Take courses for the GED;
- Take the GED;
- Attend half day of school on Saturday;
- Attend a teen leadership program;
- Attend a program run by a juvenile case manager;
- Attend a program involving life-coping skills or parenting skills;
- No texting at night (and require submission of cell phone records as proof);
- No video games on school nights;
- Remove TV, cell phone, video games, internet access from child's room;
- Ankle bracelet monitoring device;
- Orders may also be directed to a parent as necessary ***(see page 69)***.

c. If the Defendant is Younger Than 25 and the Offense is a Moving Violation

COMMON PITFALL

If the defendant is younger than 25 years of age and the offense committed by the defendant is a traffic offense classified as a moving violation, then the judge **must, as a condition of the deferral,** require the defendant to complete a driving safety course and may, until June 1, 2023, require the defendant to complete an additional driving safety course designed for drivers younger than 25 years of age.

What is a Moving Violation?

DPS is granted the power to define which offenses are moving violations, and they have done so in the Texas Administrative Code. ***Moving Violation List*** (Once on site, click "Attached Graphic" on that page).

If the defendant holds a provisional license, the judge **must** also order the defendant to take the DPS driving examination as a condition of deferral, even if they were previously examined by DPS. *Code of Criminal Procedure Art. 45.051(b-1).*

Please note: This requirement is separate from the procedure to dismiss a citation under the Driving Safety Course statute. *Code of Criminal Procedure Art. 45.0511(a-1).* For more information on the Driving Safety Course statute, please see Chapter 5 of the *Criminal*

Deskbook and Section 2 below.

d. Why is a Deferred Disposition a Useful Tool in a Juvenile Case?

Deferred disposition can be an effective means of providing meaningful remedies in juvenile cases because of the flexibility it affords the court in imposing conditions of deferral, and because it gives a juvenile the opportunity to obtain a dismissal of the complaint upon meeting those conditions. The fact that the court may impose "any reasonable condition" gives the court great leeway in imposing an effective remedy.


BEST PRACTICE

Deferred disposition is also useful since the court may permit the defendant to perform community service instead of paying court costs or may waive court costs. If the juvenile fully complies with the conditions of deferral the court may elect not to impose the fine. This flexibility, combined with dismissal of the complaint and the right of expunction ***(discussed on page 108)***, offers incentives to juveniles interested in keeping a clean record.

2. Driving Safety Course (DSC)

A justice court may apply Art. 45.011 of the Code of Criminal Procedure and allow a defendant, including a juvenile, to dismiss an offense via a driving safety course (DSC), as long as all of the eligibility requirements of the statute are met, and the offense charged is eligible for DSC dismissal.

If the defendant is under 25, the offense is eligible for DSC dismissal if it:

- is within the jurisdiction of a justice court or a

Payment by TWC of Certain DSC Fees

The Texas Workforce Commission shall on request pay the fees associated with taking a Driving Safety Course for a person who is:

- eligible for a driver 's license fee exemption under Section 521.1811; **or**
- younger than 26 years of age and:
  - was in the managing conservatorship of the Department of Family and Protective Services on the day before the person 's 18th birthday; **or**
  - is a homeless child or youth as defined by 42 U.S.C. Section 11434a.

While the court is not involved in this process, the court may make this information known to any person placed on a deferral or DSC order.

municipal court;

- involves the operation of a motor vehicle; **and**
- is classified as a moving violation.

Code of Criminal Procedure Art. 45.0511(a-1).

For full details of other eligibility requirements and procedures, please see Chapter 5 of the *Criminal Deskbook*.

3. Teen Court Program

A justice court **may** defer proceedings for up to 180 days and permit the defendant to attend a teen court program upon oral or written request if the defendant:

- Is under the age of 18 or enrolled full time in an accredited secondary school in a program leading to a high school diploma;
- Pleads guilty or nolo contendere to the offense in open court with the defendant's parent, guardian or managing conservator present, **and**
- Has not successfully completed a teen court program in the two years preceding the date the alleged offense occurred.

Teen Court Program

A defendant who is less than 18 years of age or is enrolled full time in an accredited secondary school in a program leading to a high school diploma and who wishes to attend a teen court program must plead guilty or nolo to the offense in open court with the defendant's parent, guardian or managing conservator present. *Art. 45.052(a),(2).*

Code of Criminal Procedure Art. 45.052(a).

The teen court program must be approved by the court. *Code of Criminal Procedure, Art. 45.052(b).* The only issue before the teen court is the punishment for the offense since the defendant has pled guilty or nolo. Teen courts have therefore been described as "peer sentencing." ***See Dawson pages 216 – 217***.

If the judge agrees to allow a defendant to attend a teen court program, the proceedings are deferred for not more than 180 days. The defendant must complete the program not later than the 90th day after the date the teen court hearing to determine punishment is held or the last day of the deferral period, whichever is earlier. *Code of Criminal Procedure Art. 45.052(a), (c).*

KEY POINT

Once the defendant presents satisfactory evidence that they have completed the program, the court must dismiss the charge. A dismissed charge may not be part of the defendant's criminal record or driving record or used for any purpose. But if the charge was for a traffic offense, the court **must** report to DPS that the defendant successfully completed the teen court program and the date of completion. *Code of Criminal Procedure Art.45.052(c), (d).*

The court may exempt the defendant from paying ordinary court costs or fees for the offense. The judge may require a defendant who requests a teen court program to pay a reimbursement fee of $10 to cover the costs of the court in administering the program, as well as an additional $10 reimbursement fee to cover the costs of the teen court program itself. A defendant who requests a teen court program and fails to complete it is not entitled to a refund of the reimbursement fees. *Code of Criminal Procedure Art. 45.052(e), (g), (h).*

Each reimbursement fee is $20 in the Texas-Louisiana Border Region which includes these counties: Bowie, Camp, Cass, Delta, Franklin, Gregg, Harrison, Hopkins, Lamar, Marion, Morris, Panola, Red River, Smith, Titus, Upshur and Wood. Code of Criminal Procedure Art. 45.052(e); Govt. Code § 2056.002(e),(2).

E. Orders Upon Conviction

When a child is convicted of an offense, in addition to imposing a fine and court costs *(*see ***page 70*** of this volume and Chapter 2 of the *Fines, Fees, and Costs Deskbook)*, the court may also impose remedial orders directed to the child, the parent, or both. *Code of Criminal Procedure Art. 45.057.*

1. Orders Directed to the Child

BEST PRACTICE

On a finding that a child committed an offense over which the court has jurisdiction, the court may require the child to attend a special program that the court determines to be in the best interest of the child. *Code of Criminal Procedure Art. 45.057(b)(2).*

These measures include programs for the purpose of:

- Rehabilitation;
- Counseling;
- Self-esteem and leadership;
- Work and job skills training;
- Job interviewing and work preparation;
- Self-improvement;
- Parenting;
- Manners;
- Violence avoidance;
- Tutoring;
- Sensitivity training;
- Parental responsibility;
- Community service;
- Restitution;
- Advocacy; **or**
- Mentoring.

Code of Criminal Procedure Art. 45.057(b)(2).

Special Programs

If a special program that the court orders a child to attend upon being convicted of a fine-only misdemeanor involves the expenditure of county funds, the program must have been approved by the county commissioners court. *Code of Criminal Procedure Art. 45.057(b),(2).*

The court may also refer the child or the child's parent to Early Youth Intervention Services under Section 264.302 of the Family Code. *Code of Criminal Procedure Art. 45.057(b)(1).*

a. What if a Child Fails to Comply with an Order Imposed After a Conviction?

Juvenile Contempt Procedure

If a child fails to obey an order of the court imposed after a conviction, including an order to pay a fine and costs *(see page 70)*, under circumstances that would constitute contempt of court, the court, after notice and a hearing, may either:

- Refer the child to the juvenile court for delinquent conduct for contempt of the justice court; **or**
- Retain jurisdiction of the case, hold the child in contempt of court, and order **either or both:**
    - The child to pay a fine not to exceed $500;
    - DPS to suspend the child's driver's license or permit (or deny issuance of a license or permit) until the child **fully complies with the orders of the court.**


KEY POINT

Code of Criminal Procedure Arts. 45.057(f), 45.050(c).


COMMON PITFALL

If the offense occurred before the child's 17th birthday, the court **must** follow the above procedure **even if** the disobedience of the court order occurred after the child turned 17. However, if the violation occurred after the 17th birthday, the court may only retain jurisdiction and may not refer the violation to the juvenile court. *Code of Criminal Procedure Art. 45.050(g).*

Notification to DPS Upon Compliance with Court Order

If the court ordered a license suspension or denial, then once the person complies with the court's orders, the court **must** notify DPS so the driver's license suspension or denial may be lifted. *Code of Criminal Procedure Art. 45.050(f).*

Court Must Send Information to the Juvenile Court upon Referral

If a justice court refers a child to a juvenile court for delinquency proceedings for contempt, the court **must** describe in writing those facts the judge believes constitute contempt of court. *Family Code § 52.04(a).* ***Dawson at page 224***.

The judge **must** also provide all information in the court's possession pertaining to the identity of the child and his address, the name and address of the child's parent, guardian or custodian, the names and addresses of any witnesses, and the child's whereabouts; and when applicable, a complete statement of the circumstances of taking the child into custody. *Family Code § 52.04(a).*

The court should send a copy of its entire file in the case to the juvenile court so it can better evaluate the case. ***Dawson at page 224***.

2. Orders Directed to a Parent


KEY POINT

The court may also require the child's parent **to do any act or refrain from doing any act** that the court determines will increase the likelihood that the child will comply with the orders of the court and that is reasonable and necessary for the welfare of the child.

