

# A JUDGE'S GUIDE TO ATTENDANCE BARRIERS ('TRUANCY') AND ACT 138

August 2021

This fact sheet is intended for Magisterial District Justices (MDJs) and other judges to use when adjudicating truancy matters under Pennsylvania's compulsory school attendance law.

It highlights key changes to the law in light of Act 138 of 2016, which substantially changed the truancy provisions of Pennsylvania's Public School Code.

## Special Considerations

Compulsory school age rules still apply during the COVID-19 pandemic. Schools and courts should be flexible in applying these laws in light of continually evolving circumstances associated with COVID-19 including attendance barriers stemming from exposure to COVID-19, illness, need to quarantine, technological barriers, and critical lack of resources to engage in virtual learning.

### Root causes of attendance barriers

Studies show that in Pennsylvania, as in other states, families of color and families living in poverty are most likely to experience truancy proceedings due a variety of intersecting systemic barriers, including racism and unequal access to resources.<sup>1</sup> While fault is often inappropriately ascribed to individual families, racism and other systemic factors often lie at the root of attendance barriers. Families of color may also encounter racially hostile school environments and school personnel who choose not to permit families to correct their children's attendance records. Involvement in truancy proceedings can have negative and lifelong consequences for students and their families, including a child's removal from their home.

### Compulsory school age

A student must be of compulsory school age to be subject to Act 138 and other compulsory school attendance laws.

Changes to the compulsory school age took effect beginning in the 2020-2021 school year and apply during the ongoing COVID-19 pandemic.<sup>2</sup> These changes require all students to attend school **no later than age 6 until age 18 or graduation, whichever occurs sooner.**<sup>3</sup> These requirements apply across Pennsylvania.

### The purpose of Act 138

Act 138 begins with a preamble that states that its purpose is to "improve school attendance and deter truancy" through a comprehensive approach to consistently identify and address attendance issues as early as possible with credible intervention techniques in order to:

- Preserve the unity of the family whenever possible as the underlying issues of truancy are addressed;
- Avoid the loss of housing, the possible entry of a child to foster care, and other unintended consequences of disruption of an intact family unit; and

- Confine a person in parental relation to a child who is habitually truant only as a last resort and for a minimum amount of time.”<sup>4</sup>

In applying the law and adjudicating petitions, MDJs must be mindful of these overarching purposes.

### **Addressing Attendance Barriers**

ELC developed a [screening tool](#) that could be helpful to MDJs to ensure that schools have identified barriers to regular attendance, taken appropriate steps to address barriers, and have followed the processes required by law prior to making or acting upon a truancy referral.

An MDJ is never required to impose fines and punishment for violation of compulsory school law.<sup>5</sup> In the event that an MDJ is considering imposing discretionary fines and punishments, the MDJ should consider whether the fines will disrupt the family unit, cause or contribute to the loss of housing, or push the child into foster care.

Courts are strictly prohibited from jailing parents and students who are unable to pay.<sup>6</sup> Moreover, before jailing parents for their children's truancy, the MDJ should consider whether all other solutions and strategies to identify and address the attendance barriers have been exhausted. If not, the MDJ should not jail parents, even when they are able to pay. The MDJ must consider a parent or student's present ability to pay when imposing any fine for truancy and cannot subject a defendant to a fine if he or she is unable to pay. (See discussion below.)

### **Schools may only cite children 15 and older in magisterial district courts.**

Act 138 clearly states that only children who are 15 and older may be properly cited by a school in a magisterial district court.<sup>7</sup> Children who are

younger than 15 cannot be cited in a magisterial district court.

### **Schools may only cite the child or the parent in a magisterial district court, not both.**

Act 138 clarifies that schools may cite either the child – if 15 or older – or the parent, but not both.<sup>8</sup> While this practice was previously permitted, MDJs can no longer accept dual petitions against the child and the parent, and the MDJ must reject any such citations.

