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OPINION COMMITTEE



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September 29, 2015

The Honorable Ken Paxton
Attorney General, State of Texas
William P. Clements State Office Building
209 W. 14th St.
Austin, Tx 78701

ATTN: Opinion Committee

Opinion.Committee@texasattorneygeneral.gov

Re: Request for Opinion regarding the applicability of expunction orders under Section 54.0541, Family Code, to juvenile records

Dear General Paxton:

The Texas Juvenile Justice Department (TJJD) is charged, in part, with providing technical assistance to juvenile justice practitioners within the state. One way TJJD fulfills this responsibility is by providing technical legal assistance through TJJD's Legal Help Line, staffed by its attorneys. This request for opinion is prompted by the numerous recent inquiries to TJJD from juvenile probation departments that have received orders from justice and municipal courts¹ instructing them to expunge some of their records. Our questions are:

1. Does an expunction order issued under newly created Article 45.0541, Code of Criminal Procedure, apply to documents in the possession of a juvenile probation department as a result of a referral to the juvenile court for delinquent conduct as defined by Section 51.03(a)(2), commonly known as a contempt referral?

¹ Certain county courts had jurisdiction over Failure to Attend School cases and are now truancy courts with jurisdiction over Truant Conduct. For ease, this request for opinion references justice and municipal courts; this is meant to also include those few county courts with such jurisdiction.

Scott W. Fisher, Chairman | David Reilly, Executive Director

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2. If the answer to question 1 is yes, what impact, if any, does the expunction have on the juvenile records related to the contempt referral and any disposition of that referral?

Certain background information is useful to explain the issue at hand. Prior to the passage of HB 2398, excessive unexcused absences were addressed in one of two ways, either as Failure to Attend School, a criminal Class C misdemeanor under Section 25.094, Education Code in justice or municipal court, or in juvenile court as truancy, a conduct indicating a need for supervision (CINS) case under Section 51.03, Family Code. The elements of either offense were the same. The majority of cases were handled as Failure to Attend School criminal cases. HB 2398 deleted both offenses and created a new civil violation of truant conduct, to be handled in newly designated truancy courts, which are the justice or municipal courts that previously had jurisdiction over Failure to Attend School cases.

In addition to new procedures, HB 2398 created a new statute, Article 45.0541, Code of Criminal Procedure, which provides for the automatic expunction of all criminal convictions or dismissals of the former Failure to Attend School offense. No similar provision was included for former CINS truancy cases. The statutory language provides that the expunction order applies to the “conviction, complaints, verdicts, sentences, and other documents relating to the offense, including any documents in the possession of a school district or law enforcement agency.”

Based on the information TJJD has received, juvenile probation departments are receiving these orders in cases in which a child failed to comply with the justice or municipal courts orders in a Failure to Attend School case and the court referred the child to juvenile court with a new delinquent conduct – contempt charge. The juvenile probation department received the referrals because it serves as the intake agency for the juvenile court. It appears that justice and municipal courts interpret Article 45.0541, Code of Criminal Procedure, to apply to the documents in the possession of a juvenile probation department that accompanied the delinquent conduct - contempt referral. Although neither the juvenile court nor the juvenile probation department is expressly mentioned in Article 45.0541, it is our understanding that this interpretation is based on the portion of the statute that includes the language “and other documents relating to the offense.”

The question we have is whether this is an accurate construction of the statute. TJJD recognizes the cardinal rule of statutory construction is to determine and give effect to the intent of the

Legislature and that the language of the statute is the best revealer of legislative intent.² TJJJ also recognizes that there is a presumption that a result feasible of execution was intended and matters such as the consequences of a particular construction can be considered when attempting to ascertain legislative intent.³ As such, TJJJ has examined the practical impact and consequences of the possible interpretations of Article 45.0541, Code of Criminal Procedure.