This may include an order requiring the parent to:

- Attend a parenting class or parental responsibility program; **and/or**
- Attend the child's school classes or functions.

Code of Criminal Procedure Art. 45.057(b)(3).

Who is a Parent?

A **"parent"** includes a person standing in a parental relation, a managing conservator or a custodian. *Code of Criminal Procedure Art. 45.057(a)(3).*

The parent must be present in court for the court to order the parent to take or refrain from taking any action. ***Dawson at page 224***.

If a Parent Fails to Appear for a Hearing…

…after receiving an order to appear, it is a separate Class C misdemeanor. *Code of Criminal Procedure Art. 45.057(g).*

Order to Parent to Pay Cost of Program and Submit Proof of Attendance

The court **may** order a parent, managing conservator, or guardian required to attend a program with a child to pay not more than $100 for the costs of the program. *Code of Criminal Procedure Art. 45.057(c).*

The judge **may** require a child, parent, managing conservator, or guardian required to attend a program, class, or function to submit proof of attendance to the court. *Code of Criminal Procedure Art. 45.057(d).*

Example

For example, suppose a child pleads guilty to a graffiti offense and is given a deferred disposition but fails to comply with the conditions and the court enters a final conviction after a show cause hearing.

The court may, as part of the judgment of conviction, order the child to attend a special program, such as a self-esteem and leadership program or a work and jobs skill training program.

If the child fails to do that, the court may order the parent to take the child to the program or to attend the program with the child. The court could order the parent to take away the child's cell phone or laptop until the child attends the program. The court may order the parent to do or refrain from doing anything the court believes will increase the likelihood the child will comply with the court's order and that is reasonable and necessary for the child's welfare.

a. What if a Parent Fails to Comply with an Order Imposed After Conviction of a Child?


KEY POINT

An order directed to a parent after a child is convicted of an offense in justice court is enforceable by contempt. *Code of Criminal Procedure Art. 45.057(l).*

After notice and an opportunity for a hearing, a justice court has authority to hold a person who is not a child in contempt and impose a fine of up to $100 and/or confinement in jail for up to three days. *Government Code § 21.002(c).* For more information on contempt procedures, please see Chapter 3 of the *Officeholding Deskbook*.

3. Fines and Court Costs

a. Court Must Enter a Written Judgment of Conviction

If a defendant (including a juvenile) is convicted of an offense, the court **must** enter a written judgment of conviction assessing the fine and court costs. *Code of Criminal Procedure Art. 45.041(a).*

How May a Person be Convicted of an Offense?

A person (including a child) may be convicted of an offense by:

- Pleading guilty or nolo contendere;
- Paying a fine in full in an amount accepted by the court;
- A finding of guilt at trial; **or**
- Failing to comply with the conditions of a deferred disposition or driving safety course (following a show cause hearing).

If the offense is a Class C misdemeanor, then the maximum fine is $500. *Penal Code § 12.23.* Most traffic offenses carry a maximum fine of $200. *Transportation Code § 542.401.*

The court **may** also order the defendant to make restitution to any victim of the offense. *Code of Criminal Procedure Art. 45.041(b)(2).*


KEY POINT

All judgments, sentences and final orders **must** be rendered in open court. *Code of Criminal Procedure Art. 45.041(d).*

b. Court's Duty to Inquire About Child's Income or Resources


COMMON PITFALL

During or immediately after imposing a sentence in any case where the defendant enters a plea in open court, the judge **must** inquire whether the defendant has sufficient resources or income to immediately pay all or part of the fine and court costs. *Code of Criminal Procedure Art. 45.041(a-1).* Since a judge must take the plea of any defendant under the age of 17 years old in open court, the judge **must always** make this inquiry if the defendant is a child. ***See page 53.***

A parent is **not** responsible for payment of the fine and court costs imposed on a child. The parent's income or resources **may not** be considered when determining whether a child is able to pay a fine and costs.

c. When Judge Must Consider Alternatives to Immediate Payment


KEY POINT

If the judge determines that the defendant **does not** have sufficient resources or income to immediately pay all or part of the fine and court costs, the judge must determine whether the fine and court costs should be:

- Allowed to be paid at a later date or in specified portions at designated intervals;
- Discharged by performing community service;
- Waived in full or in part; **or**
- Satisfied through any combination of these methods.

Code of Criminal Procedure Art. 45.041(a-1).

The judge **may not** require a defendant who is under the conservatorship of the

Department of Family and Protective Services or in extended foster care as provided by Subchapter G, Chapter 263 of the Family Code, to pay any amount of the fine and costs. Instead of the payment of fine and costs, the judge may require the defendant to perform community service as described in the next section. *Code of Criminal Procedure Art. 45.041(b-6).*

d. Community Service or Payment Plan

Judge May Allow Child to Elect Community Service or Payment Plan

A judge may allow a child to elect at the time of conviction (including at the time an order of deferred disposition is entered) to discharge the fine and court costs by:

- Performing community service; **or**
- Paying the fine and court costs at a later date or in specified intervals.

Code of Criminal Procedure Art. 45.041(b-3).

How Does a Child Discharge a Fine and Court Costs?

The court may allow a child to perform community service to discharge a fine and court costs, or to pay the fine and court costs in installments. The court may also waive all or a portion of the fine and court costs.

If the child elects to do so, they must do so in writing signed by them and, if present, by their parent, guardian or managing conservator. The court must maintain the election as a record of the court and provide a copy to the defendant. *Code of Criminal Procedure Art. 45.041(b-4).*

Court Must Specify Number of Hours of Community Service

KEY POINT

In the judge's order requiring a defendant to perform community service to discharge all or part of the fine and court costs, the judge must specify:

- The number of hours of community service the defendant is required to perform; **and**
- The date by which the defendant must submit to the court documentation verifying the defendant's completion of the community service.

Code of Criminal Procedure Art. 45.0492(c).

COMMON PITFALL

Time Credited toward Fine and Court Costs

A defendant is considered to have discharged **not less than $100** of fines and court costs

for each **eight hours** of community service. *Code of Criminal Procedure Art. 45.0492.* The court may, of course, order **more than $100** credit for each eight hours of community service. For example, the court could order $200, $400, or $600 credit for each eight hours of community service. There is no maximum amount of credit the court may order; there is only a minimum of $100 for each eight hours.

A judge **may not** order a defendant to perform more than 16 hours of community service per week unless the judge determines that requiring the defendant to perform additional hours **does not** impose an undue hardship on the defendant or the defendant's family. *Code of Criminal Procedure Art. 45.0492.*

What Qualifies as Community Service

KEY POINT

The judge may order the defendant to perform community service by attending:

- A work and job skills training program;
- A preparatory class for the high school equivalency examination or similar activity;
- An alcohol or drug abuse program;
- A rehabilitation program;
- A counseling program, including a self-improvement program;
- A mentoring program;
- A tutoring program; **or**
- **Any similar activity**.

Code of Criminal Procedure Arts. 45.041(b-5), 45.049(c), 45.0492(d).

The judge may order the defendant to perform community service for:

- A governmental entity;
- A nonprofit organization or another organization that provides services to the general public that enhance social welfare and the general well-being of the community, as determined by the judge; **or**
- An educational institution.

Code of Criminal Procedure Arts. 45.049(c)(2), 45.0492(d)(2).

An entity that accepts a defendant to perform community service must agree to supervise, either on-site or remotely, the defendant in the performance of the defendant's community service and report on the defendant's community service to the judge who ordered the service. *Code of Criminal Procedure Arts. 45.049(c-1), 45.0492(d-1).*

e. Waiver of Payment of Fine and Court Costs

KEY POINT

The court may waive payment of all or part of a **fine** imposed on a defendant if the court determines that:

- The defendant was a child (less than 17 years old) at the time the offense was committed; **or**
- The defendant is indigent or does not have sufficient resources or income to pay all or part of the fine, and performing community service would be an undue hardship.

Code of Criminal Procedure Art. 45.0491.

In order to waive payment of **court costs**, the above standards apply, except those costs **may** be waived **even if** community service would not be an undue hardship. For more information, see Chapter 8 of the *Criminal Deskbook* and Chapter 2 of the *Fines, Fees, and Costs Deskbook*.

Presumption of Indigence or Inability to Pay

A defendant is presumed to be indigent, or not to have sufficient resources or income to pay all or part of the fine or court costs if the defendant is:

- In the conservatorship of the Department of Family and Protective Services, or was at the time of the offense; **or**
- Designated as a homeless child or youth or an unaccompanied youth, or was at the time of the offense.

Code of Criminal Procedure Art. 45.0491.

4. What if the Defendant Fails to Pay Their Fine and Court Costs?

A justice court can use most options that are generally available in criminal cases to enforce judgments against juveniles for fines and costs. Special rules, discussed below, apply regarding capias pro fines if the offense occurred before the defendant's 17th birthday. Also, note that a person can only be entered into Omni if they currently have a driver's license, so that option will not be effective against many juvenile defendants. For a full description of general options and procedures when a defendant doesn't pay the fine and costs assessed in a case, see the *Criminal Deskbook*, particularly Chapter 8.

KEY POINT

Additionally, a child may be held in contempt for failure to pay fines and costs, as described on *page 67* above. Note that the court **must not** hold someone in contempt for failure to pay if they are unable to pay the fine and costs. Therefore, this is a better option when the fine and costs have been converted to community service, the defendant has failed to do the community service, **and** the community service would not be an undue hardship.

a. Capias Pro Fine When Offense Occurs Before Age 17

KEY POINT

What if the defendant is still under 17?

A justice court may **never** issue a capias pro fine for a child; nor may a judge order the confinement in jail of a child for:

- Failing to pay all or a portion of a fine or court costs imposed for the conviction of an offense punishable by fine only;
- Failing to appear for an offense committed by the child; **or**
- Contempt of another order of the court.

