Texas Juvenile Mental Health and Intellectual and Developmental Disabilities Law Bench Book

Judicial Commission on Mental Health
Second Edition
2021-2022

This Bench Book is intended for educational and informational purposes only. It should not be construed as legal advice from the JCMH, or as an advisory opinion or ruling by the Texas Court of Criminal Appeals or the Supreme Court of Texas on specific cases or legal issues. Readers are responsible for consulting the statutes, rules, and cases pertinent to their issue or proceeding.

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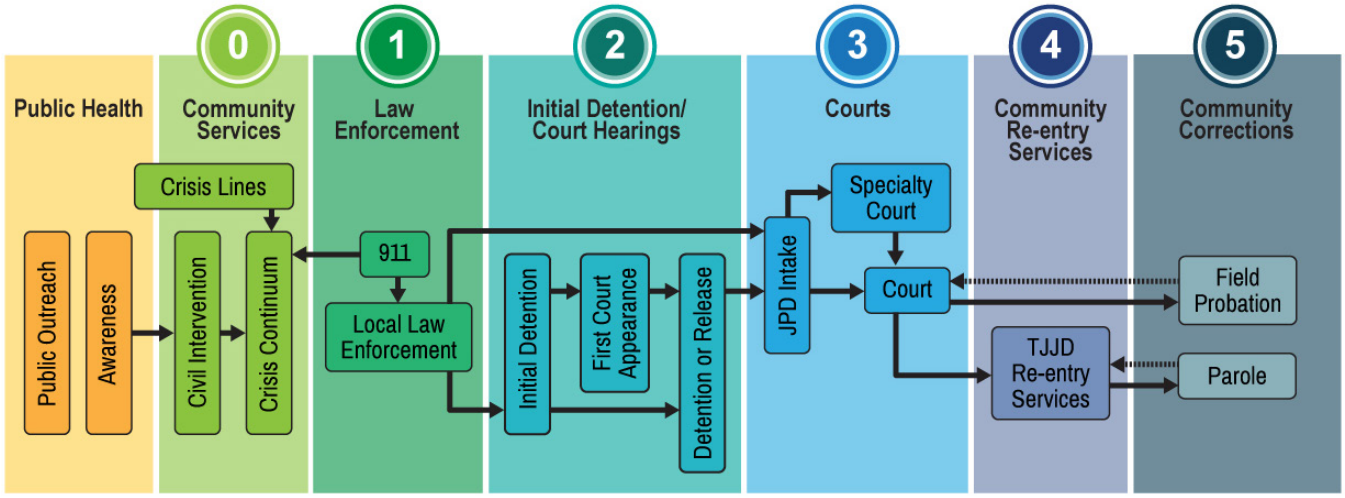
Contents

Using This Bench Book

This Bench Book is a procedural guide organized around the Sequential Intercept Model[1].

This Bench Book is a procedural guide for Texas judges hearing cases regarding juveniles with mental illness and/or IDD. Each section contains applicable statutory processes, relevant guidance, and sample forms (forms can also be found in an online forms bank on the JCMH website). Statutory language is simplified where possible, and practice notes are included in text boxes and footnotes.

The procedures discussed below are organized according to an adaptation of the widely recognized Sequential Intercept Model (SIM). The original SIM was developed as a "conceptual framework for communities to organize targeted strategies for justice-system involved individuals with behavioral health disorders."[2] For this Bench Book, the SIM has been modified to reflect the processes in the Texas juvenile justice system.



Appropriate responses at identified intercepts can prevent entry or divert children and adolescents from the juvenile justice system. Using the SIM can help communities transform fragmented systems, identify local resources and gaps, and develop strategies for intervention. The most effective responses will engage community collaborators early and often.

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[1] *The Sequential Intercept Model (SIM)*, SAMHSA, https://www.samhsa.gov/criminal-juvenile-justice/sim-overview (last visited Aug. 14, 2020).

[2] SAMHSA's GAINS Center, Policy Research Associates, Inc., Developing a Comprehensive Plan for Behavioral Health and Criminal Justice Collaboration: The Sequential Intercept Model (3rd ed. 2013); Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness,* 57 Psychol. Serv. 544, 544-49, (April 2006) https://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.4.544. This SIM adopts the traditional model but also expands it to include new intercepts that allow for a better understanding of early intervention to effectively address those with mental health issues before they enter the criminal justice system. *See also* National Center for State Courts, Research Division, Fair Justice for Persons with Mental Illness: Improving the Courts Response 6 (Aug. 2018), https://www.neomed.edu/wp-content/uploads/CJCCOE_10-Dave-Byers-COURT-RESOURCES-Mental-Health-Protocols-Oct-2018.pdf

What this Second Edition of the JCMH Juvenile Bench Book Covers

The ultimate aim of the JCMH Juvenile Bench Book is to provide guidance to the judiciary for handling issues pertaining to mental health and intellectual and developmental disabilities across all intercepts and systems. Specifically, this Bench Book will cover:

Early Identification, Assessment, and Diversion

Fitness to Proceed

Lack of Responsibility

The first section of this Bench Book – Early Identification, Assessment, and Diversion – spans Intercepts 0 through 3, which includes the earliest diversion points in which the juvenile justice system is involved. The second edition of the JCMH Juvenile Bench Book describes procedures relating to community-based services, emergency detention, initial contact with law enforcement, juvenile detention procedures, release from detention, pre-adjudication diversion programs, fitness to proceed, and lack of responsibility. Legislative changes from the 86th legislative session (2019) and the 87th legislative session (2021) are noted throughout the book. Look for boxes with this icon:

In the context of the juvenile justice system, the concept of equity strives to provide system responses and outcomes based on the unique characteristics and individual rehabilitative needs of each juvenile. Despite differences, practitioners must endeavor to treat each child equally within the framework of due process and fundamental fairness. Throughout this bench book, you will find Reflection Points at critical places in the processing of a juvenile case where the consequences of systemic bias and disproportionality can be minimized. Although the Reflection Points are directed at judges, each one of us has a role to play in identifying and ending systemic bias in the justice system, and we encourage all juvenile justice professionals to use these points for honest and thoughtful consideration in their work. Look for Reflection Points with this icon:

Sample forms submitted from several juvenile courts can now be found in an online forms bank on the JCMH website: http://texasjcmh.gov/publications/resources/. If your court would like to add forms to the online bank, please send them to JCMH@txcourts.gov.

Stakeholder Input is Essential

Finally, this Bench Book represents a collaborative effort among stakeholders from across disciplines. It is a dynamic publication that will be regularly updated to incorporate legislative changes, provide current practice tips and other practical information, and highlight matters about which stakeholders disagree. If you are reading this book, you are a stakeholder, and we value your opinion. If you would like to provide feedback on any part of this book, please email us at JCMHBenchBook@txcourts.gov. Thank you for your service and for your interest in these issues.

Introduction

It is estimated that up to 70% of youth involved with the juvenile justice system[3] meet the criteria for a mental health disorder, and many experts would argue that nearly all of the youth in the system have experienced life-altering trauma. Such statistics reiterate the need to recognize that children are different. Juvenile court was originally based on this principle, providing rehabilitation and protective supervision for youth.[4] In the 1990s, tough-on-crime policies shifted the focus away from treatment.[5] Recent developments in brain science have led experts back to treatment, training, and rehabilitation as the goals of the juvenile justice system. Advances in neuroscience and cognitive psychology reveal that decision-making abilities develop at different rates in youth and the need to carefully consider juvenile justice intervention programs.[6]

Youth who have come into contact with our juvenile justice system represent an important opportunity to intervene before they become a part of a repeated cycle, experiencing court involvement in the criminal justice system, removal from home and school, civil commitment in state hospitals, and homelessness. Lack of alternatives in our nation leads to unnecessary arrests where individuals often languish in jail, resulting in the criminalization of mental illness.[7] In the adult criminal justice system, national best practices urge courts to divert individuals with mental illness or intellectual and developmental disabilities (IDD) away from incarceration. Because half of all mental health conditions begin by age 14,[8] the juvenile justice system is primed to successfully intervene and divert offenders away from detention to prevent this cycle.

Texas has one of the highest populations of young people,[9] and according to the Meadows Mental Health Policy Institute[10], mental illness is no small problem for children and youth. In any given 12-month period there are more than a half-million children and adolescents with severe emotional disturbances (SED) in Texas.[11] SED includes mental health conditions, such as attention deficit disorders, conduct disorders and depression, along with impaired ability to function at school and at home.[12] It is important to note that of those 500,000 children and youth with SED, that over 300,000 children, youth, and adolescents with SED are living at or below 200% of the federal poverty level.[13] Among youth with SED, 30,000 are estimated to remain in the "school to prison pipeline," if nothing is done to help them.[14] However, a new understanding of the neuroplasticity of the brain offers real hope that rehabilitation is possible.[15]

The National Center for State Courts (NCSC)[16] offers resources for courts to promote rehabilitation in youth by improving their responses to those with mental illness and IDD. The NCSC highlights the ambitious Models for

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[3] Lee A. Underwood & Aryssa Washington, *Mental Illness and Juvenile Offenders*, Int'l J. of Envtl. Res. and Pub. Health 13, no. 2, 228 at 3 (2016).

[4] Center on Juvenile and Criminal Justice, *Juvenile Justice History,* CJCJ.org, http://www.cjcj.org/education1/juvenile-justice-history.html (last visited August 2, 2021).

[5] *Id.*

[6] Conference of Chief Justices and Conference of State Court Administrators, *Resolution 6 Commending the Models for Change Initiative*, NCSC.org, https://ccj.ncsc.org/__data/assets/pdf_file/0025/23488/07252015-commending-models-for-change-initiative.pdf

[7] Kristi Taylor, Exec. Dir., Tex. Judicial Comm'n on Mental Health, Patti Tobias, Principal Court Mgmt. Consultant, Nat'l Center for State Courts, Leading Change: Improving the Court and Community Response to Those with Mental Illness, Presentation at Lubbock County Office of Dispute Resolution Continuing Education Workshop (January 25, 2020) (citing Institute for Court Management).

[8] National Alliance for Mental Illness, *Closing the Gap for Children's Mental Health*, NAMI.org, https://www.nami.org/Blogs/NAMI-Blog/May-2012/Closing-the-Gap-for-Children-s-Mental-Health (last visited Aug. 26, 2020).

[9] United States Census Bureau, *QuickFacts, Texas, Persons under 18 Years, Percent*, Census.gov, https://www.census.gov/quickfacts/geo/chart/TX/AGE295219 (last visited Aug. 26, 2020).

[10] The Meadows Mental Health Policy Institute, https://www.texasstateofmind.org/ (last visited Aug. 31, 2020).

[11] The Meadows Mental Health Policy Institute, Estimates of Prevalence of Mental Health Conditions among Children and Adolescents in Texas (2016), https://www.texasstateofmind.org/wp-content/uploads/2016/01/MMHPI-Child-Adolescent-Prevalence-Summary-2016.03.24.pdf

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Kristin Anderson Moore, Child Trends, The Developing Brain: Implications for Youth Programs, (2015) https://www.childtrends.org/wp-content/uploads/2015/06/2015-20DevelopingBrain.pdf (last visited Aug. 31, 2020).

[16] National Center for State Courts, https://www.ncsc.org/ (last visited Aug. 31, 2020).

Change[17] initiative to identify and develop juvenile justice reform efforts for a "more fair, rational, effective and developmentally sound system of justice for youth";[18]

Over the last decade the Models for Change initiative has supported a broad array of goals, including:

- identifying and addressing the mental health treatment needs of youth that come in contact with the juvenile justice system;
- increasing the use of evidence-based assessments and treatment programs;
- improving access to counsel and the quality of representation in delinquency proceedings;
- reducing racial and ethnic disparities;
- improving the response to dual status youth;
- improving probation services; and
- expanding alternatives for youth charged with status offenses.

Research supports this multifactorial approach as a matter of public health to support good mental health in children and youth. Factors such as childhood trauma, including prior abuse and neglect, stress from poverty or racial and ethnic disparities, and the re-traumatization that can occur from child-serving systems, must be considered in a child's treatment and in their juvenile court case. The National Child Traumatic Stress Network[19] notes:

> More than 80% of juvenile justice-involved youth report experiencing trauma, with many having experienced multiple, chronic, and pervasive interpersonal traumas. This exposure places them at risk for emotional, behavioral, developmental, and legal problems. Unresolved posttraumatic stress symptoms can lead to serious long-term consequences across the entire lifespan, such as problems with interpersonal relationships; cognitive functioning; and mental health disorders including PTSD, substance abuse, anxiety, disordered eating, depression, self-injury, and conduct problems—all of which can increase the likelihood of involvement in delinquency, crime, and the justice system. The prevalence and severity of traumatic stress reactions among juvenile justice-involved youth, caregivers, families, professionals, and providers, necessitates a system-wide response to prevent, identify, address, and minimize further traumatic stress.

Judges, attorneys, probation officers, mentors, and other adults in a child's life can help create and promote resiliency – protective factors that can prevent or ameliorate the negative effects of Adverse Childhood Experiences (ACEs).[20] Increasingly, child-serving systems, including juvenile courts and juvenile probation departments, are turning to Trauma-Informed Care as a framework for interactions with and responses to children and families who have experienced trauma.

Courts are uniquely positioned to bring together the necessary stakeholders to be agents of change for the justice system's response to children and youth with mental illness or IDD. This bench book aims to provide courts the knowledge and tools they need to be able to look beyond the traditional lens of seeing willful kids with criminal behavior to a more hopeful, proactive approach where just one caring adult can change a child's life and life chances.[21]

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[17] Models for Change, http://www.modelsforchange.net/index.html (last visited Aug. 31, 2020).

[18] Hon. Bobbe J. Bridge, *Introduction: Models for Change in Juvenile Justice Reform, Trends in State Courts,* National Center for State Courts (2014) https://ncsc.contentdm.oclc.org/digital/collection/famct/id/990

[19] The National Child Traumatic Stress Network, https://www.nctsn.org/ (last visited Aug. 12, 2020).

[20] Vanessa Sacks & David Murphey, *The Prevalence of Adverse Childhood Experiences, Nationally, by State, and by Race or Ethnicity,* Child Trends (Feb. 20, 2018), https://www.childtrends.org/publications/prevalence-adverse-childhood-experiences-nationally-state-race-ethnicity

[21] David Murphey et. al., Child Trends, *Caring Adults: Important for Positive Child Well-Being* (2013) https://www.childtrends.org/wp-content/uploads/2013/12/2013-54CaringAdults.pdf (illustrating that developmental research shows that having one or more caring adults in a child's life increases the likelihood that they will flourish, and become productive adults themselves).

Definitions

Adaptive Behavior:

Adaptive behavior means the effectiveness with or degree to which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. Tex. Code Crim. Proc. art. 46B.001(1); Tex. Health & Safety Code § 591.003(1).

Admission:

Admission means the formal acceptance of a prospective patient to a facility. Tex. Health & Safety Code § 572.0025(h)(1).

Adverse Childhood Experiences (ACEs):

Adverse childhood experiences, or ACEs, refer to the following 10 childhood experiences that researchers have identified as risk factors for chronic disease in adulthood: emotional abuse, physical abuse, sexual abuse, emotional neglect, physical neglect, violent treatment towards mother, household substance abuse, household mental illness, parental separation or divorce, and having an incarcerated household member.[22] Juveniles with ACEs are at an increased risk for justice system involvement and re-offense.[23]

Assessment:

Assessment means the administrative process a facility uses to gather information from a prospective patient, including a medical history and the problem for which the patient is seeking treatment, to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified. Tex. Health & Safety Code § 572.0025(h)(2).

Child:

A child is a person who is 10 years of age or older and under 17 years of age; or seventeen years of age or older and under 18 years of age who is alleged or found to have engaged in delinquent conduct or conduct indicating a need for supervision as a result of acts committed before becoming 17 years of age. Tex. Fam. Code § 51.02(2).

Community Resource Coordination Group (CRCG):

A coordination group established under a memorandum of understanding adopted under section 531.055. Tex. Gov't Code § 531.421(2). CRCGs are comprised of local public and private agencies, and they work with parents, caregivers, youth, and adults to develop service plans for families. CRCGs can help identify service gaps and meet client needs through interagency cooperation.

Conduct Indicating a Need for Supervision (CINS):

Conduct indicating a need for supervision is:

1. conduct, other than a traffic offense, that violates:
    A. the penal laws of this state of the grade of misdemeanor that are punishable by fine only; or
    B. the penal ordinances of any political subdivision of this state;
2. the voluntary absence of a child from the child's home without the consent of the child's parent or guardian or for a substantial length of time or without intent to return;
3. conduct prohibited by city ordinance or by state law involving the inhalation of the fumes or vapors of paint and other protective coatings or glue and other adhesives and the volatile chemicals itemized in Section 485.001, Health and Safety Code;

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[22] Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, 3 OJJDP J. OF JUV. JUST. 1, 1-2, (2014), https://nicic.gov/prevalence-adverse-childhood-experiences-ace-lives-juvenile-offenders.

[23] *Id*. at 11

4. an act that violates a school district's previously communicated written standards of student conduct for which the child has been expelled under Section 37.007(c), Education Code;
5. ... conduct described by Section 43.02(a) or (b), Penal Code;
6. ... conduct that violates Section 43.261, Penal Code; or
7. notwithstanding Subsection (a)(1), conduct that violates Section 42.061, Penal Code, if the child has not previously been adjudicated as having engaged in conduct violating that section.

Tex. Fam. Code § 51.03(b).

Custodian:

A custodian is the adult with whom a child resides. Tex. Fam. Code § 51.02(3).

Dating violence:

(a) Dating violence is an act, other than a defensive measure to protect oneself, by an actor that:
   1. Is committed against a victim or an applicant for a protective order:
      A. With whom the actor has or has had a dating relationship; or
      B. Because of the victim's or applicant's marriage to or dating relationship with an individual with whom the actor is or has been in a dating relationship or marriage; and
   2. Is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the victim or applicant in fear of imminent physical harm, bodily injury, assault, or sexual assault.

(b) For purposes of this title, "dating relationship" means a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. The existence of such a relationship shall be determined based on consideration of:
   1. The length of the relationship;
   2. The nature of the relationship; and
   3. The frequency and type of interaction between the persons involved in the relationship.

(c) A casual acquaintanceship or ordinary fraternization in a business or social context does not constitute a "dating relationship" under Subsection (b).

Tex. Fam. Code § 71.0021.

Delinquent Conduct:

Delinquent conduct is:

1. Conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or confinement in jail;
2. Conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in:
   A. A justice or municipal court;
   B. A county court for conduct punishable only by a fine; or
   C. A truancy court;
3. Conduct that violates Section 49.04, 49.05, 49.06, 49.07, or 49.08, Penal Code; or
4. Conduct that violates Section 106.041, Alcoholic Beverage Code, relating to driving under the influence of alcohol by a minor (third subsequent offense).

Tex. Fam. Code § 51.03(a).

Developmental Disability (DD):

Manifests before the age of 22; severe chronic disability that involves impairments of general mental abilities resulting in at least three out of six of the following limitations:[24]

- Self-care;
- Understanding & use of receptive and expressive language;
- Learning;
- Mobility;
- Self-direction; and/or
- Capacity for independent living, including economic self-sufficiency.

Examples of such disabilities include autism-spectrum disorder, fetal alcohol spectrum disorder, and cerebral palsy.

Tex. Health & Safety Code § 614.001(4).

Developmental Period:

This is the period of a person's life from birth through 17 years of age. Tex. Code Crim. Proc. art. 46B.001(4).

Dual Status Child

Dual status child means a child who has been referred to the juvenile justice system and is:

(A) in the temporary or permanent managing conservatorship of the Department of Family and Protective Services;

(B) the subject of a case for which family-based safety services have been offered or provided by the department;

(C) an alleged victim of abuse or neglect in an open child protective investigation; or

(D) a victim in a case in which, after an investigation, the department concluded there was reason to be the child was abused or neglected.

Tex. Fam. Code § 51.02(3-a).