The first interpretation is that Article 45.0541, Code of Criminal Procedure, does not apply to documents in the possession of the juvenile court because, once a case is referred to juvenile court, all documents sent with that referral become juvenile records. Within the juvenile justice community, the understanding is that juvenile records are not subject to expunction statutes. The legal basis for this understanding is two-fold. First, Title 3, Family Code, which governs juvenile court proceedings, provides that the Texas Rules of Civil Procedure generally govern unless directly in conflict with something in Title 3.⁴ While certain Code of Criminal Procedure statutes are made applicable to juvenile proceedings via Title 3, the expunction statutes are not. Instead, juvenile records are governed by Chapter 58, Family Code, which allows for sealing of records in certain instances; despite some nuanced differences, the impact of having a record sealed is substantially similar to an expunction. Secondly, Juvenile records are not subject to expunction statutes because expunction statutes apply to a person “arrested” and juveniles are not “arrested” but are instead, “taken into custody.” One court recently affirmed this concept.⁵ Although that case focused on the expunction provisions on Chapter 55, Code of Criminal Procedure, it seems the same limitation would apply to the Chapter 45 provisions as the issuance of a citation, either through custodial detention or the mail, is considered an arrest for expunction purposes.⁶

The consequence of the first interpretation is that the statutory processes for criminal and juvenile records remain distinct; the justice and municipal court records are expunged while the juvenile court records remain intact unless sealed as provided in Chapter 58, Family Code. It bears noting that while juvenile records are recorded in the Juvenile Justice Information System maintained by DPS and in the Juvenile Case Management System maintained by TJJJ and used

² *Zanchi v. Lane*, 408 S.W.3d 373, 376 (Tex. 2013); quoting *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009)

³ Sections 311.021 and 311.023, Government Code

⁴ Section 51.17, Family Code

⁵ *State v. J.B.C.*, 2014 Tex. App. LEXIS 8841 (Tex. App. Austin Aug. 13, 2014)

⁶ *Carson v. State*, 65 S.W.3d 774 (Tex. App. Fort Worth 2001)

by juvenile probation departments, the numeric code used to enter delinquent – conduct contempt into those systems is the same code whether the underlying offense was Failure to Attend School or some other Class C misdemeanor; thus, using this interpretation does not result in a lingering “record” showing there was once a Failure to Attend School conviction; that exists only in individual documents residing in each individual file. Those files are protected by confidentiality rules in Chapter 58, Family Code.

The second interpretation assumes that Article 45.0541, Code of Criminal Procedure does require the expunction records in the possession of the juvenile probation department. One consequence of this interpretation is that evidence necessary to establish the elements of the delinquent conduct – contempt charge that was referred to juvenile court, namely the terms with which the child was required to comply and the conviction upon which those terms were based, is destroyed. This raises the next logical question, which is whether the destruction of that evidence then requires any findings related to those records to be set aside and, if so, what procedure is to be followed given these are juvenile records? TJJJD does not have an answer for this question as no such procedure has been set out in statute.

A second consequence of this interpretation is that all justice and municipal court expunctions related to a Class C misdemeanor conviction of a child, not just those related to Failure to Attend School offenses, would potentially impact juvenile records. This is because the language in Article 45.0216, Code of Criminal Procedure, which allows for expunctions of most Class C misdemeanor convictions of children if certain criteria are met, contains the same language as the language that is key to the issue raised here. That is, the statute provides that the expunction extends to “any other documents relating to the offense.” If that language in Article 45.0541, Code of Criminal Procedure, is broadly interpreted to apply to documents in the possession of a juvenile court by virtue of a referral to juvenile court for delinquent conduct – contempt, it follows that Article 45.0216, Code of Criminal Procedure, would be interpreted the same way. The result would be that every time a child was granted an expunction in justice or municipal court related to an offense that was the basis of a delinquent conduct – contempt referral to juvenile court, the documents accompanying that referral would be expunged. This would then create the same issues and questions with regard to these juvenile records that is set out in the above paragraph and is the basis for our second question.

TJJD appreciates your time and attention and looks forward to your guidance with regard to these questions. If we can provide any further information or clarification, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "David Reilly". The signature is fluid and cursive, with the first name "David" and last name "Reilly" clearly distinguishable.

David Reilly
Executive Director

dr/kc

cc: Jill Mata, General Counsel