Code of Criminal Procedure Art. 45.050(b).

Capias Pro Fine?

Never issue if defendant is under 17 years old.

May issue if defendant is over 17 years old and convicted of an offense committed before they were 17 **but only after** making findings concerning the necessity of the issuance of the capias pro fine, as well as ability to pay and alternative methods of satisfying the judgment.

What if the Defendant Has Turned 17?

If the defendant is now over the age of 17 and was convicted of an offense that was committed before their 17th birthday, the court may issue a capias pro fine for the defendant but only if:

The court has proceeded under Art. 45.050 to compel the individual to discharge the judgment as described on *page 67* **and** finds that the issuance of the capias pro fine is justified after considering:

- The sophistication and maturity of the individual;
- The criminal record and history of the individual; **and**
- The reasonable likelihood of bringing about the discharge of the judgment through the use of procedures and services currently available to the court.

Code of Criminal Procedure Art. 45.045(b).

The procedures "currently available" to the court would include the measures discussed above, such as community service or a payment plan.

The procedures under Art. 45.050 consist of ordering DPS to suspend the defendant's driver's license (or not issue one) until the defendant complies with a court order.

BEST PRACTICE

In effect, a capias pro fine for an individual who is over the age of 17 and has failed to pay a fine imposed for a conviction when younger than 17 is a means of last resort to be issued only after the court has considered whether the fine may be discharged through community service and/or installment payments and after the court has attempted to obtain payment of the fine by ordering DPS to suspend the individual's driver's license.

5. Chart of Orders Upon Conviction or Deferral of Juvenile Offense

Click Here to Open Juvenile and Parent Orders Chart

Chapter 4: Alcohol Cases

A. Age-Related Alcohol Offenses

The alcohol offenses committed by a minor that a justice court has jurisdiction over are:

Who is a Minor?

When it comes to alcohol offenses, a "minor" is a person under 21 years of age. *Alcoholic Beverage Code § 106.01.*

Purchase of Alcohol by a Minor
A minor commits this offense if they purchase an alcoholic beverage. *Alcoholic Beverage Code § 106.02.*

Attempt to Purchase Alcohol by a Minor
A minor commits this offense if, with specific intent to purchase alcohol, the minor does an act that amounts to more than mere preparation in order to affect the purchase even though the purchase is not successful. *Alcoholic Beverage Code § 106.025.* For example, a minor goes into a convenience store, picks up a six pack of beer, goes to the counter and puts money on the counter to pay for it but the store attendant refuses to sell it.

Consumption of Alcohol by a Minor
A minor commits this offense if they consume an alcoholic beverage. *Alcoholic Beverage Code § 106.04.*

Possession of Alcohol by a Minor
A minor commits this offense if they possess an alcoholic beverage. *Alcoholic Beverage Code § 106.05.*

Misrepresentation of Age by a Minor
A minor commits this offense if they falsely state that they are 21 years of age or older or present any document that indicates that they are 21 years of age or older to a person engaged in selling or serving alcoholic beverages. *Alcoholic Beverage Code § 106.07.*

Driving or Operating Watercraft Under the Influence of Alcohol by a Minor
A minor commits this offense if the minor operates a motor vehicle in a public place, or a watercraft, while having **any detectable amount of alcohol** in the minor's system.

Alcoholic Beverage Code § 106.041.

Public Intoxication by a Minor

A minor commits this offense if they appear in a public place while intoxicated to the degree that they may endanger themselves or another person. *Penal Code § 49.02.*

1. What Defenses May be Raised to an Alcohol Offense?

The defenses listed in this section **do not** result in the court dismissing a criminal case. Instead, the defendant could raise them with the prosecutor in hopes of a motion to dismiss. Or they could be shown at trial, and if so, should result in a judgment of acquittal.

a. Immediate Supervision of Peace Officer

A minor does not commit a **purchase or possession** offense if the minor purchases or possesses the alcoholic beverage under the immediate supervision of a commissioned peace officer engaged in enforcing the Alcoholic Beverage Code. *Alcoholic Beverage Code § 106.02; 106.05.*

For example, it is not an offense if a minor, working under the immediate supervision of a peace officer, purchases alcohol at a convenience store as part of a law enforcement operation to determine whether that store is selling alcohol to minors.

b. Presence of Parent or Other Adult

It is an affirmative defense to a **possession or consumption** offense that the alcoholic beverage was possessed or consumed in the **visible presence** of the minor's adult parent, guardian or spouse. *Alcoholic Beverage Code § 106.04; 106.05.*

c. Possession in Course of Employment

A minor may possess an alcoholic beverage in the course of employment if the employer is a licensee of alcoholic beverages and the employment is not prohibited. *Alcoholic Beverage Code § 106.05(b).* For example, 19-year-old Amy works as a server at Chili's. If someone orders a Presidente Margarita, Amy can deliver it to them without committing

an offense.

d. Request for Emergency Medical Assistance

The offenses of **possession or consumption** by a minor do not apply to a minor who:

- Requested emergency medical assistance in response to the possible alcohol overdose by themselves or another person;
- Was the first person to request medical assistance; **and**
- If the minor made the request for medical assistance for another person:
    - Remained on the scene until the medical assistance arrived; **and**
    - Cooperated with medical assistance and law enforcement personnel.

Alcoholic Beverage Code §§ 106.04(e), 106.05(d).

For example, if a college student under the age of 21 is at a fraternity party, sees another student binge drinking, is the first person to call EMS and remains on the scene and cooperates with EMS and law enforcement, then the student may not be charged with the offense of either possession or consumption of alcohol by a minor.

e. Report of a Sexual Assault

The offenses of possession or consumption by a minor do not apply to a minor who either reports the sexual assault of the minor or another person or is the victim of a sexual assault reported by another person. The defense only applies if the sexual assault occurred at the time the minor was in possession of or consuming an alcoholic beverage and the sexual assault is reported to:

- A health care provider treating the victim;
- A law enforcement official, including campus police; **or**
- A Title IX coordinator or other employee of an institution of higher education responsible for responding to reports of sexual assault.

The defense may not be raised by a minor who commits a sexual assault that is reported. *Alcoholic Beverage Code §§ 106.04(f),(g),(h), 106.05(e),(f),(g).*

f. Tasting Exception

A minor may taste (meaning "to draw into the mouth without otherwise swallowing or consuming") an alcoholic beverage if:

- The minor is at least 18 years old;
- The minor is enrolled in a higher education institution or career school offering a program in culinary arts or wine, beer or distilled spirits;
- The beverage is tasted for educational purposes as part of the curriculum;
- The beverage is not purchased by the minor; **and**
- The service and tasting of the beverage is supervised by a faculty or staff member who is at least 21 years of age.

Alcoholic Beverage Code § 106.16.

g. Therapeutic Purpose Defense to Public Intoxication

It is a defense to prosecution for public intoxication that the alcohol or other substance was administered for therapeutic purposes and as part of the person's professional medical treatment by a licensed physician. *Penal Code § 49.02(b).*

B. Alcohol Case Procedures

1. Guilty or Nolo Plea Must be Taken in Open Court


KEY POINT

A minor (that is, a person under the age of 21 years) **must** plead guilty to any offense under Chapter 106 of the Alcoholic Beverage Code "in open court before a judge." *Alcoholic Beverage Code § 106.10.*

This requirement is separate from the plea and parental presence requirements that apply to a defendant who is younger than 17 years of age, as described on ***pages 53-55***.

Putting these two requirements together means that if a defendant is **younger than 17**, the court **must** take **any** plea (guilty, not guilty or nolo contendere) in open court **and** summon their parents, in **any** criminal case, including **all** age-related alcohol offenses.

But if the defendant is **over 17 but less than 21** years old, the court **must** (for an Alcoholic Beverage Code offense) take a plea of guilty or nolo contendere in open court but the defendant could mail in or deliver to the clerk at the window a plea of not guilty. ***Note that this requirement does not apply to Public Intoxication by a minor, since it is not found in the Alcoholic Beverage Code.***

What About a Nolo Plea?

Section 106.10 of the Alcoholic Beverage Code states that a ***guilty*** plea must be taken in open court before the judge. However, we suggest following this practice for a plea of ***nolo contendere*** as well since the criminal prosecution consequences are the same for a nolo and a guilty plea.

2. Procedure in Age-Related Alcohol Cases *Other Than* DUI by a Minor

a. Jurisdiction and Prior Convictions

All of the alcohol offenses discussed in this section are Class C misdemeanors. *Alcoholic Beverage Code § 106.071(b).* An offense of public intoxication committed by a person younger than 21 years of age is punishable in the same manner as if the minor had committed an offense to which Section 106.071 of the Alcoholic Beverage Code applies (that is, the punishment is the same as if they had committed an offense of purchase, attempt to purchase, consumption, possession or misrepresentation of age). *Penal Code § 49.02(e).*

COMMON PITFALL

However, if it is **alleged in the complaint** charging any of the offenses covered in this section that a minor who is not a child (that is, the minor is at least 17 years old but under the age of 21) has two or more prior convictions of any of these offenses, then the offense is punishable by confinement in jail, which means **a justice court would not have**

jurisdiction to hear the case. *Alcoholic Beverage Code § 106.071(c).*

KEY POINT

For this purpose, a "conviction" includes not only criminal convictions, but also:

- A prior adjudication in juvenile court under Title 3 of the Family Code that the minor engaged in conduct that would constitute an alcohol offense; **or**
- A prior order of deferred disposition, **even if** the case was ultimately dismissed.

Alcoholic Beverage Code § 106.071(f).