Family Violence

Family violence means:

1. An act by a member of a family or household against another member of the family or household that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself;
2. Abuse, as that term is defined by Texas Family Code Sections 261.001(C), (E), (G), (H), (I), (J), (K), and (M), by a member of a family or household toward a child of the family or household; or
3. Dating violence, as that term is defined by Texas Family Code Section 71.0021.

Tex. Fam. Code § 71.004.

Guardian:

A guardian is the person who, by a court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court. Tex. Fam. Code § 51.02(4).

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[24] Tex. Hum. Res. Code Ann. § 112.001(3) (Vernon Supp. 2015) (defining developmental disability as "mean[ing] a severe, chronic disability as defined by applicable federal developmental disability law"); *see*, Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. §§ 15001 – 15115 (2018) (cited by the Tex. Hum. Res. Code Ann. § 112.001(3) as the "Applicable Federal Developmental Disabilities Laws").

Home and Community-Based Services Program:

HCS is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) pursuant to section 1915(c) of the Social Security Act. 42 U.S.C. 1396n. It provides community-based services and support to eligible individuals as an alternative to an intermediate care facility for individuals with an intellectual disability or related conditions program. The HCS program is operated by the authority of the Health and Human Services Commission (HHSC). 40 Tex. Admin. Code §§ 9.153(36), 9.154(a).

Implicit Bias (also known as unconscious bias):

Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual's awareness or control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness.[25]

Inpatient Mental Health Facility:

Refers to a mental health facility that can provide 24-hour residential and psychiatric services and that is:

- A facility operated by the Health and Human Services Commission (HHSC);
- A private mental hospital licensed by HHSC;
- A community center, facility operated by or under contract with a community center or other entity HHSC designates to provide mental health services;
- A local mental health authority or a facility operated by or under contract with a local mental health authority;
- An identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the department; or
- A hospital operated by a federal agency.

Tex. Health & Safety Code § 571.003(9).

Intake:

Intake means the administrative process for gathering information about a prospective patient and giving a prospective patient information about the facility[26] and the facility's treatment and services. Tex. Health & Safety Code § 572.0025(h)(3).

Intellectual and Developmental Disabilities (IDD):

IDD is a broader category than ID: it includes people with ID, DD, or both. DD are often lifelong disabilities that can be cognitive, physical, or both. Some Texas statutes on early identification, screening and assessment still do not currently address developmental disabilities, but developmental disabilities are important to consider as they often co-occur with mental illness and ID. Further, people with IDD are more likely than their peers without disabilities to be involved in the justice system, both as victims and suspects.[27]

Intellectual Disability (ID):

ID means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Code Crim. Proc. art. 46B.001(8); Tex. Health & Safety Code § 591.003.

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[25] *Understanding Implicit Bias,* The Ohio State University Kirwan Institute for the Study of Race and Ethnicity, http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/ (last visited Aug. 20, 2020).

[26] "Facility" as used in this statute refers to an inpatient mental health facility.

[27] *See Frequently Asked Questions on Intellectual Disability,* American Association on Intellectual and Developmental Disabilities (AAIDD), https://www.aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited June 19, 2020).

Intellectual Disability Services:

Intellectual disability services includes all services concerned with research, prevention, and detection of intellectual disabilities, and all services related to the education, training, habilitation, care, treatment, and supervision of persons with an intellectual disability, but does not include the education of school-age persons that the public education system is authorized to provide. Tex. Health & Safety Code § 531.002(10).

Juvenile:

A juvenile is a person who is under the jurisdiction of the juvenile court, confined in a juvenile justice facility, or participating in a juvenile justice program. 37 Tex. Admin. Code § 341.100(19).

Licensed Practitioner of the Healing Arts (LPHA):

An LPHA is a staff member who is a physician; a licensed professional counselor; a licensed clinical social worker; a psychologist; an advanced practice registered nurse; a physician assistant; or a licensed marriage and family therapist. 26 Tex. Admin. Code § 301.303(35).

Local Behavioral Health Authority (LBHA):

LBHAs are units of government that provide services to a specific geographic area of the state, called the local service area. LBHAs deliver mental health and chemical dependency services in communities across Texas. An authority designated as an LBHA has all of the responsibilities and duties of a Local Mental Health Authority (LMHA), and the responsibility and duty to ensure that chemical dependency services are provided in the service area. Tex. Health & Safety Code § 533.0356(a). *See also* Tex. Health & Safety Code § 461A.056.

Local Intellectual and Developmental Disability Authority (LIDDA):

LIDDAs are units of government that provide services to a specific geographic area of the state, called the local service area. LIDDAs serve as the point of entry for publicly funded intellectual and developmental disability programs, whether the program is provided by a public or private entity. LIDDA responsibilities are delineated in section 533.035 of the Texas Health and Safety Code. *See* Tex. Health & Safety Code § 531.002(12).

Local-level Interagency Staffing Group:

Local-level interagency staffing group means a group established under the memorandum of understanding described by §531.055, Texas Government Code. Tex. Fam. Code § 53.011(a)(2).

Local Mental Health or Behavioral Health Authority (LMHA or LMHA/LBHA):

LMHAs, also referred to as community centers, community mental health centers, or MHMRs, are units of local government that provide services to a specific geographic area of the state called the local service area. HHSC contracts with the 39 LMHAs/LBHAs to deliver mental health services in communities across Texas. Their responsibilities in this capacity are set out in Title 25, Chapter 412 of the Texas Administrative Code. *See* Tex. Health & Safety Code §§ 533.035, 571.003(11).

Medical Care:

"Medical Care" means all health care and related services provided under the medical assistance program under Chapter 32, Human Resources Code, and described by Section 32.003(4), Human Resources Code. Tex. Fam. Code § 266.001(5).

Mental Health Services:

"Mental Health Services" includes all services concerned with research, prevention, and detection of mental disorders and disabilities, and all services necessary to treat, care for, supervise and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from a substance use disorder. Tex. Health & Safety Code § 531.002(14).

Mental Health Facility:

A mental health facility refers to:

- An inpatient or outpatient mental health facility operated by the department (meaning the Department of State Health Services), a federal agency, a political subdivision, or any person;
- A community center or a facility operated by a community center;
- That identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided; or
- With respect to a reciprocal agreement entered into under section 571.0081 of the Texas Health and Safety Code, any hospital or facility designated as a place of commitment by HHSC, a local mental health authority, and the contracting state or local authority.

Tex. Health & Safety Code § 571.003(12).

Mental Illness (MI):

Mental illness is an illness, disease, or condition that either:

- Substantially impairs a person's thoughts, perception of reality, emotional process, or judgment; or
- Grossly impairs behavior as demonstrated by recent disturbed behavior.

The term, as statutorily defined, does not include epilepsy, dementia, substance abuse, or intellectual disability. Tex. Health & Safety Code § 571.003.

Note that Chapter 46B of the Code of Criminal Procedure also defines this term and, in contrast to the definition above, provides that mental illness is an illness, disease, or condition that grossly impairs (rather than substantially impairs) a person's thoughts, perception of reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Code Crim. Proc. art. 46B.001(11).

Mental Impairment:

Mental impairment means a mental illness, an intellectual disability, or a developmental disability. Tex. Health & Safety Code § 614.001(6).

Non-physician Mental Health Professional:

Non-physician mental health professional means:

1. A psychologist licensed to practice in this state and designated as a health-service provider;
2. A registered nurse with a master's degree or doctoral degree in psychiatric nursing;
3. A licensed clinical social worker;
4. A licensed professional counselor, licensed to practice in this state; or
5. A licensed marriage and family counselor, licensed to practice in this state.

Tex. Health & Safety Code § 571.002(15).

Offender with a Medical or Mental Impairment:

An offender with a medical or mental impairment means a juvenile or adult who is arrested or charged with a criminal offense and who:

A. is a person with:
   i. a mental impairment; or
   ii. a physical disability, terminal illness, or significant illness; or
B. is elderly.

Tex. Health & Safety Code § 614.001(8).

Parent:

A parent is the mother or father of a child but does not include a parent whose rights have been terminated. Tex. Fam. Code § 51.02(9).

Person-Centered Language:

Person-centered language refers to language used to speak appropriately and respectfully about an individual with a disability. Person-centered language emphasizes the person first, not the disability. Examples from the Texas Council for Developmental Disabilities[28] are listed in the chart below:

Person-Centered Language	Language to Avoid
Person with a disability	The handicapped, the disabled
Person without a disability	Normal, healthy, whole or typical people
Person with an intellectual, cognitive, or developmental disability	Mentally retarded, retarded, slow, idiot, moron
Person with an emotional or behavioral disability, person with a mental health or a psychiatric disability	Crazy, insane, psycho, mentally ill, emotionally disturbed, demented

Physician:

Physician means: (1) a person licensed to practice medicine in this state; (2) a person employed by a federal agency who has a license to practice medicine in any state; or (3) a person authorized to perform medical acts under a physician-in-training permit at a Texas postgraduate training program approved by the Accreditation Council for Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board. Tex. Health & Safety Code § 571.002(18).

Qualified Mental Health Professional – Community Services (QMHP-CS):

A QMHP-CS is a staff member who is credentialed as a QMHP-CS who has demonstrated and documented competency in the work to be performed, and has a bachelor's degree from an accredited college or university with a minimum number of hours that is equivalent to a major (as determined by the LMHA or MCO in accordance with § 412.316(d) of this title (relating to Competency and Credentialing)) in psychology, social work, medicine, nursing, rehabilitation, counseling, sociology, human growth and development, physician assistant, gerontology, special education, educational psychology, early childhood education, or early childhood intervention; is a registered nurse; or completes an alternative credentialing process as determined by the LMHA or MCO in accordance with § 412.316(c) and (d) of this title relating to (Competency and Credentialing). 26 Tex. Admin. Code § 301.303(48).

Referral to Juvenile Court:

A referral to juvenile court is the referral of a child or a child's case to the office or official, including an intake officer or a probation officer, designated by the juvenile board to process children within the juvenile justice system. Tex. Fam. Code § 51.02(12).

Residential Care Facility:

A residential care facility is a state supported living center or the Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IID) component of the Rio Grande Center. Tex. Health & Safety Code § 591.003(18).

School Offense:

A school offense is an offense committed by a child enrolled in a public school that is a Class C misdemeanor other than a traffic offense and that is committed on property under the control and jurisdiction of a school district. Tex. Ed. Code § 37.141(2).

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[28] Texas Council for Developmental Disabilities, https://tcdd.texas.gov/ (last visited Aug. 31, 2020).

Serious Emotional Disturbance (SED):

Serious emotional disturbance is a diagnosable mental, behavioral, or emotional disorder in children and youth experienced in the past year that resulted in functional impairment that substantially interfered with or limited the child's or youth's role or functioning in family, school, or community activities.[29] Many mental health resources refer to SED in children, and to serious mental illness (SMI) in adults.

State Hospital:

A state hospital is a state-operated hospital inpatient mental health facility operated by HHSC that provides 24-hour residential and psychiatric services to persons civilly and forensically admitted. Tex. Health & Safety Code § 571.003(9).

State-Supported Living Center (SSLC):

A SSLC is a state-supported and structured residential facility operated by HHSC to provide clients with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills. Tex. Health & Safety Code § 531.002(19).

Subaverage General Intellectual Functioning:

Subaverage general intellectual functioning means a measured intelligence two or more standard deviations below the age-group mean, using a standardized psychometric instrument. Tex. Code Crim. Proc. art. 46B.001(14).

Texas Commission on Law Enforcement (TCOLE):

TCOLE is the agency that establishes and enforces standards to ensure that the people of Texas are served by highly trained and ethical law enforcement, corrections, and telecommunications personnel.

Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI):

TCOOMMI is the agency responsible for providing a formal structure for criminal justice, health and human services, and other affected organizations to communicate and coordinate on policy, legislative, and programmatic issues affecting offenders with special needs, including those with MI and ID. The TCOOMMI program monitors, coordinates, and implements a continuity of care system through collaborative efforts with the 39 LMHAs/LBHAs throughout the state. Outpatient levels of service include Intensive Case Management, Transitional Case Management, and Continuity of Care for individuals on probation or parole. *See* Tex. Health & Safety Code Ch. 614.

Texas Juvenile Justice Department (TJJD):

TJJD is the state agency responsible for the supervision and rehabilitation services provided by the juvenile justice system in the community and in residential and secure facilities. Following its creation in 2011, TJJD was tasked with the following purposes:

1. creating a unified state juvenile justice agency that works in partnership with local county governments, the courts, and communities to promote public safety by providing a full continuum of effective supports and services to youth from initial contact through termination of supervision; and
2. creating a juvenile justice system that produces positive outcomes for youth, families, and communities by:
   A. assuring accountability, quality, consistency, and transparency through effective monitoring and the use of systemwide performance measures;
   B. promoting the use of program and service designs and interventions proven to be most effective in rehabilitating youth;
   C. prioritizing the use of community-based or family-based programs and services for youth over the placement or commitment of youth to a secure facility;
   D. operating the state facilities to effectively house and rehabilitate the youthful offenders that cannot be safely served in another setting; and
   E. protecting and enhancing the cooperative agreements between state and local county governments.

Tex. Hum. Res. Code § 201.002.

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[29] *Serious Mental Illness and Serious Emotional Disturbance*, Substance Abuse and Mental Health Services Administration, https://www.samhsa.gov/dbhis-collections/smi (last visited Aug. 13, 2020).

Trauma Informed Care

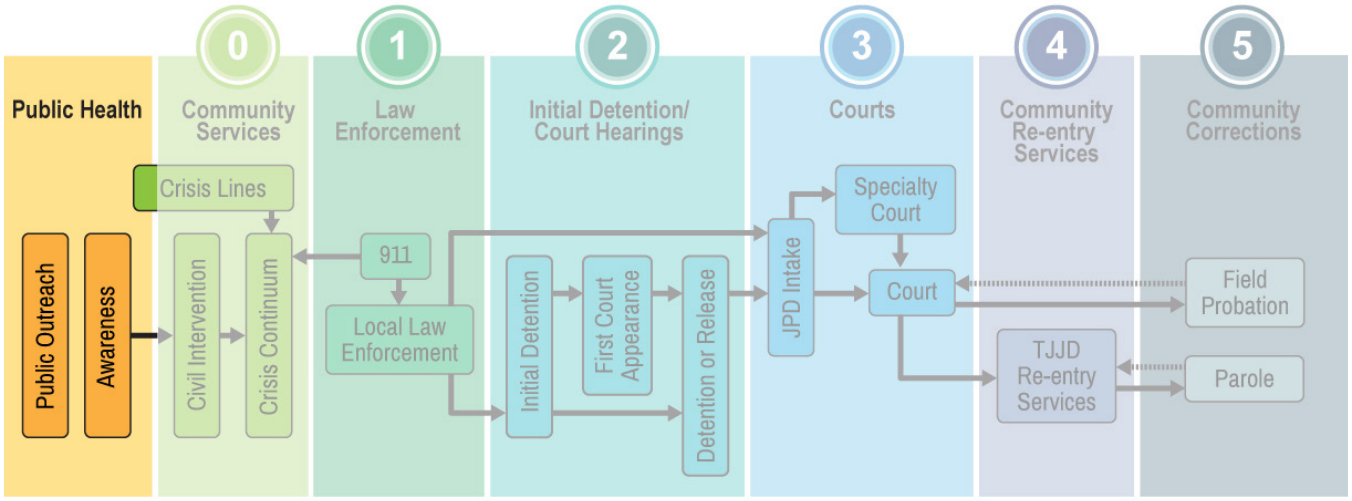
a. Trauma results from an event, series of events, or set of circumstances experienced by an individual as physically or emotionally harmful o life-threatening woth lasting adverse effects on the individual's functioning or the individual's mental, physical, social, emotional, or spiritual well-being.

b. An individual, program, organization, or system that is trauma-informed fully integrates knowledge about trauma into policies, procedures, and practices by:

    1. Realizing the widespread impact of trauma, understanding potential paths for recovery, and acknowledging the compounding impact of structural inequities related to culture, history, race, gender, identity, locale, and language;
    2. Recognizing the signs and symptoms of trauma in clients, families, staff, and others involved with the system;
    3. Maximizing physical and psychological safety and responding to the impact of structural inequities on individuals and communities;
    4. Building healthy, trusting relationships that create mutuality among children, families, caregivers, and professionals at an individual and organizational level; and
    5. Striving to avoid re-traumatization.

40 Tex. Admin. Code § 702.701.

Public Health



Public Health addresses the importance of laying a foundation that sets up individuals, families, and public outreach systems for appropriate identification and responses to mental health and intellectual and developmental disabilities (IDD) issues before any justice-related system comes into play.[30] Addressing mental health issues does not and should not begin with the justice system.[31] Ideally, many people in a child's life, including family members, educators, and physicians, will understand the signs of mental illness and IDD, as well as the social determinants of good mental health such as the availability of healthy food, safe homes and neighborhoods, the quality of relationships, and experiences with trauma or racism. While there is no guarantee that a child or adolescent with MI or IDD will not eventually interact with the justice system, early intervention is ideal. [32] Therefore, this Bench Book includes Public Health as the first opportunity to intercept an individual from moving further into the system, although it might be more appropriate to think of public health flowing through each intercept.

Mental health and IDD awareness should be heightened by public outreach to individuals including children, families, and support systems. Awareness is intentionally broad and refers to identification as well as awareness of resources.

Individual Awareness: Identifying signs of mental illness is the first step to achieving effective responses. Children and adolescents seek help from a parent or guardian when they feel that it is safe and normal to ask for help. Children and adolescents need trusted adults to listen and to provide a warm and trusting environment. Avenues of awareness include teachers and other school personnel, childcare workers, after school program staff, coaches, pediatricians, and the media. Sesame Street's collection of *Traumatic Experiences*[33] and *Caring for Each Other*[34] videos demonstrate that it is never too early to begin these conversations.

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[30] National Center for State Courts, Research Division, Fair Justice for Persons with Mental Illness: Improving the Court's Response 19 (2018) https://www.neomed.edu/wp-content/uploads/CJCCOE_10-Dave-Byers-COURT-RESOURCES-Mental-Health-Protocols-Oct-2018.pdf.

[31] *Id.*

[32] *Id.*

[33] *Traumatic Experiences*, Sesame Street in Communities, https://sesamestreetincommunities.org/topics/traumatic-experiences/ (last visited June 5, 2020).

[34] *Caring for Each Other,* Sesame Street, https://www.sesamestreet.org/caring (last visited June 5, 2020).

Mental Health Workforce Shortage

According to the National Alliance on Mental Illness-Texas (NAMI-Texas),[35] three million Texans live in counties that have no psychiatrist. About 200 of the state's 254 counties have a mental health workforce shortage. Therefore, some Texans travel long distances for care and others use telehealth services. S.B. 1636 (86th Reg. Sess. (2019)) requires the Health Professions Council[36] to include in its annual report strategies to expand the health care workforce, including methods for increasing the number of health care practitioners providing mental and behavioral health care services.

Legislative Change

The 86th Legislature (2019) passed numerous bills to increase mental health awareness and public outreach. Many of those bills focused on schools. According to the National Alliance on Mental Illness (NAMI),[37] most people living with mental illness start to experience symptoms early in life, with 50% of all conditions developing by age 14 and 75% by age 24.[38] Schools provide a unique opportunity to identify and treat mental health conditions by serving students where they already are.[39] School personnel play an important role in identifying the early warning signs of an emerging mental health condition and in linking students with effective services and supports.[40]

H.B. 18 added an emphasis on mental health to (1) continuing education for teachers, principals, and school counselors and (2) curriculum for grades K-12. The bill authorized school districts to employ or contract with one or more non-physician mental health professionals. In addition, the school district's student handbook and website must now include certain information related to mental health, including resources available at each campus.

H.B. 19 allows more school staff to receive mental health first aid training[41] and/or other training to increase awareness and understanding of mental health by requiring LMHAs/LBHAs to employ a non-physician mental health professional that is located at the Education Service Center to serve as a mental health training resource for school districts.

