Eyes on the Horizon: Legislation of Interest to Juvenile Case Managers
TMCEC Juvenile Case Manager Conference 2013
June 25-27, 2013
Ryan Kellus Turner
General Counsel and Director of Education
TMCEC

ROADMAP

"*The Money*"
S.B. 1419

"THE ACCOMMODATORS"
H.B. 232 and H.B. 1020

"The Excused"
H.B. 455, H.B. 260, and S.B. 553

"The Conflicted"
S.B. 394, H.B. 528 and S.B. 393

"THE BIG DOGS"
S.B 393 and S.B. 1114

Eyes on the Horizon: Legislation of Interest to Juvenile Case Managers
TMCEC Juvenile Case Manager Conference 2013
June 25-27, 2013
Ryan Kellus Turner
General Counsel and Director of Education
TMCEC

Subject: Juvenile Case Managers and the Creation of the Truancy Prevention and Diversion Fund
S.B. 1419
Effective: September 1, 2013

S.B. 1419 amends Article 45.056 of the Code of Criminal Procedure (Juvenile Case Managers) to expand the types of cases for which a juvenile case manager may be employed by a county court, justice court, municipal court, school district, juvenile probation department, or other appropriate governmental entity to include cases involving juvenile offenders referred to a court by a school administrator or designee for misconduct that would otherwise be within the court's statutory powers prior to a case being filed, and conditions the employment of such a juvenile case manager on the consent of the juvenile and the juvenile's parents or guardians. The bill authorizes a juvenile case manager employed by a county court, justice court, municipality, or municipal court to provide prevention services to a child considered at risk of entering the juvenile justice system and intervention services to juveniles engaged in misconduct prior to cases being filed, excluding traffic offenses.

S.B. 1419 amends by adding Article 102.015 of the Code of Criminal Procedure establishing the Truancy Prevention and Diversion Fund as a dedicated account in the general revenue fund. The bill requires a person convicted in municipal or justice court of an offense, other than an offense relating to a pedestrian or the parking of a motor vehicle, to pay as a court cost $2 in addition to other court costs, and establishes that, for purposes of the bill's provisions, a person is considered to have been convicted if a sentence is imposed or the defendant receives deferred disposition in the case. The bill establishes that such court costs are collected in the same manner as other fines or costs and requires an officer collecting the costs to keep separate records of the funds collected as costs under the bill's provisions and to deposit the funds in the county treasury or municipal treasury, as applicable.

S.B. 1419 requires the custodian of a county treasury or municipal treasury, as applicable, to keep records of the amount of funds on deposit collected under the bill's provisions. The bill requires such a custodian to send to the comptroller of public accounts before the last day of the first month following each calendar quarter the funds collected during the preceding quarter, except that the custodian may retain 50 percent of the collected funds for the purpose of operating or establishing a juvenile case manager program, if the county or municipality has either (1) established or is (2) attempting to establish a juvenile case manager program. The bill requires the custodian of the treasury, if no funds due as costs under the bill's provisions are deposited in a county treasury or municipal treasury in a calendar quarter, to file the report required for the quarter in the regular manner and to state that no funds were collected.

S.B. 1419 requires the Comptroller to deposit the funds received under the bill's provisions to the credit of the Truancy Prevention and Diversion Fund and authorizes the legislature to appropriate money from the account only to the Criminal Justice Division of the Governor's Office for distribution to local governmental entities for truancy prevention and intervention services. The bill authorizes a local governmental entity to request funds from the Criminal Justice Division of the Governor's Office for providing truancy prevention and intervention services and authorizes the division to award the requested funds based on the availability of appropriated funds and subject to the application procedure and eligibility requirements specified by division rule. The bill establishes that funds collected under the bill's provisions are subject to audit by the comptroller.

TMCEC: The amendment to Article 45.056 in Section 1 of S.B. 1419 is derived from S.B. 393 with a notable exception. The language in Article 45.056(c) attempts to further clarify what was already widely understood: local governments that enter into interlocal agreements jointly employ cases managers for purposes of Chapters 102 of the Code of Criminal Procedure and Government Code. Because the amendments to Article 45.056(a) and (c) in S.B. 1419 received a final record vote three days after the final passage of S.B. 393, the language contain in S.B. 1419 controls.

Notably, the monies that local governments may retain under S.B. 1419 are in addition to those collected under Article 102.0174 of the Code of Criminal Procedure (Juvenile Case Manager Fund). However, unlike the local juvenile case manager fee, which can only be collected if the local government employs a juvenile case manager (see, S.B. 1489. 82nd Legislature, amending Section Article 102.0174(b), Code of Criminal Procedure), a local government may retain $1.00 if it is attempting to establish a juvenile case manager program. Local governments that have no intention of establishing a juvenile case manager program send 100 percent of the costs collected to the Comptroller on a quarterly basis. It is worth repeating that all funds retained locally under the newly created, Article 102.015, Code of Criminal Procedure are subject to audit by the Comptroller.

Since 2001, when Article 45.056 first became law, the Governor’s Office has had the authority to seek reimbursement for juvenile case managers. However, until now, with the creation of Section 103.034 of the Government Code (Truancy Prevention and Diversion Fund) there has been no state-based funding mechanism for the Governor’s Office to make authorized awards to local governments. S.B. 1419 provides no definition for what constitutes “truancy prevention and intervention services.” Notably, nothing in the S.B. 1419 expressly states that money must be awarded to local government that employs juvenile case managers. Nevertheless, through interlocal agreements between local government and possible assistance from the Governor’s Office it is possible that more local governments will continue to establish local juvenile case manager programs.

Subject: Online Alcohol Awareness/Community Service in Lieu of Alcohol Awareness Program for Certain Minors
H.B. 232
Effective: June 14, 2013

Minors placed on deferred disposition or convicted of an alcohol related offense are required to attend an alcohol awareness course. Defendants in rural areas may not have access to such a course due to a lack of approved providers in their community. Consequently, these individuals have to travel long distances in order to meet the mandatory requirement. H.B. 232 amends current law relating to allowing certain minors convicted of certain alcohol offenses to perform community service instead of attending an alcohol awareness program. H.B. 232 amends Section 106.115, Alcoholic Beverage Code, by adding Subsections (b-1), (b-2), and (b-3).