Deferrals *Only* Count as Prior Convictions for Purpose of Determining Punishment

Note that this definition of conviction **only** applies when determining prior convictions for punishment. It **does not** apply when determining whether an alcohol awareness class is mandatory, or whether a defendant is eligible for expunction. See ***page 88*** and ***page 108*** for more information.

Deferrals as a Prior Conviction Example

For example, suppose a minor who is not a child (more than 17 but less than 21) is charged with **possession** of alcohol and the complaint shows that the defendant has one prior conviction for **consumption** and one prior **deferred disposition** for **misrepresentation of age**. The defendant would be considered to have two prior convictions. In that case the current offense charging possession is punishable by up to 180 days in jail and a fine of $250 to $2,000. *Alcoholic Beverage Code § 106.071(c).* A justice court **does not** have jurisdiction to hear an offense that is punishable by confinement in jail, and so the case must be dismissed for lack of jurisdiction.

Cannot Consider Prior Convictions That Are Not in the Complaint

It is up to a law enforcement officer or a prosecutor to allege the prior offenses in a charging instrument (for example, a complaint). It is **not** up to the court or the clerk of the court to investigate whether a minor has any prior convictions (including any prior deferred dispositions) of alcohol offenses, and the court may not rely on the results of any such investigation.

What if the Defendant is Under 17?

The "two prior convictions" rule **does not** apply to a defendant who is under the age of 17 and is charged with any of these six alcohol offenses. For example, if a 16 year old is charged with a possession of alcohol offense, and previously plead guilty to a purchase

offense and had a deferred disposition on a consumption offense, the offense would still be a Class C misdemeanor, and a justice court **would** still have jurisdiction to hear the case.

b. Effects of Prior Convictions on Eligibility for Deferred Disposition

Generally, defendants are **not eligible** for deferred disposition on age-related alcohol offenses if they have two prior convictions. *Alcoholic Beverage Code § 106.071(i).* Normally, this would not impact the justice court, since, as discussed above, the court would not have jurisdiction over the case if there are two prior convictions.

However, if the defendant is **under 17**, the court **would** still have the authority to place the defendant on deferred disposition for five of the six offenses discussed here, **even if** they had two or more prior convictions. But the court **may not** grant deferred disposition for the offense of Minor in Consumption if the defendant has **two prior convictions (including deferrals or juvenile adjudications) of Minor in Consumption specifically**. *Alcoholic Beverage Code § 106.04(d).*

Therefore, if a 16-year-old defendant is charged with Minor in Consumption (MIC), and had one prior Minor in Consumption conviction and one prior deferral for Minor in Possession, they **would be eligible** for deferred disposition, since they have only one prior MIC conviction.

c. Community Service Requirement

For the age-related alcohol offenses discussed in this section (purchase, attempt to purchase, consumption, possession, misrepresentation of age, and public intoxication), the court **must** order a minor who is **either** given deferred disposition **or** convicted of an offense to perform community service for:


KEY POINT

- **Not less than eight or more than 12 hours** if the minor **has not** previously been convicted of any of the above-listed alcohol offenses; **or**

- **Not less than 20 or more than 40 hours** if the minor **has** previously been convicted once of any of the above-listed alcohol offenses.

Alcoholic Beverage Code § 106.071(d).

COMMON PITFALL

Again, a "prior conviction" **includes** a prior adjudication in juvenile court under Title 3 of the Family Code and a prior order of deferred disposition for a driving under the influence by a minor offense. *Alcoholic Beverage Code § 106.071(f).*

The community service **must** be related to education about or prevention of misuse of alcohol or drugs, as applicable, if programs or services providing that education are available in the community in which the court is located. If such programs or services are **not** available, then the court may order community service that it considers appropriate for rehabilitative purposes. *Alcoholic Beverage Code § 106.071(e).*

See the chart on ***page 93*** for some ideas regarding alcohol-related community service.

d. Driver's License Suspension

If a minor is **convicted** of an offense of purchase, attempt to purchase, consumption, possession, misrepresentation of age or public intoxication, then the court must order DPS to suspend the driver's license or permit of the minor (or not to issue them a license or permit if they don't have one) for:

KEY POINT

- **30 days** if the minor has not previously been convicted of any of these offenses;
- **60 days** if the minor has one prior conviction of any of these offenses;
- **180 days** if the minor has two or more prior convictions of any of these offenses (the court would only have jurisdiction in this case if the defendant was under 17 years old).

Alcoholic Beverage Code § 106.071(d)(2).

"Prior Conviction"

Remember: A "prior conviction" includes a prior adjudication in juvenile court or a prior deferred disposition for an alcohol offense. *Alcoholic Beverage Code § 106.071(f)*

A driver's license suspension takes effect on the 11th day after the conviction. *Alcoholic Beverage Code § 106.071(h).*

KEY POINT

The court has no authority to order a DL suspension when placing a defendant on deferred disposition.

e. Alcohol Awareness Program

The court **must** order completion of an alcohol awareness program if a defendant is placed on deferred disposition or convicted if the defendant has never been convicted previously of **any** age-related alcohol offense (including DUI by a Minor). For this purpose, a conviction **only** includes a final conviction, **not** a juvenile adjudication or a successfully completed deferred disposition.

The court **may** order the program if the defendant has been previously convicted.

For full details on alcohol awareness programs, please see ***page 88*** and ***page 93***.

3. Procedure in DUI by a Minor (DUIM) Cases

a. Jurisdiction and Prior Convictions

DUI by a Minor (DUIM) is a Class C misdemeanor. *Alcoholic Beverage Code § 106.041(b).*

COMMON PITFALL

However, if it is alleged in the complaint that a minor who is not a child (that is, the minor is at least 17 years old but under the age of 21) has two or more prior convictions of DUI by a Minor, then the offense is punishable by confinement in jail, which means **a justice court would not have jurisdiction to hear the case.** *Alcoholic Beverage Code § 106.041(c).*

Note that **only** DUIM convictions, **not** convictions of other age-related alcohol offenses, count in determining prior offenses for **current DUIM charges**.

For this purpose, a "conviction" includes not only criminal convictions, but also:

- A prior adjudication in juvenile court under Title 3 of the Family Code that the minor engaged in conduct that would constitute an alcohol offense; **or**
- A prior order of deferred disposition, **even if** the case was ultimately dismissed.

Alcoholic Beverage Code § 106.041(h).

Deferrals *Only* Count as Prior Convictions for Purpose of Determining Punishment

Note that this definition of conviction **only** applies when determining prior convictions for punishment. It **does not** apply when determining whether an alcohol awareness class is mandatory, or whether a defendant is eligible for expunction. See ***page 88*** and ***page 93*** for more information.

Cannot Consider Prior Convictions That Are Not in the Complaint

It is up to a law enforcement officer or a prosecutor to allege the prior offenses in a charging instrument (for example, a complaint). It is **not** up to the court or the clerk of the court to investigate whether a minor has any prior convictions (including any prior deferred dispositions) of alcohol offenses, and the court may not rely on the results of any such investigation.

What if the Defendant is Under 17?

The possible jail time **does not** apply to a defendant who is under the age of 17 and is charged with DUI by a Minor, even if they have two prior convictions. Therefore, the justice court **would** still have jurisdiction to hear the case.

b. Effects of Prior Convictions on Eligibility for Deferred Disposition

KEY POINT

The defendant is not eligible for a deferred disposition if the minor has two or more "convictions" – as defined above to include juvenile court adjudications or prior deferred dispositions – of DUI by a Minor. *Alcoholic Beverage Code § 106.041(f).*

If the defendant is **under 17**, a justice court could hear a DUIM offense against a defendant who has two prior DUIM convictions (including juvenile court adjudications or prior deferred dispositions), **but** the court could still not give the defendant a deferred disposition. *Alcoholic Beverage Code § 106.041(f).*

If a defendant is **under 17** and has a current DUIM charge, and had a previous DUIM conviction (including juvenile adjudications or deferrals), and one other age-related alcohol offense conviction, they **would** be eligible for deferred disposition.

c. Community Service Requirement

KEY POINT

For the offense of Driving Under the Influence by a Minor, in addition to any fine and any order to attend an alcohol awareness program (or perform community service in lieu of such a program), the court **must** order a minor who is ***convicted*** of an offense to perform community service for:

- **Not less than 20 or more than 40 hours** if the minor has not previously been convicted of a DUIM offense; **or**

- **Not less than 40 or more than 60 hours** if the minor has previously been convicted of a DUIM offense. *Alcoholic Beverage Code § 106.041(d).*

COMMON PITFALL

Again, a "prior conviction" includes a prior adjudication in juvenile court under Title 3 of the Family Code and a prior order of deferred disposition for a driving under the influence by a minor offense. *Alcoholic Beverage Code § 106.041(h).*

The community service must be related to education about or prevention of misuse of alcohol. *Alcoholic Beverage Code § 106.041(e).* See the chart on ***page 93*** for some ideas regarding alcohol-related community service.

d. No Driver's License Suspension

COMMON PITFALL

The court **does not** order DPS to suspend the driver's license of a minor who is convicted of the offense of Driving Under the Influence by a Minor. This is not necessary because DPS administratively suspends the minor's license at the time they are cited for the offense. However, if the defendant is acquitted of the DUIM offense, then the court **must** notify DPS of the acquittal. *Alcoholic Beverage Code § 106.117(a)(4).*

e. Alcohol Awareness Program

The court **must** order successful completion of an alcohol awareness program if a defendant is placed on deferred disposition or convicted if the defendant has never been convicted previously of **any** age-related alcohol offense. For this purpose, a conviction **only** includes a final conviction, **not** a juvenile adjudication or a successfully completed

deferred disposition.

The court **may** order the program if the defendant has been previously convicted.

For full details on alcohol awareness programs, please see below and ***page 93***.

