

## **H.B. 2398**

### **Court Jurisdiction and Procedures Relating to School Attendance and the Authority to Establish a Judicial Donation Trust Fund**

**Effective: September 1, 2015**

**TMCEC:** The Texas compulsory school attendance law will be 100 years old next year. To understand the significance of H.B. 2398 requires understanding the history surrounding school attendance. “School attendance was made compulsory in Texas in 1916 and required children between eight and fourteen years of age to attend public school for 60 days during the school year, 80 days the following year, and 100 days each year thereafter. Parents (or persons acting in the parental role) were responsible for ensuring that children complied, and children who declined to attend school could be adjudicated by a juvenile court as habitual truants.” Elizabeth A. Angelone, *The Texas Two Step: The Criminalization of Truancy Under the “Failure to Attend” Statute*, 13 SCHOLAR 433, 447-448 (2011). Although Texas in 1993 became one of only two states in the United States to criminalize non-attendance (i.e., Section 25.094, Education Code - Failure to Attend School), truancy remained a civil matter, handled as conduct indicating a need for supervision (CINS) under Section 51.03(b)(2) of the Family Code. Despite the fact that juvenile courts have jurisdiction over CINS petitions alleging truancy, increasingly few CINS cases are actually adjudicated in juvenile court. Due to cost and efficiency, criminal adjudication of Failure to Attend School has all but usurped CINS petitions alleging truancy. The trend favoring criminal prosecution over the last two decades has begged a fundamental question: why should children in Texas be prosecuted for behavior that for most of our state’s history was neither a crime nor something the public believed should consume limited judicial resources?

Eight pieces of legislation aimed at changing the enforcement of Texas’ compulsory school attendance laws were introduced in the 84th Legislative Session. Most of these bills aimed to refine laws on the books. One sought to have municipal and justice courts handle school attendance in the same manner as a juvenile court (i.e., as conduct indicating need for supervision under Title 3 of the Family Code). None of them passed. It was not until nearly halfway through session that preparations began for drafting legislation that would not only end the “criminalization of truancy” but also creates an entirely new and unique type of court and set of procedures to handle school attendance cases involving children. The legislation, S.B. 106, authored by Senator John Whitmire, was drafted by the Office of Court Administration. S.B. 106 passed the Senate, but failed to survive a vote in the House Juvenile Justice and Family Issues Committee. However, near the end of the session, the text of S.B. 106 was added to H.B. 2398, filed by Representative James White. Identical versions of H.B. 2398 were eventually passed by the House and the Senate. Governor Greg Abbott signed the bill into law on June 18, 2015.

H.B. 2398 is nearly 125 pages long and consists of 44 sections. It is a complicated piece of legislation. The first 26 sections mostly make conforming changes to accommodate Section 27, which is nearly 30 pages long and the heart of the bill. It contains a new Title 3A and Chapter 65 of the Family Code, Truancy Court Proceedings. With the exception of Section 31, Judicial Donation Trust Funds, the remaining sections, for the most part, are additional conforming changes to what may be considered one of the most significant changes in Texas juvenile law since the passage of Title 3, The Juvenile Justice Code in 1973 and its revision in 1995.

## **Section by Section Analysis:**

### **Sections 1 and 4: Interlocal Agreements**

Under Article 4.14 of the Code of Criminal Procedure, municipalities may enter into interlocal agreements to share jurisdiction between municipal courts for certain offenses. Additionally, some local governments have interlocal agreements for the employment of juvenile case managers (JCMs). Because of the repeal of the criminal nonattendance offense by children, Failure to Attend School (Section 25.094, Education Code), cities may no longer share jurisdiction over Failure to Attend School cases. Municipalities may, however, jointly employ JCMs with “any appropriate governmental entity,” or “jointly contribute to the costs of a [JCM] employed by one government entity” (Article 45.056(a), Code of Criminal Procedure).

### **Sections 3 and 38: Dismissal of the Offense of Parent Contributing to Nonattendance and Expunction for the Former Offense of Failure to Attend School**

Chapter 45 of the Code of Criminal Procedure is amended by the addition of two articles.

Under Article 45.0531, a county, justice, or municipal court, notwithstanding any other law, may dismiss a charge alleging Parent Contributing to Nonattendance (Section 25.093, Education Code) if the court finds it would be in the interest of justice because there is a low likelihood of recidivism or sufficient justification exists for the failure to attend school.

Article 45.0541 (Expunction of Failure to Attend School Records) provides that an individual who has been convicted of the former offense of Failure to Attend School, or who has had a complaint dismissed, is entitled to an expunction, regardless whether the person petitions for the expunction. The \$30 fee authorized in 103.021(20-b) of the Government Code to defray the cost of notifying state agencies of orders of expunction is repealed. No new expunction fee is authorized.