S.B. 11, in addition to adding mental health as a required curriculum for grades K-12, permits a school district to provide educational materials to all parents and families in the district, including identifying risk factors, accessing resources for treatment, and accessing available student accommodations provided on each campus. The bill also requires provision of a school safety allotment to school districts to be used to improve school safety and security, including costs associated with, among other things, providing mental health personnel and support and behavioral health services. Additionally, S.B. 11 established the Texas Child Mental Health Care Consortium,[42] which must create a network of child psychiatry access centers and telemedicine/telehealth programs for identifying and assessing behavioral health needs and providing access to mental health care services. As an example of implementation, in Dallas, the schools use an iPad to connect with clinicians and make appointments for students at the children's hospital

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[35] National Alliance on Mental Illness-Texas, https://namitexas.org/ (last visited Aug. 14, 2020).

[36] Health Professions Council, https://www.hpc.state.tx.us/ (last visited Aug. 19, 2020).

[37] National Alliance on Mental Illness, https://nami.org/home (last visited Aug. 14, 2020).

[38] *Mental Health in Schools,* National Alliance on Mental Illness, https://www.nami.org/Advocacy/Policy-Priorities/Intervene-Early/Mental-Health-in-Schools (last visited June 5, 2020).

[39] *Id.*

[40] *Id.*

[41] Mental health first aid is a public education program that helps people identify, understand, and respond to signs of mental illness and substance use disorders. *See* Mental Health First Aid, https://www.mentalhealthfirstaid.org/ (last visited Aug. 31, 2020).

[42] Texas Child Mental Health Care Consortium, https://www.utsystem.edu/pophealth/tcmhcc/ (last visited Aug. 14, 2020).

Family Support: Parents, guardians, and relatives are often the first to recognize signs of a child's possible mental health condition. Families should be encouraged to seek out information and support from their community as soon as possible, as early intervention can result in a better outcome for the child. Organizations like NAMI and the Texas Health and Human Services Commission (HHSC)[43] provide guidelines for how to talk to children about mental health, how to respond to a mental health crisis, and how to find available resources in the community.

Public Outreach: Public outreach and campaigns to enhance mental health awareness enable citizens, loved ones, and professionals to identify and correctly respond to the need for mental health interventions before a crisis occurs. Two such campaigns are Okay to Say[44] and Children's Mental Health Awareness Day.[45] New efforts are underway every day. The Federal Communications Commission recently approved 988 as a nationwide, three-digit phone number that people can call to speak with suicide prevention and mental health counselors at the existing National Suicide Prevention Lifeline (1-800-273-TALK).[46]

Disproportionality in the Juvenile Justice System: Disproportionality is the over- or underrepresentation of a racial or cultural group within a system at a percentage that is not proportionate to their representation in the general population.[47] Disparity refers to the difference in outcome and conditions for some groups of people compared to other groups because of unequal treatment or services.[48] Youth who identify as Black or African American, Hispanic or Latino, and Indigenous are involved in the Texas juvenile justice system at disproportionate rates than other youth. Systemic racial and ethnic disparity in the juvenile justice system in Texas is supported by data contained in *The State of Juvenile Probation Activity in Texas*. Specifically, of the 39,185 juveniles referred in 2019, caucasian youth represent 30.9% of the state's population, yet account for only 20.2% of the referrals to juvenile probation departments.[49] In contrast, Hispanic youth comprise 50.4% of the state's population and 51% of referrals.[50] African American youth represent 11.4% of the state's population and 27.4% of referrals to juvenile probation departments.[51] This trend is reflected nationally as well: in 2018, Black youth represented 16% of the national youth population, but 50% of national youth arrests, while white youth represented 75% of the youth population and 47% of the youth arrests.[52] In some respects, the juvenile justice system often serves as a filter for mental health issues that manifest as delinquent conduct. To that end, racial and ethnic disparities are dramatically compounded by the effects of behavioral and mental health disorders.

In recent years, national initiatives to identify effective evidence-based programs for addressing the mental health needs of justice-involved youth, such as Models for Change, have emerged. These efforts have also helped to raise the level of awareness in underserved populations and the need to expand the number of culturally competent mental health professionals in the face of the state's changing demographics. In addition, these initiatives have highlighted the importance of greater reflection on the conscious and unconscious decisions of practitioners that impact which juveniles enter the system and the opportunities for successful rehabilitative outcomes.

Implicit Bias. Juvenile system stakeholders are often challenged with navigating the myriad of complex factors, including socioeconomic status and the prevalence of mental health issues that contribute to delinquency and criminal conduct. Nevertheless, it is important to have a fundamental understanding of the ways in which implicit bias impacts an individual's justice system experience and perceptions of fundamental fairness. Practitioners should be aware of the contact points in which implicit bias may play a role in how an individual is perceived and processed at critical points during arrest, prosecution, judicial proceedings, probation, placement, and discharge.

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[43] Texas Health and Human Services Commission, https://hhs.texas.gov/ (last visited Aug. 14, 2020).

[44] Okay to Say, https://www.okaytosay.org/ (Last visited July 4, 2020).

[45] Children's Mental Health Awareness Day ATX, https://cmhaustin21.com/ (Last visited August 2, 2021).

[46] Federal Communications Commission, FCC Designates '988' as 3-Digit Number for National Suicide Prevention Hotline (2020), https://docs.fcc.gov/public/attachments/DOC-365563A1.pdf.

[47] Supreme Court of Texas Permanent Commission for Children, Youth and Families, Texas Child Protection Law Bench Book 214 (2019).

[48] *Id.*

[49] Texas Juvenile Justice Department, The State of Juvenile Probation Activity in Texas 7 (2019).

[50] *Id.*

[51] *Id.*

[52] Caren Harp & David B. Muhlhausen, U.S. Dep't of Justice, Juvenile Justice Statistics, National Report Series Bulletin, Juvenile Arrests, 2018 8 (2020). https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/media/document/254499.pdf

These processes should be individualized and examined through an equity lens. While subjective considerations such as implicit bias may be difficult to ascertain, one method to identify clear trends regarding disproportionality is by gathering data on decision-making practices. These metrics may be useful to inform local dialogue about ways to minimize the direct and indirect consequences of race and ethnicity at critical process points.

Gathering Race and Ethnicity Data at Important Decision Points

Arrest and Detention

- Number of juveniles by race/ethnicity taken into custody and/or released by law enforcement
- Number of juveniles by race/ethnicity placed in detention or ordered to wear electronic leg monitoring (ELM) devices

Case Referral

- Number of cases accepted and referred to court by race/ethnicity
- Number of cases diverted for counsel and release, mediation, or assessment, by race/ethnicity

Assessment

- Consider whether implicit bias is inherent in the administration and application of standardized assessment tools (i.e., MAYSI-2, PACT, etc.)

Disposition

- Number of juveniles by race/ethnicity who receive deferred prosecution, by offense
- Analysis of juvenile characteristics that impact dispositional outcomes

Placement

- Number of juveniles by race/ethnicity who are placed in residential placement
- Number of juveniles by race/ethnicity who are committed to TJJD

Probation Supervision

- Length of probation term by race/ethnicity
- Factors used to make community service restitution referrals
- Impact of fees, court costs, and fines on the juvenile and family (relating to income and indigence)

Prosecutorial Decisions

- Number of probation revocations by race/ethnicity, and by basis of violation (decisions by probation and by prosecutor)
- Number of early terminations by race/ethnicity (decisions/recommendations by probation and by prosecutor)

Cultural Barriers to Treatment. Of the population receiving mental health services, youth who identify as BIPOC (Black, Indigenous, and People of Color) are more likely to be referred to the juvenile justice system rather than to mental health providers.[53] Section 51.20 of the Family Code authorizes a juvenile who is alleged to have committed delinquent conduct or conduct indicating a need for supervision (CINS) to be referred for a mental health examination by a physician, psychologist, psychiatrist, or other qualified professional *at any stage of the proceedings*. Juvenile justice practitioners should be mindful of the stigma of mental illness that exists in many communities of color and the unwillingness of many families to acknowledge or seek out treatment services for a

[53] Lyndonna Marrast, David Himmelstein, and Steffie Woolhandler, *Racial and Ethnic Disparities in Mental Health Care for Children and Young Adults: A National Study*, 46 Int'l J. of Health Services 810, 819 (2016): "The under-provision of mental health care for minority children contrasts starkly with the high frequency of punitive sanctions that their behaviors elicit. Black children suffer excessive rates of school discipline, such as suspensions and expulsions, starting at preschool ages. Minority teens also have disproportionate contact with the juvenile justice system, with higher arrest rates for nonviolent, low-level offenses such as drug possession and for non-criminal misbehaviors such as truancy and curfew violations."

justice-involved child. Studies suggest that youth in certain racial groups are less likely to access available mental health services.[54] Further, systemic bias has been cited as an obstacle to treatment, even when a youth's diagnosis justifies a referral for services.

Culturally-Informed Care. According to NAMI, "culture, beliefs, sexual identity, values, race, and language all affect how we perceive and experience mental health conditions. In fact, cultural differences can influence what treatments, coping mechanisms and supports work for us. It is therefore *essential* for culture and identity to be a part of the conversation as we discuss both mental health and mental health care."[55]

Youth must feel comfortable and understood by their mental health professional for a therapeutic relationship to be effective. This includes feeling that their mental health professional understands their identity and being comfortable addressing it openly. Practitioners should engage with community providers that have taken steps to build a diverse staff with training in cultural competency in order to meet the needs of youth and other special populations.

Research shows that culturally and linguistically appropriate services improve the quality of health care.[56] In 1997, the process for developing national standards for culturally and linguistically appropriate services (CLAS) began. Over time, the National CLAS Standards[57] have been updated, and they are intended to advance health equity, improve quality, and help eliminate health care disparities by establishing a blueprint[58] for health and health care organizations.

Death by Suicide is closely linked to mental illness, but the majority of people who have a mental illness do not die by suicide.[59] Although suicide affects youth of all backgrounds, some groups are at higher risk than others. In Texas, Black high school students are 1.5 times more likely than White or Latino students to report at least one suicide attempt in the past year.[60] Youth who identify as gay or lesbian are more than three times as likely to report a suicide attempt in the last year, compared to the overall reporting rate of Texas high school students. [61]National research shows that youth in foster care are four times more likely to have attempted suicide than youth who have never been in care,[62] and youth who are involved in the juvenile justice system have up to a four times higher rate of suicide than youth who are not justice system-involved.[63]

Several initiatives are under way to combat this preventable tragedy. Texas Suicide Prevention Council[64] developed both a training program, ASK About Suicide to Save a Life,[65] to recognize suicide risk factors, protective factors,

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[54] *National Minority Mental Health Month,* U.S. Dep't of Health and Hum. Serv., Office of Minority Health, https://www.minorityhealth.hhs.gov/omh/content.aspx?ID=9447 (documenting mental and behavioral data by population) (last visited Aug. 31, 2020).

[55] *Challenging Multicultural Disparities in Mental Health*, National Alliance on Mental Illness, https://www.nami.org/Your-Journey/Identity-and-Cultural-Dimensions (last visited Aug. 29, 2020).

[56] Mary Catherine Beach et. al., *Strategies for Improving Minority Healthcare Quality*, 90 Evidence Report/Tech. Assessment (Summ.) 1 (2004) and Tawara D. Goode et. al., *The Evidence Base for Cultural and Linguistic Competency in Health Care*, Commonwealth Fund Publication, no. 962 (2006), https://www.commonwealthfund.org/sites/default/files/documents/___media_files_publications_fund_report_2006_oct_the_evidence_base_for_cultural_and_linguistic_competency_in_health_care_goode_evidencebasecultlinguisticcomp_962_pdf.pdf.

[57] Think Cultural Health, *National Culturally and Linguistically Appropriate Services Standards*, HHS.gov, https://thinkculturalhealth.hhs.gov/clas/standards (last visited Aug. 29, 2020).

[58] U.S. Dep't of Health and Hum. Serv., Off. of Minority Health, Nat'l Standards for Culturally & Linguistically Appropriate Services in Health Care: A Blueprint for Advancing and Sustaining CLAS Policy and Practice (2013), https://thinkculturalhealth.hhs.gov/assets/pdfs/EnhancedCLASStandards-Blueprint.pdf.

[59] Tex. Suicide Prevention Council, Texas State Plan for Suicide Prevention: Guidelines for Suicide Prevention in Texas 1 (2018), https://www.sprc.org/sites/default/files/TexasPlanUpdate2018FINALpdf.pd_.pdf.

[60] Josette Saxton, Texans Care for Children, Youth Suicide Prevention in Texas Schools and Communities 3 (2019), https://static1.squarespace.com/static/5728d34462cd94b84dc567ed/t/5cc1d437b208fc5b549f4140/1556206651227/youth-suicide-prevention-brief.pdf.

[61] *Id.*

[62] *Id.* (citing Daniel J. Pilowsky & Li-Tzy Wu, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, 38 J. of Adolescent Health 351 (2006)).

[63] *Id.* (citing U.S. Dep't of Health and Hum. Serv. Off. of the Surgeon Gen. & Nat'l Action Alliance for Suicide Prevention, 2012 National Strategy for Suicide Prevention: Goals and Objectives for Action (2012)), https://www.hhs.gov/sites/default/files/national-strategy-for-suicide-prevention-overview.pdf

[64] Texas Suicide Prevention, https://texassuicideprevention.org/ (last visited Aug. 31, 2020).

[65] *Ask About Suicide (ASK),* Texas Suicide Prevention, https://texassuicideprevention.org/training/video-training-lessons-guides/ask-about-suicide-ask/ (last visited Aug. 31, 2020).

warning signs, and appropriate referral strategies; and a free suicide prevention app.[66] Additionally, the Texas Suicide Prevention Council created a state suicide prevention plan,[67] and a toolkit for schools.[68] Two important bills directly relating to children's mental health and suicide prevention were passed in the 86th legislative session: Senate Bill 1390, and Senate Bill 18. Senate Bill 1390 (86th Reg. Sess. (2019)) promoted comprehensive suicide prevention strategies in school, including responding to suicide attempts or deaths by suicide in ways that help prevent future suicidal behaviors. Senate Bill 1390 also required state agencies to focus planning on the reduction of suicide rates among all Texans. Senate Bill 18 (86th Reg. Sess. (2019)) contained many measures to support mental health in schools, notably: a requirement that every school district to create a district improvement plan that includes evidence-based practices for suicide prevention; positive behavior interventions and support, including grief-informed and trauma-informed care; and required instruction for teachers on positive behavioral interventions for students with mental health conditions or substance use.

Trauma-Informed Care is more than a trending buzzword. Research shows that trauma impacts a child's development and health. The groundbreaking Adverse Childhood Experiences (ACEs) study[69] and replicated studies since demonstrate that childhood stress is linked to poor health outcomes, including obesity, diabetes, depression, heart disease, cancer, and stroke as well as alcohol and drug abuse, low graduation rates, and poor employment outcomes.[70]

Prevalence estimates of ACEs among children and youth in the major child-serving systems in Texas underscore the need for these systems to be adept at identifying, understanding, and treating trauma. Statewide, approximately 730,000 children and adolescents, have experienced three or more ACEs.[71] Nearly 90,000 children and adolescents under the age of 17 have been exposed to 10 or more episodes of violence,[72] and among youth involved within the juvenile justice system in Texas, 5,900 have experienced four or more ACEs.[73]

Children and adolescents who are not experiencing consistent physical and emotional safety may develop behaviors and coping mechanisms that allow them to survive and function day-to-day. These learned adaptations make sense when a physical and/or emotional threat is pervasive but are not helpful once a person is no longer under such threats.[74] Trauma and ACEs can result in a range of behaviors that are punishable by law, and a referral to juvenile court.

Knowing that children who interact with the juvenile justice system are vulnerable to trauma, our systems must respond to the needs of children and families through a trauma-informed lens. This requires judges, attorneys, court staff, and other stakeholders to understand how traumatic responses present in the children and families in front of the court and change courtroom practices to help families build resilience. In doing so, serving children and families moves beyond responding to behaviors to promoting healing. A trauma-informed juvenile justice system "acknowledges the prevalence and impact of trauma and attempts to create a sense of safety for all persons, whether or not they have experienced trauma."[75]

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[66] *Mobile Applications,* Texas Suicide Prevention, https://texassuicideprevention.org/information-library/app-promotions/ (last visited Aug. 31, 2020).

[67] Tex. Suicide Prevention Council, Texas State Plan for Suicide Prevention: Guidelines for Suicide Prevention in Texas 1 (2018), http://www.sprc.org/sites/default/files/TexasPlanUpdate2018FINALpdf.pd_.pdf

[68] *Texas Suicide Prevention Toolkit,* Texas Suicide Prevention, https://texassuicideprevention.org/information-library/texas-suicide-prevention-toolkit/ (last visited Aug. 31, 2020).

[69] Vincent J. Felitti et. al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. of Preventive Med., 245-58 (1998), https://www.ajpmonline.org/article/S0749-3797(98)00017-8/fulltext#secd1847701e2623

[70] *About the CDC-Kaiser ACE Study*, Centers for Disease Control and Prevention, https://www.cdc.gov/violenceprevention /childabuseandneglect/acestudy/about.html (last visited Aug. 23, 2020).

[71] Meadows Mental Health Policy Inst., Trauma-Informed Care Final Report 21 (2017), http://texaschildrenscommission.gov/media/83503/trauma-informed-care-final-report.pdf.

[72] *Id.* at 22.

[73] *Id*. at 23.

[74] *Complex Trauma Effects,* The National Child Traumatic Stress Network, https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma/effects (last visited Aug. 23, 2020).

[75] Meadows Mental Health Policy Inst., Trauma-Informed Care Final Report 5 (2017), http://texaschildrenscommission.gov/media/83503/trauma-informed-care-final-report.pdf.

The essential elements of a trauma-informed juvenile justice system[76] are:

1. Trauma-informed policies and procedures
2. Identification and screening of youth who have been traumatized
3. Clinical assessment and intervention for trauma-impaired youth
4. Trauma-informed programming and staff education
5. Prevention and management of secondary traumatic stress
6. Trauma-informed partnering with youth and families
7. Trauma-informed cross system collaboration
8. Trauma-informed approaches to address disparities and diversity.

In 2017, the Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families[77] launched the Statewide Collaborative on Trauma-Informed Care (SCTIC)[78] to elevate trauma-informed policy and practices in the Texas child welfare system by creating a statewide strategy to support system reform, organizational leadership, cross-systems collaboration, and community-led efforts with data-informed initiatives. The SCTIC published a report in February 2019 entitled "Building a Trauma-Informed Child Welfare System: A Blueprint."[79]The Trauma Blueprint provides a plan for the state to advance trauma-informed care practices in the child welfare system but recognizes the interplay between other systems such as the juvenile justice system and suggests that the Blueprint can and should be used as a framework for any system.

The presence of ACEs does not mean that a child will experience poor life outcomes. Positive experiences and protective factors can prevent children from experiencing adversity and protect against many negative health and life outcomes.[80] Judges have the power to lead the way in transforming the juvenile justice system into one that engages the children in their courtrooms, avoids re-traumatization, and supports recovery, all in the pursuit of increased public safety and reduced recidivism.

Reflection Point

All assumptions and interactions with juveniles should be framed within the following considerations: adolescent brain development; trauma; and racial or ethnic bias.

[76] The National Child Traumatic Stress Network, Essential Elements of a Trauma-Informed Juvenile Justice System (2015), https://www.nctsn.org/sites/default/files/resources//essential_elements_trauma_informed_juvenile_justice_system.pdf (last visited Aug. 29, 2020).