Subsection (b-1) authorizes a court, if a defendant 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, to allow the defendant to either (1) take an online alcohol awareness program [if the Department of State Health Services (DSHS) approves online courses], or (2) require the defendant to perform not less than eight hours of community service related to alcohol abuse prevention or treatment and approved by DSHS under Subsection (b-3) instead of attending the alcohol awareness program. Notably, that community service ordered under this subsection *is in addition* to community service ordered under Section 106.071(d) (relating to requiring a court to order certain minors to perform community service as a punishment for an alcohol-related offense).

Subsection (b-2) authorizes a court, for purposes of Subsection (b-1), if the defendant is enrolled in an institution of higher education located in a county in which access to an alcohol awareness program is readily available, to consider the defendant to be a resident of that county. If the defendant is not enrolled in such an institution of higher education or if the court does not consider the defendant to be a resident of the county in which the institution is located, the defendant's residence is the residence listed on the defendant's driver's license or personal identification certificate issued by the Department of Safety (DPS). If the defendant does not have a driver's license or personal identification certificated issued by DPS, the defendant's residence is the residence on the defendant's voter registration certificate. If the defendant is not registered to vote, the defendant's residence is the residence on file with the public school district on which the defendant's enrollment is based. If the defendant is not enrolled in public school, the defendant's residence is determined per Alcoholic Beverage Commission rule.

Subsection (b-3) Requires DSHS to create a list of community services related to alcohol abuse prevention or treatment in each county in the state to which a judge is authorized to sentence a defendant under Subsection (b-1).

TMCEC: While courts will appreciate that the Legislature recognizes the alcohol awareness programs are not as readily available as driving safety courses and tobacco awareness courses, the final version of this bill substantially differs from what was introduced. The requirements in the final bill are cumbersome. Online alcohol awareness or alcohol awareness is only available to defendants who reside in a county with a population of less than 75,000. It requires courts to determine the population of where the defendant resides via a complex means of determining

residency. See also HB 1020 relating to the certification of alcohol awareness programs and drug and alcohol awareness programs required for minors convicted of or receiving deferred disposition for certain alcohol offenses.

Subject: Certification of Alcohol Awareness Programs Required for Minor Convicted or Receiving Deferred Disposition for Certain Alcohol Offenses.
H.B. 1020
Effective: June 14, 2013

H.B. 1020 relates to the certification of alcohol awareness programs required for minors convicted of or receiving deferred disposition for certain alcohol offenses. While the Texas Department of State Health Services (DSHS) certifies Drug and Alcohol Driving Awareness Programs (DADAP), the law has been unclear as to whether the Texas Education Agency (TEA) regulated DADAP courses are considered state-approved. As its name implies, DADAP is a course that teaches about the dangers of driving after using drugs and/or alcohol. The course also teaches about Texas driving while intoxicated laws and defensive driving strategies, as well as how alcohol affects a person's body and mind generally. H.B. 1020 seeks to clarify this issue by authorizing TEA regulated DADAP courses to be deemed as state approved by amending Section 106.115(a) of the Alcohol Beverage Code. This will end any confusion for citizens, courts, and judges, and will create a much larger network of quality courses to ensure that defendants get the education they need to effectively reduce recidivism.

TMCEC: While this bill will create a much larger network of quality courses, it remains to be seen if it "will end any confusion for citizens, courts, and judges." More than nine years ago TMCEC first reported on DADAP courses and why they could not be used to meet the alcohol awareness requirement of Section 106.115. "DADAP versus AAPM," *The Recorder (*December 2004) at 2. More recently Cathy Riedel revisited the issue in her article "Online Alcohol Awareness Classes" *The Recorder* (May 2009) at 15. The problem was not with the curriculum or content of DADAP courses. Simply, DADAP courses (which are approved by TEA) were not approved by Texas Commission on Alcohol and Drug Abuse (TCADA), now DSHS. The problem is solved.

H.B. 1020 makes it clear that minors placed on deferred disposition for certain alcohol offenses may attend either an alcohol awareness course approved by DSHS or a DADAP course approved by TEA. What is less clear is how H.B. 1020 will impact H.B. 232. The bills amend different sections of Section 106.115 and are not in conflict. Nevertheless, it will be interesting to see if by expanding the pool of eligible course to include DADAP courses it will alleviate the need in rural parts for online course or community services under the more cumbersome provisions added by H.B. 232,

Subject: Total Confidentiality for Records of Children Charged with Fine-Only Misdemeanors
H.B. 528
Effective: January 1, 2014

TMCEC: Under current law, the records of a child convicted of a fine-only misdemeanor, other than a traffic offense, are confidential *contingent upon satisfaction of the judgment* (i.e., "conditional confidentiality"). Critics claim that conditional confidentiality is insufficient and that children accused of such crimes should have confidentiality identical to children civilly adjudicated in juvenile court under Title 3 of the Family Code. Supporters of conditional confidentiality believe that total confidentiality from the inception of a criminal case runs afoul of society's expectation of being able to access information about criminal cases. While the Senate Research Center states that the intent of H.B. 528 is to close "an unintended loophole" in current law which allows public inspection of records of a child who have been charged with or who are appealing their cases, H.B. 528 actually is a repeal of key provisions H.B. 961 (82nd Regular Legislature), a bill passed in 2011 that was supported by the Texas Judicial Council and the Texas Municipal Courts Association.

This bill could have broad and profound implications. While the media will still be able to access criminal records pertaining to children accused of murder, they will no longer be able to access criminal case records of children accused of non-traffic fine only misdemeanors. Local governments ostensibly will no longer be able share information pertaining to non-traffic offenses with 3rd party vendors, including private non-profit teen court providers and collection services. This approach is very different from that taken in S.B. 393 and S.B. 394 which expands the use of conditional confidentiality to include deferred disposition.