C. Alcohol Awareness Program

1. Mandatory if Minor with No Prior Convictions is Either Given Deferred or Convicted


KEY POINT

If a minor is given a deferred disposition for **or** convicted of **any** age-related alcohol offenses (that is, purchase, attempt to purchase, consumption, possession, misrepresentation of age, driving under the influence or public intoxication) **and does not** have a prior conviction (***actual convictions, not deferrals or juvenile adjudications***) of one of those offenses, then the court **must** require the minor to attend an alcohol awareness program, a drug education program, or a drug and alcohol driving awareness program. *Alcoholic Beverage Code § 106.115(a).* Effective June 1, 2023, the drug and alcohol driving awareness program will no longer be an option.

Alcohol Awareness Program

Mandatory if defendant is given deferred or convicted of any of the alcohol offenses and has no prior conviction.

Optional if the defendant has a prior conviction.

2. Optional if Minor has Prior Convictions

If a minor **has** been previously convicted (***again, actual convictions, not juvenile adjudications or cases dismissed after deferral***) of one or more of any of those offenses, then the court **may** require the minor to attend an alcohol awareness program, a drug education program, or a drug and alcohol driving awareness program. In this case the court is not required to order attendance at a program, but the court may choose to do so. *Alcoholic Beverage Code § 106.115(a).* Effective June 1, 2023, the drug and alcohol driving awareness program will no longer be an option.

3. When May the Court Require the Parent to Attend the Program with the Minor?

If the minor is under the age of 18 years old, the court may require the parent to attend the alcohol awareness program, drug education program, or drug and alcohol driving awareness program with the minor. *Alcoholic Beverage Code § 106.115(a).* Effective June 1, 2023, the drug and alcohol driving awareness program will no longer be an option.

4. Approval of the Alcohol Awareness Program

The alcohol awareness program or drug education program must be approved and regulated by the Texas Department of Licensing and Regulation under Government Code Chapter 171. The drug and alcohol driving awareness program, available until June 1, 2023, must be approved by the Texas Education Agency. *Alcoholic Beverage Code § 106.115(a).*

5. What if an Alcohol Awareness Program is Not Available?

BEST PRACTICE

If the minor resides in a county with a population of 75,000 or less, and access to an alcohol awareness program is not readily available in the county, then the court:

- May allow the minor to take an online alcohol awareness program; **or**
- May require the minor to perform not less than eight hours of community service related to alcohol abuse prevention or treatment (approved by the Department of Licensing and Regulation).

Examples of an online alcohol awareness program and an online drug and alcohol driving awareness program may be found at these links:

CLICK HERE

http://www.texasaliveteam.org/
http://www.dadaponline.com/state_approval.html
http://www.tabc.texas.gov/public-safety/alcohol-education-resources/

KEY POINT

If the court orders community service as an alternative to an alcohol awareness program, that community service is **in addition to** the community service the court must impose on a minor for an alcohol offense. *Alcoholic Beverage Code § 106.115(b-1).* *See page 93*.

The Department of Licensing and Regulation must create a list of community services related to alcohol abuse prevention or treatment available in each county in the state to which the judge may sentence a defendant as part of the community service requirement. *Alcoholic Beverage Code § 106.115(b-3).*

Community Service as an Alternative to Alcohol Awareness Program

If the court requires community service as an alternative to an alcohol awareness program, that community service is **in addition** to the regular community service the court must impose for an alcohol offense.

CLICK HERE

TLDR Alcohol Education Program

TLDR Database of Approved Programs

Determining Where the Defendant Resides

The court has some flexibility in determining where the defendant resides for purposes of taking an alcohol awareness program. If the defendant is enrolled in an institution of higher education in a county in which access to an alcohol awareness program is readily available, the court may consider the defendant to be a resident of that county. *Alcoholic Beverage Code § 106.115(b-2).*

For example, if a minor lives in Andrews County and an alcohol awareness program is not readily available there but the minor is going to Texas Tech University and an alcohol awareness program is readily available in Lubbock County, the court may consider the minor to be a resident of Lubbock County and allow them to take the alcohol awareness program there.

Otherwise, the defendant's residence is the residence listed on their driver's license or personal identification certificate, or (if they don't have a DL or I.D.), on their voter registration certificate, or on file with the public school district in which they are enrolled.

If the defendant is not enrolled in public school and does not have a DL or ID, the defendant's residence is determined by the court. *Alcoholic Beverage Code § 106.115(b-2).*

6. Proof of Successful Completion of the Program or the Substituted Community Service


KEY POINT

The court **must** require the defendant to present to the court, within 90 days of the date of the final conviction or during the time specified in the deferral order, evidence in the form ordered by the court that the defendant has satisfactorily completed an alcohol awareness program or performed the required hours of community service. The court may extend this period for good cause for up to an additional 90 days if the program was ordered on conviction, or for a period determined by the court if the program was ordered on deferred disposition. *Alcoholic Beverage Code § 106.115(c); Code of Criminal Procedure Art. 45.051.*

If the defendant presents the evidence of compliance within the required period of time, the court may reduce the fine to no less than one-half the amount of the initial fine if the program was ordered on conviction or dismiss the case if the program was ordered on deferred disposition. *Alcoholic Beverage Code § 106.115(c); Code of Criminal Procedure Art. 45.051.*

7. What if the Defendant Does Not Complete the Program or the Substituted Community Service?

If the defendant does not present the evidence of completion of the program or performance of the community service to the court within the required time, the proper process depends on if the order was part of a deferred disposition or was ordered on conviction.

If the order was part of a deferred disposition, the court should hold a show cause hearing, just as with any deferred disposition. If

Driver's License Suspension

The court must order DPS to suspend the defendant's license (or not issue a license) if they fail to complete the program or perform the community service as ordered following conviction.

This driver's license suspension (or denial) is a separate sanction from the driver's license suspension following a conviction of an alcohol offense. ***See page 84***.

the defendant doesn't appear, or fails to show good cause for the failure, the court should convict the defendant, and then may order the successful completion of the awareness program or substituted community service on conviction (and shall order it if this is the first conviction as described above).

If the order was on conviction, then the court **must** order DPS to:

- Suspend the defendant's driver's license or permit for a period not to exceed **six months** (or order DPS to deny issuance of a driver's license or permit if the defendant does not have one); **or**

- If the defendant has previously been convicted of any of the alcohol offenses by minors ***(see page 88)***, suspend the defendant's driver's license or permit for a period not to exceed **one year** (or order DPS to deny issuance of a driver's license or permit if the defendant does not have one); **and**

BEST PRACTICE

- **May** order the defendant or the defendant's parent, managing custodian or guardian to do any act or refrain from doing any act if the court determines that doing the act or refraining from doing the act will increase the likelihood that the defendant will present evidence that they have completed the alcohol awareness program or performed the required community service.

Alcoholic Beverage Code § 106.115(d).

For example, the court could order a parent to drive the minor to an alcohol awareness program or to the location where the minor will perform the community service. Or the court could order the minor not to play any video games and order the parent to deliver to the court all devices on which the minor could play video games (which might include Nintendo devices and even their cell phone) until they have completed the alcohol awareness program or performed the community service.

DPS Notification to Defendant

If the defendant's license is suspended, DPS must send a notice of the suspension (or of the prohibition on issuing a license or permit) to the defendant by first class mail. The notice has to include the date of the suspension or prohibition order, the reason for the

suspension or prohibition and the period of time for the suspension or prohibition. *Alcoholic Beverage Code § 106.115(e).*

D. Alcohol Awareness Program and Community Service Options Chart

Click Here to Open the Alcohol Awareness Program and Community Service Options Chart

E. Chart Showing Penalties for Age-Related Alcohol Offenses

Click Here to Open the Alcohol Offenses Chart

F. Expunction

The right to expunction using the procedures in this section applies to the offense of purchase, attempt to purchase, consumption, possession, misrepresentation of age and driving under the influence by a minor. **These procedures *do not* apply to an arrest or conviction for public intoxication.**

1. Right to Expunction for *Conviction* of Alcohol Offense by Minor


KEY POINT

Any person convicted of only one offense under the Alcoholic Beverage Code while a minor may apply to the court in which they were convicted to have the conviction expunged when they reach the age of 21 years. *Alcoholic Beverage Code § 106.12(a).*

What Counts as a Conviction for Expunction?

For purposes of expunction a prior juvenile adjudication or a prior deferred disposition **do not** count as a conviction.

Therefore, if Johnny Jones has a completed deferred disposition for a minor in possession, and then is convicted of minor in consumption, the MIC **is** subject to expunction.

What Does the Applicant Have to Show?

The application for expunction must contain the applicant's sworn statement that they were not convicted of any violation of the Alcoholic Beverage Code while they were a minor **other than** the one they seek to have expunged. *Alcoholic Beverage Code § 106.12(b).*

What Does the Court Do?

KEY POINT

If the court finds that the applicant was not convicted of any other Alcoholic Beverage Code offense while they were a minor, the court **must** order the conviction, together with all complaints, verdicts, sentences, prosecutorial and law enforcement records, and other documents relating to the offense, to be expunged from the applicant's record. *Alcoholic Beverage Code § 106.12(c).*

After the order is entered, the applicant is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose. *Alcoholic Beverage Code § 106.12(c).*

2. Expunction for Alcohol Offense Arrest *Without a Conviction*

Any person who was placed under arrest (including a non-custodial arrest) for only one Alcoholic Beverage Code offense while a minor **and** who was not convicted of the offense may apply to the court in which the person was charged to have the records of the arrest expunged. *Alcoholic Beverage Code § 106.12(d).*

What Does the Applicant Have to Show?