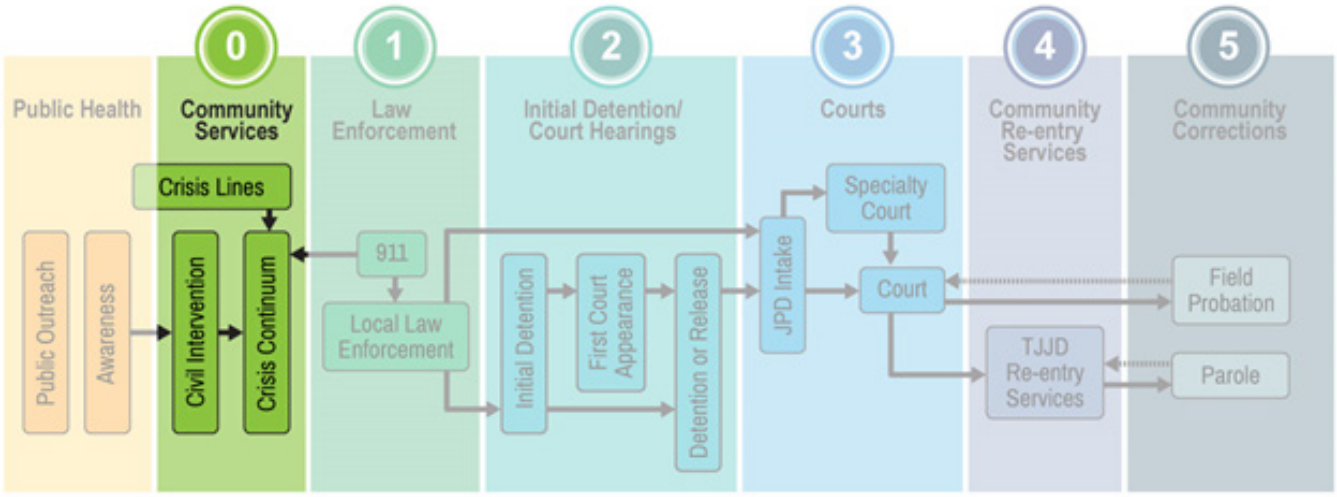
[77] The Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, http://texaschildrenscommission.gov/

[78] *Statewide Collaborative on Trauma-Informed Care,* The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families, http://texaschildrenscommission.gov/our-work/systems-improvement/sctic/ (last visited Aug. 31, 2020).

[79] The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families, Building a Trauma-Informed Child Welfare System: A Blueprint (2019) http://texaschildrenscommission.gov/media/84026/building-a-trauma-informed-child-welfare-system-a-blueprint-online.pdf

[80] *Resilience: A Powerful Weapon in the Fight Against ACEs*, Center for Child Counseling, https://www.centerforchildcounseling.org/resilience-a-powerful-weapon-in-the-fight-against-aces/ (last visited Aug. 29, 2020).

0 Intercept 0: Community Services



Intercept 0: Community Services encompasses the early intervention points for children with mental illness or intellectual or developmental disabilities before they are taken into custody by law enforcement. It captures systems and services designed to connect children with treatment before a mental health crisis begins or at the earliest possible stage of system interaction. In Texas, these include services such as crisis hotlines, screening and assessment, crisis-response teams, and specially trained law enforcement. Children and adolescents are eligible for many of the same services and supports as adults.

An understanding of complex trauma and its association with the risk of delinquency is critical to early intervention. Effective intervention that addresses factors related to complex trauma *before* a youth becomes involved in the juvenile justice system can prevent youth from offending and entering the system.[81] The effect of trauma is cumulative: the greater the number of traumatic events that a child experiences, the greater the risks to a child's development and their emotional and physical health.[82] Youth who experience complex trauma have been exposed to a series of traumatic events that include interpersonal abuse and violence, often perpetrated by those who are meant to protect them.[83] This level of traumatic exposure has extremely high potential to derail a child's development on a number of levels.[84] Communities must work together to recognize and address mental illness, intellectual and development disabilities, and traumatic stress, and to provide early interventions for treatment before a youth becomes entrenched in a pattern of maladaptive and problematic behavior.[85]

Reflection Point

As a judge, consider building strengths-based teamwork between families and systems. Seek to identify existing community coalitions and organizations that will build a network of support for children and families in advance of justice-involvement.

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[81] National Council of Juvenile and Family Court Judges, Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency (2010), https://www.ncjfcj.org/wp-content/uploads/2012/02/trauma-bulletin_0.pdf#:~:text=Ten%20Things%20Every%20Juvenile%20Court%20Judge%20Should%20Know,NCTSN%20Office%20of%20Juvenile%20Justice%20and%20Delinquency%20Prevention (last visited Aug. 7, 2020).

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*. at 5.

1. Community-based Mental Health Services

Community-based mental health services are available for children and adolescents with intellectual disabilities, developmental disabilities, serious emotional disturbance, mental illnesses, and substance use disorders. As a judge and a community leader, it is advantageous to have a general understanding of the resources available in your community.[86]

Reflection Point

As a judge, it is important to remember that youth who identify as BIPOC strongly benefit from culturally competent services at all intercept points.

1.1 Services Provided by Local Mental Health Authorities and Local Behavioral Health Authorities (LMHAs/LBHAs)

LMHAs and LBHAs serve as the point of entry for publicly funded, privately funded, or unfunded mental health services for people who are assessed with mental illness in Texas.

General Services

LMHAs/LBHAs:

- Provide a full array of services and supports for people with mental illness.
- Are responsible for admitting eligible people with Medicaid into assessed and most appropriate level of care based on completion of the Uniform Assessment.[87]
- Are responsible for admitting eligible people, when they have capacity, without Medicaid, into assessed and most appropriate level of care based on completion of the Uniform Assessment.
- Are responsible for completing Preadmission Screening and Resident Review (PASRR)[88] Evaluations, known as a PE, for people suspected of having a serious mental illness seeking admission to a Medicaid-certified nursing facility.
- Provide specialized services in the most appropriate setting for the people, including the nursing facility, who are PASRR positive and agree to receive the Mental Health Specialized Services.[89]

Statutorily Required Services

Each of the 39 LMHAs/LBHAs is required to provide:

- 24-hour emergency screening and rapid crisis stabilization services;[90]
- Community-based crisis residential services or hospitalization;
- Community-based assessments, including the development of interdisciplinary treatment plans and diagnosis and evaluation services;

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[86] HHSC has a program called 2-1-1 Texas, which helps Texas citizens connect with services. *See 211 Connecting People and Services,* Tex. Health & Human Serv., https://www.211texas.org/about-2-1-1/ (last visited Aug. 31, 2020) for more information. *See also*, Hon. Barbara Hervey et al., Texas Mental Health Resource Guide, (1st ed. 2019), https://www.txcourts.gov/media/1445767/texas-mental-health-resource-guide-01242020.pdf. (A compilation of mental health and substance use disorder resources across Texas organized by county.).

[87] The Uniform Assessment is an assessment used by the Texas Health and Human Services Commission as Form 3020. *See* https://hhs.texas.gov/laws-regulations/forms/3000-3999/form-3020-uniform-assessment (last visited Sept. 1, 2020).

[88] PASRR is a federally mandated program that requires all states to prescreen all people, regardless of payer source or age, seeking admission to a Medicaid-certified nursing facility. For more information, *see Preadmission Screening Resident Review,* Tex. Health & Hum. Serv., https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/resources/preadmission-screening-resident-review-pasrr (last visited Aug. 31, 2020).

[89] Specialized Services are administered by LMHAs/LBHAs, LIDDAs, and nursing facilities. *See Specialized Service Definitions & Provider Roles,* Tex. Health & Hum. Serv., https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/resources/preadmission-screening-resident-review-pasrr/specialized-service-definitions-provider-roles (last visited Aug. 31, 2020).

[90] Every LMHA/LBHA has a 24-hour crisis line. Find yours here: *Mental Health Crisis Services,* Tex. Health & Hum. Serv., https://hhs.texas.gov/services/mental-health-substance-use/mental-health-crisis-services (last visited Aug. 31, 2020).

- Medication-related services, including medication clinics, laboratory monitoring, medication education, mental health maintenance education, and the provision of medication; and
- Psychosocial rehabilitation programs, including social support activities, independent living skills, and vocational training.

Tex. Health & Safety Code § 534.053(a).

To the extent that resources are available, LMHAs/LBHAs shall:

- Ensure that the services listed in this section are **available for children, including adolescents**, as well as adults, in each service area;
- Emphasize early intervention services for children, including adolescents, who meet the department's[91] definition of being at high risk of developing severe emotional disturbances or severe mental illnesses; and
- Ensure that services listed in this section are available for defendants required to submit to mental health treatment under Article 17.032, 42A.104, or 42A.506, Code of Criminal Procedure.

Tex. Health & Safety Code § 534.053(c).

1.2 Crisis Services

A crisis is defined as a situation in which:

- An individual presents an immediate danger to self or others;
- An individual's mental or physical health is at risk of serious deterioration; or
- An individual believes either that:
  - they present an immediate danger to self or others; or
  - their mental or physical health is at risk of serious deterioration.

26 Tex. Admin. Code § 301.303(13).

The LMHA must have a crisis screening and response system in operation 24 hours a day, every day of the year, that is available throughout the contracted service area. 26 Tex. Admin. Code § 301.327(b).

1.2.1 What Crisis Response Services Include

Crisis response services include three services:

- A crisis screening;
- A crisis assessment; and
- A recommendation about the level of care required to resolve the crisis.

An LMHA/LBHA ensures immediate screening and, if recommended based on the screening, a face-to-face intake assessment of an individual found in the LMHA/LBHA's local service area who is experiencing a crisis in accordance with Texas Administrative Code, Title 26, Rule 301.327 of this title, which governs access to mental health community services. 26 Tex. Admin. Code § 306.161(a).

LMHAs/LBHAs Conduct Crisis Response for Both MI and IDD

For persons with MI and IDD, crisis response will be conducted by the LMHA/LBHA. However, it is recommended that the LMHA/LBHA consult with the LIDDA. For persons with IDD who are NOT in crisis, the LIDDA will serve as the point of access for services. In all but two Texas counties (Bexar and Dallas) the LMHA and LIDDA functions are performed by one local agency. *See* Tex. Health & Safety Code § 533.035(a).

Note: In Bexar County, the Alamo Area Council of Government serves as the LIDDA. In Dallas County, Metrocare serves as the LIDDA.

[91] As used here, "department" refers to the Department of State Health Services (DSHS).

1.2.2 Crisis Screening and Response System

All LMHA/LBHAs have a crisis screening and response system in operation 24 hours a day, seven days a week, that is available to individuals throughout its contracted service delivery area.[92] The telephone system to access the crisis screening and response system includes a toll-free crisis hotline number. The crisis hotline number is prominently placed on each LMHA/LBHA website and is typically the primary point of contact for a county jail or a juvenile detention center that does not have mental health professionals available on staff or through a local contract.

1.2.3 Crisis Hotline

The crisis hotline is a continuously available telephone service staffed by trained and competent QMHP-CSs who provide information, screening, intervention, support, and referrals to callers 24 hours a day, seven days a week.[93]The hotline facilitates referrals to 911, a Mobile Crisis Outreach Team (discussed below), or other crisis services and conducts follow-up contacts to ensure that callers successfully accessed the referred services. If an emergency is not evident after further screening, the hotline includes referral to other appropriate resources within or outside the LMHA/LBHA local service area. The hotline works in close collaboration with local law enforcement, 211, and 911 systems.

1.2.4 Mobile Crisis Outreach Team (MCOT)

When the crisis hotline is called, the crisis hotline staff member provides a crisis screening, and determines if the crisis situation requires deployment of the LMHA/LBHA MCOT. If the crisis situation is determined to be emergent or urgent, at least one trained MCOT member shall respond to the site of the crisis situation and conduct a crisis assessment. Immediately upon arrival a face-to-face screening shall be completed by at least a QMHP-CS if a telephone screening has not been previously completed. MCOTs provide a combination of crisis services including emergency care, urgent care, crisis follow-up, and relapse prevention to the child, youth, or adult in the community.[94] Some local intellectual and development disability authorities operate integrated teams to include staff with IDD expertise but may not always have a professional available for the crisis call.

Note: Some counties, such as Travis County, have an Expanded Mobile Crisis Outreach Team (EMCOT) that collaborates with local law enforcement or other first responders for a real-time co-response to a person in psychiatric crisis. EMCOT connects people to treatment appropriate for psychiatric crises, diverting them from emergency rooms and jails. This improves health outcomes and allows first responders to return to responding to medical emergencies and public safety issues.[95]

Crisis Alternative Programs such as Crisis Respite Facilities are located in the community and allow children and adolescents in behavioral health crisis to receive treatment in the most appropriate and available setting.[96] Additionally, use of these programs can minimize time spent by law enforcement officers driving to and waiting at hospitals and facilities, divert individuals from the criminal justice system, and reduce use of local emergency room services to manage behavioral health crises. Contact your local LMHA/LBHA to determine if a crisis alternative program is available in your community.

1.2.5 What a Crisis Assessment Includes

A crisis assessment shall include an evaluation of risk of harm to self or others, presence or absence of cognitive signs suggesting delirium, need for immediate full crisis assessment, need for emergency intervention, and an evaluation of the need for an immediate medical screening/assessment by a physician (preferably a psychiatrist), psychiatric advanced practice nurse, physician assistant or registered nurse.[97]

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[92] Tex. Health & Human Serv., Information Item V, Crisis Services Standards (2019) https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/behavioral-health-provider/community-mh-contracts/info-item-v.docx. *See Community Mental Health Contracts,* Tex. Health & Human Serv., https://hhs.texas.gov/doing-business-hhs/provider-portals/behavioral-health-services-providers/behavioral-health-provider-resources/community-mental-health-contracts (last visited Aug. 20, 2020).

[93] Tex. Health & Human Serv., Crisis Services Standards, at V-1.

[94] *Id.* at V-3 – V-6.

[95] Integral Care Crisis Services, Expanded Mobile Crisis Outreach Team, AustinTexas.gov, https://www.austintexas.gov/edims/document.cfm?id=302634 (last visited Aug. 27, 2020).

[96] Tex. Health & Human Serv., Information Item V, Crisis Services Standards at V-38 – V-41.

[97] *Id.* at V-5.

After the crisis assessment is conducted, the LMHA/LBHA will make a recommendation about the treatment necessary to resolve the crisis.

Communication with LMHAs/LBHAs

Open and clear communication and planning between facilities and LMHAs/LBHAs on crisis assessments and crisis response is encouraged. Every second counts when a child or adolescent experiences an emergent or urgent mental health crisis. Solving procedural complications before a crisis occurs will save time and avoid redundancy.

The LMHA/LBHA's crisis response and response time should not change, whether the youth is in custody or not. MCOT staff will respond to location of the crisis to provide services, whether it is a private home or a residential facility.

Secure juvenile facilities, such as juvenile detention centers and post-adjudication facilities, should be in ongoing communication with the LMHA/LBHA so that any part of the crisis assessment or recommendation for treatment needed to resolve the crisis is clear. Ongoing communication between facilities and the LMHA/LBHA on the local process and procedure for delivery of MCOT services is also needed. This will naturally vary center to center.

1.2.6 Emergency Care Services: LMHA/LBHA Shall Respond Within One Hour

If, during a crisis screening, it is determined that an individual is experiencing a crisis that may require emergency care services, the QMHP-CS must:

- Take immediate action to address the emergency situation to ensure the safety of all parties involved;
- Activate the immediate screening and assessment processes as described in title 26, section 301.327 of the Texas Administrative Code; and
- Provide or obtain mental health community services or other necessary interventions to stabilize the crisis.

26 Tex. Admin. Code § 301.327(d)(B).

For emergency calls, a face-to-face crisis response (or telehealth based on policies and procedures approved by the medical director) shall be provided within one hour. After crisis intervention services are provided, and if the individual is still in need of emergency care services, then the individual shall be assessed by a physician (preferably a psychiatrist) within 12 hours.

1.2.7 Urgent Care Services: LMHA/LBHA Shall Respond Within Eight Hours

If the crisis screening indicates that an individual needs urgent care services, a QMHP-CS shall, within eight hours of the initial incoming hotline call or notification of a potential crisis situation:

- Perform a face-to-face assessment; and
- Provide or obtain mental health community services or other necessary interventions to stabilize the crisis.

26 Tex. Admin. Code § 301.327(d)(C).

Local Mental Health Authorities/Behavioral Health Authorities

In all but two Texas counties (Bexar and Dallas), the LMHA/LBHA and LIDDA functions are united under one local agency.

LMHA/LBHA	Address	Main and Crisis Phone Numbers	Counties served
ACCESS http://www.accessmhmr.org/	913 N. Jackson St. Jacksonville, TX 75766	M: 903-586-5507 C: 800-621-1693	Anderson, Cherokee
Andrews Center Behavioral Healthcare System http://www.andrewscenter.com/	2323 West Front St. Tyler, TX 75702	M: 903-597-1351 C: 877-934-2131	Henderson, Rains, Smith, Van Zandt, Wood
Behavioral Health Center of Nueces County https://www.ncmhid.org/	1630 S. Brownlee Blvd. Corpus Christi, TX 78401	M: 844-379-0330 C: 888-767-4493	Nueces
Betty Hardwick Center https://bettyhardwick.org/	2616 S. Clack St. Abilene, TX 79606	M: 325-690-5100 C: 800-758-3344	Callahan, Jones, Shackleford, Stephens, Taylor
Bluebonnet Trails Community Services http://bbtrails.org/	1009 N. Georgetown St. Round Rock, TX 78664	M: 512-255-1720 C: 800-841-1255	Bastrop, Burnet, Caldwell, Fayette, Gonzales, Guadalupe, Lee, Williamson
Border Region Behavioral Health Center http://www.borderregion.org/	1500 Pappas St. Laredo, TX 78041	M: 956-794-3000 C: 800-643-1102	Jim Hogg, Starr, Webb, Zapata
Burke https://myburke.org/	2001 S. Medford Dr. Lufkin, TX 75905	M: 936-639-1141 C: 800-392-8343	Angelina, Houston, Jasper, Nacogdoches, Newton, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity, Tyler
Camino Real Community Services http://www.caminorealcs.org/	19965 FM 3175 N. Lytle, TX 78052	M: 210-357-0300 C: 800-543-5750	Atascosa, Dimmit, Frio, La Salle, Karnes, Maverick, McMullen, Wilson, Zavala
The Center for Health Care Services https://chcsbc.org/	6800 Park Ten Blvd. Suite 200-S San Antonio, TX 78213	M: 210-261-1000 C: 800-316-9241 or 210-223-7233	Bexar
Center for Life Resources http://cflr.us/ns/	408 Mulberry St. Brownwood, TX 76801	M: 325-646-9574 C: 800-458-7788	Brown, Coleman, Comanche, Eastland, McCulloch, Mills, San Saba
Central Counties Services https://centralcountiesservices.org/	304 S. 22nd St. Temple, TX 76501	M: 254-298-7000 C: 800-888-4036	Bell, Coryell, Hamilton, Lampasas, Milam
Central Plains Center http://centralplains.org/	2700 Yonkers Plainview, TX 79072	M: 806-293-2636 C: 800-687-1300	Bailey, Briscoe, Castro, Floyd, Hale, Lamb, Motley, Parmer, Swisher
Coastal Plains Community Center http://www.coastalplainsctr.org/	200 Marriott Dr. Portland, TX 78374	M: 361-777-3991 C: 800-841-6467	Aransas, Bee, Brooks, Duval, Jim Wells, Kenedy, Kleberg, Live Oak, San Patricio