IMPORTANT: It will be argued by opponent s of H.B. 528 that under the Code Construction Act (Section 311.025, Government Code) H.B. 528 and S.B. 393 contain irreconcilable provisions that cannot be harmonized. If this argument prevails, because the last legislative vote taken on S.B. 393 was one day after H.B. 528, then S.B. 393 prevails over H.B. 528 (specifically, Sections 1-3 detailed below). Because S.B. 393 did not amend Section 58.0711 of the Family Code and because it can be reconciled and harmonized, ostensibly Section 4 of H.B. 528 prevails (see, below). Of course if supporters of H.B. 528 successful argue that the bills can be harmonized, then it does not matter which bill passed last in time.

Ultimately, local governments will have to wait for an Attorney General opinion before we will know whether H.B. 528 and S.B 393/394 can be harmonized or if S.B. 393 prevails. An opinion will be requested by the Office of Court Administration. The only consolation to local governments is that S.B. 393 is effective September 1, 2013 and H.B. 528 is not effective until January 1, 2014.

Section by Section Analysis:

Section 1 amends Article 44.2811, Code of Criminal Procedure so that no criminal record may be inspected by the public once a non-traffic fine-only misdemeanor case involving a child is

appealed from either a municipal or justice court to county court. If a case is appealed trial de novo from either a municipal or justice court and the child is again convicted in county court, the child will no longer have to satisfy the judgment before all records become confidential.

Sections 2 and 3 amend Article 45.0217 of the Code of Criminal Procedure is amended repealing all provision pertaining to conditional confidentiality. Non-traffic related criminal records of children will now be confidential when the child is (1) charged, (2) convicted, (3) acquitted, or (4) granted deferred disposition. Information subject to inspection is exclusively limited to the public officials, agencies, and individuals listed in Article 45.0217(b).

Section 4 amends Section 58.0711 of the Family Code to conform with the amendments to Article 45.0217, Code of Criminal Procedure. Justice and municipal courts are required to notify the juvenile court in their county of any pending complaints against children for fine-only misdemeanors other than traffic offenses and must send a copy of the final disposition to the juvenile court. This means that juvenile courts will have records and files that may relate to a conviction of a child for a fine-only misdemeanor offense. This amendment makes all of such records in the possession of juvenile courts governed confidential.

Section 5 provides that provides that Articles 44.2811 and 45.0217, Code of Criminal Procedure, and Section 58.00711, Family Code, as amended by this Act, apply to an offense committed before, on, or after the effective date of the act.

Subject: Procedural and Substantive Law Relating to Children Accused of Committing Certain Class C Misdemeanors
S.B. 393
Effective: September 1, 2013

TMCEC: In recent years, the adjudication of children for fine-only misdemeanors has piqued the attention of critics and, in turn, the media. Laws passed more recently suggest the Texas Legislature and Governor Perry realize that the criminalization of misbehavior by children should be subject to restraints and that the unbridled outsourcing of school discipline from the school house to the court house is bad public policy. Yet, at the same time, efforts to decriminalize truancy in 2011 and substantially curtail ticketing at schools in 2009 and 2011 failed to gain traction at the Capitol. While critics assert that such cases should be returned to the civil juvenile justice system, neither juvenile courts nor juvenile probation services are prepared to shoulder the caseload of conduct indicating a need for supervision (CINS) petitions which have been shifted to municipal and justice courts in the form of Class C misdemeanors.

In January 2012, Chief Justice Wallace Jefferson of the Texas Supreme Court formed the Juvenile Justice Committee of the Texas Judicial Council. The judicial members of the committee, chaired by Travis County District Judge Orlinda Naranjo, and 14 advisory committee members were charged to: “[a]ssess the impact of school discipline and school-based policing on referrals to the municipal, justice, and juvenile courts and identify judicial policies or initiatives that: work to reduce referrals without having a negative impact on school safety; limit recidivism; and preserve judicial resources for students who are in need of this type of intervention.”

After multiple meetings in which members were able to hear presentations and opinions from various stake holders and diverse views on issues, the Juvenile Justice Committee made four recommendations:

1. The Legislature should expressly authorize local governments to implement "deferred prosecution" measures in Class C misdemeanors to decrease the number of local filings from schools.

2. The Legislature should amend applicable criminal laws to ensure that local courts are the last and not the first step in school discipline (*i.e.*, Amend Section 8.07 of the Penal Code to create a rebuttable presumption that a child younger than age 15 is presumed to not have criminal intent to commit a Class C Misdemeanors - with exception for traffic offenses). This could be limited to Chapter 37, Education Code offenses but would make more sense to apply to all children.

3. The Legislature should amend offenses relating to Disruption of Class, Disruption of Transportation, and Disorderly Conduct so that age (not grade level) is a prima facie element of the offense.

4. The Legislature should amend existing criminal law and procedures to increase parity between "criminal juvenile justice in local trial courts" and "civil juvenile justice in juvenile court and juvenile probation."

The four recommendations were the basis for a 20 page legislative proposal that was adopted by the judicial members of the Juvenile Justice Committee in August 2012. In November 2012, the Texas Judicial Council unanimously adopted the recommendations of the Juvenile Justice Committee. Various parts of the proposal were sponsored by members of the Senate and House (most notably, S.B. 393, S.B. 394 and S.B. 395). S.B. 393, S.B. 394 and S.B. 395 were supported by the Texas Municipal Courts Association. All three bills enjoyed bipartisan support and were signed into law by the Governor. Notably, S.B. 393 was amended in the House to contain nearly all of the provisions of both S.B. 394 and S.B. 395.

IMPORTANT: The introduction of S.B. 393, S.B. 394, and S.B. 395 early in the session set the stage for other legislators to file similar juvenile justice bills. Some of these bills are in conflict with S.B. 393 (notably, H.B. 528 and to a lesser degree S.B. 1114). Certain sections, noted below, appear to have irreconcilable conflicts with these bills. If such conflicts are deemed irreconcilable, then S.B. 393 will prevail because it received the last record vote. The Office of Court Administration is requesting an Attorney General opinion. Ultimately, local governments will have to wait for an Attorney General opinion to be issued before it is known whether the conflicting bills can be harmonized or if S.B. 393 prevails.