### **Schools *may* refer children who are considered to be habitually truant<sup>9</sup> under law who are younger than 15 to CYS or an attendance improvement program *and* also cite the parent/guardian in a magisterial district court.**

Act 138 states that schools may refer children who are *younger than 15* to either (1) a school-based or community-based attendance improvement program or (2) the county children and youth agency (CYS) for services or for possible disposition as dependent children under the Juvenile Act.<sup>10</sup> And only *in the case of a child younger than 15*, the school may also cite the person in parental relation in a magisterial district court.<sup>11</sup>

### **Schools may *not* file citations against a child or person in parental relation for a *subsequent* offense if a proceeding is already pending in a magisterial district court or the matter was referred to CYS and CYS has not closed the case.**

Act 138 states that schools may *not* file citations in a magisterial district court against a child or person in parental relation if any of the following apply:

- A proceeding on a prior citation is pending before a magisterial district court (*i.e.* a petition has been filed, but a verdict not yet entered);
- The school referred the child to CYS and CYS has not yet closed the case; or
- CYS filed a petition for dependency, which remains under the jurisdiction of the Juvenile Court.<sup>12</sup>

**In all cases, the school must provide the court with written verification that it held a school attendance improvement conference.**

Act 138 requires schools to convene school attendance improvement conferences before referring truancy matters to magisterial district courts or CYS agencies.<sup>13</sup> The outcome of every conference must be a written school attendance improvement plan that aims to address all the barriers to the child's regular attendance.<sup>14</sup> Updated guidance from the Pennsylvania Department of Education states that schools should be proactive about initiating conversations to determine whether students are missing school due to harassment or bullying, unmet special education needs, school-provided transportation barriers, or experiencing homelessness.<sup>15</sup> Schools cannot count absences caused by a student experiencing homelessness as unexcused absences and must also excuse any absences related to a student's involvement in the foster care or juvenile justice system, such as court hearings or family visitations.<sup>16</sup> Schools could consider using an [attendance barrier screening tool](#) and a [family self-assessment tool](#) to help school personnel proactively identify and address the wide range of attendance barriers that can prevent children from regularly attending school. To enforce this provision, the law requires that schools provide MDJs and county CYS agencies with **verification** of school attendance improvement plans. MDJs and county CYS *must not* accept referrals from schools without verification.<sup>17</sup>

These plans are critical to ensuring improved attendance for habitually truant children. Best practice in truancy prevention and intervention holds that the key to improved attendance is the removal of barriers to the child's regular attendance. School attendance improvement plans are the vehicle to that end, and should be used by courts to appropriately identify and address the barriers to a child's attendance.

### **Mandatory notifications of magistrate proceedings**

Act 138 states that MDJs must notify the following persons and entities of truancy proceedings in magisterial district courts:

- The person in parental relation;
- The child; and
- CYS.<sup>18</sup>

MDJs must also notify the child or the person in parental relation of the availability of a preconviction diversionary program offered by the court.<sup>19</sup>

### **Venue**

In magistrate proceedings, venue is determined based on the address of the school. This is true for traditional public schools and brick-and-mortar charter schools.<sup>20</sup> However, for cyber charter schools, venue is based on the residence of the child or person in parental relation.<sup>21</sup> Cyber charter personnel may participate in magistrate proceedings via teleconference or videoconferencing.<sup>22</sup>

### **Burden of proof, presumptions, and affirmative defenses**

Act 138 aligns the burden of proof in summary criminal trials on truancy petitions with the standard for habitual truancy articulated in the Juvenile Act. The burden is on the school to prove, beyond a reasonable doubt that:

- While subject to compulsory school attendance;
- The child was habitually truant; and
- Without justification.<sup>23</sup>

All of these elements must be met. To meet the burden of proving "without justification," the Superior Court has held, under the Juvenile Act, that the "Commonwealth may offer testimony and school attendance records to establish that no excuse was received by the school for an absence, or that a proffered excuse is facially invalid or insufficient."<sup>24</sup> The Superior Court explained that "[u]pon introduction of such evidence, an inference arises that the absence in question is unjustified, at which point the parent or the minor child may proceed to rebut the inference."<sup>25</sup> *Thus, where schools have proffered evidence to establish a rebuttable presumption, MDJs must permit students and persons in parental relation to present evidence to rebut the presumption that the absence was unjustified.*