LMHA/LBHA	Address	Main and Crisis Phone Numbers	Counties served
Community Healthcore http://www.communityhealthcore.com/	107 Woodbine Place Longview, TX 75601	M: 903-758-2471 C: 800-832-1009	Bowie, Cass, Gregg, Harrison, Marion, Panola, Red River, Rusk, Upshur
Denton County MHMR Center http://www.dentonmhmr.org/	2519 Scripture St. Denton, TX 76201	M: 940-381-5000 C: 800-762-0157	Denton
Emergence Health Network https://emergencehealthnetwork.org/	1600 Montana Ave. El Paso, TX 79902	M: 915-887-3410 C: 915-779-1800	El Paso
Gulf Bend Center https://www.gulfbend.org/	6502 Nursery Dr. Suite 100 Victoria, TX 79904	M: 361-575-0611 C: 877-723-3422	Calhoun, DeWitt, Goliad, Jackson, Lavaca, Refugio, Victoria
Gulf Coast Center https://gulfcoastcenter.org/	123 Rosenberg St. Suite 6 Galveston, TX 77550	M: 409-763-2373 C: 866-729-3848	Brazoria, Galveston
The Harris Center https://www.theharriscenter.org/	9401 Southwest Fwy Houston, TX 77074	M: 713-970-7000 C: 866-970-4770	Harris
Heart of Texas Region MHMR Center https://www.hotrmhmr.org/	110 S. 12th St. Waco, TX 76703	M: 254-752-3451 C: 866-752-3451	Bosque, Falls, Freestone, Hill, Limestone, McLennan
Helen Farabee Centers https://www.helenfarabee.org/	1000 Brook St. Wichita Falls, TX 76301	M: 940-397-3143 C: 800-621-8504	Archer, Baylor, Childress, Clay, Cottle, Dickens, Foard, Hardeman, Haskell, Jack, King, Knox, Montague, Stonewall, Throckmorton, Wichita, Wilbarger, Wise, Young
Hill Country Mental Health & Developmental Disabilities Center https://www.hillcountry.org/	819 Water St. Suite 300 Kerrville, TX 78028	M: 830-792-3300 C: 877-466-0660	Bandera, Blanco, Comal, Edwards, Gillespie, Hays, Kendall, Kerr, Kimble, Kinney, Llano, Mason, Medina, Menard, Real, Schleicher, Sutton, Uvalde, Val Verde
Integral Care https://integralcare.org/en/home/	1631 E. 2nd St. Building C Austin, TX 78702	M: 512-447-4141 C: 512-472-4357	Travis

LMHA/LBHA	Address	Main and Crisis Phone Numbers	Counties served
Lakes Regional MHMR Center https://lakesregional.org/	400 Airport Rd. Terrell, TX 75160	M: 972-524-4159 C: 877-466-0660	Camp, Delta, Franklin, Hopkins, Lamar, Morris, Titus
LifePath Systems https://www.lifepathsystems.org/	1515 Heritage Dr. McKinney, TX 75069	M: 877-562-0190 C: 877-422-5939	Collin
MHMR Authority of Brazos Valley https://mhmrabv.org/	1504 S. Texas Ave. Bryan, TX 77802	M: 979-822-6467 C: 888-522-8262	Brazos, Burleson, Grimes, Leon, Madison, Robertson, Washington
MHMR Services for the Concho Valley https://www.mhmrcv.org/	1501 W. Beauregard San Angelo, TX 76901	M: 325-658-7750 C: 800-375-8965	Coke, Concho, Crockett, Irion, Reagan, Sterling, Tom Green
MHMR Tarrant https://www.mhmrtarrant.org/	3840 Hulen St. Fort Worth, TX 76107	M: 817-569-4300 C: 800-866-2465	Tarrant
North Texas Behavioral Health Authority (NTBHA) https://ntbha.org/	9441 LBJ Freeway Suite 350 Dallas, TX 75243	M: 877-653-6363 C: 866-260-8000	Dallas, Ellis, Hunt, Kaufman, Navarro, Rockwall
Pecan Valley Centers for Behavioral & Developmental Healthcare https://www.pecanvalley.org/	2101 W. Pearl St. Granbury, TX 76048	M: 817-579-4400 C: 800-772-5987	Erath, Hood, Johnson, Palo Pinto, Parker, Somervell
PermiaCare https://www.pbmhmr.com/	401 E. Illinois Ave. Suite 403 Midland, TX 79701	M: 432-570-3333 C: 844-420-3964	Brewster, Culberson, Ector, Hudspeth, Jeff Davis, Midland, Pecos, Presidio
Spindletop Center http://spindletopcenter.org/	655 S. 8th St. Beaumont, TX 77701	M: 409-784-5400 C: 800-937-8097	Chambers, Hardin, Jefferson, Orange
StarCare Specialty Health System https://www.starcarelubbock.org/	904 Ave. O Lubbock, TX 79408	M: 806-766-0310 C: 806-740-1414 or 800-687-7581	Cochran, Crosby, Hockley, Lubbock, Lynn
Texana Center https://www.texanacenter.com/	4910 Airport Ave. Rosenberg, TX 77471	M: 281-239-1300 C: 800-633-5686	Austin, Colorado, Fort Bend, Matagorda, Waller, Wharton
Texas Panhandle Centers https://www.texaspanhandlecenters.org/	901 Wallace Blvd. Amarillo, TX 79106	M: 806-358-1681 C: 800-692-4039 or 806-359-6699	Armstrong, Carson, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hall, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Wheeler
Texoma Community Center https://www.texomacc.org/	315 W. McLain Dr. Sherman, TX 75092	M: 214-366-9407 C: 877-277-2226	Cooke, Fannin, Grayson

LMHA/LBHA	Address	Main and Crisis Phone Numbers	Counties served
Tri-County Behavioral Healthcare http://www.tricountyservices.org/	233 Sgt. Ed Holcomb Blvd. Conroe, TX 77304	M: 936-521-6100 C: 800-659-6994	Liberty, Montgomery, Walker
Tropical Texas Behavioral Health http://www.ttbh.org/	1901 S. 24th Ave. Edinburg, TX 78540	M: 956-289-7000 C: 877-289-7199	Cameron, Hidalgo, Willacy
West Texas Centers https://www.wtcmhmr.org/	319 Runnels St. Big Spring, TX 79720	M: 432-263-0007 C: 800-375-4357	Andrews, Borden, Crane, Dawson, Fisher, Gaines, Garza, Glasscock, Howard, Kent, Loving, Martin, Mitchell, Nolan, Reeves, Runnels, Scurry, Terrell, Terry, Upton, Ward, Winkler, Yoakum

1.3 Ongoing Non-crisis Outpatient Mental Health Services

Individuals who meet diagnostic- and need-based requirements will be assigned a level of care to determine which services they may be eligible to receive. Section 534.53 of the Texas Health and Safety Code describes the required community-based mental health services:

(A) HHSC shall ensure at a minimum, the following are available in each LMHA/LBHA service area:

(1) 24-hour emergency screening and rapid crisis stabilization services;

(2) Community-based crisis residential services or hospitalization;

(3) Community-based assessments, including the development of interdisciplinary treatment plans and diagnosis and evaluation services;

(4) Medication-related services, including medication clinics, laboratory monitoring, medication education, mental health maintenance training, and the provision of medication; and

(5) Psychosocial rehabilitation programs, including social support activities, independent living skills, and vocational training.

(B) HHSC shall arrange for appropriate community-based services to be available in each service area for each person discharged from a department facility who is in need of care.

(C) To the extent that resources are available, HHSC shall:

(1) Ensure that the services listed in this section are **available for children, including adolescents**, as well as adults, in each service area;

(2) **Emphasize early intervention services for children, including adolescents**, who meet the department's definition of being at high risk of developing severe emotional disturbances or severe mental illnesses; and

(3) Ensure that services listed in this section are available for defendants required to submit to mental health treatment under articles 17.032 or 42A.104 or 42A.506 of the Texas Code of Criminal Procedure.

Tex. Health & Safety Code § 534.053.

Eligibility for ongoing outpatient mental health treatment is a diagnosis- and need-based determination governed by the state and federal requirements and the HHSC performance contract with LMHAs/LBHAs and section 534.053 of the Texas Health and Safety Code.

The child and adolescent mental health priority population are children ages 3 – 17 with serious emotional disturbance (excluding a single diagnosis of substance abuse, intellectual or developmental disability, or autism

spectrum disorder) who have a serious functional impairment or who are at risk of disruption of a preferred living or childcare environment due to psychiatric symptoms, or are enrolled in special education because of a serious emotional disturbance.

YES Waiver

The Youth Empowerment Services Waiver (YES Waiver) is a 1915(c) Medicaid program that partners with families and the community to ensure qualifying Texas youth ages 3 through 18 who have serious mental, emotional, and behavioral difficulties, have access to a wide range of community-based services and supports. The YES Waiver provides intensive services delivered within a strengths-based team planning process called Wraparound. YES services are family-centered, coordinated, and effective at preventing out-of-home placement. The average length of time in the YES Waiver is 11 – 18 months, however, each youth's needs will determine duration of care. Individuals must contact their LMHA/LBHA to be added to the YES Waiver inquiry list. Only a parent, guardian, or managing conservator may request a youth be added to the inquiry list and assessed for the YES Waiver, unless the youth is 16 years of age or older. For more information about YES Waiver, *see* https://hhs.texas.gov/services/mental-health-substance-use/childrens-mental-health/yes-waiver

Residential Treatment Center Relinquishment Avoidance Project (RTC Project)

The Residential Treatment Center Relinquishment Avoidance Project (RTC Project) is a collaborative effort between the Department of Family and Protective Services (DFPS) and the Health and Human Services Commission (HHSC). The RTC Project provides support for families in crisis who are at risk of parental custody relinquishment to the child welfare system because they are unable to access the intensive mental health care necessary for their child to remain at home. Through the RTC Project, families are matched with state-funded residential placement for their child while maintaining full custody and rights as a parent or guardian. Families interested in receiving support through the RTC Project must contact the Department of Family Protective Services at **1-800-252-5400** or www.txabusehotline.org. Parents should mention that they are trying to access mental health resources through DFPS or refer to the "Mental Health Support Protocol."[98]

Community Resource Coordination Groups (CRCGs)

CRCGs are groups of individuals from state agencies and community organizations who collaborate to provide recommendations for a unique combination of services that one agency, alone, cannot provide. CRCGs are available across Texas and serve children, adolescents, and adults with multiple service needs. To find a CRCG in your area, call 512-206-4658, or search online at: https://crcg.hhs.texas.gov/find-resources-near-me.html

[98] The mental health support protocol is not a document but language that DFPS intake uses statewide to properly route calls from families seeking access to mental health treatment, and specifically, access to the RTC Project.

Texas System of Care

The National Child Traumatic Stress Network noted the common frustration that "Mental health services and IDD-focused services have traditionally been provided through separate and parallel systems of care, rather than a collaborative service delivery plan involving shared recognition, accountability, and decision-making. The lack of intersystem planning and coordination has resulted in obstacles to mental health and trauma-informed care, within both the mental health and IDD sectors.

- In the mental health system, there may be reluctance to treat youth with IDD such as Intellectual disability or Autism Spectrum Disorder; this likely stems from both the providers' lack of knowledge that youth with IDD can benefit from trauma treatment, and the providers' lack of expertise in implementing the appropriate care.
- In the IDD field, the tendency is to rely on behavior management instead of approaches that would better help youth process and recover from traumatic experiences.
- In the trauma field, providers often lack familiarity or experience working with youth with IDD.

Overcoming these obstacles within each sector requires greater understanding of the trauma-related needs of youth with IDD. Across sectors, there is equally pressing need for improved communication, collaboration, and sharing of resources by providers and systems."[99]

One solution for preventing the "siloing" – or isolation – of planning, coordination, and services is through **System of Care**.

Texas System of Care is not a specific program for delivering services, but rather a "spectrum of effective community-based services and supports for children, youth, and young adults with or at risk for mental health and related challenges and their families that is organized into a coordinated network, builds meaningful partnerships with families and youth, and addresses their cultural and linguistic needs in order to help them function better at home, in school, in the community, and throughout life."[100]

The system of care framework, which was established over 25 years ago and is already working in urban and rural communities across the state, builds on existing community assets to improve access to mental health services, expands access to wraparound services like Yes Waiver, assists emerging adults with transition planning, provides training in core values and best practices such as Trauma Informed Care, and includes family and youth voices in decision making.[101]

Most impressively, the system of care approach works: it has been shown to result in increases in school attendance by 18%; decreases in unlawful activities by 48%; and decreases in suicide attempts by 81%.[102] More information and a toolkit for implementing the Texas System of Care philosophy in your community are available here: https://txsystemofcare.org/texas-system-of-care-toolkit/

[99] The National Child Traumatic Stress Network, NADD, The Impact of Trauma on Youth with Intellectual and Developmental disabilities: A Fact Sheet for Providers (2020), https://www.nctsn.org/sites/default/files/resources/fact-sheet/the_impact_of_trauma_on_youth_with_intellectual_and_developmental_disabilities_a_fact_sheet_for_providers.pdf

[100] *About Us*, Texas System of Care https://txsystemofcare.org/about/ (last visited July 8, 2020).

[101] *Id.*

[102] *Id.*

2. Community-based IDD Services

2.1 How Individuals with IDD Receive Services and Supports

2.1.1 How Programs are Funded

Medicaid Waivers are federal funds that help provide services to people who would otherwise be in an institution, nursing home, or hospital to receive long-term care in the community.

General Revenue (GR) Funded Services are state funds from the GR that are primarily intended to help people remain in their own or their family's homes. Not all GR funded services are available in all areas of the state. GR services are provided by or directly through a LIDDA.

2.1.2 Waiver Services

Waiver services for individuals, including children, include the following:

- **Home and Community-based Services (HCS)** is a Medicaid waiver program approved by Centers for Medicare & Medicaid Services (CMS) pursuant to section 1915(c) of the Social Security Act. It provides community-based services and supports to eligible individuals as an alternative to an intermediate care facility for individuals with an intellectual disability or related condition. The HCS Program is operated by the Texas Health and Human Services Commission (HHSC), formerly the Department of Aging and Disability Services. 40 Tex. Admin. Code §§ 9.153(36), 9.154(a).
- **Texas Home Living (TxHmL)** supplies essential services and supports to Texans with ID or a related condition so that they can continue to live in the community.
- **Community Living Assistance and Support Services (CLASS)** provides home- and community-based services to people with related conditions as a cost-effective alternative to placement in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID).
- **Deaf-blind with Multiple Disabilities** focuses on increasing opportunities for people who are deaf-blind with multiple disabilities to communicate and interact with their environment, providing a cost-effective alternative to institutional placement.

2.1.3 State Plan Services

Community First Choice (CFC) is a state plan option that allows states to provide home- and community-based attendant services and supports to eligible Medicaid enrollees under their state plan.

2.2 Where Services are Provided

- Person's own home or family home
- Community-based residential home
- Schools
- Intermediate Care Facilities for Individuals with an ID or Related Condition (ICF/IID)
- State Supported Living Centers (SSLCs)

2.3 Local Intellectual and Developmental Disability Authorities (LIDDAs) Serve Individuals with IDD

2.3.1 The Role of LIDDAs

A LIDDA's role is to serve as the single point of access to certain publicly-funded services and supports for the residents within the LIDDA's local service area. A LIDDA's responsibilities include:

- Providing information about services and supports;
- Ensuring an individual's access to services and supports by:
  - Conducting intake and eligibility activities for an individual seeking services and supports; and
  - Enrolling or assisting an eligible individual to access long-term services and supports or GR revenue services;

- Performing safety net functions ensuring the provision and oversight of general revenue services by:
  - Developing and managing a network of general revenue services providers; and
  - Establishing processes to monitor the performance of general revenue services providers
- Conducting service coordination for individuals in HCS, TxHmL, and GR;
- Conducting planning for the local service area, including ensuring involvement by a local advisory committee and other stakeholders;
- Conducting permanency planning for certain individuals under 22 years of age; and
- Protecting the rights of an individual.

40 Tex. Admin. Code §§ 2.305, 9.154; *see also* LIDDA Performance Contract.[103]

Local Intellectual and Developmental Disability Authorities

In all but two Texas counties (Bexar and Dallas), the LMHA and LIDDA functions are united under one local agency. A list of these agencies can be found on pages 27, 28, 29, and 30. Stand-alone LIDDAs are:

LIDDA	Address	Phone Number	County Served
Alamo Area Council of Governments https://www.aacog.com/	8700 Tesoro Dr. Suite 160 San Antonio, TX 78217	210-832-5020	Bexar
Metrocare https://www.metrocareservices.org/	Multiple locations in Dallas County	214-333-7000	Dallas

2.3.2 Types of Services Offered or Contracted

Screening is performed face-to-face or by telephone contact with persons to determine a need for services.

Eligibility determination includes an interview and assessment, or an endorsement conducted in accordance with Texas Health and Safety Code section 593.005, and 40 Texas Administrative Code chapter 5, subchapter D to determine if a person has an intellectual disability or is a member of the IDD priority population.

Service coordination helps people access medical, social, educational, and other services and supports that will help them achieve an acceptable quality of life and community participation.

Community supports are individualized activities that are provided in the person's home and at community locations, such as libraries and stores. Supports may include:

- Habilitation and support activities that foster improvement of, or facilitate, the person's ability to perform daily living activities;
- Activities for the person's family that help preserve the family unit and prevent or limit out-of-home placement of the person;
- Transportation for the person between home and their community employment site or day habilitation site; and
- Transportation to facilitate the person's employment opportunities and participation in community activities.

Permanency Planning is required by the LIDDA for persons under age 22 who reside in an ICF/IID, an HCS residential group home, or nursing facility.

Respite is either planned or emergency short-term relief provided by trained staff to the person's unpaid caregiver

[103] Health & Hum. Serv. Comm'n, Complete Fiscal Year 2018-2019 Performance Contract Notebook, Statement of Work A-1 (2017), https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/providers/long-term-care/lidda/performance-contract/performance-contract.pdf

when the caregiver is temporarily unavailable. If enrolled in other services, the person continues to receive those services as needed during the respite period.

Crisis respite provides short-term respite for persons with IDD:

- Out-of-home crisis respite provides on-site therapeutic support and 24-hour supervision; and
- In-home crisis respite provides therapeutic support in a less restrictive setting for crises that can be resolved within a 72-hour period.

Employment assistance helps people locate paid jobs, and includes helping them:

- Identify employment preferences, skills, and work requirements and conditions; and
- Identify prospective employers who offer appropriate employment.

Supported employment is provided to a person who has paid employment to help them sustain that employment. It includes individualized support services, supervision, and training.

Nursing is provided to people who require treatment and monitoring of health care procedures that are prescribed by a physician or medical practitioner or that are required by standards of professional practice or state law to be performed by licensed nursing personnel.

Behavioral supports are specialized interventions to help people increase adaptive behaviors and to replace or modify maladaptive behaviors that prevent or interfere with their inclusion in home and family life or community life. Supports include:

- Assessing and analyzing assessments findings so that an appropriate behavior support plan can be designed;
- Developing an individualized behavior support plan consistent with the outcomes identified in the person-directed plan;
- Training and consulting with family members or other providers and, as appropriate, with the person; and
- Monitoring and evaluating the success of the behavior support plan and modifying it as necessary.

Crisis Intervention Specialists provide information about IDD programs and services to persons with IDD and their families, and to IDD providers in the local service area. LIDDAs are provided funds to support persons with IDD who experience significant behavioral and psychiatric challenges. These persons often exhibit significant needs requiring additional support beyond the array of services typically provided within community programs.

Specialized therapies include assessment and treatment by licensed or certified professionals for social work services, counseling services, occupational therapy, physical therapy, speech and language therapy, audiology services, dietary services, and behavioral health services other than those provided by an LMHA, as well as training and consulting with family members or other providers.

Vocational training is a service provided to people in industrial enclaves, work crews, sheltered workshops or affirmative industry settings to help them get a job.

Day habilitation is assistance with getting, keeping, or improving self-help, socialization, and adaptive skills necessary to live successfully in the community and to participate in home and community life. Day habilitation is normally provided regularly in a group setting (not in the person's residence) and includes personal assistance for those who cannot manage their personal care needs during day habilitation and need assistance with medications and performing tasks delegated by a registered nurse.[104]

Medicaid Program Enrollment: LIDDAs are responsible for enrolling eligible individuals into the following Medicaid programs:

- Intermediate Care Facilities for Individuals with Intellectual Disabilities (a 24-hour residential setting including state-supported living centers);

[104] *See* 40 Tex. Admin. Code § 9.555(a)(2).

- Home and Community-based Services (HCS);[105] and
- Texas Home Living.[106]

Transition Support Teams (TST) were originally developed to assist people in the transition from an institutional setting (e.g., SSLCs and nursing facilities) into a community setting, but these TSTs have since expanded their reach. Because individuals with complex needs often require more experienced staff, HHSC has contracted with eight LIDDAs across Texas to provide support to other LIDDAs and community waiver providers in designated service areas.

The eight contracted LIDDAs have teams that offer educational activities, technical assistance, and case review. The teams have licensed medical staff such as physicians, registered nurses, psychiatrists, and psychologists with experience working with people with IDD.