**Note:** Section 3 of H.B. 2398 may prove controversial. The dismissal authorized under Article 45.0531 is without statutory precedent and arguably allows for the subjective abuse of discretion by judges. The expunction under Article 45.0541 must be performed regardless of whether the person petitions, and without payment of any fee to defray the cost of notifying state agencies. While it may be the intent of Article 45.0541 to eliminate any proof that Texas once criminally enforced school attendance laws against children, another provision in the bill (Section 42) appears to create a conflict. Section 42 explicitly provides that the changes in law apply only to an offense committed or conduct that occurs after the effective date, September 1, 2015, after which date no further Failure to Attend School charges may be filed. The former expunction provision, 45.055 of the Code of Criminal Procedure, is also repealed. However, it is continued in effect for offenses committed and conduct which occurred prior to September 1, 2015, per Section 42 of this bill.

## **Sections 5 and 37: Court Costs for Child Safety Fund in Municipalities**

Article 102.021 of the Government Code gives courts permission to collect the \$20 Child Safety Fund court cost, currently applicable to “an offense of truancy or contributing to truancy,” as defined under Article 102.014 of the Code of Criminal Procedure, which refers to convictions for offenses under Section 25.093 (Parent Contributing to Nonattendance) and Section 25.094 (Failure to Attend School) of the Education Code. H.B. 2398 removes references to the repealed Failure to Attend School offense, and changes the phrase “contributing to truancy” to now read “parent contributing to student nonattendance.”

## **Sections 6 and 15: High School Equivalence Exam, as Ordered by Truancy Court**

Sections 7.111 and 29.087 of the Education Code are amended to reflect the creation of truancy courts and the authority of such a court to order a person, if the person is 16 years of age or older and does not have a high school diploma, to take the high school equivalency exam.

## **Section 7: Compulsory School Attendance**

Section 25.085 of the Education Code requires students to attend school. H.B. 2398 makes several amendments to this section. All persons are required to attend school until their 19th birthdays, rather than 18th. Those who voluntarily enroll in school after their 19th birthdays shall attend, and may not have their enrollments revoked on a day in which they are present in school. Students enrolled after age 19 are not subject to rules regarding truant conduct under new Section 65.003 of the Family Code. After the third unexcused absence of a student older than age 19, the school district shall issue a warning letter, regarding revocation of enrollment after five such absences. As an alternative to revocation of enrollment, a school district may impose a behavior improvement plan.

**Note:** In 2011, the Texas Legislature decided that students age 18 or older could not be criminally prosecuted for failing to attend school. Under the new law, 18 year olds can be petitioned for truant conduct as long as the petition is filed before the individual’s 19th birthday.

## **Section 8: Powers and Duties of Peace Officers Serving as Attendance Officers**

Under the amended Section 25.091 of the Education Code, an attendance officer may refer a student to truancy court for unexcused absences described in Section 65.003(a) of the Family Code. The officer may not take a student into custody, nor contact a peace officer to take a student into custody, regardless of whether the attendance officer is a peace officer.

**Note:** Believe it or not, in some Texas locales, law enforcement are utilized to get recalcitrant children out of bed, and in others, they pick truant kids up on the street and take them to school. With the repeal of both Failure to Attend School and truancy as a subset of CINS, Texas peace officers are unable to take a child into custody with the permission of the student’s parent or in obedience to a court order. Notably, however, Section 25.091(b-1) of the Education Code still authorizes a peace officer who has probable cause to believe that a child is in violation of the

compulsory school attendance law to take the child into custody for purposes of returning the child to school to comply with school attendance requirements.

### **Section 9: Truancy Prevention Measures**

Under current law, Section 25.0915 of the Education Code requires a school district to adopt truancy prevention measures. H.B. 2398 increases the requirements for these measures, and expands the range of measures available to schools. School districts are directed to adopt truancy prevention measures for students, prior to absences constituting truant conduct under Chapter 65 of the Family Code. These measures may include: a behavior improvement plan; school-based services; referral to counseling, mediation, mentoring, a Teen Court program; or community-based, in-school, or out-of-school services. Referrals to truancy court must be accompanied by a statement that the school employed truancy prevention measures. Referrals to truancy court must be dismissed if the court determines that the school did not comply with these requirements, did not timely file the referral, or the referral is otherwise defective. A school district shall employ a truancy prevention facilitator or juvenile case manager to implement truancy prevention measures, and that person shall meet at least annually with a case manager or other individual designated by a truancy court. Instead of a truancy prevention facilitator or juvenile case manager, a school district may designate an existing district employee to perform this function. TEA shall adopt rules regarding truancy prevention measures, best practices, and sanctions for noncompliance.

**Note:** Section 25.0915 (Truancy Prevention Measures) is the last remnant of the Truancy/Failure to Attend School era. Data from the Office of Court Administration suggests that they have successfully reduced the number of school attendance cases since 2011. Moving forward into the new era of truant conduct and truancy courts, Section 25.0915 will play even more of a pivotal role in school attendance cases. Truancy prevention measures are mandatory when a student fails to attend school without excuse on three or more days (or part of days) within a four-week period. In essence, this is in lieu of what is commonly referred to as discretionary filing under Section 25.094(a)(3) of the Education Code. The list of prevention measures has been expanded to include more concrete measures such as mediation and Teen Court. The requirements of the statute are more substantial and exact. This is intended to further reduce the number of school attendance cases involving children referred to the legal system. As amended, truancy prevention measures will play the role currently played by deferred disposition and school attendance orders imposed by courts. A trip to court and a face-to-face visit with a judge is no longer an immediate option.