The application for expunction must contain the applicant's sworn statement that they were not arrested for any violation of the Alcoholic Beverage Code **other than** the one they seek to have expunged. *Alcoholic Beverage Code § 106.12(d).*

What Does the Court Do?

If the court finds that the applicant was not arrested for any other Alcoholic Beverage Code offense while a minor, the court must order all complaints, verdicts, prosecutorial and law enforcement records, and other documents relating to the offense, to be expunged from the applicant's record. *Alcoholic Beverage Code § 106.12(d).*

3. Reimbursement Fee for Expunction for Alcohol Offense by a Minor

The reimbursement fee for an application for expunction of a conviction or arrest for an alcohol offense by a minor is **$30**. *Alcoholic Beverage Code § 106.12(e).*

4. Separate Expunction Procedures in Chapter 55

These expunction procedures under the Alcoholic Beverage Code are separate and distinct from the expunction procedures under Chapter 55 of the Code of Criminal Procedure. See Chapter 10 of the *Criminal Deskbook.*

> ***Separate expunction procedures apply to offenses other than alcohol offenses. See page 100 (tobacco offenses) and page 108 (fine-only misdemeanor offenses) and the Expunction Chart on page 110.***

G. Reporting Requirements

For full information on the court's reporting requirements, please see Chapter 3 of the R*ecordkeeping and Reporting Deskbook*.

1. Reporting to DPS

The court **must** send a notice to DPS of each:

- Conviction of an Alcoholic Beverage Code offense by a minor;
- Order of deferred disposition for an Alcoholic Beverage Code offense by a minor; **and**
- Acquittal of a DUIM offense.

Alcoholic Beverage Code § 106.117(a).

These reporting requirements apply to purchase, attempt to purchase, consumption, possession, misrepresentation of age and Driving Under the Influence by a Minor offenses. **They *do not* apply to a Public Intoxication offense, since it is found in the Penal Code, not the Alcoholic Beverage Code.**

2. Reporting Form

The notice must be in a form prescribed by DPS and contain the driver's license number of the defendant if they have a driver's license. *Alcoholic Beverage Code § 106.117(b).* If you have questions about the process, please contact April Williams at TJCTC and ask for the Helpful Information Contact Sheet. April's email address is ***adw167@txstate.edu***. If April is unavailable, call TJCTC and press 1 for a legal question, and the Legal Department will assist you.

3. Information is Confidential

KEY POINT

This information is confidential and may not be disclosed other than to DPS and to law enforcement agencies and courts to enable them to carry out their official duties. *Alcoholic Beverage Code § 106.117(c) and (d).*

Another law, such as Chapter 58 of the Family Code, that limits collecting or reporting information on a juvenile or minor or requiring destruction of that information does not apply to information collected and reported to DPS under these requirements. *Alcoholic Beverage Code § 106.117(d).*

For other confidentiality requirements please see ***page 40*** (truancy court records), ***page 107*** (juvenile case records) and Chapter 10 of the *Criminal Deskbook* (fine-only misdemeanor cases five years after the date of a conviction or dismissal following a deferred disposition).

4. Reporting to the Alcoholic Beverage Commission

The clerk of the court must submit to the Alcoholic Beverage Commission, **upon request by the Commission**, a notice of a conviction of an alcohol offense by a minor. *Alcoholic Beverage Code § 106.116.*

Chapter 5: Tobacco Offenses

A. What Is a Tobacco Offense?


KEY POINT

An individual **who is younger than 21 years of age** commits an offense if they:

- Possess, purchase, consume or accept a cigarette, e-cigarette, or tobacco product; **or**

- Falsely represent themselves to be 21 years of age or older by displaying false proof of age information (including someone else's) in order to possess, purchase or receive a cigarette, e-cigarette, or tobacco product.

Health & Safety Code § 161.252(a).

This offense is punishable by a fine not to exceed **$100**. *Health & Safety Code § 161.252(d).* The court **must** inform a defendant convicted of a tobacco offense of their right to have the conviction expunged. *Health & Safety Code § 161.252(e).*

E-cigarettes?

Tobacco offenses also apply to e-cigarettes. An e-cigarette is an electronic cigarette or any other device that simulates smoking by using a mechanical heating element, battery, or electronic circuit to deliver nicotine or other substances to the individual inhaling from the device; or a consumable liquid solution or other material that is aerosolized or vaporized during the use of an electronic cigarette or other device described above. *Health & Safety Code § 161.081(1-a).*

B. What are the Defenses?

Performance of Employee's Duties

The offense **does not** apply if an individual younger than 21 years of age possessed the cigarette, e-cigarette or tobacco product in the presence of the employer of the individual if possession or receipt of the e-cigarette or tobacco product is required in the performance of the employee's duties. *Health & Safety Code § 161.252(b).* For example, a 19-year-old who is working at a grocery store may ring up and sell a pack of cigarettes for an adult customer.

Participating in Inspection or Compliance Testing

The offense also does not apply if an individual younger than 21 years of age is participating in an inspection or test of compliance by governmental authorities. *Health & Safety Code § 161.252(c).*

Valid U.S. or State Military ID

Additionally, the offense does not apply if the person is at least 18 years of age, and presents at the time of purchase a valid military identification card of the United States military forces or the state military forces. *Health & Safety Code § 161.252(c-1).*

At Least 18 Years Old on August 31, 2019

Finally, anyone who was at least 18 years of age on August 31, 2019, the day before the minimum age changed from 18 to 21, is "grandfathered in" and the offense **does not** apply to them.

C. Tobacco Awareness Program or Community Service

1. Court Must Require Defendant to Attend Program

KEY POINT

If an individual is convicted of a tobacco offense, the court **must** suspend execution of the sentence and require the defendant to attend an e-cigarette and tobacco awareness program approved by the Commissioner of Health Services. *Health & Safety Code § 161.253(a).*

The court may require the defendant's parent or guardian to attend the e-cigarette and tobacco awareness program with the defendant. *Health & Safety Code § 161.253(a).*

May the Course be in Another Language?

Yes. On request the e-cigarette and tobacco awareness course may be taught in a language other than English. *Health & Safety Code § 161.253(b).*

CLICK HERE

Approved courses may be found at ***https://www.dshs.state.tx.us/tobacco/TYTAP/***.

To locate and register for an approved course, click "license search" at ***the DSHS course database.***

2. Community Service as Alternative to Attending Program


KEY POINT

If the defendant resides in a rural area of the state or an area where access to an e-cigarette and tobacco awareness program is not readily available, the court **must** require the defendant to perform eight to 12 hours of e-cigarette and tobacco-related community service instead of attending an e-cigarette and tobacco awareness program. *Health & Safety Code § 161.253(c).*

3. Proof of Compliance

Not later than the 90th day after the date of a conviction for a tobacco offense, the defendant must present to the court, in the manner required by the court, evidence of satisfactory completion of the e-cigarette and tobacco awareness program or the e-cigarette and tobacco-related community service. *Health & Safety Code § 161.253(e).*

4. Reduction of Fine or Dismissal if Defendant Complies

If the defendant provides proof of compliance within 90 days of the conviction, then the court **must**:

- If the defendant has previously been convicted of a tobacco offense, execute the sentence but at the discretion of the court, the court may reduce the fine imposed to not less than half the fine previously imposed by the court; **or**

- If the defendant has not been previously convicted of a tobacco offense, discharge the defendant and dismiss the complaint filed against the defendant.

Health & Safety Code § 161.253(f).


COMMON PITFALL

When the court discharges a defendant who has not previously been convicted of a tobacco offense, the defendant is released from all penalties and disabilities resulting from the offense **except** that the defendant is considered to have been convicted of the offense if the defendant is subsequently convicted of a tobacco offense after the dismissal. *Health & Safety Code § 161.253(g).*

Does the defendant have to pay court costs if their case is dismissed?

Yes. The deferral and suspension of sentence counts as a conviction for purposes of court

costs. *Local Government Code § 133.101.* The defendant is released from "penalties" resulting from the offense, but court costs are not a penalty. Keep in mind that the defendant may be unable to pay the costs, in which case the court must consider community service and/or waiver. See the *Criminal Deskbook,* particularly Chapter 8, for details on what to do when a defendant cannot pay costs.

D. Expunction

An individual convicted of a tobacco offense may apply to have the conviction expunged once the defendant turns 21. Upon application, the court must order the conviction and any complaint, verdict, sentence, or other document relating to the offense to be expunged from the defendant's record and the conviction may not be shown or made known for any purpose. *Health & Safety Code § 161.255(a).*

The reimbursement fee for filing an application for expunction is **$30**. *Health & Safety Code § 161.255(b).*

E. Tobacco Offenses Flowchart

Click Here to Open the Tobacco Offenses Flowchart

Chapter 6: Non-Truancy School Offenses

A. What Are School Offenses?

KEY POINT

A "school offense" is a Class C misdemeanor other than a traffic offense committed by a child, who is a public school student and is at least 10 years of age and younger than 18 years of age, on property under the control and supervision of a school district. *Education Code § 37.141.*

Some school offenses found in the Education Code include:

- Being a member of, or pledging to become a member, or joining or soliciting another person to become a member of a public school fraternity, sorority, secret society, or gang *(Education Code § 37.121(a))*;

- Possession of an intoxicating beverage for consumption, sale or distribution while on public school grounds (including a building, field or stadium) *(Education Code § 37.122(a));* and

- For a person other than a primary or secondary grade student enrolled in the school: intentionally disrupting, on school property or on public property within 500 feet of school property, the conduct of classes or other school activities *(Education Code § 37.124(a)).*

Please note that the offenses of disrupting the conduct of classes or other school activities *(Education Code § 37.124)* may only be committed by a person who is **not** attending the school where the disruption occurs. For example, if Johnny Jones is a sophomore at Travis High School he cannot commit the offense of disruption of class at Travis High; but if he goes over to Bowie High School and disrupts classes there he can be charged with the offense (subject to graduated sanctions, discussed below).