These programs are currently funded through the Money Follows the Person (MFP) Grant, which is distributed by CMS to Texas and passed on to the LIDDAs. Because MFP rebalancing funds are evaluated yearly, uncertainty of ongoing funding affects the existence of the TST Program. LIDDAs are aware that funding is subject to change based on guidance from CMS which impacts whether or not the TST program is an available resource.

Early Childhood Intervention (ECI) is a program administered by HHSC that assists families in helping their children under age 3 with disabilities and developmental delays to reach their full potential. If eligible, the family and a team create an Individualized Family Service Plan to identify the child's strengths and needs and prioritize services. Most services are provided at home but can be provided at day care or other community settings. ECI program locations can be found here: https://citysearch.hhsc.state.tx.us/

2.4 Housing through the HCS Program

The HCS Program can be an important diversionary program because it can provide housing to prevent an individual's admission to institutional services. Providers offering services under the HCS program maintain three- to four-bed group homes where individuals reside. When residing in an HCS group home, individuals are entitled to many services, including:

- Supervised and supported home living 24 hours a day, seven days a week;
- Direct personal assistance with activities of daily living (grooming, eating, bathing, dressing, and personal hygiene);
- Assistance with meal planning and preparation;
- Securing and providing transportation;
- Assistance with housekeeping;
- Day habilitation;
- Supported employment;
- Financial management services;
- Assistance with medications and the performance of tasks delegated by a registered nurse;
- Social worker;
- Behavioral support by a licensed professional;
- Physicians;
- Dietary services; and
- Dental treatment.

Those interested in receiving HCS services are placed on an interest list by the LIDDA until funding becomes

[105] *See Home and Community-based Services (HCS),* TEX. HEALTH & HUM. SERV., https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/home-community-based-services-hcs (last visited June 1, 2020).

[106] *See Texas Home Living (TxHmL),* TEX. HEALTH & HUM. SERV., https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/texas-home-living-txhml (last visited June 1, 2020).

available. An offer from the HCS program to provide services depends on individual need and one's date of placement on the interest list. Further, funding each individual placement depends on the outcome of the HHSC's Legislative Appropriations Request (LAR) where HHSC outlines its funding requirements and/or needs for the upcoming biennium.

An alternate route to enter into the HCS program is available through a crisis diversion slot. A person may qualify for a crisis diversion slot if:

- The person is at imminent risk of admission to an institution;
- The person is not being court-committed to a facility for competency evaluation, such as an SSLC or state hospital;
- Adequate and appropriate community resources are not available, as evidenced by attempts to locate and use community-based services and supports, such as ICF/IID, GR funded services, CFC services, Crisis Intervention Services, other Medicaid waiver programs, or support through the local school district and
- The person meets the criteria for a Level of Care I.
    - An LOC I requires either a diagnosis of ID or a related condition (RC). Along with the diagnosis of an RC, the person's IQ score must be 75 or below. For the specific requirements for LOC I, *see* 40 Tex. Admin. Code § 9.238.

3. Civil Mental Health Law: The Texas Mental Health Code

The statutes that govern the provision of mental health treatment are found in Chapters 571 – 578 of the Texas Health and Safety Code, commonly referred to as the "Texas Mental Health Code." These substantive provisions and procedures apply to all public and private facilities operating in the state of Texas. It is important to remember that the purpose of the Mental Health Code is to provide persons with severe mental illness[107] access to humane care and treatment in the least restrictive appropriate setting while also protecting their fundamental rights. Tex. Health & Safety Code § 571.002.

A child 16 years of age or older may decide voluntarily to request mental health treatment. Tex. Health & Safety Code § 572.001(a). Chapter 572 of the Texas Mental Health Code addresses the requirements for voluntary admission to mental health treatment. Voluntary admission does not involve the court, except when the involuntary commitment process is initiated because a voluntary patient, parent, managing conservator, or guardian of a person younger than 18 years of age requests discharge and a treating physician determines that the person poses a risk of serious harm to self or others unless continued treatment is provided. Tex. Health & Safety Code § 572.004.

Generally, a child under the age of 18, including a child who is in the managing conservatorship of the Department of Family and Protective Services, may not be involuntarily committed *unless* provided by Chapter 572 of the Texas Health and Safety Code, Chapter 55 of the Texas Family Code, or department rule. Tex. Health & Safety Code §§ 572.001(c-1); 572.0025(f-3). Chapter 55 proceedings are discussed in Intercept 3: Courts, on page 81.

3.1 Voluntary Mental Health Services

Children under the age of 16 generally do not have the right to consent to medical or mental health treatment. However, children can consent to counseling for suicide prevention, chemical addiction or dependency, or sexual, physical, or emotional abuse. Tex. Fam. Code § 32.004(a).

3.1.1a Parental Consent

Before a child can receive medical or mental health treatment, consent is required. Parents have both the duty to provide a child with medical care, and the right to consent to the child's medical care and psychiatric

[107] *See* Persons with Intellectual Disabilities Act, 7 Tex. Health & Safety Code Ann. Ch.§§ 591.001 – 597.054 (Vernon 2019) (containing the provisions related to persons with ID).

and psychological treatment. Tex. Fam. Code § 151.001(a). Most children who receive inpatient or outpatient treatment for a mental illness do so only after their parent consents to the treatment.

3.1.1b Non-Parental Consent

Some children may not have a parent available to consent to mental health treatment for them. The Texas Family Code provides several remedies for non-parent caregivers to consent to treatment for a child.

Written Authorization under Texas Family Code Chapter 32:

The "written authorization" in Texas Family Code Chapter 32 can be a simple consent form and is a good option for caregivers who may need to make a one-time medical decision for a child.

- If the child's parent is not available to give consent, the following persons may consent to treatment:
  - the child's grandparent, adult sibling, or adult aunt or uncle. Tex. Fam. Code § 32.001(a)(1), (2) and (3).
  - an adult who has care, control, and possession of the child and has written authorization to consent from the parent. Tex. Fam. Code § 32.001(a)(5).
  - an education institution in which the child is enrolled and has written authorization to consent from the parent. Tex. Fam. Code § 32.001(a)(4).
  - a court having jurisdiction over a suit affecting the parent-child relationship of which the child is the subject. Tex. Fam. Code § 32.001(a)(6).
  - an adult responsible for the actual care, control, and possession of a child under the jurisdiction of a juvenile court or committed by a juvenile court to the care of an agency of the state or county. Tex. Fam. Code § 32.001(a)(7).
  - a peace officer who has lawfully taken custody of a minor, if the peace officer has reasonable grounds to believe the minor is in need of immediate medical treatment. Tex. Fam. Code § 32.001(a)(8).

Authorization Agreement for Nonparent Adult Caregiver

The authorization agreement in Texas Family Code Chapter 34 is a good option for parents who anticipate being unavailable for an ongoing period of time, and wish to designate an adult caregiver to make medical and other caregiving decisions for their child during their absence. The requirements for an authorization agreement are more detailed than those for a written authorization.

- One or both parents of a child can enter into a written "**authorization agreement**" with an adult caregiver that authorizes the caregiver to make certain decisions for the child, including medical care decisions. Tex. Fam. Code § 34.002(a).
- The agreement must contain a statement that the adult caregiver has been given authorization to make certain decisions for the child as a result of voluntary action of the parent and that the adult caregiver has voluntarily assumed the responsibility of making those decisions. Tex. Fam. Code § 34.003(a)(4).
- The agreement must also contain a statement by the parent as to the duration of the authorization, which can be for six months, with automatic renewals every six months until termination; or for less than six months, with a specific date of termination. Tex. Fam. Code § 34.003(a)(10)(A).
- The agreement must identify the circumstances under which the agreement can be terminated before the termination date or continued beyond the term of the agreement. Tex. Fam. Code § 34.003(a)(10)(B).
- The agreement must contain a specific series of legal warnings and disclosures. Tex. Fam. Code § 34.003(b).
- The agreement must be signed and sworn to before a notary public by the parent and the caregiver. Tex. Fam. Code § 34.004(a).

Temporary Authorization for Care of Minor Child

If no parent is available or willing to sign an authorization agreement, adult caregivers can petition the court for temporary authorization for care of the child. A caregiver is only able to seek temporary authorization if the child has lived with the caregiver for at least 30 days prior to the filing of the petition, and if the caregiver does not have an authorization agreement available under Texas Family Code Chapter 34, or other signed documentation

from the child's parent, guardian, or conservator that enables the caregiver to make decisions for the child. Tex. Fam. Code § 35.002.

- The petition must state any reason that the caregiver is unable to obtain signed, written documentation from the child's parent, conservator, or guardian. Tex. Fam. Code § 35.003(a)(8).
- The petition must contain a description of the service or action that the caregiver is unable to take without court authorization, a statement of any reason supporting the request, and a statement of the time period of the authorization. Tex. Fam. Code §§ 35.003(a)(7), (9), and (10).
- The court must hold a hearing and can hear evidence relating to the child's need for care, any other matter raised in the petition, and any objection or testimony of the child's parent, conservator, or guardian. Tex. Fam. Code § 34.005(a).
- If an objection is made by the child's parent, conservator, or guardian, the court must **dismiss the petition**. Tex. Fam. Code § 34.005(b).
- The court must grant the petition if it finds:
  - It is necessary to the child's welfare and no objection is made;
  - By a **preponderance of the evidence** that the child does not have a parent, conservator, guardian, or other legal representative available to give the necessary consent.

  Tex. Fam. Code § 35.005(b), (c).
- The temporary authorization expires after one year, or at an earlier date set by the court. The temporary authorization can be renewed by court order for up to one year, upon a showing of continued need. Tex. Fam. Code §§ 35.005(d), 35.006(a).
- At any time, the child's parent, conservator, or guardian can request that the court terminate the order. The order must be terminated upon a finding that there is no longer a need for it. Tex. Fam. Code § 35.006(b).

Legislative Change

S.B. 1238 (86th Reg. Sess. (2019)) created Texas Family Code Chapter 35A, which allows certain family members to seek a court order for **temporary authorization to consent to voluntary inpatient mental health services** for a child.

- A caregiver is able to seek temporary authorization for inpatient mental health services if the child has lived with the caregiver for at least six months prior to the filing of the petition. Tex. Fam. Code § 35A.001.
- The petition must include a **certificate of medical examination** for mental illness prepared by a physician who has examined the child in the 3 days before the petition was filed, and be accompanied by a sworn statement containing the physician's opinion, and the detailed reasons for that opinion, that the child is a person:
  - With mental illness or who demonstrates symptoms of a serious emotional disorder;
  - Who presents a risk of serious harm to self or others if not immediately restrained or hospitalized.... Tex. Fam. Code § 35A.003(7).
- The petition must also state any reason that the caregiver is unable to obtain signed, written documentation from a parent, conservator, or guardian of the child. Tex. Fam. Code § 35A.003(8).
- The court must hold a hearing, and can hear evidence relating to the child's need for inpatient mental health services, any other matter raised in the petition, and any objection or testimony by the child's parent, conservator, or guardian. Tex. Fam. Code § 35A.005(a).
- The court must grant the petition only if the court finds:

  1. By a **preponderance of the evidence** that the child does not have available a parent, conservator, guardian, or other legal representative to give consent under Section 572.001, Health and Safety Code, for voluntary inpatient mental health services; and

  2. By **clear and convincing evidence** that the child is a person:

     A. With mental illness or who demonstrates symptoms of a serious emotional disorder; and

     B. Who presents a risk of serious harm to self or others if not immediately restrained or hospitalized.

  Tex. Fam. Code § 35A.005(c).
- The court must **dismiss the petition** if an objection is made by the child's parent, conservator, or guardian. Tex. Fam. Code § 35A.005(b).
- The order expires on the date the caregiver requests that the child be discharged from the inpatient mental health facility; the date a physician determines that the criteria listed in Subsection (c)(2) no longer apply to the child; or the 10th day after the order for temporary authorization is issued, whichever is earliest. Tex. Fam. Code § 35A.005(d).
- If the caregiver obtains an order for temporary managing conservatorship before the order for temporary authorization expires, then the order for temporary authorization remains in effect until the caregiver requests that the child be discharged, or a physician determines that the criteria listed in Subsection (c)(2) no longer apply, whichever is earlier. Tex. Fam. Code § 35A.005(e).

3.1.1c Consent for Children in Foster Care

Children in Foster Care and Consent to Medical Care

Every child in DFPS conservatorship is required to have a **medical consenter**. The responsibility of the medical consenter is to provide medical consent – that is, decisions on whether or not to agree to a medical test, treatment, procedure, or a prescription medication.

Informed consent means the medical consenter gets complete information about the proposed medical care before making a decision. The goal is to ensure that the medical consenter makes an informed decision about the child's physical and mental health care. When permission is given for health care, the medical consenter must understand the child's symptoms and diagnosis, how the treatment will help the condition, what could happen without the treatment, and the risks and side effects associated with the treatment. Medical consenters must complete approved training. Tex. Fam. Code § 266.004(h-1).

The court with continuing jurisdiction over the child will authorize an individual, or DFPS, as the medical consenter, on its own motion or during a hearing under Texas Family Code Chapter 263. The individual may be the child's foster parent, the child's parent (if the parent's rights have not been terminated and the court determines it is in the best interest of the child), a relative, or an adult involved in the child's life. Tex. Fam Code § 266.004(b).

If the court authorizes DFPS to consent to medical care for the child, DFPS can designate up to four primary and backup medical consenters. DFPS can designate the child's foster parents, relatives, caseworker, other CPS staff member, or the child's parent, if the parent's rights have not been terminated and it is in the child's best interest. Tex. Fam. Code § 266.004(c).

The court may also determine that **a foster child who is at least 16 years old** has the capacity to consent to medical care. Tex. Fam. Code § 266.010(a). Attorneys ad litem and DFPS staff are required to inform 16- and 17-year-old children in foster care of their right to ask the court whether they can consent to their own medical care. Tex. Fam. Code §§ 107.003(b)(3), 266.010(l).

If a child's healthcare decision puts the child at risk of harm, the court can overrule the child's decision to refuse medical care. *See* Tex. Fam. Code §§ 266.010(d-i).

Emergency medical care: No consent or court authorization is needed during an emergency in which it is "immediately necessary to provide medical care to the foster child to prevent the imminent probability of death or substantial bodily harm to the child or others..." Tex. Fam. Code § 266.009(a).

3.1.2 Request for Admission

- **A person 16 years of age or older** may request admission to an inpatient mental health facility or for outpatient mental health services by filing a request with the administrator of the facility where admission or outpatient treatment is requested. Tex. Health & Safety Code § 572.001(a).
  - The administrator of an inpatient or outpatient mental health facility may admit a minor who is 16 years of age or older to an inpatient or outpatient mental health facility as a voluntary patient *without the consent of the parent, managing conservator, or guardian*. Tex. Health & Safety Code § 572.001(d).
- **A parent, managing conservator, or guardian** of a person younger than 18 years of age may request the admission of the person to an inpatient mental health facility or for outpatient mental health services by filing a request with the administrator of the facility where admission or outpatient treatment is requested. Tex. Health & Safety Code § 572.001(a).
  - An inpatient mental health facility may admit or provide services to a person 16 years of age or older and younger than 18 years of age if the person's parent, managing conservator, or guardian consents to the admission or services, *even if the person does not consent to the admission or services*. Tex. Health & Safety Code § 572.001(a-2).

- **A person eligible to consent to treatment for the person** under section 32.001(a)(1), (2), or (3), Family Code, may request temporary authorization for the admission of the person to an inpatient mental health facility by petitioning under Chapter 35A, Family Code, in the district court in the county in which the person resides for an order for temporary authorization to consent to voluntary mental health services under this section.
    - The petitioner may be represented by the county attorney or the district attorney. Tex. Health & Safety Code § 572.001(a-1).
- A person or agency appointed as **the guardian or a managing conservator of as person younger than 18** years of age and acting as an employee or agent of the state may request admission of the person younger than 18 years of age only with the person's consent. If the person does not consent, the person may be admitted for inpatient services only pursuant to an application for court-ordered mental health services or emergency detention or an order for protective custody. Tex. Health & Safety Code § 572.001(c).
- **A child in DFPS conservatorship** can only be admitted to an inpatient mental health facility if a physician states their opinion and detailed reasons for the opinion, that the child is a person:
    - with mental illness or who demonstrates symptoms of a serious emotional disorder; and
    - who presents a risk of serious harm to self or others if not immediately restrained or hospitalized.

  Tex. Health & Safety Code § 572.001(c-1).
- An admission request must be in writing and signed by the person requesting the admission. Tex. Health & Safety Code § 572.001(b).
- A request for admission as a voluntary patient must state that the person for whom admission is requested agrees to voluntarily remain in the facility until the person's discharge and that person consents to the diagnosis, observation, care, and treatment provided until the earlier of:
    - The person's discharge; or
    - The period described by section 572.004.

  Tex. Health & Safety Code § 572.001(e).

3.1.3 Admission

After the person requests admission to a facility, the facility may admit the person if the facility determines:

- That the person has symptoms of mental illness and will benefit from the inpatient or outpatient services after conducting a preliminary exam;
- That the person has been informed of the person's rights as a voluntary patient; and
- That the admission was voluntarily agreed to by said person, if they are 16 or older; or, if they are younger than 18 years of age, by their parent, managing conservator, or guardian.

  Tex. Health & Safety Code § 572.002.

3.1.4 Information on Medications

- A mental health facility must provide a patient with information about the patient's medication ordered by a treating physician. The information must, if possible, be in the patient's own language. Tex. Health & Safety Code § 572.0022(a).
- A facility must also provide the information to the patient's family if they request it, but only if it does not violate state and federal privacy laws. Tex. Health & Safety Code § 572.0022(b).

3.1.5 Intake, Assessment, and Admission

- HHSC has promulgated administrative regulations that establish rules regarding the intake and assessment process that takes place prior to a formal admission of the patient to an inpatient facility. These rules govern a patient's consent to treatment as well as ensure the patient's understanding of the financial commitments such treatment will entail. Tex. Health & Safety Code § 572.0025.

- The three following terms are defined in a way that is unique to this section. An "admission" means the formal acceptance of a prospective patient to a facility. Tex. Health & Safety Code § 572.0025(h)(1).
- An "assessment" means the administrative process a facility uses to gather information from a prospective patient to determine whether a prospective patient should be examined by a physician to determine if admission is clinically justified. This term does not refer to the examination that must be performed within 72 hours before or 24 hours after a patient or prospective patient is admitted to the facility. Tex. Health & Safety Code §§ 572.0025(g), (f); 572.0025(h)(2).
- "Intake" means the administrative process for gathering information about a prospective patient and giving a prospective patient information about the facility and treatment services. Tex. Health & Safety Code § 572.0025(h)(3).
- The rules governing the intake process shall establish minimum standards for:
  - Reviewing a prospective patient's finances and insurance benefits;
  - Explaining to a prospective patient the patient's rights;
  - Explaining to a prospective patient the facility's services and treatment process. Tex. Health & Safety Code § 572.0025(b).
- The rules governing the assessment process prescribe:
  - The types of professionals who may conduct an assessment;
  - The minimum credentials each type of professional must have to conduct an assessment; and
  - The type of assessment that professional may conduct. Tex. Health & Safety Code § 572.0025(d).
- The applicable rules can be found in the Texas Administrative Code. 25 Tex. Admin. Code §§ 411.490; 411.461.

Legislative Change

S .B. 1238 (86th Reg. Sess. (2019)) amended subsections 572.0025(g) and (f) by requiring a psychiatric examination within 72 hours *before* the admission or 24 hours *after* the admission. Section 572.0025 relates to the examination that must be performed by a physician for a voluntary inpatient admission. Former subsection (f) required an examination to be performed within 72 hours of the admission, which when read with subsection (g) was commonly understood to mean within 72 hours *prior to the admission*. The revision provides flexibility for the exam to be performed up to either 72 hours before or 24 hours after the patient is admitted to the facility.

The bill also added subsections (f-1) and (f-2), which are discussed below, and (f-3), which relates to the admission of a child in the managing conservatorship of the Department of Family and Protective Services.