### **Section 10: Uniform Truancy Policies**

Under the amended Section 25.0916 of the Education Code, a county with two or more courts hearing truancy cases and two or more school districts must either have adopted a “uniform truancy policy” under this section, or the county judge and the mayor of the municipality with the greatest population (or their designees) must assemble a committee. To assemble the committee, each shall appoint one representative of each of the following: a juvenile court; a municipal court; the office of a justice of the peace; the superintendent of an independent school district; the office of the prosecutor with original truancy jurisdiction in the county; the general

public; and an open-enrollment charter school if one exists. In addition to those, the chief juvenile probation officer, the judge, and the mayor, or their appointees, and such other additional members as are necessary shall serve. The committee shall recommend a uniform truancy policy. Compliance with that policy is voluntary.

**Note:** Make sure to share this section of the bill with your mayor regardless if you anticipate hearing school attendance cases in your court. While the idea of local governments collaborating to enhance truancy filing procedures is a good idea, Section 25.0916 requires a lot of effort without articulating what exactly is to be gained from the effort. When Section 25.0916 was created last session (H.B. 1549), it only applied to school districts and municipalities in Bexar County. While it proved to be a beneficial endeavor for Bexar County, its cities, and school districts, as amended, Section 25.0916 is unlikely to be well received by counties, cities, and school districts because of its one size fits all requirement. While there potentially is a lot to be learned by going through the process of developing a uniform truancy plan, the benefits seem limited absent an opportunity for local governments to share, compare, and discuss best practices.

### **Section 11: Parent Contributing to Nonattendance**

The number of absences which constitute the offense of Parent Contributing to Nonattendance (Section 25.093, Education Code) is currently “10 or more days or parts of days within a six-month period in the same school year,” reflecting the definition of truant conduct in 65.003 of the Family Code. The offense of Parent Contributing to Nonattendance is recast as a “misdemeanor, punishable by fine only,” rather than a “Class C Misdemeanor.” Punishment for the offense is structured as a maximum-fine ladder. A first offense has a maximum fine of \$100. The maximum fines increase by \$100 for each offense, up to a maximum of \$500 for the fifth and subsequent offenses.

**Note:** One of the greatest public misperceptions likely to come from recent media attention surrounding changes in Texas school attendance laws is that it is “no longer illegal to skip school.” Wrong. It is true that Texas is now one of 48 states that will not criminally prosecute children for nonattendance. However, it is not true that it is legal for children in Texas to “skip school.” Rather, children in Texas will be civilly adjudicated by municipal and justice courts acting in their new designated roles as truancy courts. Adults (i.e., parents and guardians of school age children) subject to the new fine ladder and authority of courts under Article 45.0531 of the Code of Criminal Procedure (See, Section 3 above) will continue to be subject to criminal prosecution for Parent Contributing to Nonattendance. The offense remains a fine-only misdemeanor and will be adjudicated in municipal and justice courts (not truancy courts). What is new is language in Section 25.0951(b) stating that a complaint filed by a school must provide evidence of the parent’s criminal negligence. (See, Section 13).

### **Section 12: Warning Notices**

Under Section 25.095 of the Education Code, a school district or open-enrollment charter school must send notices to students who are at risk of engaging in truant conduct. Under the amended law, the notice must be sent when the student is absent on ten or more days or parts of days

within a six-month period in the same school year. The notice must warn that the conduct may result in referral to truancy court, and that the student may be subject to truancy prevention measures.

### **Section 13: School District Referral for Truant Conduct and Complaint for Parent Contributing to Nonattendance**

As amended, when a child fails to attend school, Section 25.0951 of the Education Code no longer allows school districts to either file a criminal complaint in municipal, justice, or county court or refer students to a juvenile court. Rather, if a student fails to attend school without excuse on 10 or more days or parts of days in a six-month period in the same school year, a school district shall, within 10 days of the 10th absence, refer the student to truancy court for truant conduct per Section 65.003 of the Family Code. Under Section 25.0951(d), a school district is not required to refer a student to truancy court if the school district is applying truancy prevention measures and determines that truancy prevention measures are succeeding. The school district, in that case, may choose to delay the referral.

Under the new law, school districts may still file criminal complaints alleging Parent Contributing to Nonattendance (Section 25.093, Education Code) against the person standing in parental relation to the student in municipal, justice, or county court, if the school district “provides evidence of the parent’s criminal negligence.” A court may dismiss a complaint alleging Parent Contributing to Nonattendance on four grounds: (1) noncompliance with Section 25.0951; (2) failure to allege elements of the offense; (3) untimely filing; and, (4) the complaint is otherwise substantively defective.