Section by Section Analysis:

SECTIONS 1, 2, 5 and 6: Fines and Court Costs Imposed on Children

It is a fundamental tenet of criminal law: imposed fines and costs in a criminal case are solely the burden of the defendant. Thus, when a child is a defendant, and ordered to pay fines and costs, the child (not their parents or legal guardians) is obligated to satisfy the judgment.

Fines are not imposed in juvenile courts. Yet, they are a staple in criminal courts with jurisdiction of fine-only offenses. While there is reason to believe that most municipal judges, justices of the peace, and county judges find children to be indigent and allow alternative means of discharging the judgment, there is no law expressly governing the imposition of fines on children. Under current law, a judge could impose a fine and costs on someone as young as age 10 and order it paid immediately. Current law allows criminal courts to waive fines and costs if performing community service would be an undue hardship on a defendant. However, statutory law does not necessarily afford such latitude for courts to waive fines and costs imposed on children although most, ostensibly, are indigent and the performance of community service may pose an undue hardship.

These sections make four amendments to the Code of Criminal Procedure. The amendments to Article 42.15 (applicable in county courts) and Article 45.041 (applicable in municipal and justice courts) reflect the belief that fines and costs should not be procedurally imposed on children in the same manner as adults. The best way to balance youth accountability with fairness to children is by requiring the child to have a say in how the judgment will be discharged (via election of either community service, payment, or as otherwise allowed by law) and to have parents and guardians involved in documenting the decision. Amendments to Article 43.091 (applicable in county courts) and Article 45.0491 (applicable in municipal and justice courts) provide more leeway to criminal judges in dealing with fines imposed on children. If the facts and circumstances warrant it, judges now have the discretion to waive fines and court costs accrued by defendants during childhood especially if the performance of community service would be an undue hardship.

Section 21 provides that amendments made by this section relating to the authority to waive fines and costs imposed on children apply *before*, on, or after the effective date of this enactment. The other provisions apply prospectively.

SECTIONS 3, 4 and 22: Conditional Confidentiality Extended to Deferral of Disposition for Certain Offenses

In 2009, in an effort to provide some semblance of parity between the civil and criminal juvenile justice systems, the Legislature passed S.B. 1056. The bill added Subsection (f-1) to Section 411.081 of the Government Code, requiring criminal courts to automatically issue a non-disclosure order upon the conviction of a child for a fine-only misdemeanor offense. While the intentions of the new law were applauded, non-disclosure was plagued with deficiencies that rendered it ineffective. By 2011, it was clear that the system for processing non-disclosure orders (via the Texas Department of Public Safety) was ill-equipped to handle the large volume of convictions involving children that occur in municipal and justice courts.

In 2011, H.B. 961 repealed and replaced non-disclosure laws pertaining to children convicted of Class C misdemeanors with laws providing children with conditional confidentiality (except for

traffic offense convictions). The 2011 shift from non-disclosure to confidentiality struck the correct balance between "the public's right to know" in criminal cases and privacy for children convicted of certain Class C misdemeanors.

This section builds on the 2011 amendments to provide confidentiality to a greater number of children adjudicated in municipal and justice courts without running afoul of the First Amendment or the public's expectation of transparency in all criminal cases. Currently, the law only allows confidentiality in instances where children are "convicted" of certain Class C misdemeanor offenses and satisfy the judgment. There are no similar provisions for children placed on deferred disposition, other types of deferred in Chapter 45, or deferred adjudication upon the dismissal of a complaint following completion of probation.

This section, amending Articles 44.2811 and 45.0217, Code of Criminal Procedure extends confidentiality to the greater number of children who have avoided being found guilty by *successfully completing* some form of probation.

Section 22 provides that amendments made to Articles 44.2811 and 45.0217, in this apply to a complaint dismissed by a court upon deferral or suspension of final disposition ***before***, on, or after the effective date of this enactment.

Important: The sections in S.B. 393 pertaining to expanding conditional confidentiality are in conflict with H.B. 528 (see, Summary S.B. 394 and Summary H.B.528). Pending a resolution via an Attorney General opinion, the only consolation to local governments is that S.B. 393 is effective September 1, 2013 and H.B. 528 is not effective until January 1, 2014.

SECTION 7: Juvenile Case Managers and Diversion from Court

Conceptualized and advocated by University of Texas Professor Robert O. Dawson until his death in 2005, juvenile case manager programs are still a relatively new and emerging addition to the municipal and justice court. In places like the City of Houston, where juvenile case managers have become integral to informal "deferred prosecution" measures of Class C misdemeanors, case filings have decreased and prosecutorial and judicial resources have been conserved. Efforts to decrease the number of cases adjudicated by municipal and justice courts through diversion efforts at the local government level should be encouraged. Accordingly, Article 45.056 of the Code of Criminal Procedure is amended to allow juvenile case managers to be involved in diversion measures without the entry of any formal court order and to expressly allow juvenile case managers to provide prevention services to juveniles considered at-risk and intervention services to juveniles engaged in misconduct prior to cases being filed.

SECTION 8: Truancy Prevention Measures

In 2011, Section 25.0915 of the Education Code was added to ensure that schools first attempt truancy prevention measures to address non-attendance of before referring a child to juvenile court or pursuing criminal charges against the child in county, justice, or municipal court. Anecdotal evidence from some courts suggests that such measures help reduce the number of school attendance cases being filed and conserve limited local judicial resources. This

amendment clarifies legislative intent from 2011. Specifically, if a complaint or referral is not made in compliance with Section 25.0915, a court shall dismiss the allegation. This is identical to the legal requirement governing what is to occur when a school does not timely file a school attendance complaint (Section 25.0951(d), Education Code). Because most children accused of not attending school do not have the assistance of counsel, such provisions are necessary to ensure the execution of the Legislature's intent.

SECTION 9: First Offender Programs and School Law Enforcement

Under current law, school law enforcement are authorized to arrest a child in the same manner as other peace officers, but unlike other peace officers, they are not expressly authorized to dispose of a case without referral to a court or by means of a First Offender Program. This limits school law enforcement's options.