- A prospective patient may not be formally admitted to the facility unless:
  - There is an order from a physician who has conducted a physical and psychiatric exam of the patient, in person or through communications technology:
    - 72 hours before admission; or
    - 24 hours after admission; or
  - The admitting physician consulted with another physician who examined the patient within the above time frames; and
  - The facility agrees to accept the patient in writing. Tex. Health & Safety Code § 572.0025(f).
  - If a facility admits a patient prior to performing a physical and psychiatric exam, the patient must be immediately discharged if a physician performing the exams after admittance determines the person does not meet clinical standards to receive inpatient mental health services. Tex. Health & Safety Code § 572.0025(f)(1).
  - If a person is discharged under these circumstances, the facility may not bill the patient or the patient's insurance for temporary admission. Tex. Health & Safety Code § 572.0025(f)(2).

3.1.6 Rights of Patients

- A person's voluntary admission into an inpatient mental health facility does not affect any legal capacity, civil rights, or the person's right to obtain a writ of habeas corpus. Tex. Health & Safety Code § 572.003(a).
- Specifically, a person voluntarily admitted to an inpatient mental health facility has the right:
  - To be reviewed periodically to determine the need for continued treatment; and
  - To have an application for court-ordered services filed only as provided by the requirements of section 572.005. Tex. Health & Safety Code § 572.003(b).
- A person must be informed of the rights contained in this section and section 572.004 (Discharge):
  - Both orally and in writing (in the person's primary language, if possible) within 24 hours after the person is admitted. Tex. Health & Safety Code § 572.003(c)(1); or
  - Through means necessary to communicate with a hearing or visually impaired person. Tex. Health & Safety Code § 572.003(c)(2).
  - **If the patient is a minor**, the patient's parent, managing conservator, or guardian must also be informed of the patient's rights. Tex. Health & Safety Code § 572.003(d).

3.1.7 Discharge

- Except as noted below, a patient is entitled to leave the facility after the patient signs, times, and dates the written request for discharge and files it with the facility administrator. This document must be made part of the patient's clinical record.
  - If a patient informs an employee of their wish to be discharged, the employee must help the patient in creating the document and present it to the patient for signature as soon as possible. Tex. Health & Safety Code § 572.004(a).
- After the patient files the request for discharge, the facility has four hours to notify the patient's treating physician. If that physician is not available during that time period, the facility may notify any other physician. Tex. Health & Safety Code § 572.004(c).
- The physician must discharge the patient before the end of the four-hour period unless the physician has reasonable cause to believe that the patient might meet the criteria for court-ordered mental health services or emergency detention. Tex. Health & Safety Code § 572.004(c).
- If the physician does have reasonable cause, the physician has to examine the patient as soon as possible, but no later than 24 hours after the written request for discharge was filed.
  - After the exam, if the physician determines that the patient does not meet the criteria for court-ordered mental health services or emergency detention, the physician shall discharge the patient.
  - If the patient does meet the criteria for court-ordered mental health services or emergency detention, the physician has **until 4 pm on the next business day after the exam** to either discharge the patient or file an application for court-ordered mental health services or emergency detention and obtain a written order for any further detention.
  - The patient must be notified if the physician files an application for court-ordered mental health services or seeks an emergency detention.
  - The physician's decision and the reasons behind it must be made part of the patient's clinical record. Tex. Health & Safety Code § 572.004(d).
- In the case of extremely hazardous weather conditions or a disaster, the physician may request the judge who has jurisdiction over court-ordered mental health services proceedings to extend the time period for which the patient may be detained. There must be a new order from the judge every day, which may extend the time period until 4 p.m. on the next business day, and this order must state that an emergency exists due to the weather or a disaster. Tex. Health & Safety Code § 572.004(e).
- If the patient files a written withdrawal of the request for discharge before the end of the prescribed period, or if an application for court-ordered mental health services or emergency detention is filed, the patient cannot leave the facility. Tex. Health & Safety Code § 572.004(f)(1); (f)(2).

- The facility must prepare a plan for continuing care in accordance with section 574.081 (Continuing Care Plan Before Furlough or Discharge) for each patient who is discharged. If there is not time to prepare before discharge, the facility may mail the plan to the patient within 24 hours of discharge. Tex. Health & Safety Code § 572.004(g).
- The facility must notify the patient (or other person who files a request for discharge of a patient) that the person filing the request assumes all responsibility for the patient upon discharge. Tex. Health & Safety Code § 572.004(h).
- **On receipt of a written request for discharge from a patient admitted under Section 572.002(3)(B) who is younger than 18 years of age, a facility shall consult with the patient's parent, managing conservator, or guardian regarding the discharge. If the parent, managing conservator, or guardian objects in writing to the patient's discharge, the facility shall continue treatment of the patient as a voluntary patient.** Tex. Health & Safety Code § 572.004(i).

3.1.8 Application for Court-Ordered Treatment

- The physician responsible for the patient's treatment must notify the patient if the physician intends to file an application for court-ordered mental health services. Tex. Health & Safety Code § 572.005(b).
- "An application for court-ordered mental health services cannot be filed against someone, including a child, who is receiving voluntary treatment **unless**:
  - A request for release of the patient has been filed with the facility administrator; or
  - In the opinion of the physician responsible for the patient's treatment, the patient meets the criteria court-ordered mental health services and:
    - is absent from the facility without authorization;
    - is unable to consent to appropriate and necessary psychiatric treatment; or
    - refuses to consent to necessary and appropriate treatment recommended by the physician responsible for the patient's treatment and that physician completes a certificate of medical examination for mental illness that, in addition to the information required by Section 574.011 [Certificate of Examination for Mental Illness], includes the opinion of the physician that:
      - there is no reasonable alternative to the treatment recommended by the physician; and
      - the patient will not benefit from continued inpatient care without the recommended treatment."

  Tex. Health & Safety Code §§ 572.005(a)(1); (a)(2).

3.1.9 Transportation of Patient to Another State

- A court order is required to transport a patient to another state for voluntary inpatient mental health services. Tex. Health & Safety Code § 572.0051.

3.2 Involuntary Mental Health Services

Least Restrictive Appropriate Setting

The Mental Health Code is clear to point out that the patient's right to liberty must always be respected and balanced against society's interest in safety. This balance is seen in section 571.004 of the Texas Health and Safety Code:

The least restrictive appropriate setting for the treatment of a patient is the treatment setting that:

1. Is available;
2. Provides the patient with the greatest probability of improvement or cure; **and**
3. Is no more restrictive of the patient's physical or social liberties than is necessary to provide the patient with the most effective treatment and to protect adequately against any danger the patient poses to themselves or others.

- Found in sections 573.001 and 573.011 of the Texas Health and Safety Code, emergency detention is the legal procedure by which a person experiencing a mental health crisis, **regardless of their age**, may be detained for a preliminary examination and crisis stabilization, if appropriate.
- Emergency detention may be necessary and appropriate when a person must be placed in the least restrictive, most appropriate setting, while safeguarding the person's legal rights to a subsequent judicial determination of their need for involuntary mental health services. *See* Tex. Health & Safety Code §§ 571.004, 576.021(a)(1). If a person under 18 years of age is experiencing a mental health crisis, and their parent or guardian is unavailable or unwilling to consent to treatment, emergency detention may be appropriate.
- The Texas Health & Safety Code permits peace officers to make a warrantless apprehension of a person with mental illness when appropriate for the purpose of transporting that person to a mental health facility for evaluation.

Rights of Persons during Emergency Detention Procedures

The purpose of emergency detention procedures is not punishment, but rather prevention of serious harm to the person or others due to the person's mental illness. *See* Tex. Health & Safety Code § 573.001(a)(1). The rights of persons involved in an emergency detention are set out in section 573.025 of the Texas Health and Safety Code. These rights are the same whether the person is detained by a peace officer, a legal guardian of an adult, or some other person, and whether the detention occurs with or without a warrant. A person apprehended, detained, or transported under Chapter 573 has the right:

- To be advised of the location and reasons for the detention, and that the detention could result in a longer period of involuntary commitment;
- To a reasonable opportunity to communicate with and retain an attorney;
- To be transported upon release to a location as provided by section 573.024 unless the person is arrested or objects;
- To be released as provided by section 573.023 if the person does not meet the requirements for admission to an inpatient mental health[108] facility after the preliminary examination, or if the facility determines that the requirements of 573.022(a)(2) no longer apply;
- To be advised that any communication with a mental health professional may be used in proceedings for further detention;
- To be transported in accordance with the requirements of Chapters 573 and 574; and
- To a reasonable opportunity to communicate with a relative or other responsible person who has a proper interest in the person's welfare.

Tex. Health & Safety Code §§ 573.025(a)(1-7).

A person must be notified of these rights both orally and in writing (in the person's primary language, if possible) within 24 hours after the person is admitted, or through means necessary to communicate with a hearing or visually impaired person. Tex. Health & Safety Code §§ 573.025(b)(1); (b)(2).

3.2.1 Emergency Detention is the First Step

A description of emergency detentions involving children and adolescents and initiated by peace officers, can be found in Intercept 1, section 1 on page 49 of this Bench Book. This section has a brief overview of the emergency detention process.

- Although rarely used, a person younger than 18 years of age may be taken into custody pursuant to an Emergency Detention. Tex. Health & Safety Code § 573.001(a).

3.2.1a Temporary Acceptance Required

- A facility must temporarily accept a person for whom:
  - An officer or EMS personnel under an MOU provides a notice of detention completed by the officer under section 573.002(a) of the Texas Health and Safety Code.

Tex. Health & Safety Code § 573.021(a).

- **Note**: a facility must comply with this section only to the extent that the commissioner determines that a facility has sufficient resources to perform the necessary services under this section. Tex. Health & Safety Code § 573.021(d).
- **Exception**: a person may not be detained in a private mental health facility without the consent of the facility administrator. Tex. Health & Safety Code § 573.021(e).

[108] Note that this language is not in the statute, which less specifically refers to "a facility."

3.2.1b Within 12 Hours of Apprehension, a Physician Must Perform a Preliminary Examination

Regardless of whether a person was transported to a facility with or without a warrant, the person must be evaluated by at least one physician within 12 hours *after the time the person is apprehended by the peace officer.* Tex. Health & Safety Code § 573.021(c).

3.2.1c When a Person May be Admitted to a Facility After a Preliminary Exam

- The person can be admitted to a facility only if the physician who performed the preliminary examination makes a written statement that:
  - Is acceptable to the facility;
  - States that after a preliminary examination it is the physician's opinion that:
    - The person is a person with mental illness;
    - The person evidences a substantial risk of serious harm to self or others;
    - The risk of harm is imminent unless the person is immediately restrained; and
    - Emergency detention is the least restrictive means by which the necessary restraint may be accomplished; and
  - Includes:
    - A description of the person's mental illness;
    - A specific description of the risk of harm, which may be demonstrated by:
      - The person's behavior; or
      - Evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty; and
      - The specific detailed information from which the physician formed the opinion.

Tex. Health & Safety Code § 573.022.

Distinguish: CME for Mental Illness

A physician's "written statement" documenting a preliminary examination under section 573.022 of the Texas Health and Safety Code is not a "CME for mental illness" under section 574.011 of the Texas Health and Safety Code. The former is required after a preliminary examination is performed for a facility to hold a person under emergency detention provided by Chapter 573 (Emergency Detention); the latter must accompany an application for court ordered mental health services under Chapter 574 as discussed in the Fitness to Proceed section of **Intercept 3: Courts**.

3.2.1d Release

- The person must be released on completion of the preliminary examination unless the person is admitted to a facility as described in section 3.2.1c above. If the person is admitted, the person must be released if the facility administrator determines at any time during the emergency detention period that one of the criteria described above no longer applies. Tex. Health & Safety Code §§ 573.022(a), (b).

3.2.1e Transport

- After admission, the admitting facility may transport the person to a facility deemed suitable by the LMHA/LBHA. At the LMHA's request, the judge may order that the person be detained in a department mental health facility (i.e., State Mental Health Hospital). Either the admitting facility or the facility where the person is detained may transfer the person to an appropriate mental hospital (inpatient mental health facility) with the written consent of the hospital administrator. Tex. Health & Safety Code §§ 573.022(b), (c); *see also* Tex. Health & Safety Code § 574.045 (detailing more requirements pertaining to transportation of a patient).

3.2.1f Within 24 Hours of Initial Detention, the Person Must be Released if No Order of Protective Custody is Obtained

- A child accepted for a preliminary examination may be detained for no more than 48 hours *after the time they are presented to the facility*. That includes any time the child spends waiting in the facility for medical care before they receive the preliminary examination. Tex. Health & Safety Code § 573.021(b).
- If the 48-hour period ends on a Saturday, Sunday, legal holiday, or before 4 p.m. on the first succeeding business day, the person may be detained until 4 p.m. on the first succeeding business day. If the 48-hour ends at a different time, the person may be detained only until 4 p.m. on the day the 48-hour period ends. Tex. Health & Safety Code § 573.021(b).

3.3 Involuntary Commitment (Court Ordered Mental Health Services)

The Texas Health and Safety Code provides the basis for the involuntary commitment of an adult to a mental health facility. For an explanation of Emergency Detentions, Orders of Protective Custody, and Commitments for adult patients, see *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book, 2nd Edition, Texas Judicial Commission on Mental Health*.[109]

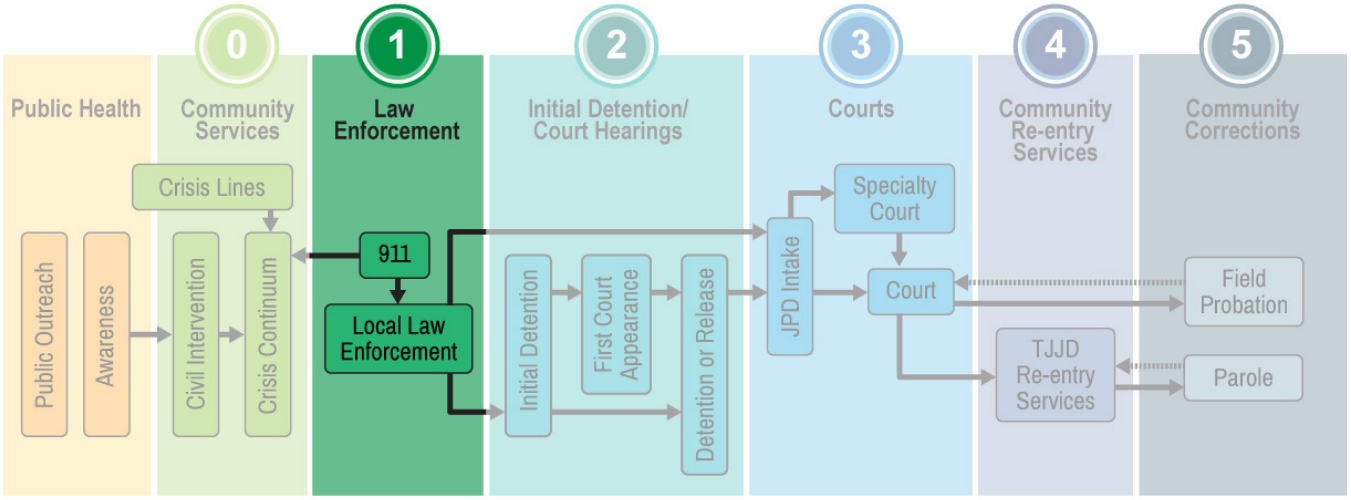
- A person younger than 18 years of age may not be involuntarily committed unless provided by Chapter 572, Texas Health and Safety Code, Chapter 55, Texas Family Code, or department rule. Tex. Health & Safety Code § 572.001(c-1).
- Most commitments of persons younger than 18 years of age occur under the provisions of Chapter 55, Texas Family Code, and are discussed in **Intercept 3: Courts**, starting on page 79.

Legislative Change

S.B. 1238 (86th Reg. Sess. (2019)) amended Texas Health and Safety Code subsection 572.001(c-1) by substituting **Chapter 55, Texas Family Code** in place of the previous wording, **other state law**. This change should clear up confusion about which laws provide for the involuntary commitment of children.

[109] Judicial Commission on Mental Health, *Texas Mental Health and Intellectual and Developmental Disabilities Law Bench Book* (2nd ed. 2019) http://texasjcmh.gov/media/1738/jcmh-bench-book-2nd-edition-digital-version.pdf

1 Intercept 1: Initial Contact with Law Enforcement



Intercept 1: Initial Contact with Law Enforcement focuses on the law enforcement response to children and adolescents with MI or IDD. Officers have considerable discretion in responding to a situation in the community involving a child or adolescent with a mental illness or intellectual disability who may be engaging in delinquent conduct or CINS, experiencing a mental health crisis, or both. School Resource Officers, in particular, are valuable partners in assisting children with MI or IDD.

While taking a child into custody may be legally permissible, there are alternatives that could better serve the child and the community. It is important that judges are familiar with alternatives to detention, and that they encourage the provision of training and resources for law enforcement on these issues.

Reflection Point

The initial contact with law enforcement is an important discretionary point to examine whether race, ethnicity, or socioeconomic status are factors in deciding if a child is issued a citation, taken into custody, or released to a parent. The Texas Family Code presumes that every juvenile who does not meet the statutory detention criteria should be released to a parent or other responsible adult.

1. Emergency Detention and Protective Custody of Children with MI

1.1 What is an Emergency Detention?

An emergency detention is not an arrest. Emergency detention is the legal procedure by which **a person of any age**, including a child, who is experiencing a severe mental health crisis may be detained for a preliminary examination and crisis stabilization, if appropriate. An emergency detention may be completed with a warrant issued by a magistrate, or without a warrant by a law enforcement officer. Law enforcement officers have significant discretion to make a warrantless apprehension for an emergency detention if the statutory criteria are met. (*See* Tex. Health & Safety Code § 573.001(a).) In the adult system, this is frequently referred to as an "APOWW" (Apprehension by Police Officer Without a Warrant).

Emergency detention may be necessary and appropriate when a parent, managing conservator, or legal guardian cannot or will not consent to voluntary services for their child. The child must be placed in the least restrictive, most appropriate setting. *See* Tex. Health & Safety Code §§ 571.004, 576.021(a)(1).

Overview of Emergency Mental Health Procedures

I. Emergency Detention (ED) Under Chapter 573 of the Texas Health and Safety Code

A. Transporting Child to, or Holding Child Currently at, a Facility

1. Law Enforcement – No Warrant (no initial court involvement required) ("APOWW")

- **Apprehension**: a peace officer believes that the child has MI, and because of the MI, there is a substantial risk of serious harm to self or others (demonstrated by behavior **or** evidence of severe emotional distress and deterioration) unless the child is immediately restrained, and there is no time to get a warrant. Tex. Health & Safety Code § 573.001(a).

  Notice to Facility: officer must give notice of detention to facility, Tex. Health & Safety Code § 573.002; without notice, the facility may not detain the child involuntarily.

B. Preliminary Examination at Facility

1. When it Must Occur

The exam must be performed by a physician within **12 hours** after the child is apprehended. Tex. Health & Safety Code § 573.021(c).

2. Standard for ED Admission

Preliminary examination must show that child both has MI and is a substantial risk of serious and imminent harm to self or others. Tex. Health & Safety Code § 573.022(a).

3. Child Must be Released if the Child Does Not Meet the Above Criteria.

4. Transportation After Release

The child must be returned to the location of apprehension, residence in Texas, or another suitable location. If the child was apprehended by a peace officer, immediate transport is required; otherwise, it must be reasonably prompt. Tex. Health & Safety Code § 573.024.

1.2 Peace Officer: Transport to a Facility Without a Warrant

Law enforcement officers have the opportunity to provide the fastest intervention to begin deescalating a crisis and obtain the necessary early information to evaluate, stabilize, and safeguard the child. Law enforcement officers trained in crisis intervention can provide an immediate response with support and access to emergency medical services.

Mental Health Officers, Crisis Intervention Teams, and Trauma-Informed Law Enforcement

Mental health officers (MHOs) are peace officers who have specialized, TCOLE-approved training in crisis intervention and de-escalation of crisis calls.