B. What Procedures Apply to School Offenses?

1. No Citations

COMMON PITFALL

A peace officer, law enforcement officer, or school resource officer **may not** issue a citation to a child (a student who is at least 10 years of age and younger than 18 years of age) who is alleged to have committed a school offense. *Education Code § 37.143(a).*

What if a School Offense Citation is Filed?
Since the Education Code makes a citation an improper charging instrument, a citation **does not** confer jurisdiction on a court if the offense is a school offense committed by a child. Therefore, the judge could dismiss the citation due to lack of subject matter jurisdiction. If your court finds this is occurring, a discussion with the school officer and/or county attorney may be necessary.

2. Graduated Sanctions for Certain School Offenses

A school district that commissions peace officers may develop a system of graduated sanctions that the school district may require to be imposed on a child before a complaint is filed against the child for a school offense of:

- Disrupting the conduct of classes or other school activities under Education Code § 37.124;

- Interfering with the lawful transportation of children under Education Code § 37.126; **or**

- Disorderly conduct through abusive, indecent, profane, or vulgar language, making an offensive gesture, creating a noxious and unreasonable odor by chemical means, abusing or threatening a person, or making unreasonable noise under Penal Code § 42.01(a)(1)-(5).

Education Code § 37.144(a).

The system of graduated sanctions may require:

- A warning letter to the child and the child's parent or guardian;
- A behavior contract;
- The performance of school-based community service by the child; **and**
- The referral of the child to counseling or community or school-based services.

Education Code § 37.144(a).

Graduated sanctions **do not apply** to the school offenses of being a member of a public school fraternity, sorority, secret society, or gang (Education Code § 37.121) or to possession of alcohol on school property (Education Code § 37.122).

3. When May a Complaint for a School Offense be Filed?

If the child fails to comply with or complete the graduated sanctions, or the school district has not elected to adopt a system of graduated sanctions, or the offense isn't one listed in the graduated sanction system, then the school may file a complaint against the child with a criminal court. *Education Code § 37.145.*

4. What Must a Complaint for a School Offense State?

A complaint alleging the commission of a school offense **must**, in addition to the requirements of Art. 45.019 of the Code of Criminal Procedure:

- Be sworn to by a person having personal knowledge of the underlying facts giving rise to probable cause to believe an offense has been committed; **and**

- Be accompanied by a statement from a school employee stating whether the child is eligible for or receives special services and the graduated sanctions, if required, that were imposed on the child before the complaint was filed.

Education Code § 37.146(a).

After a complaint is filed a summons may be issued under Arts. 23.04 and 45.057(e) of the Code of Criminal Procedure requiring the child to appear.

A complaint may include a recommendation from a school employee that the child attend a teen court program if the school employee believes attending a teen court program is in

the best interest of the child. ***For more information on teen court programs, see page 65.***

5. Offense Report and Witness Statements Must be Filed by Law Enforcement

If a law enforcement officer issues a citation (which they may not do for a school offense) or files a complaint as provided in Art. 45.018 of the Code of Criminal Procedure for conduct by a child 12 years of age or older that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district, the officer must submit to the court:

- The offense report;
- A statement by a witness to the alleged conduct; **and**
- A statement by a victim of the alleged conduct, if any.

Code of Criminal Procedure Art. 45.058(i).

A prosecutor **may not** proceed to trial unless the law enforcement officer has complied with this requirement. *Code of Criminal Procedure Art. 45.058(i).*

6. Law Enforcement May Not File a Citation or Complaint for Child Younger Than 12

A law enforcement officer **may not** issue a citation or file a complaint in the manner provided for in Art. 45.018 of the Code of Criminal Procedure for a child under 12 years of age for conduct that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district. *Code of Criminal Procedure Art. 45.058(j).*

A complaint in this situation would have to be filed by the school district under Education Code § 37.145.

Chapter 7: Distracted Driving Offenses by Minors

A. Ban on Wireless Communication Device

1. While Operating Motor Vehicle

A person who is under 18 years of age **may not** operate a motor vehicle while using a wireless communication device, except in case of emergency. *Transportation Code § 545.424(a).*

A "wireless communication device" is a handheld or hands-free device that uses commercial mobile service. *Transportation Code § 545.424(f).*

Peace Officer May Not Stop a Vehicle . . .

. . .or detain the operator for the sole purpose of determining whether the operator of the vehicle has committed this offense. *Transportation Code § 545.242(e).*

KEY POINT

This law covers more than just texting. A person under the age of 18 years old may not **use any** mobile device while driving unless there is an emergency. This means they may not use a cell phone to talk with someone else while driving, even if they are using the device "hands free." Obviously, they also may not use a cell phone to text or take photos (including a selfie) or to look at a map for directions or to search the internet for information.

2. While Operating Motorcycle or Moped

A person under 17 years of age who holds a restricted motorcycle license or a moped license **may not** operate a motorcycle or moped while using a wireless communication device, except in case of emergency. *Transportation Code § 545.424(b).*

This offense **does not** apply to a person licensed by the FCC while operating a radio frequency device other than a wireless communication device.

H.B. 62, passed in the 85th Legislative Session (2017), imposed a ban on the use of a wireless communication device to read, write or send an electronic message while operating a motor vehicle for all persons, but with notable exceptions (for example, to navigate using a GPS, to use an app to obtain traffic and road conditions, to play music or to read a message that the person believes concerns an emergency). Transportation Code § 545.4251(c). See Chapter 11 of the Criminal Deskbook.

B. Fine Amount

This offense is a misdemeanor punishable by a fine of at least $25 and not more than $99. But if it is shown at trial that the defendant has previously been convicted at least one time of this offense (either while driving a motor vehicle or motorcycle or moped), then the offense is punishable by a fine of not less than $100 or more than $200. *Transportation Code § 545.424(g).*

Chapter 8: Juvenile Criminal Case Records

A. Confidentiality

1. What Records are Confidential?

KEY POINT

All records and files relating to a fine-only misdemeanor case against a child (person under the age of 17) **other than a traffic offense** are confidential and may not be disclosed to the public. *Code of Criminal Procedure Art. 45.0217(a).*

The outcome of the proceeding **does not** affect the confidentiality of the records. They **must** be maintained as confidential and **may not** be disclosed to the public if the child was charged with, convicted of, found not guilty of, had a charge dismissed for, or is granted a deferred disposition for a non-traffic fine-only misdemeanor. *Code of Criminal Procedure Art. 45.0217(a).*

Confidentiality applies to all records and files, including those held by law enforcement and information stored by electronic means or otherwise. *Code of Criminal Procedure Art. 45.0217(a).*

2. Who May the Confidential Information be Disclosed to?

The confidential information is open to inspection **only** by:

- Judges or court staff;
- A criminal justice agency;
- DPS;
- An attorney for a party to the proceeding;
- The child defendant;
- The defendant's parent, guardian **or** managing conservator.

Code of Criminal Procedure Art. 45.0217(b).

A "Criminal Justice Agency" . . .

. . .is a federal or state agency that is engaged in and allocates a substantial portion of its annual budget to the administration of criminal justice (for example, DPS); or a campus police department that has obtained an originating agency identifier from the FBI. *Government Code § 411.082(3).*

In addition, information may be provided regarding certain offenses to a school superintendent or person designated by a school superintendent in the school district in which the child is enrolled. This information is provided by law enforcement or a prosecutor, **not** the court. *Code of Criminal Procedure Art. 15.27.*

COMMON PITFALL

Please note that the military or a military recruiter is **not** included among the persons to whom confidential information may be given; but the defendant could obtain the records and give them to a recruiter.

This confidentiality provision is in addition to the general confidentiality provision for all persons in all fine-only misdemeanor cases (including traffic offenses) that applies five years after the date of a conviction or dismissal following a deferred disposition. Code of Criminal Procedure Art. 45.0218; see Chapter 10 of the Criminal Deskbook.

B. Expunctions

1. Which Records May be Expunged?

Alcohol and Tobacco Offenses

Please note that separate expunction eligibility requirements apply to alcohol and tobacco offenses by minors, see ***page 93*** and ***page 100***, respectively, for details.

KEY POINT

If Defendant is Acquitted

Records of a person under 17 years of age relating to a complaint may be expunged if the person was acquitted of the offense. *Code of Criminal Procedure Art. 45.0216(h)(2).*

If Complaint Dismissed

Records of a person under 17 years of age relating to a complaint may be expunged if the complaint was dismissed following a deferred disposition, or teen court, or other law. *Code of Criminal Procedure Art. 45.0216(h)(1)*

If Only One Conviction

Records relating to a conviction may be expunged **on or after a person's 17th birthday** if

the person was convicted of not more than one fine-only misdemeanor offense while the person was a child, or if the person was convicted of only one sexting offense. *Code of Criminal Procedure Art. 45.0216(b).*

2. Procedure and Order of Expunction

The person must make a written request to have the records expunged. If the request is based on only one conviction of a fine-only misdemeanor offense or sexting offense, the request must contain the person's statement under oath that the person was not convicted of any additional fine-only misdemeanor offense while a child or been found to have engaged in conduct indicating a need for supervision for a sexting offense. *Code of Criminal Procedure Art. 45.0216(c), (d).*


KEY POINT

If the court finds those statements to be true, then the court is to order the conviction, together with all complaints, verdicts, sentences, and prosecutorial and law enforcement records, and any other documents relating to the offense, to be expunged from the person's record. *Code of Criminal Procedure Art. 45.0216(f).*

After entry of the expunction order, the person is released from all disabilities resulting from the conviction and the conviction may not be shown or made known for any purpose. *Code of Criminal Procedure Art. 45.0216(g).*

3. Reimbursement Fee

The reimbursement fee for an application for expunction under these circumstances is **$30**. *Code of Criminal Procedure Art. 45.0216(i).*

4. Other Expunction Procedures

As noted above, these expunction procedures **do not** apply to alcohol and tobacco cases involving minors. *Code of Criminal Procedure Art. 45.0216(g).*

They are also separate and distinct from other expunction procedures (including for arrest records) under Chapter 55 of the Code of Criminal Procedure. *Art. 45.0216(j).* See Chapter 10 of the *Criminal Deskbook*.