### **Section 18: Conduct Indicating a Need for Supervision and Delinquent Conduct**

Section 51.03 of the Family Code defines conduct indicating a need for supervision (CINS) and delinquent conduct. Such conduct may subject juveniles to referral to a juvenile court. Subsection (a) of Section 51.03 lists conduct which constitutes delinquent conduct, including violation of a truancy court order. Subsection (b) lists conduct that may indicate a need for supervision, and under current law, includes (b)(2), “the absence of a child on 10 or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period from school.”

H.B. 2398 removes 51.03(b)(2), excessive absences, from the list of CINS, and renumbers the remaining items on the list, making further nonsubstantive changes to subsections (e) and (g), due to the removal of (b)(2) and of subsections (g), (d), and (e-1).

**Note:** To reiterate, outside of the provisions in Title 3A, juvenile courts in Texas no longer have original jurisdiction of school attendance in Texas. Although it has not received much publicity, it is truly a big deal. Has any other state stripped its juvenile courts of original jurisdiction in such matters? The full implications of this change will likely take some time to be fully appreciated.

## Section 27: Truancy Courts

H.B. 2398 provides enforcement procedures for students who do not attend school, defined in the newly created Title 3A of the Family Code. Though it resembles a conglomeration of existing rules, it is important to appreciate that it supersedes provisions in the Code of Criminal Procedure and the Family Code that formerly governed cases involving truant children. The new title consists of a single chapter containing six subchapters: Subchapter A: General Provisions (Sections 65.001 through 65.017); Subchapter B: Initial Procedures (Sections 65.051 through 65.065); Subchapter C: Adjudication Hearings and Remedies (Sections 65.101 through 65.109); Subchapter D: Appeals (Sections 65.151 through 65.153); Subchapter E: Records (Sections 65.201 through 65.203); and Subchapter F: Enforcement (Sections 65.251 through 65.259).

**Note:** All references, unless stated otherwise, in the following analysis of Section 27 are to the Family Code. To assist in transitioning from the familiar criminal law provisions to the new civil law provisions, TMCEC has prepared a chart titled *Transitioning to Title 3A of the Family Code: Before and After H.B. 2398*. It, and other resource material, is available on the TMCEC website.

**Subchapter A (GENERAL PROVISIONS)** outlines the definitions, jurisdiction, and procedure applicable to truancy courts. Subchapter A consists of 17 new statutes, numbered Sections 65.001 through 65.017. The scope and purpose of Chapter 65 are provided in Section 65.001. Unlike in criminal cases against children, the primary consideration in adjudicating truant conduct is the best interest of the child (Section 65.001(c)).

Although failure to attend school is no longer a criminal offense, the new laws are aimed at addressing truant conduct (Section 65.003). To address this, Title 3A creates a new court and defines the procedures it may use. Justice, municipal, and certain county courts are designated as truancy courts, having original, exclusive jurisdiction over allegations of truant conduct (Section 65.004). Truant conduct can only be prosecuted in truancy court (Section 65.003(b)). In certain instances involving contiguous municipalities, interlocal agreements allowing for jurisdiction are allowed (Section 65.004(c)). A truancy court is in session at all times (Section 65.005). Venue is in the county where the school in which the child is enrolled is located or the county where the child resides (Section 65.006). Per Section 65.007, trials in truancy court are to a six-member jury unless the child waives that right in writing, following the rules outlined in Section 65.008. In a jury trial, each party receives three peremptory challenges (Section 65.007(b)). If the child waives a jury trial, allegations of truant conduct are tried to the bench.

This subchapter defines truant conduct, the only allegation which the truancy court is authorized to hear. Truant conduct, which is clearly stated to be a civil case in truancy court, is defined as failure to attend school on 10 or more days or parts of days within a six-month period in the same school year, for a child (defined as a person between the ages of 12 and 19 in Section 65.002(1)) who is otherwise required to attend school. Truant conduct is not a criminal offense. An adjudication of truant conduct is not a criminal conviction. Proceedings relating to truant conduct are not criminal proceedings. Generally, with the exception of appeals and enforcement, an adjudication of truant conduct cannot be used in subsequent court proceedings or result in any civil disability (Section 65.009). The standard of proof in cases of truant conduct, although civil,

is still proof beyond a reasonable doubt (Section 65.010). Discovery follows procedures applicable in a criminal case (Section 65.011).

Although Chapter 65 tries to cover most aspects of truant conduct proceedings, including provisions pertaining to interpreters (Section 65.013) and use of electronic signatures (Section 65.014), the Legislature recognized that anticipating all issues and creating all necessary rules is an impossible task. Accordingly, additional formal and informal procedural rules may be created by the Texas Supreme Court (Section 65.012).

Generally, proceedings in truancy court are open to the public, unless good cause is shown to exclude the public, or if a person to be excluded is expected to be a witness and the court determines that presence at the hearing would materially affect that person's testimony (Section 65.015). Proceedings may not be recorded by a truancy court which is not also a court of record. If the court is a court of record, proceedings may be recorded only by stenographic notes or "other appropriate means" (Section 65.016). The reason for this is unclear because appeals are de novo (See, Section 65.151(b)).