Act 138 states that “[i]t shall be an affirmative defense to a citation [against the person in parental relation] if the person in parental relation . . . took every reasonable step to ensure the attendance of the child at school.”<sup>26</sup> Such a defense must be proven by a preponderance of the evidence.<sup>27</sup>

### **\*A note on students with disabilities:**

The Superior Court has held, under the Juvenile Act, that evidence of a child’s disability and its impact on the child’s attendance, is relevant to the inquiry into the justification of an absence.<sup>28</sup> *The Superior Court articulated that “[if] [the] evidence [of the student’s disability] establishes justification, then [the student] simply may not be adjudicated dependent.”*<sup>29</sup>

MDJs must apply this same standard for justification in summary criminal proceedings. To that end, MDJs should hear evidence of a child’s disability and its relation to the absences when determining justification. This includes evidence of a child’s Individualized Education Program (IEP), Section 504 Service Agreement, mental health evaluations, etc. The failure of a school to appropriately implement an IEP or accommodate a child’s physical or mental impairment may have caused or be related to a child’s absences and hence the result of a disability. The MDJ must consider this evidence.

Lastly, in *In re C.M.T.*, the Superior Court openly questioned the District Attorney’s exercise of prosecutorial discretion, where it was clear that the child’s disability impacted her attendance, and the “comprehensive framework established by the [Individuals with Disabilities Education Act (IDEA) was] . . . the more appropriate vehicle[] for resolving . . . specialized and sensitive issues” related to the student’s disability and absenteeism.<sup>30</sup> *Therefore, when hearing evidence of a student’s disability, MDJs should consider whether the IDEA is the better vehicle for*

*addressing the attendance of a child with a disability, and should either dismiss the petition or order the school to address the attendance through the child’s IEP or Section 504 Service Agreement.*

### **The “offense” for purposes of imposing penalties is the citation, *not* the number of illegal absences averred therein.**

Act 138 clarifies that the “offense” for purpose of imposing penalties is defined as the “citation,” *regardless of the number of illegal absences alleged in the citation.*<sup>31</sup> Thus, if a citation avers that a student was illegally absent on 20 school days as a first offense, then the student may be fined only up to \$300 – not up to \$6,000 (\$300 x 20).

### **All penalties for violation of the compulsory school attendance requirement are *discretionary*.**

Act 138 makes *all* penalties against children and parents under the compulsory school attendance law *discretionary*.<sup>32</sup> MDJs may *choose* to issue penalties. The only penalties that MDJs may impose are:

- Fines;
- Community service; or
- Completion of an “appropriate course or program designed to improve school attendance which has been approved by the president judge of the judicial district.”<sup>33</sup>

The MDJ may also, *but does not have to*, refer the conviction of a child to the Pennsylvania Department of Transportation (PennDOT), but *“only if the child fails to comply with a lawful sentence entered for the violation and is not subject to an exception to compulsory attendance . . . .”*<sup>34</sup>

If PennDOT receives a certified record of a child’s conviction, it must suspend the child’s driver’s license for 90 days.<sup>35</sup> Upon receipt of a certified record of a child’s second conviction, PennDOT must suspend the child’s license for six months.<sup>36</sup>

MDJs should consider the impact of referring a child's conviction to PennDOT before doing so, as this may impact a child's employment, attendance, and engagement in extra-curricular activities.

### The court can impose a fine only if the defendant is able to pay it.

Under Act 138, fines are discretionary, not mandatory.<sup>37</sup> Accordingly, a court can impose the fines **only if** the "defendant is or will be able to pay the fine"; additionally, in setting any fine, the court **must** consider "the financial resources of the defendant and the nature of the burden that its payment will impose."<sup>38</sup> In setting the fine, the court must hold an ability-to-pay hearing at sentencing to affirmatively inquire into the defendant's financial circumstances.<sup>39</sup> Without holding such a hearing and gathering information about the defendant's finances, the court cannot impose a fine (even if the defendant pleads guilty).<sup>40</sup> Among the information the court must consider is the defendant's current income, indebtedness, and living situation.<sup>41</sup>

### Procedure for restoring a child's license

Act 138 explains that a PennDOT may restore a child's license if it receives a "certified record from the child's school that the child:

- [H]as attended school for a period of at least two months after the first conviction or four months after the second conviction without an unexcused absence or an unexcused tardy;
- [I]s subject to an exception to compulsory school attendance . . . ; or
- [G]raduates, withdraws from school [in accordance with law], receives a general education diploma [(GED)] or enlists in the military.<sup>42</sup>

MDJs should inform children and their parents of this procedure, where relevant.