As amended, Section 37.081 of the Education Code authorizes, but does not require, school law enforcement to dispose of such cases without referral to a court or by means of a First Offender Program. This potentially increases school law enforcement's options and diverts more cases from municipal and justice courts.

SECTIONS 10, 11, and 19: Disruption of Class, Disruption of Transportation, and Disorderly Conduct

In 2011, the Education Code and Penal Code were amended to make it an exception to the offenses of Disruption of Class (Section 37.124, Education Code), Disruption of Transportation (Section 37.126), and Disorderly Conduct (Section 42.01) that the accused, at the time of the offense, was a student in the sixth grade or a lower grade. Under Section 2.02 of the Penal Code, when an exception to a criminal offense is created, the prosecuting attorney must negate the existence of an exception in the accusation charging a commission of the offense and prove beyond a reasonable doubt that the defendant or defendant's conduct does not fall within the exception. The purpose of the amendment in 2011 was to prevent young children from being subjected to criminal prosecution for disruptive and disorderly behavior. However, under current law, some sixth graders as young as ten years of age may still be prosecuted. Furthermore, there appears to be consensus among law enforcement and prosecutors that it is easier to prove age than grade level. This amendment is a clarification of the changes to the respective laws made in 2011.

Note: S.B. 1114 fundamentally refocuses the offenses of Disruption of Class and Disruption of Transportation while expanding the scope of Disorderly Conduct (see, Summary S.B. 1114) These changes combined with other amendments in S.B. 393 will dramatically curtail the number of related case filings.

SECTION 12: New Education Code, Chapter 37, Subchapter E-1. Criminal Procedure

While Chapter 37 of the Education Code contains subchapters governing "Law and Order" (Subchapter C allows schools to have their own police departments), "Protection of Buildings and School Grounds" (Subchapter D which tasks justice and municipal courts with jurisdiction

for certain school offenses), and “Penal Provisions” (Subchapter E contains certain offenses specific to school settings), yet no subchapter in the Education code governs criminal procedure. This omission has contributed to existing disparities in the legal system and has resulted in greater consumption of limited local judicial resources.

The creation of a new subchapter in the Education Code (Subchapter E-1, Criminal Procedure), while limited in scope, will balance the interest of the other subchapters with due process and procedural protections for children accused of criminal violations. In conjunction with other proposed amendments, Subchapter E-1 will help reduce referrals to court without having a negative impact on school safety.

Subchapter E-1 consists of seven new statutes:

Section 37.141 (DEFINITIONS). Definitions of “child” and “school offense” are provided. A “child” under this Subchapter is a person who is between ages 10 and 16 and who is a student. This section states that Subchapter E-1 provides criminal procedures to be utilized when a child is alleged to have committed an offense on property under the control and jurisdiction of a school district which is a Class C misdemeanor, excluding traffic offenses. It aims to preserve judicial resources for students who are most in need of formal adjudication.

Section 37.142 (CONFLICT OF LAWS) Provides that to the extent of any conflict, Subchapter E-1 controls over any other law applied to a school offense alleged to have been committed by a child. This is important because until now such cases were exclusively controlled by the Code of Criminal Procedure.

Section 37.143 (CITATION PROHIBITED: CUSTODY OF CHILD). Under current law, peace officers routinely instigate criminal cases against children by using citations on school grounds Ensuring that justice is done in cases involving children should take precedence over the utility and convenience that accompanies issuing citations to children who are students at Texas public schools. There is precedent for limiting the use of citations. Texas law does not allow citations to be issued to corporations, associations, or people who are publicly intoxicated. Because public schools are authorized and expected by the public to handle misbehavior without immediately resorting to the criminal justice system, special rules governing the use of citations for fine-only offenses on school property are warranted.

Section 37.143 prohibits the issuance of citations at public schools for non-traffic offenses. (In lieu of using citations, a system of enhanced complaints is proscribed in Section 37.146). It is important to note that Section 37.143 does not, preclude law enforcement from issuing a citation to a student who is not a child (i.e., a person legally an adult, 17 years of age or older). Section 37.143 neither affects a peace officer’s authority to arrest a child nor preclude school officials or employees from filing charges in court.

Section 37.144 (GRADUATED SANCTIONS FOR CERTAIN SCHOOL OFFENSES). Under current law, nothing prohibits a school district from instigating criminal allegations against a child as a first response to any misconduct which is illegal. Criminal courts with jurisdiction over school grounds in school districts that employ police officers report that their juvenile dockets are ballooning with cases involving disruptive behaviors and that such cases consume significant amounts of judicial resources.

Under the proposed Section 37.144, Education Code, school districts that employ law may, but are not required to, adopt a system of progressive sanctions before filing a complaint for three specific offenses: (1) disruption of class; (2) disruption of transportation; and (3) disorderly conduct.

Note that Section 37.144 is entirely discretionary for all school districts and does not apply to school districts that do not commission peace officers but rather have an assigned school resource officer assigned by a local law enforcement agency.

Section 37.145 (COMPLAINT). Authorizes a school, if a child fails to comply with or complete graduated sanctions under Section 37.144, to file a complaint against the child with a criminal court in accordance with Section 37.146.

Section 37.146 (REQUISITES OF COMPLAINT). Under current law, there is no requirement that a school-based complaint be attested to by a person with personal knowledge giving rise to probable cause. There is also no way for a prosecutor, defense attorney, or judge to determine if probable cause exists or if the child is a student who is either eligible for or receiving special education services.

Under current law, some school-based offenses are already instigated by complaint (e.g. Failure to Attend School). However, the information in the complaint rarely provides ample information to assess the merit of the allegation. Enhanced complaints provide greater information to prosecutors, defense lawyers, and judges. Under Section 37.146, the complaint for all non-traffic, school based offenses must be accompanied by additional information that prosecutors and judges need to know in order to ensure fair and proper administration of justice for children.