A truancy court may employ juvenile case managers (JCMs). JCMs may be utilized when a child is in jeopardy of being referred to court or when a child is referred to court (Section 65.017). Notably, though the truancy court may not assess a JCM fee, the truancy court may enter into an interlocal agreement with a municipal court to employ a JCM (See, Section 4).

**Subchapter B** defines initial procedures including referral, prosecutorial intake and review, and the initial hearing. Subchapter B consists of 15 new statutes, Sections 65.051 through 65.065.

A referral to truancy court must be reviewed first by the court for compliance with Section 25.0915 of the Education Code (See, Section 9). If the court is not required to dismiss the referral for noncompliance under Section 25.0915, the court forwards the referral to the truant conduct prosecutor (Section 65.051). The prosecutor of the justice, municipal, or county court acting as the truancy court shall serve as the truant conduct prosecutor for that court (Section 65.052). When the truancy court forwards a referral to the prosecutor, that prosecutor must promptly review the referral. The prosecutor is granted discretion to file a petition requesting adjudication, provided the petition is made within 45 days of the last absence, and in compliance with Section 25.0915 of the Education Code. If the prosecutor decides not to file the petition, the court and school district must be notified of the decision (Section 65.053).

**Note:** Although the Legislature was made aware that most municipal prosecutors (unlike prosecutors in justice or county court) are rarely salaried and commonly paid by the hour, no distinction or accommodation is made. Despite the apparent authority of the truancy court to dismiss a referral in Section 65.051, such authority is clearly rooted in Section 25.0915 of the Education Code. Section 25.0915(c) implies that the court has no authority to dismiss referrals prior to prosecutor review and the filing of a petition with the truancy court.

The contents of the State's petition are detailed in Section 65.054. Petitions may not be filed after the 45th day of the last absence giving rise to truant conduct (Section 65.055). Upon the filing of the petition, the court must set a hearing date and time more than 10 days after the date of filing

(Section 65.056). After the date is set, the court must summon the child named in the petition; that child's parent, guardian, or custodian; guardian ad litem if any; and any other person whom the court determines to be necessary to the proceeding. If any person summoned, other than the child, fails to appear, the hearing may proceed. The child must be present for the court to hold a hearing (Section 65.057). A person with physical custody or control of a child who disobeys a summons that orders the child be brought to a hearing is subject to a writ of attachment per Section 65.254. Provisions pertaining to service of the summons are stated in Section 65.058. A child may answer the petition orally or in writing, or the court is directed to assume a general denial of the alleged conduct (Section 65.060).

A child may be represented by an attorney, but representation is not required, and a child is not entitled to have an attorney appointed. However, the court may appoint an attorney if it is in the best interest of the child, and may require the child's parent or other responsible person to pay the costs if the court determines the person has sufficient financial resources (Section 65.059).

Truancy courts may appoint guardians ad litem in cases in which parents do not accompany a child, or if it appears to the court that the child's parent or guardian is incapable or unwilling to make decisions in the best interest of the child. The guardian ad litem may be the attorney, and the court may order that person to reimburse the county or municipality, regardless of whether the court determines that the child's parent or other responsible person has sufficient financial resources, (Section 65.061).

**Note:** With the passage of S.B. 1876, the court must also maintain a list of all attorneys and other persons who are qualified to serve as a guardian ad litem and are registered with the court (Section 37.003(a)(2) of the Government Code). The court must use a rotation system for appointments, as defined by Section 37.004 of the Government Code.

Who is required to be present at a hearing under Title 3A is governed by Section 65.062. Attendance at a hearing may not be used as a reason to terminate the employment of a "permanent employee" required to attend. An employer who wrongfully terminates such a person's employment must reemploy the person, and is liable for damages (Section 65.063).

Subpoena of witnesses occur in the same manner as in a criminal case (Section 65.064). Specific provisions in Section 65.055 govern allegations that a child alleged to have engaged in truant conduct is mentally ill.

**Subchapter C** specifies the adjudication and remedies available in truant conduct cases. Subchapter C consists of nine new statutes, Sections 65.101 through 65.109.

The only way a child can be found to have engaged in truant conduct is after an adjudication hearing conducted in accord with Chapter 65 (Section 65.101(a)). At the beginning of an adjudication hearing, the judge is required to tell the child and the child's parents, guardian, or guardian ad litem of six enumerated rights, including the right to a jury trial (Section 65.101(b)). In addition to the trial provisions in Sections 65.007 and 65.008, jury verdicts must be unanimous (Section 65.101(c)). The Texas Rules of Evidence do not apply to an adjudication hearing in truancy court, unless the judge determines that a rule must apply to ensure fairness, or

as otherwise provided in Chapter 65 (Section 65.101(d)). Section 65.101(e) affords a child a privilege against self-incrimination and restricts the use of extrajudicial statements. A child is presumed to have not engaged in truant conduct and it is the prosecutor's burden to prove beyond a reasonable doubt with competent, admissible evidence that the child engaged in truant conduct (Section 65.101(f)). If the court or a jury finds otherwise, the court shall dismiss the case with prejudice (Section 65.101(g)). If the court or a jury finds that the child did engage in truant conduct, the judge may issue a judgment and remedial order under Section 65.103.