### Occupational limited license

Act 138 states that a child whose driver's license has been suspended may still apply for an occupational limited license.<sup>43</sup>

### Referral to CYS if the child or person in parental relation was convicted of truancy twice within a three-year period

Act 138 states that if a child or person in parental relation is convicted of violating the compulsory school attendance requirements twice within a three-year period, the court shall refer the child to CYS for services or possible disposition as a dependent child.<sup>44</sup> **No other provision permits the MDJ to refer children directly to CYS.**

### The court *may* refer a child who has failed to pay fines or costs to juvenile probation for the purpose of initiating dependency proceedings if permitted by local rule but only in limited circumstances.

Act 138 permits the "presiding judge of a judicial district ... [to] adopt a local policy under [the Juvenile Act, relating to the powers and duties of juvenile probation officers] and the Pennsylvania Rules of Juvenile Court Procedure to provide that a juvenile probation officer may receive allegations that the child who **fails to satisfy a fine or costs imposed** under [the School Code for violating the compulsory school attendance requirement] is dependent for the purpose of considering the commencement of proceedings under [the Juvenile Act]."<sup>45</sup> However, "the failure to satisfy a fine or costs imposed . . . shall not be considered a delinquent act."<sup>46</sup> *MDJs should only refer children who are considered to be habitually truant to juvenile probation if this procedure has been adopted by the president judge pursuant to local rule.*

### The MDJ may remit or waive fines and costs at any time.

Act 138 explains that MDJs may "suspend the sentence of a person [parent or child] convicted of an offense and may remit or waive fines and costs if the child attends school in accordance with a plan devised by the court."<sup>47</sup> Because the purpose of the law is to (1) preserve the unity of the family whenever possible as the underlying issues of truancy are addressed; (2) avoid the loss of housing, the possible entry of a child into foster care and other unintended consequences of disruption of an intact family unit; and (3) confine a person in

parental relation to a child who is considered to be habitually truant **only as a last resort** and for a minimum amount of time,<sup>48</sup> MDJs should employ this provision whenever a child's attendance has improved in accordance with an attendance improvement plan. Fines and court costs can further ensnare families of color and families living in poverty in the criminal justice system and have been shown to be ineffective in addressing absenteeism.

### Expungement

Act 138 provides an expedited procedure for the expungement of truancy convictions. The court **must** grant a child's application for expungement "if all of the following apply:

- The child has earned a high school diploma, a Commonwealth secondary school diploma or another Department of Education-approved equivalent or is subject to compulsory attendance under Section 1330; **and**
- The child has satisfied any sentence imposed by the court with respect to the conviction, including payment of fines and costs."<sup>49</sup>

The MDJ should inform the child of the procedure for obtaining an expungement so that truancy convictions do not hinder the educational and economic opportunities available to Pennsylvania's youth.

### Appeals and payment of fines or imprisonment pending appeal

Appeals now follow the same procedure as any other summary case.<sup>50</sup> Accordingly, per

Pa.R.Crim.P. 460-62, the defendant has 30 days to file an appeal.<sup>51</sup> During this time, failure to pay any fines and costs is **not** grounds for imprisonment.<sup>52</sup> If the defendant files an appeal, the execution of the sentence is stayed pending appeal, and—because truancy is a non-jailable offense—a defendant cannot be held on collateral pending appeal.<sup>53</sup>

The standard of review on appeal is *de novo*, meaning that the defendant will receive a new trial before a judge of the Court of Common Pleas.<sup>54</sup>