5. Expunction Chart

Click Here to Open the Expunction Chart

Chapter 9: Juvenile Case Managers

A. What is a Juvenile Case Manager?

A juvenile case manager is a person employed by a justice court (or by a school district or other governmental entity), with the approval of the commissioners court, to:

- Provide services in cases involving juvenile offenders who are before a court, or who are referred to the court by a school administrator for misconduct that would otherwise be within the court's statutory powers prior to a case being filed, with the consent of the juvenile and the juvenile's parents or guardian; **or**

- Assist the court in administering the court's juvenile docket and in supervising the court's orders in juvenile cases, and who may provide prevention services to a child considered at risk of entering the juvenile justice system or intervention services to juveniles engaged in misconduct before cases are filed, excluding traffic offenses.

Jointly Hired Juvenile Case Managers

A justice court may hire its own juvenile case manager or may agree with other justice courts (including justice courts in other counties) or a municipal court to jointly employ a juvenile case manager. *Code of Criminal Procedure Art. 45.056(a)(3).*

Code of Criminal Procedure Art. 45.056(a).

A juvenile case manager may be full or part-time.

B. What are the Advantages of a Juvenile Case Manager?

BEST PRACTICE

A juvenile case manager gives the court the ability to more effectively administer the court's juvenile case docket and supervise its orders in juvenile cases.

For example, the juvenile case manager may inform the judge about the child's home

environment, the child's developmental, psychological and educational status, the child's previous interaction with the justice system and any sanctions available to the court that would be in the best interest of the child. *Code of Criminal Procedure Art. 45.056(j).*

A juvenile case manager may also assist the court in handling the juvenile docket under the court's direction. In some courts, juvenile case managers receive and docket all complaints filed against juveniles and assist the judge in processing those cases, as well as securing the attendance of juveniles and their parents to court proceedings. If directed by the court, case managers can operate deferred disposition programs and assist in the implementation of dispositional orders, such as arranging for community service by juveniles and supervising the juvenile during the deferral period. ***See Dawson page 213***.

A juvenile case manager must receive training in ethics, case planning and management, procedural and substantive law, courtroom proceedings and presentation, services to at-risk youth, local programs, and services for juveniles and how juveniles may access those services, and detecting and preventing abuse, exploitation and neglect of juveniles. *Code of Criminal Procedure Art. 45.056(f).*

If a justice court employs a juvenile case manager, then the court is not required to refer a charge of a non-traffic offense to a juvenile court if the juvenile has two prior convictions for fine only offenses.

The juvenile case manager gives the justice court an additional means of dealing with the habitual juvenile offender so that requiring the juvenile court to be involved is not seen as necessary. But if the justice court does not have a juvenile case manager, then it must refer a charge of a non-traffic offense to a juvenile court if the juvenile has two prior convictions for fine-only offenses. *Family Code § 51.08(b)*; ***See Dawson page 214*** and ***page 52*** of this volume.

C. How is the Juvenile Case Manager Paid?

The court may pay the salary and benefits of the juvenile case manager, as well as the costs of training, travel, office supplies, and other necessary expenses relating to the position, from the Local Truancy Prevention and Diversion Fund, funded by the Local Consolidated Court Cost. *Code of Criminal Procedure Art. 45.056(d); Local Government*

Code § 134.156.

Funding may also be available through the Governor's Office, which can award grants from the State Truancy Prevention and Diversion Fund, which is funded by the State Consolidated Court Cost. *Code of Criminal Procedure Art. 45.056(b); Local Government Code § 133.102.*

For more information on these funds and distribution of costs in criminal cases, please see Chapter 2 of the *Fines, Fees, and Costs Deskbook.*

Chapter 10: Juvenile Detention Hearings

A. What is a Juvenile Detention Hearing?


KEY POINT

A juvenile detention hearing is a hearing to determine whether there is probable cause to believe a child engaged in delinquent conduct or conduct indicating a need for supervision (CINS) and may be held in detention pending a determination by a juvenile court of the charges against the child. *Family Code § 53.01.*

"Child" means a person who is:

- Ten years of age or older and under 17 years of age; **or**
- 17 years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age.

Family Code § 51.02(2).

A child **must** be released unless detention is required by law. *Family Code § 53.02.* A detention hearing is necessary when a child is taken into custody and is not released administratively by an intake officer at a detention facility.

B. Who Conducts the Detention Hearing?

The detention hearing will normally be held by the juvenile court. **But** if the judge of the juvenile court (or any alternate judge designated under Family Code § 51.04) is out of the county or unavailable, then **any magistrate** may conduct a detention hearing. *Family Code § 51.04(f).*

If a magistrate presides at the detention hearing, a determination of unavailability of the juvenile court judge **must** be made. This must be done for the first hearing and all subsequent hearings in the same case. ***See Dawson page 31***.

Who May Conduct the Hearing?

The Attorney General has concluded that any magistrate may be a detention magistrate whether the magistrate is a lawyer or not. *Atty. Gen. Op. No. H-1301 (1978).*

C. When Must the Hearing be Held?

A detention hearing without a jury **must** be held "promptly," but not later than the second working day after the child is taken into custody. If the child is taken into custody on a Friday or Saturday, the detention hearing **must** be held on the first working day after the child was taken into custody. *Family Code § 54.01(a).*

If the child is detained in a county jail or other facility because a certified detention facility is not available, then the detention hearing **must** be held within 24 hours (excluding weekends and holidays) after the child was taken into custody. *Family Code § 54.01(q).*

The detention hearing for a **status offender** or a non-offender who has not been released **must** be held before the 24th hour after the time the child arrived at the detention facility (excluding hours of a weekend or holiday). *Family Code §§ 54.011(a), 53.01(a)(2)(B).*

What is a Status Offender?

A status offender means a child who is accused, adjudicated or convicted for conduct that would not be a crime if committed by an adult. *Family Code § 51.02(15).*

D. Right to Legal Counsel

KEY POINT

Before the first detention hearing, the court **must** notify the child and their parents of the child's right to legal counsel. If the court determines that the child's family is indigent, the court **must** appoint an attorney prior to the initial detention hearing. The child's attorney must then be present at all subsequent detention hearings unless the hearings are waived by the child and the child's attorney. *Family Code §§ 54.01(b), 51.01(a)(1), 51.09.*

E. Notice of the Hearing

Reasonable notice of the hearing **must** be given to the child and, if they can be located, to the parents, guardian, or custodian of the child. A detention hearing may be held without the child's parents if the court has not been able to locate them. If no parent or guardian is

present, the court **must** appoint a lawyer or **guardian ad litem** for the child. *Family Code §§ 54.01(b), (d).*

Guardian Ad Litem

A guardian ad litem acts as the legal representative for the child who is the subject of a lawsuit. The guardian ad litem may be a qualified non-lawyer, such as a volunteer advocate or a lawyer who serves in a dual role as attorney for the child and guardian ad litem. *Family Code Chapter 107.*

F. When May the Child be Detained?

KEY POINT

After a detention hearing is held, a child **must be released unless** the judge finds that the child:

- Is likely to abscond;
- Lacks adequate supervision;
- Lacks a parent or other person to return him or her to court when required;
- Is a danger to himself or may threaten the public safety; **or**
- Was previously adjudicated for delinquent conduct and is likely to commit an offense if released.

Family Code § 54.01(e).

Conditional Release

Release of a juvenile may be conditioned on requirements reasonably necessary to ensure the child's appearance at later court proceedings. Conditions of release **must** be in writing, and a copy must be furnished to the child. If the child is released to an adult, the release must be conditioned on an agreement that the adult will ensure the appearance of the child at a later court proceeding or be subject to an order of contempt. *Family Code §§ 54.01(f), 53.02(d).*

Orders to Parents

A judge may order a child's parent, who is present at the detention hearing, to perform certain acts or omissions specified by the judge that will assist the child in complying with the conditions of release. Such an order must be in writing and a copy furnished to the parent or guardian. The order is enforceable by contempt of court. *Family Code § 54.01(r).*

G. How Long Does the Detention Remain in Effect?

An initial detention order extends to the end of the court case, if there is one, but in no

event for more than 10 working days. If a county does not have a certified detention facility, any subsequent detention orders may extend for up to 15 working days. The reason for holding a detention hearing every 10 (or 15) days is for the juvenile court to determine whether there are sufficient grounds for continued detention of the child. *Family Code § 54.01(h).*

Chapter 11: Resources

TJCTC Truancy Court Information Page: ***http://www.tjctc.org/truancy.html***

Texas Truancy Court Resource Manual (including additional forms):
http://tmcec.com/resources/truancy/texas-truancy-court-resource-manual/

Juvenile Justice Handbook (Texas Attorney General 2020):
https://www.texasattorneygeneral.gov/files/cj/juvenile_justice.pdf

Robert Dawson, ***Texas Juvenile Law for Justice and Municipal Courts*** (2d ed. 2008), and ***Texas Juvenile Law*** (8th ed. 2014 Supplement)

Appendix of Cases

In the Matter of B.A.M., 980 S.W.2d 788 (Tex. App.—San Antonio 1998, pet. denied)