Section 65.102 governs remedial actions. If a child is determined to have engaged in truant conduct, the court shall determine and order appropriate remedial actions, orally and in a written order. The remedial actions available are defined in Section 65.103 and include ordering a child to attend school without absence, attend counseling or special programs, and perform community service or tutoring. The court must notify the child and the child's parent, guardian, or guardian ad litem of the child's right to appeal under Subchapter D and the procedures for sealing truancy court records.

Section 65.103 governs remedial orders. Its contents may look familiar because it is mostly derived from the soon-to-be-repealed provision governing Failure to Attend School proceedings (Article 45.054, Code of Criminal Procedure). The order of the truancy court is effective until the later of the date on the order, which may not be more than 180 days after entry, or the last day of the school year in which the order was entered (Section 65.104).

Section 65.105 is entitled Orders Affecting Parents and Others. Under its provisions, a truancy court may order a parent to accompany the child to a class for students at risk of dropping out of school. The court may also order any other person found to have contributed to the child's truant conduct to do any act or refrain from doing any act that the court determines to be reasonable and necessary for the welfare of the child. Last but not least, because it has great potential to be a powder keg, Section 65.105 allows a court to enjoin all contact between the child and a person who is found to be a contributing cause of the child's truant conduct (unless the person is related within the 3rd degree of consanguinity, in which case the court may contact the Department of Family and Protective Services).

Section 65.106 addresses the liability of local governments arising from community service. While provisions in Chapter 65 are "cut and paste" from Chapter 45, regrettably that did not occur in Section 65.106. Inexplicably, counties and cities operating courts under the guise of truancy courts will have less protection afforded to them under Section 65.106 than a municipal or justice court under Article 45.049(f) of the Code of Criminal Procedure.

With the repeal of the criminal offense of Failure to Attend School, comes the repeal of *criminal* court costs. However, per Section 65.107, there is only one court cost applicable to truancy courts: a \$50 court cost which shall be imposed only if the child has been found to have engaged in truant conduct, and only if the child, parent, or other person is financially able to pay it. An order to pay the cost must be reduced to writing and signed by the judge. Note: All costs shall be retained in the local government's treasury in a special account that can only be used to offset the costs of operations of the truancy court (See also, Section 39).

A hearing to modify a remedy is governed by Section 65.108. During the period that the order is effective, the court may hold a hearing to modify a remedial order upon motion by any party to the case or any party affected by an order in the case. There is no right to jury trial at this hearing. At the hearing, the court may consider a written report from the school, JCM, or professional consultant. All written matters must be provided to the child's attorney and the truant conduct prosecutor. The court may order that counsel not reveal the contents to the child if disclosure would materially harm the child's treatment and rehabilitation. If the court modifies the remedy, it must orally pronounce the changes, reduce them to writing, and provide a copy to the child.

Motions for new trial are governed by Section 65.109. Per Rules 505.3(c) and (e) of the Texas Rules of Civil Procedure, a party may file a motion for new trial in a truancy court not later than 14 days after the judgment is signed, and must serve copies on all other parties no later than the next business day. The judge may grant the motion upon a showing that justice was not done in the trial of the case. Only one new trial may be granted to either party. If the judge has not ruled on the motion for new trial by 5:00 p.m. on the 21st day after the judgment was signed, the motion is automatically denied.

**Subchapter D** contains procedures for the appeal of truant conduct cases. Subchapter D consists of three new statutes, Sections 65.151 through 65.153. When it comes to appeals, there are big changes, a number of questions, and likely unanticipated problems ahead.

Any person (child, child's parent, or guardian) subject to an order of the truancy court under Section 65.105 may appeal. Additionally, because this is a civil case, the State may also appeal an order (Section 65.151(a)). All appeals from a truancy court shall be heard by a juvenile court. The case must be tried de novo using the rules set forth in Chapter 65 of the Family Code (Section 65.151(b)). On appeal, the order of the truancy court is *vacated*.

**Note:** Regardless if a municipal court is a court of record, at least for the time being, there is no such thing as a truancy court of record. Could this change? See, Sections 65.012 and 65.016.

The appeal from truancy court to juvenile court is governed by Rule 506 of the Texas Rules of Civil Procedure, except no appeal bond is required (Section 65.152). Under Rule 506, an appeal must be perfected within 21 days after either the judgment is signed or after the motion for new trial, if any, is denied. This raises a question regarding the appeal itself. Under Rule 506.1, normally the appeal bond (or cash deposit or sworn statement of inability) is the method of appeal. Posting the bond perfects the appeal, and no other requirements are listed. What exactly must be filed to perfect the appeal?

Once the appeal is perfected, the truancy court must immediately send a certified copy of all docket entries, a certified copy of the bill of costs, and the original papers in the case to the clerk of the juvenile court. There, the juvenile court will try the case de novo. However, notably, nothing in Chapter 65 specifies how soon a juvenile court must conduct the trial de novo. This could prove problematic. What, if anything, obligates a child to attend school during the pendency of the trial de novo?