### Proceedings upon failure to pay fines and costs

If a person in parental relation, but not a child, fails to pay fines and costs, the court may hold a payment determination hearing under Pennsylvania Rule of Criminal Procedure 456 to determine whether the parent "had reasonable ability to comply with the penalty imposed and that noncompliance was willful."<sup>55</sup> If the court determines that the noncompliance was willful, the individual may be jailed for a maximum of three days in any one case.<sup>56</sup> This means that a person in parental relation should never be jailed for more than three days, period, even if there are multiple violations alleged in a citation. To ensure that the court is complying with the relevant constitutional, statutory, and procedural requirements necessary in order to hold an individual in contempt and impose imprisonment for nonpayment, please see the "ACLU-PA Overview of MDJ Fines and Costs Procedures," which addresses these matters in detail.<sup>57</sup>

---

The Education Law Center-PA (ELC) is a nonprofit, legal advocacy organization with offices in Philadelphia and Pittsburgh, dedicated to ensuring that all children in Pennsylvania have access to a quality public education. Through legal representation, impact litigation, community engagement, and policy advocacy, ELC advances the rights of underserved children, including children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English learners, LGBTQ students, and children experiencing homelessness.

ELC's publications provide a general statement of the law. However, each situation is different. If questions remain about how the law applies to a particular situation, contact ELC's Helpline for information and advice — visit [www.elc-pa.org/contact](http://www.elc-pa.org/contact) or call 215-238-6970 (Eastern and Central PA) or 412-258-2120 (Western PA) — or contact another attorney of your choice.

---

<sup>1</sup> JOINT STATE GOVERNMENT COMMISSION, GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TRUANCY AND SCHOOL DROPOUT PREVENTION: REPORT OF THE TRUANCY ADVISORY COMMITTEE 35 (2015), available at <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2015-10-27%202015%20TAC%20Final%20Report%2010-27-15%203pm.pdf>.

<sup>2</sup> 24 P.S. § 13-1326.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* § 13-1325(1)-(3).

<sup>5</sup> *Id.* § 13-1333.3(a).

<sup>6</sup> See PA. R. CRIM. P. 456; 42 PA. CONS. STAT. § 9730(b).

<sup>7</sup> 24 P.S. § 13-1333.1(a).

<sup>8</sup> *Id.* § 13-1333.1(b)(2).

<sup>9</sup> “Habitually truant” refers to a student with six or more unexcused absences during the current school year assuming that the student is subject to compulsory school attendance. See *id.* § 13-1325(3). The term “truant” means a student who “stays away from school without leave or explanation.” *Truant*, OXFORD UNIVERSITY PRESS (Lexico 2021), available at <https://www.lexico.com/en/definition/truant>. ELC uses the phrase “experiencing attendance barriers” rather than “truant” in recognition of the fact that many students are absent due a variety of reasons that need to be identified and addressed. However, truant as used here is a legal term referring to a student who has three or more absences in the current school year as defined by Pennsylvania law. See 24 P.S. 13-1326.

<sup>10</sup> 24 P.S. § 13-1333.1(a)(1).

<sup>11</sup> *Id.* § 13.1333.1(a)(2).

<sup>12</sup> *Id.* § 13-1333.3(d).

<sup>13</sup> *Id.* § 13-1333(b)(3) (“Further legal action may not be taken by the school to address unexcused absences by the child until after the date for the scheduled conference has passed.”).

<sup>14</sup> *Id.* § 13-1333(b)(2).

<sup>15</sup> PENNSYLVANIA DEPARTMENT OF EDUCATION, *Compulsory School Attendance, Unlawful Absences, and School Attendance Improvement Conferences* (Feb. 2020), available at <https://www.education.pa.gov/Policy-Funding/BECS/Purdons/Pages/CompulsorySchoolAttendance.aspx>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* § 13-1333.1(d) (“When referring a habitually truant child to the county children and youth agency or filing a citation with the court because a child has been habitually truant, the school shall provide verification that a school attendance improvement conference was held.”).

<sup>18</sup> *Id.* § 13-1333.2(b)(1).

<sup>19</sup> *Id.* § 13-1333.2(b)(2).

<sup>20</sup> *Id.* § 13-1333.2(a).