Section 37.146 requires that a complaint alleging the commission of a school offense, in addition to the requirements imposed by Article 45.019 (Requisites of Complaint), Code of Criminal Procedure: (1) be sworn to by a person who has personal knowledge of the underlying facts giving rise to probable cause to believe that an offense has been committed; and (2) be accompanied by a statement from a school employee stating whether the child is eligible for or receives special services under Subchapter A (Special Education Program), Chapter 29 (Educational Programs) and the graduated sanctions, if required under Section 37.144, were imposed on the child before the complaint was filed.

Section 37.146 authorizes the issuance of a summons under Articles 23.04 (In Misdemeanor Case) and 45.057(e) (requiring a parent to personally appear at the hearing with the child), Code of Criminal Procedure, after a complaint has been filed under this subchapter. Judges and clerks are reminded that under Article 23.04 a summons may only be issued upon request of the attorney representing the state. In other words, unless a prosecutor requests a summons, none shall be issued by a court.

Section 37.147 (PROSECUTING ATTORNEYS). Akin to provisions governing prosecutions in juvenile court, Section 37.147 gives local prosecutors the discretion to implement filing guidelines and obtain information from schools. Some prosecutors have experienced opposition from schools when attempting to procure additional information before allowing a school-initiated complaint against a child to proceed. Expressly authorizing such guidelines and

allowing prosecutors to obtain such information is necessary to ensure that only morally blameworthy children are required to appear in court and enter a plea to criminal charges. Federal law precludes punishing special education students when the student's misbehavior is a manifestation of a disability. Prosecutors should be able to ascertain if a child is eligible for or is receiving special education services, has a behavioral intervention plan (BIP), or has a disorder or disability relating to culpability prior to the filing of charges. Prosecutors should also be able to easily ascertain from schools what disciplinary measures, if any, have already been taken against a child to ensure proportional and fair punishment.

Section 37.147 authorizes an attorney representing the state in a court with jurisdiction to adopt rules pertaining to the filing of a complaint under this subchapter that the state considers necessary in order to determine whether there is probable cause to believe that the child committed the alleged offense, review the circumstances and allegations in the complaint for legal sufficiency, and see that justice is done.

SECTIONS 13 and 18: Child with Mental Illness, Disability, or Lack of Capacity; Mandatory Transfer to Juvenile Court

Current law does not provide direction to criminal court judges who encounter children accused of fine-only misdemeanors who are suspected of having mental illness or developmental disabilities, who lack the capacity to understand the proceedings in criminal court or assist in their own defense, or who are otherwise unfit to proceed.

Chapter 8 of the Penal Code is amended by adding Section 8.08. On motion by the state, the defendant, a person standing in parental relation to the defendant, or on the court's own motion, a court with jurisdiction of misdemeanor punishable by fine only or a violation of a penal ordinance of a political subdivision shall determine if there is probable cause to believe that a child, including a child with mental illness or developmental disability, (1) lacks the capacity to understand the proceedings or to assist in their own defense and is unfit to proceed or (2) lacks substantial capacity either to appreciate the wrongfulness of the child's own conduct or to conform their conduct to the requirements of the law. If the court determines that probable cause exists, after giving notice to the prosecution, the court may dismiss the complaint. The prosecution has the right to appeal such determinations per Article 44.01, Code of Criminal Procedure. This scope of Section 8.08 is limited to Class C misdemeanors (other than traffic offenses).

Section 13 contains a related amendment. Once a court with jurisdiction of fine-only misdemeanor has concluded that a child has a mental illness, disability, lack of capacity, or is otherwise unfit to unfit to proceed similar subsequent cases should not continue to be adjudicated in that criminal court. Section 51.08, Family Code is amended to mandate that after a criminal court has dismissed a complaint per Section 8.08 of the Penal Code, the court would be required to waive its jurisdiction and transfer subsequent eligible cases to the civil juvenile justice system where they can be addressed as conduct indicating a need for supervision (CINS).

The mandatory transfer to juvenile court created by Section 51.08(f) applies regardless if the criminal court employs a juvenile case manager.

SECTIONS 14-16: Disposition without Referral to Court; First Offender Program

The existing language in Sections 52.03 and 52.031, Family Code, gives juvenile boards the discretion to create informal disposition guidelines that do not entail referral to court and the authority to implement First Offender Programs (i.e. diversions). When identical misconduct is alleged as conduct indicating a need for supervision (CINS), rather than a Class C misdemeanor, such diversions may be utilized. However, under current law there is no authorization for children accused of Class C misdemeanors to have their cases disposed in the same manner as a CINS case. This is unfair to children accused of non-traffic Class C misdemeanors that could have instead been alleged to have engaged in CINS. It limits the options of law enforcement and has created criminal dockets in municipal and justice courts involving children that are five times the size of those in juvenile court.

In conjunction with the previously described conforming change made to Section 37.081, Education Code, Chapter 52 of the Family Code is amended to give juvenile boards the authority, if they so choose, to include Class C offenses in local law enforcement efforts to dispose of cases without referral to courts and by use of First Offender programs. As amended, Sections 52.03 and 52.031, Family Code, are expanded to include non-traffic Class C misdemeanors. This would allow but not require, juvenile boards to utilized existing laws governing disposition without referral to court and First Offender programs and divert cases that otherwise would require formal adjudication by a criminal court and consume limited local criminal court resources.

SECTION 17: Age Affecting Criminal Responsibility

Under current law, the Legislature's classification of an offense as a Class C misdemeanor singularly determines whether a child is to be held criminally responsible for the his or her conduct. The penalty classification for an offense may be altogether irrelevant to whether a defendant is morally blameworthy. Currently, Section 8.07 of the Penal Code, a statutory formulation of the common law defense of infancy, expressly prohibits the prosecution of the relatively small number of children in Texas who commit "more serious" jailable offenses, while providing no similar prohibition against prosecuting the large number of children who commit "less serious" fine-only criminal offenses. An unintended consequence of existing law is that more children in Texas are being adjudicated in criminal court for fine-only offenses than in juvenile courts. Adjudicating such a large number of children as criminals consumes limited judicial resources at the expense of local government and defies Texas' long-standing commitment to juvenile justice being distinct from criminal justice.