The child has the right to counsel on appeal, as in the initial hearing (Section 65.153). An attorney, if there is one, must file notice of appeal to the juvenile court and inform the court whether that attorney will handle the appeal. However, Section 65.153 provides no guidance if there is no attorney or if the attorney chooses not to handle the appeal. Once a child's case is appealed from a city's truancy court to a juvenile court, which government potentially bears the cost of representation?

**Subchapter E** defines procedures related to the records of the truancy court. Subchapter E consists of three new statutes, Sections 65.201 through 65.203.

Section 65.201 governs the sealing of records in a truant conduct case. A child's records in a truancy court are confidential, and may be disclosed only to a particular list of persons and agencies. After the child's 18th birthday, if the child petitions to have the records sealed and the court determines that the child complied with the remedies ordered, the truancy court must seal the records. Index references to sealed records must be deleted no later than the 30th day after the date of the sealing order. Sealed records may be inspected only by persons subject to the records, and only upon petition and order of the court.

The court or the child may move to destroy sealed records on or after the fifth anniversary of the child's 16th birthday, provided the child has not been convicted of a felony (Section 65.201(h)). This limitation on destroying sealed records seems at odds with Section 65.009 (adjudication for truant conduct cannot be used in subsequent court proceedings) and in light of Section 65.201(g).

Confidentiality of records is governed by Section 65.202. With two important exceptions, this section is nearly identical to Article 45.0217 of the Code of Criminal Procedure, which governs confidentiality of criminal records relating to a child in municipal and justice courts. First, unlike Article 45.0217, there are not two different versions of it "on the books." See, commentary to S.B. 108. Second, like provisions in Title 3 of the Family Code, it contains a "leave of court to inspect" provision that is conspicuously and problematically absent in either version of Article 45.0217. See, Ryan Kellus Turner, "Making Sense of GA-1035" *The Recorder* (January, 2015) at 3.

Referrals for truant conduct which the truant conduct prosecutor decides not to file must be ordered destroyed by the court after the prosecutor has completed the mandatory review (Section 65.203).

**Subchapter F** provides for enforcement of orders of the truancy court. Subchapter F consists of eight new statutes, Sections 65.251 through 65.259. Enforcement was the most debated aspect of truancy legislation this session. Some people opposed moving away from a criminal adjudication model to a civil adjudication model because they did not believe that the latter would encompass meaningful consequences for noncompliance with school attendance orders. In fact, there is anecdotal evidence that when school attendance-related matters (e.g., habitual offenders, contempt stemming from violation of a school attendance order) are referred to juvenile court from municipal court, as required by law, such referrals are not handled by juvenile judges and are inadequately addressed by juvenile probation. By the end of session, what became apparent was that many of the opponents of what became H.B. 2398 were not as much defending the

practice of fining children as they were frustrated by the systemic lack of cooperation and other meaningful statutory options. Such systemic problems are not addressed in H.B. 2398, but may be the subject of study during the interim and future legislation.

Per Section 65.251, a truancy court may not order the confinement of a child for the child's failure to obey a remedial order pertaining to school attendance under Section 65.103(a). However, a truancy court does have remedies, similar to those in Article 45.050 of the Code of Criminal Procedure, for children who either fail to comply with orders under Section 65.103(a) or are in direct contempt of court. The court may order the child to pay a fine not to exceed \$100 or that DPS suspend or deny the issuance of the child's driver's license or permit. If a child has been found in contempt on two or more previous occasions, the court may, after notice and a hearing, refer the child (younger than 17), accompanied by a litany of documentation, to juvenile probation, who may either (1) reinstate truancy prevention measures under Section 25.0916 of the Education Code, or (2) refer to juvenile court for contempt proceedings per Section 65.252. If a juvenile court prosecutor, *not a truancy court prosecutor*, finds that there is probable cause to believe the child engaged in direct contempt, a juvenile court is required to conduct the contempt hearing not later than the 20th day after receiving a request for an adjudication. Once the juvenile court determines whether probable cause exists that the child was in contempt, the juvenile court shall notify the truancy court of the decision and any remedies, if appropriate, within 5 days.

Section 65.253 contains a complicated itemization of circumstances when a parent or a person other than a parent (excluding a child) may be held in contempt. Depending on the type of violation, a truancy court may enforce its orders for "contempt" or "direct contempt." Both forms of contempt allow imposition of a fine not to exceed \$100. Direct contempt may result in additional punishment, confinement in jail for up to three days, and up to 40 hours community service. Section 65.253 is augmented by a lengthy series of non-sequential dizzying statutes: (1) Section 65.255 (contains notice, due process, and identity protections); (2) Section 65.256 (governs appeals); (3) Section 65.257 (enforcement of a truancy court order may be initiated by the truancy court or on a motion by the State); (4) Section 65.258 (notice and appearance requirements for an enforcement order); Section 65.259 (procedures for conducting an enforcement hearing).