<sup>21</sup> *Id.* § 13-1327.2(b).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* § 13-1333.2(c). Note that, while the burden of proof on the Commonwealth under the Juvenile Act is “clear and convincing evidence,” the burden of proof under Act 138 for truancy is “beyond a reasonable doubt.” See *In re C.M.T.*, 861 A.2d 348 (Pa. Super. Ct. 2004) (explaining that the burden of proof under the Juvenile Act is clear and convincing evidence). Courts adjudicating truancy cases must appropriately apply the higher burden of proof.

<sup>24</sup> *In re C.M.T.*, 861 A.2d at 354.

<sup>25</sup> *Id.*

<sup>26</sup> 24 P.S. § 13-1333.2(d).

<sup>27</sup> *Id.* § 13-1333.2(e).

<sup>28</sup> *In re C.M.T.*, 861 A.2d at 356.

<sup>29</sup> *Id.* at 356-57.

<sup>30</sup> *Id.* at 355-56.

<sup>31</sup> 24 P.S. § 13-1326 (“‘Offense’ shall mean each citation filed under section 1333.1[] for a violation of the requirement for compulsory school attendance under this article regardless of the number of unexcused absences alleged in the citation.”).

<sup>32</sup> *Id.* § 13-1333.3(a)

<sup>33</sup> *Id.* §§ 13-1333.3(a)(1)-(3).

<sup>34</sup> *Id.* § 13-1333.3(g)(1) (emphasis added).

<sup>35</sup> *Id.* § 13-1333.3(g)(2).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 13-1333.1(b)(2).

<sup>38</sup> 42. PA. CONS. STAT. § 9726(c)-(d); *see also* *Commonwealth v. Martin*, 335 A.2d 424, 426 n.3 (Pa. Super. Ct. 1975) (en banc) (holding that defendant's "ability to pay a fine in the immediate future was seriously curtailed by the imposition of a prison term," which counseled against imposing a fine).

<sup>39</sup> *Commonwealth v. Schwartz*, 418 A.2d 637, 639-40 (Pa. Super. Ct. 1980).

<sup>40</sup> *Commonwealth v. Thomas*, 879 A.2d 246, 264 (Pa. Super. Ct. 2005); *Commonwealth v. Gaskin*, 472 A.2d 1154, 1157 (Pa. Super. Ct. 1984).

<sup>41</sup> *Commonwealth v. Mead*, 446 A.2d 971, 973-74 (Pa. Super. Ct. 1982); *Commonwealth v. Fusco*, 594 A.2d 373, 375 (Pa. Super. Ct. 1991).

<sup>42</sup> 24 P.S. § 13-1333.3(g)(4).

<sup>43</sup> *Id.* § 13-1333.3(g)(6).

<sup>44</sup> *Id.* § 13-1333.3(e).

<sup>45</sup> *Id.* § 13-1333.3(f)(2).

<sup>46</sup> *Id.* § 13-1333.3(f)(1).

<sup>47</sup> *Id.* § 13-1333.3(b).

<sup>48</sup> *Id.* § 13-1325.

<sup>49</sup> *Id.* § 13-1333.3(h).

<sup>50</sup> *Id.* § 13-1333.3(c).

<sup>51</sup> *See also id.*

<sup>52</sup> PA. R. CRIM. P. 461(E).

<sup>53</sup> *Id.* 461(D)(3) (prohibiting courts from holding defendants on collateral for any period of time longer than the underlying sentence).

<sup>54</sup> *Id.* 462; *see also* 24 P.S. § 13-1333.3(c).

<sup>55</sup> 24 P.S. § 13-1333.3(f).

<sup>56</sup> *Id.*

<sup>57</sup> ACLU-PA, *An Overview of Fines and Costs Procedures in Summary Cases*, available at [https://www.aclupa.org/sites/default/files/2018-09-05\\_Summary\\_Fines\\_and\\_Costs\\_Procedures\\_Endnotes\\_Handout.pdf](https://www.aclupa.org/sites/default/files/2018-09-05_Summary_Fines_and_Costs_Procedures_Endnotes_Handout.pdf).