This amendment to Section 8.07 clarifies current law: children under age 10 are not to be prosecuted or convicted of fine-only offenses. It also creates a presumption that children between ages 10-14 are presumed *any* not criminally responsible for misdemeanors punishable by fine only or a violation of a penal ordinance of a political subdivision (with the exception of juvenile curfew ordinances). This presumption can be refuted by a preponderance of evidence showing that the child is morally blameworthy. Notably, the presumption would have no application to fine-only traffic offenses created by state law or ordinance, and the prosecution would neither be

required to prove that the child knew that the act was illegal at the time it occurred or understood the legal consequences of the offense.

In light of the fact that few children in municipal or justice court are represented by counsel, Section 8.07 and Section 8.08 of the Penal Code (detailed in Section 13 and 18) provide municipal judges and justices of peace much needed tools to ensure the 6th Amendment rights of children are not violated.

Subject: Prosecution of Certain Class C Misdemeanor Offenses Committed by Children and to School Law Enforcement
S.B. 1114
Effective: September 1, 2013

TMCEC: S.B. 1114 in conjunction with S.B. 393 constitutes a major paradigm shift in the relationship between schools, school discipline, and the role of criminal courts.

The distinction between the bills is that S.B. 393 is the work product of the Texas Judicial Council and was championed by members of the judiciary, including Chief Justice Wallace Jefferson and supported by the Texas Municipal Courts Association. While S.B. 1114 contains provisions that are also included in S.B. 393, it also contains provisions that were not vetted by the Texas Judicial Council. S.B. 1114 and its counterpart, S.B. 1234, were predominantly supported by child and civil rights advocacy groups. (Notably, S.B. 1234 was vetoed by Governor Perry. In his veto statement, the governor stated that S.B. 1234 conflicted with S.B. 393.)

Unlike H.B. 528, containing provisions that conflict with S.B. 393, most of S.B. 1114 either compliments or mirrors provisions in S.B. 393. Important exceptions, however, are noted below. In certain ways, S.B. 1114 goes farther to curtain the outsourcing of discipline to local courts than the balanced approach favored by S.B. 393. It is for this reason that it is also more likely to be criticized as going too far.

Section by Section Analysis:

SECTION 1: Curtailing Use of Citations and Complaints for Offenses Occurring on School Property or ISD or County Vehicle

This section amends Article 45.058 of the Code of Criminal Procedure (Children taken into Custody), by adding Subsections (i) and (j). (Notably, as discussed below in Section 5, neither of these Subsections has any bearing on the authority taking a child into custody.) There is reason to doubt that these amendments prevail over those made by S.B. 393.

Subsection (i) requires a law enforcement officer who issues a citation or files a complaint in the manner provided by Article 45.018 (Complaint) for conduct by a child (between age 12 and 16) alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district, to 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. Notably,

Subsection (i) also prohibits an attorney representing the state from proceeding in a trial of an offense unless the law enforcement officer complied with the requirements of this subsection.

Subsection (j) prohibits a law enforcement officer, notwithstanding Subsection (g) (relating to authorizing a law enforcement officer to issue a field release citation in place of taking a child into custody for a traffic offense) or (g-1) (relating to authorizing a law enforcement officer to issue a field release citation in place of taking a child into custody only if the officer releases the child to the child's parent or responsible adult), from issuing a citation or filing a complaint in the manner provided by Article 45.018 for conduct by a child younger than 12 years of age that is alleged to have occurred on school property or on a vehicle owned or operated by a county or independent school district.

S.B. 1114 provisions limiting the use of citations and complaints in Article 45.058 have to be harmonized with S.B. 393 (Section 12). To the degree they conflict, S.B. 393 ostensibly prevails. S.B. 393 passed last in time and in Section 12 has an express conflict of law provision (i.e., Section 37.142, Education Code). The notion that citations may be issued to children at school to children between the ages of 12-16 in Subsections (i) and (j) clearly conflict with provisions in S.B. 393 (e.g., Sections 37.143, 37.146, and 37.147 Education Code) prohibiting the use of citations for non-traffic, school offenses.

SECTION 2: Consequences of a School District's Failure to Attest to Truancy Prevention Measure in a Criminal Complaint

This amendment, which also appears in S.B. 393 (Section 8) amends Section 25.0915 of the Education Code, by adding Subsection (c), to require a court to dismiss a complaint or referral made by a school district under this section that is not made in compliance with Subsection (b) (relating to required information for complaints filed to courts).

SECTION 3: Student Code of Conduct

This section amends Section 37.001(a), of the Education Code to require that the student code of conduct, in addition to establishing standards for student conduct, to specify the circumstances, in accordance with this subchapter, under which a student is authorized to be removed from a classroom, campus, disciplinary alternative education program, or vehicle owned or operated by the district and provide, as appropriate for students at each grade level, methods, including options, for managing students in the classroom, on school grounds, and on a vehicle owned or operated by the district.

SECTION 4: School District Peace Officers and Security Personnel

This section amends Sections 37.081(b), (c), and (f) of the Education Code. Subsection (b) provides that, in a peace officer's jurisdiction, a peace officer commissioned under this section is authorized to, in accordance with Chapter 52 (Proceedings Before and Including Referral to Juvenile Court), Family Code, or Article 45.058 (Children Taken into Custody), Code of Criminal Procedure, take a child, rather than juvenile, into custody. Subsection (d) requires a school district peace officer to perform law enforcement duties, rather than administrative and

law enforcement duties, for the school district as determined by the board of trustees of the school district. Subsection (f) requires the chief of police of the school district police department to be accountable to the superintendent and to report to the superintendent, rather than to the superintendent or the superintendent's designee.

SECTION 5: Prohibiting Arrest Warrants for Children who Commit Education Code Class C Misdemeanors

This section amends Subchapter C, Chapter 37, Education Code, by adding Section 37.085, which prohibits "[n]othwithstanding any other provisions of law, a warrant may not be issued for the arrest of a person for a Class C misdemeanor under this code committed when the person was younger than 17 years of age."

The creation of Section 37.085 of the Education Code is likely to be the most discussed provision in S.B. 1114. Advocates for children and civil rights will claim it as a big win. Other will criticize as a hallmark in Texas criminal justice: the birth of "non-arrestable crimes." The reality is likely somewhere in between.