### **Section 28: At-Risk Child**

Although H.B. 2398 modifies the number of absences which may constitute an "at-risk" youth, another bill, S.B. 206, repealed Section 264.304 of the Family Code in its entirety making Section 28's modification moot.

### **Sections 31 and 40: Judicial Donation Trust Fund**

Under the new Chapter 36 of the Government Code, the governing body of a municipality or county, pursuant to Section 36.001, is authorized to establish a judicial donation trust fund (JDTF). Section 81.032 of the Local Government Code is amended to allow a local governing body to accept a gift, grant, donation, or other consideration from a public or private source, designated for the JDTF, a designated account held outside of the treasury. Money so received

shall be awarded by judges in accordance with the local rules adopted pursuant to Section 36.002 of the Government Code. Interest and income from assets shall be credited to and deposited in the JDTF.

Section 36.002 requires the governing body to adopt procedures necessary to receive and disburse money from the JDTF. It must establish eligibility requirements for disbursement to assist needy children or families who appear before a county, justice, or municipal court for a criminal offense or truant conduct, as applicable, by providing money for resources and services that eliminate barriers to school attendance or that seek to prevent criminal behavior.

In accordance with those rules, per Section 36.003(a), the judge of a county, justice, or municipal court may award money from the JDTF, but only “to eligible children or families who appear before the court for a truancy or curfew violation or in another misdemeanor offense proceeding before the court.” Under Section 36.003(b), the judge then orders the local government’s treasurer to issue payment from the JDTF.

Note: Despite the best of intentions, before any local government establishes a JDTF, consider the following question: Do the provisions in Chapter 36 place a judge directly in conflict with provisions in the Code of Judicial Conduct?

The interests of the local judiciary would benefit from the Commission on Judicial Conduct issuing a public statement regarding the ethical propriety of the statutory role of a judge in regard to the operation of a judicial donation trust fund.

### **Section 33, 34, and 35: Magistrates in Fort Bend County**

Subchapter JJ in Chapter 54 of the Government Code applies only to a county with a population of more than 585,000 and that is contiguous with a population of at least four million. At this time, the only county to which this applies is Fort Bend County. A county judge there may appoint one or more part-time or full-time magistrates to hear particular matters. Those matters no longer include the repealed Failure to Attend School offense. These sections remove references to that offense, and add references to truant conduct under 65.003 of the Family Code.

### **Section 36: Requirements for Courts Reporting to the Office of Court Administration**

Section 71.0352 of the Government Code is amended to modify OCA reporting requirements for justice courts, municipal courts, and truancy courts. The amendments remove filings of failure to attend school under 25.094 of the Education Code, add truant conduct under 65.003 of the Family Code, and require, in addition to other contempt referrals, reporting of contempt referrals to juvenile court under Section 65.251 of the Family Code.

### **Section 39: Costs in Truancy Cases**

The bill amends Chapter 103 of the Government Code to add Section 103.035. This new section defines a court cost of \$50 for a party to a truancy case, if ordered by the truancy court under Chapter 65 of the Family Code.

## **Section 41: Repealers**

The following code sections are repealed: Article 45.054 of the Code of Criminal Procedure (Failure to Attend School Proceedings); Article 45.055 of the Code of Criminal Procedure (Expunction of Conviction and Records in Failure to Attend School Cases); Section 25.094 of the Education Code (Failure to Attend School); Section 25.0916(d) of the Education Code; Sections 51.03(d), (e-1), and (g) of the Family Code; Section 51.04(h) of the Family Code; Section 51.08(e) of the Family Code; Section 54.021 of the Family Code (County, Justice, or Municipal Court: Truancy); Section 54.0402 of the Family Code (Dispositional Order for Failure to Attend School); Sections 54.041(f) and (g) of the Family Code; and Section 54.05(a-1) of the Family Code.

## **Sections 2, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, and 32: Conforming Changes due to Repeal of CINS (Truancy) and Failure to Attend School**

With the removal of 51.03(b)(2) of the Family Code in Section 18, numerous conforming changes are required. Similar conforming changes are required by the repeal of Section 25.094 of the Education Code (Failure to Attend School). As amended, former references to CINS (Truancy) and failure to attend school now refer to truant conduct in Section 65.003. This includes, among others, changing the definition of a “status offender,” to exclude attendance-based offenses. References to the remaining repealed statutes are also removed.

## **Sections 42, 43, and 44: Applicability of H.B. 2398**

The changes in law apply prospectively. Offenses committed, and conduct occurring prior to September 1, 2015, are governed by the former law. An offense is committed or conduct occurs before the effective date of the act if any element of the offense or conduct occurs before that date. To the extent of any conflict, this act prevails over other acts of the 84th Legislature, Regular Session, relating to nonsubstantive additions and corrections.

**Note:** The primacy clause, Section 43, only applies to bills making nonsubstantive additions and corrections. The conflict between this section and the newly created Article 45.0541 of the Code of Criminal Procedure is addressed in Section 3 and 38.