This bill will prohibit courts for issuing arrest warrants for any Class C misdemeanor proscribed in the Education Code (most notably, Section 25.094, Failure to Attend School). Ostensibly, the prohibition of issuing an arrest warrant for such offenses is tied to the age of the defendant at the time of the alleged criminal conduct. Even when the child reaches adulthood an arrest warrant cannot be issued for a Class C misdemeanor defined in the Education Code.

However, by its plan language Section 37.085 hardly precludes courts from ordering that children be taken children into custody. Code of Criminal Procedure Article 45.014 (Warrant of Arrest) and Article 45.015 (Detention in Jail) generally govern procedures pertaining to arrest and detention in Class C misdemeanor cases. These provisions, however, are inapplicable to cases involving children. Both statutes are trumped by a specific statute proscribing the procedure for securing the presence of a child via an order of non-secured custody: Article 45.058 of the Code of Criminal Procedure (Children Taken into Custody). It deserves emphasis that authorization for a child to be taken into custody under Article 45.058 is not affected by this bill. (See, Section 1). Accordingly, municipal and justice courts may continue to procure the custody of children accused of Education Code offenses through an order of non-secured custody but they may not issue an arrest warrant for such offense regardless if the defendant is a child or has reached adulthood.

What does this mean in terms of JNA (Juveniles Now Adults) procedures? It means nothing. H.B. 1114 does not affect the JNA capias pro fine provisions in Article 45.045(b) of the Code of Criminal Procedure. The arrest warrant issued for young adults per Article 45.060 of the Code of Criminal Procedure is unaffected as it is not a Class C misdemeanor created by the Education Code. Similarly, this bill does not preclude a child from being taken into custody for Failure to Appear (Section 38.10, Penal Code)

It is likely to be argued that Section 37.085 was intended to preclude the arrest of all children. However, these arguments are likely to come up short for two reasons. First, there is no general

warrant requirement for taking a child into custody, rather when probable cause exists, a child may be taken into custody pursuant to the law of arrest. (See, Section 52.01, Family Code). Second, the Legislature distinguished the capias, capias pro fines, and arrest warrant during the 80th Legislature (H.B. 3060). Despite efforts to distinguish the different writs used to procure custody many continue to misuse them. Readers are once again advised not everything is an "arrest warrant." S.B. 1114 serves as a reminder that what an order to procure custody is called is not simply a matter of semantics.

As Section 10 makes this amendment retroactive, all affected Class C misdemeanor arrest warrants for Education Code offenses should be recalled by September 1, 2013.

SECTION 6-7: Redefining Disruption of Class and Disruption of Transportation

Section 37.124(a) of the Education Code (Disruption of Class) is amended to provide that a person other than a primary or secondary grade student enrolled in the school commits an offense if the person, on school property or on public property within 500 feet of school property, alone or in concert with others, intentionally disrupts the conduct of classes or other school activities.

Section 37.126(a) of the Education Code (Disruption of Transportation) is amended to provide that, except as provided by Section 37.125 (Exhibition of Firearms), a person other than a primary or secondary grade student commits an offense if the person intentionally disrupts, prevents, or interferes with the lawful transportation of children.

Redefining the elements of these two commonly filed offenses is likely to substantially reduce the number of the Class C misdemeanor criminal offenses filed by public schools against school children. While S.B. 393 clarifies exceptions to both offenses, S.B. 1114 redefines them.
These amendments shift the focus of each criminal offense from students who disrupt class and transportation to *people who are not enrolled* in that particular primary or secondary school.

These amendments substantially narrow the focus of each criminal offense. What may not be evident on first impression are children who remain within the scope of criminal law. Under these amendments the only children who can commit Disruption of Class and Disruption or Disruption of Transportation are children who are not enrolled at that particular school (e.g., expelled students and students from other schools). S.B. 393 (Sections 10 and 11) provide an exception that such children are younger than age 12 at the time of the offense. However, even those children are initially presumed to not be criminally responsible. (See, S.B. 393, Section 17).

Presumably in an effort to balance the amendments narrowing the focus of Disruption of Class and Disruption of Transportation, S.B. 1114 expands the scope of Section 42.01, Penal Code (Disorderly Conduct). See, Section 9, below.

SECTION 8: Title 3, Family Code Diversions Expanded to Accommodate Class C Misdemeanors

This section amends 52.031, Family Code, by adding Subsection (a-1) and amending Subsections (d), (f), (i), and (j). The intent of the amendment is to allow local governments to utilize existing diversion programs currently utilized exclusively by juvenile cases to include Class C misdemeanors.

While this section attempts to do the same thing as S.B. 393 (Section 16) differences in how the amendments are structured make them irreconcilable. Assuming this to be true, as S.B. 393 received the last record vote, its language would prevail.

SECTION 9: Disorderly Conduct at School

This section amends 42.01, Penal Code (Disorderly Conduct), by adding Subsection (a-1), to provide that, for purposes of Subsection (a) (relating to a person committing an offense), the term "public place" includes a public school campus or the school grounds on which a public school is located.

This amendment should be read in light of those detailed in Sections 6 and 7 of S.B. 1114. It is aimed at lingering and recurring arguments Disorderly Conduct cannot occur at a school because it is not truly a place open to the public even though most primary and secondary school are funded by the public.

Does this mean that all school children who, prior to S.B. 1114, were charged with Disruption of Class or Disruption of Transportation should, going forward, be charged with Disorderly Conduct? The answer is no. S.B. 393 provides a wide array of new procedural requirements aimed at making sure that courts are a rare and last resort for disruptive behavior cases and disorderly conduct. See, S.B. 393: Section 10 (making it an exception to Disorderly Conduct that the defendant was younger than 12), Section 12 (creating Section 37.144, Graduated Sanction for Certain School Offenses) and Section 17 (amending Section 8.07, Age Affecting Criminal Responsibility).

SECTION 10: Application

Except for the provisions in Section 5 (prohibiting arrest warrants for children who commit Education Code Class C misdemeanors) application of the changes in law made by S.B. 1114 are prospective.