Crisis Intervention Teams (CITs) are local initiatives designed to improve the law enforcement and community response to people experiencing mental health crises. Teams are built on strong partnerships between law enforcement, mental health providers, and individuals and families affected by mental illness. For more information on CITs, *see* https://www.texascit.org. MHOs work collaboratively with the crisis response teams of LMHAs and LBHAs to divert adults and children in need of crisis services from jails and hospitals to community-based services. These partnerships can help communities develop solutions to close service gaps, and to deliver more effective, and less expensive, behavioral health treatment to an individual than they would receive at a hospital or jail facility.

Trauma-Informed Law Enforcement Training "not only educate[s] police about trauma, but give[s] them specific techniques for carrying out their duties... when police officers acquire a trauma perspective and work in concert with mental health providers and the community, families and children see them not simply as forces of order charged with enforcing the law, but as trusted advocates concerned about their safety."[110]

1.2.1 Standard: A Substantial Risk of Serious Harm

A peace officer may take a person into custody, **regardless of the age of the person**, without a warrant if the officer has reason to believe and does believe that:

- The person has MI
- Because of the MI, there is a substantial risk of serious harm to the person or others unless the person is immediately restrained; and
- There is insufficient time to obtain a warrant before taking the person into custody.

Tex. Health & Safety Code § 573.001(a).

A substantial risk of serious harm may be demonstrated by:

- The person's behavior; or
- Evidence of severe emotional distress and deterioration in the person's mental condition to the extent that the person cannot remain at liberty.

Tex. Health & Safety Code § 573.001(b).

Legislative Change

Because some law enforcement officers were hesitant to detain minors pursuant to an APOWW under section 573.001 of the Texas Health and Safety Code, S.B. 1238 amended subsection 573.001(a) permitting an officer to take a person into custody, "**regardless of the age of the person**," if the statutory requirements are met. 86th Reg. Sess. (2019). This should clear up confusion about which laws provide for the involuntary commitment of children.

[110] National Child Traumatic Stress Network, *Creating a Trauma-Informed Law Enforcement System*, 2 NCTSN Serv. Sys. Briefs 2 (2008), https://www.nctsn.org/sites/default/files/resources/creating_trauma_informed_law_enforcement_systems.pdf

Children Cannot be Involuntarily Committed

Recall that Texas Health and Safety Code subsection 572.001(c-1) instructs: "A person younger than 18 years of age may not be involuntarily committed unless provided by this chapter, Chapter 55, Family Code, or department rule."

The legislature amended the section of the Texas Health and Safety Code pertaining to warrantless Emergency Detentions in 2019 to specifically include children, as explained above. No similar amendment was made to section 573.011 of the Texas Health and Safety Code, "Application for Emergency Detention." Some have interpreted that reading the two statutes together yields the conclusion that children cannot be the subject of an Emergency Detention Warrant, an Order of Protective Custody, or of Civil Commitment outside of Texas Family Code Chapter 55.

A warrantless Emergency Detention will last for 48 hours, which could provide the opportunity for a parent, guardian, or caregiver to be located to give consent for voluntary mental health treatment.

In the event that a child has no readily identifiable parent or caregiver, a mandated reporter would likely contact the Department of Family and Protective Services so that the Department, or another party, can file an emergency petition for temporary managing conservatorship.

1.2.2 What May Support an Officer's Belief

The officer must be able to cite specific recent behavior, overt acts, attempts, or threats in support of their belief. Tex. Health & Safety Code § 573.002(b)(5).

The officer's belief may be based on:

- The representation of a credible person;
- The person's conduct; or
- The circumstances under which the person is found.

Tex. Health & Safety Code § 573.001(c).

Officer's Personal Observations Not Required

Note that the statute does not require an officer's personal observations of conduct or behavior suggesting a substantial risk of serious harm. An officer's belief may be based on credible information given to the officer by a witness, such as a family member, teacher, or coach.

1.2.3 An Officer Must Investigate

A peace officer must "investigate the circumstances surrounding a mental health call prior to taking the subject into custody and before transporting the subject to a mental health facility." *Trevino v. State*, 512 S.W.3d 587, 595 (Tex. App.—El Paso 2017, no pet.).

1.2.4 Transport to a Facility

An officer must transport the person:

- To the nearest appropriate inpatient mental health facility;
- If such a facility is unavailable, to another mental health facility[111] **deemed suitable** by the LMHA/LBHA; or

[111] The definition of mental health facility includes "that identifiable part of a general hospital in which diagnosis, treatment, and care for persons with mental illness is provided." Tex. Health & Safety Code § 571.003(12). Pursuant to their obligations under the federal Emergency Medical Treatment and Active Labor Act or otherwise, hospital emergency departments often diagnose, treat, and care for persons with mental illness.

- To EMS personnel in accordance with a memorandum of understanding (MOU) for transport to an appropriate facility as described in section 1.2.5 below.

Tex. Health & Safety Code § 573.001(d).

Deemed Suitable

A jail or similar detention facility may not be deemed suitable except in an extreme emergency. Tex. Health & Safety Code § 573.001(e).

1.2.5 Memorandum of Understanding (MOU) Regarding Transportation for Emergency Detention

A law enforcement agency and an EMS provider may execute an MOU under which EMS personnel employed by the provider may transport a person taken into custody under an emergency detention by a peace officer employed by the law enforcement agency. The MOU must:

- Address responsibility for the cost of transporting the person taken into custody; and
- Be approved by the county in which the law enforcement agency is located and the LMHA that provides services in that county with respect to provisions of the MOU that address the responsibility for the cost of transporting the person.

Tex. Health & Safety Code § 573.005(b).

1.2.6 Person's Rights

An officer must immediately inform the person orally and in simple, nontechnical terms:

- Of the reason for the detention; and
- That a staff member of the facility will inform the person of their rights within 24 hours.

Tex. Health & Safety Code § 573.001(g).

1.2.7 Firearms

An officer may immediately seize any firearms in the person's possession. Tex. Health & Safety Code § 573.001(h). Note that specific procedures for seizure and return of firearms will vary by jurisdiction.[112]

1.2.8 Notice of Detention to Facility

After taking the person to a facility, the officer must immediately file with the facility a notification of detention on the statutorily required form (***see* page 56 of this Bench Book**). The facility must honor the statutorily prescribed form and cannot require use of a different form. The facility must include the notice in the person's clinical file. Tex. Health & Safety Code §§ 573.002(a), (c).

If emergency medical personnel transport the person at the request of a peace officer, they must immediately file with the facility the notification of detention completed by the peace officer who made the request. Tex. Health & Safety Code § 573.002(a).

[112] *See also* Tex. Code Crim. Proc. arts. 18.19, 18.191 for the procedures related to the disposition of firearms.

Notification – Emergency Detention NO. _____

DATE: _____ TIME: _____

THE STATE OF TEXAS

FOR THE BEST INTEREST AND PROTECTION OF:

_____

NOTIFICATION OF EMERGENCY DETENTION

Now comes _____, a peace officer with (name of agency) _____, of the State of Texas, and states as follows:

- I have reason to believe and do believe that (name of person to be detained) _____ evidences mental illness.
- I have reason to believe and do believe that the above-named person evidences a substantial risk of serious harm to themselves or others based upon the following:

_____

_____

_____

- I have reason to believe and do believe that the above risk of harm is imminent unless the above-named person is immediately restrained.

- My beliefs are based upon the following recent behavior, overt acts, attempts, statements, or threats observed by me or reliably reported to me:

_____

_____

_____

- The names, addresses, and relationship to the above-named person of those persons who reported or observed recent behavior, overt acts, attempts, statements, or threats of the above-named person are (if applicable):

_____

_____

_____

For the above reasons, I present this notification to seek temporary admission to the (name of facility) _____ inpatient mental health facility or hospital facility for the detention of (name of person to be detained) _____ on an emergency basis.

- Was the person restrained in any way? Yes ☐ No ☐

_____ _____

PEACE OFFICER'S SIGNATURE BADGE NO.

Address:_____ Zip Code: _____

Telephone: _____

_____

SIGNATURE OF EMERGENCY MEDICAL

SERVICES PERSONNEL (if applicable)

Address:_____ Zip Code: _____

Telephone: _____

A mental health facility or hospital emergency department may not require a peace officer or emergency services personnel to execute any form other than this form as a predicate to accepting for temporary admission a person detained by a peace officer under section 573.001, Health and Safety Code, and transported by the officer under that section or by emergency services personnel of an emergency medical services provider at the request of the officer made in accordance with a memorandum of understanding executed under section 573.005, Health and Safety Code.

2. Taking a Child into Custody Absent a Mental Health Crisis

Reflection Point

Absent a mental health crisis, a law enforcement custodial event is an important discretionary point to examine whether race, ethnicity, or socioeconomic status are factors in the custody decision. The Family Code presumes that every juvenile who does not meet the statutory detention criteria should be released to a parent or other responsible adult.

2.1 Taking a Child into Custody is Usually Discretionary

Law enforcement may take a child into custody:

- pursuant to an order of the juvenile court;
- pursuant to the laws of arrest;
- if the officer has probable cause to believe the child engaged in:
  - conduct that violates a penal law of this state or a penal ordinance of any political subdivision of this state;
  - delinquent conduct or conduct indicating a need for supervision; or
  - conduct that violates a condition of probation imposed by the juvenile court;
- pursuant to a directive to apprehend issued as provided by section 52.015 of the Texas Family Code.

Tex. Fam. Code § 52.01.

The officer can also issue a warning notice to the child instead of taking the child into custody, if certain conditions are met. Tex. Fam. Code § 52.01(c). These citations cannot be issued for school offenses. Tex. Ed. Code § 37.143(a). See section 2.5.1 below for further discussion.

2.2 When Taking a Child into Custody is Mandatory

A peace officer shall take a child into custody on the issuance of a directive to apprehend. Tex. Fam. Code § 52.015(b).

2.3 Notice to Probate Court May be Required

As soon as practicable, but not later than the first working day after the date a law enforcement officer takes **a child who is a ward** into custody under section 52.01(a)(2) or (3) of the Texas Family Code, the law enforcement officer or other person having the custody of the child shall notify the court with jurisdiction over the child's guardianship of the child's detention or arrest. Tex. Fam. Code § 52.011(b).

Note that in this section, "ward" has the meaning assigned by section 22.033, Texas Estates Code: "Ward" means a person for whom a guardian has been appointed. This notification is an added safety net to prevent a child with MI or ID from being lost within the system.

2.4 Release or Delivery to Court

Law enforcement agencies can develop guidelines to help determine when to take children, but particularly children with mental illness or an intellectual disability, into custody, if at all. Officers should consider whether adequate supervision is available in the child's home before taking a child into custody.

Out-of-Custody Referrals

Many juvenile cases can be filed by law enforcement as "out-of-custody" referrals. Absent a present threat to the safety of the juvenile or the community, officers should consider not taking a juvenile with MI or ID into custody, and instead making an out-of-custody referral. Separation from family is difficult for all juveniles, and a juvenile with specialized needs may find their needs unmet by the detention program.

A law enforcement officer who has taken a child into custody is required to immediately take one of seven actions:

- Take the child to the juvenile processing office designated by the juvenile board;
- Release the child to a parent, guardian, custodian, or other responsible adult;
- Bring the child to the office or official designated by the juvenile board if there is probable cause to believe that the child engaged in delinquent conduct, CINS, or conduct that violates a condition of probation imposed by the juvenile court;
- Bring the child to a juvenile detention facility;
- Bring the child to a medical facility if the child is believed to suffer from a serious physical condition or illness that requires prompt treatment;
- Dispose of the case without referral to juvenile court under section 52.03; or
- Return the child to their school campus if school administrators agree to resume responsibility for the child for the remainder of the day.

Tex. Fam. Code § 52.02(a).

Note that a person taking a child into custody must promptly give notice of the person's action and a statement of the reason for taking the child into custody, to:

- The child's parent, guardian, or custodian; and
- The office or official designated by the juvenile board.

Tex. Fam. Code § 52.02(b).

Firearms Offenses

A child who is alleged to have engaged in delinquent conduct and to have used, possessed, or exhibited a firearm in the commission of the offense must be detained until the child is released at the direction of the judge of the juvenile court, a substitute judge, or a juvenile referee. Tex. Fam Code § 53.02(f). The judge can authorize the child's release over the phone. Firearms offenses include all offenses committed with a firearm and illegal carrying or possession of a firearm.

2.5 Law Enforcement Diversions from Juvenile Court

Even when a law enforcement officer has determined that a child should be taken into custody, the officer does not have to make a referral to juvenile court. Several kinds of informal dispositions are available to law enforcement. These diversions from juvenile court can result in better outcomes in cases involving all children, including children with MI or IDD.[113]

[113] *See* Holly A. Wilson and Robert D. Hoge, *The Effect of Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAVIOR, 497, 499 (2013) ("A growing body of results from empirical research is also providing at least indirect support for the use of diversion. This research demonstrates clearly that involvement in the juvenile justice system, holding all other factors constant, is associated with an increased likelihood of offending behavior."); *see also* BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 2 (2006) ("A recent literature review of youth corrections shows that detention has a profoundly negative impact on young people's mental and physical well-being, their education, and their employment.").

2.5.1 Warning Notice

Under certain circumstances involving minor offenses, law enforcement officers can issue a warning notice to a child instead of taking the child into custody. Tex. Fam. Code § 52.01(c). A warning notice is similar to a traffic ticket.

- Guidelines for the issuance of warning notices must be adopted by the law enforcement agency and approved by the juvenile board.
- The warning notice must identify the child and describe the conduct.
- When a child is issued a warning notice, copies of the notice must be sent to the child's parent, guardian, or custodian; filed with the office or official designated by the juvenile board; and filed with the law enforcement agency.

Tex. Fam. Code §§ 52.01(c)(1-6).

Further action, such as a family conference, may be taken by the juvenile court staff or law enforcement agency, but is not required. Note that warning notices cannot be issued for school offenses. Tex. Ed. Code § 37.143(a).

Reflection Point

Every law enforcement agency should seek to utilize warning notices when and where possible. Each law enforcement agency should learn what guidelines the local juvenile board has adopted for making dispositions without referral to court under Texas Family Code section 52.03. Appropriate diversions help to reduce disparate outcomes.

2.5.2 Law Enforcement Disposition Without Referral to Court

Law enforcement officers can dispose of certain low-level offenses and non-traffic Class C misdemeanors without referring them to juvenile court or municipal court if:

- Guidelines for such dispositions have been adopted by the juvenile board;
- The disposition is authorized by the guidelines; and
- The officer makes a written report of the disposition to the law enforcement agency, identifying the child and specifying the grounds for believing that taking the child into custody was authorized.

Tex. Fam. Code § 52.03(a).

Possible authorized dispositions under this section include referral of the child to an agency other than the juvenile court, a family conference, or a referral of the child and family to a family services agency or a DFPS youth intervention program. Tex. Fam. Code § 52.03(c).

2.5.3 First Offender Program

Another diversion opportunity for law enforcement agencies is first offender programs. The juvenile board is authorized to establish a law enforcement first offender program for children with no prior delinquent conduct adjudications who are taken into custody or accused, prior to the filing of charges, of:

- conduct indicating a need for supervision;
- a non-traffic Class C misdemeanor; or
- Class A or B misdemeanor or state jail felony delinquent conduct that does not involve violence to a person or the use or possession of a firearm, location-restricted knife, or club.

Tex. Fam. Code § 52.031(a).

First offender programs are operated by the law enforcement officer or agency designated by the juvenile board, pursuant to disposition guidelines adopted by the juvenile board. Tex. Fam. Code § 52.031(b). The program may

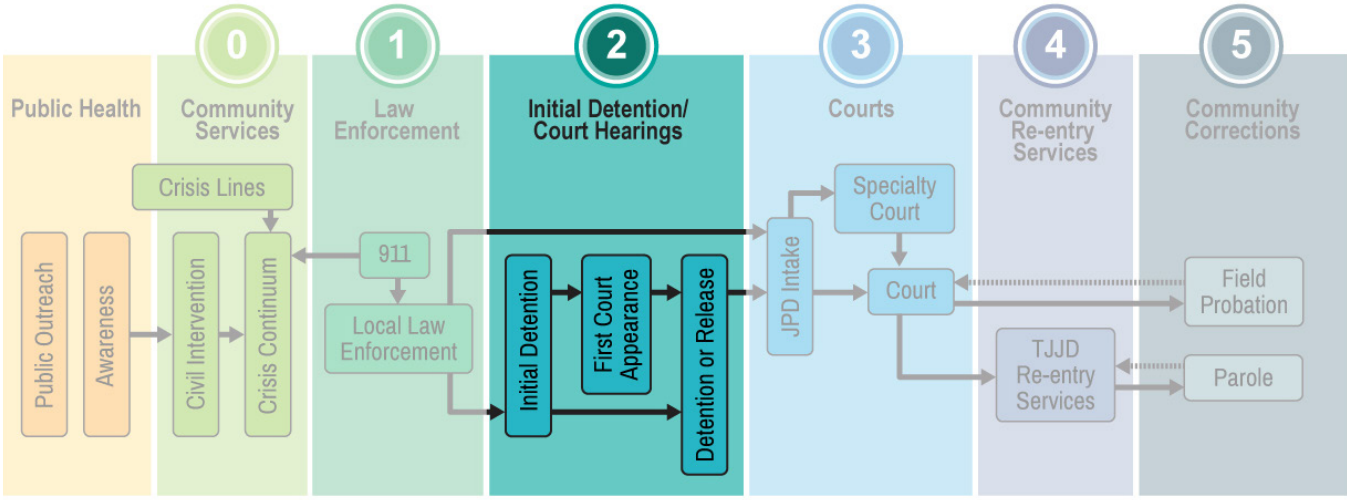
include periodic reporting to the law enforcement officer or agency, voluntary restitution, voluntary community service restitution, and educational training, vocational training, counseling, or other rehabilitative services. Tex. Fam. Code § 52.031(h).

A child referred by law enforcement to the first offender program is not referred to the juvenile court, and the record of the offense is not submitted to DPS. Tex. Fam. Code § 58.001(c). If the child successfully completes the program, and is not taken into custody for a new offense for the next 90 days, the law enforcement agency destroys all records linking the child to the offense, other than keeping the child's name and basic information for the purpose of determining future eligibility for the program. Tex. Fam. Code § 52.031(i). Chapter 58, Family Code, contains additional record-keeping requirements related to first offender programs.

Human Trafficking Victims

If there is probable cause to believe that a child engaged in delinquent conduct or CINS, and is the victim of human trafficking, the child's case cannot be disposed of under either the Disposition Without Referral to Court or First Offender Program sections of the Texas Family Code. Tex. Fam. Code § 52.032(b). Instead, that child's case should be addressed under a special deferred prosecution program for trafficked children, under Texas Family Code section 54.0326, discussed below, in Intercept 3: Courts, on page 97.

2 Intercept 2: Initial Detention and Court Hearings



Intercept 2: Initial Detention and Court Hearings focuses on initial detention and court hearings. This intercept will frequently be the first opportunity for judicial involvement. This includes matters such as intake screening, early assessment, and pretrial release of children with mental illness or intellectual disabilities. Identification at this stage can facilitate informed decision-making around a juvenile's care, treatment continuation, and release orders. Diversion continues to be a focus in this intercept.

Part I: Detention

Laws across the Administrative Code, the Code of Criminal Procedure, and the Family Code detail the various procedures for identifying a juvenile's possible MI or ID at the earliest stages of – and throughout – a juvenile court proceeding.

Facilities moving toward trauma-informed practice will want to carefully examine what happens from the moment youth enter the door, and how well detention intake policies and procedures create an environment of safety. Some of the considerations[114] are whether:

- Staff are sensitive and alert to whether a child is in distress, and take appropriate steps to address concerns;
- Youth are informed of non-discrimination policies, and that their needs will be recognized; for example, that "Safe Zone" signs are posted to help youth who identify as LGBTQ feel more at ease;
- Interviews about sensitive information occur in private areas;
- Youth are informed about safety in the facility; for example, how gang issues are handled, what protections ensure safety, and how to confidentially report problems;
- Searches are no more intrusive than needed for intake and in compliance with Prison Rape Elimination Act standards[115] (no cross-gender pat downs, and cross-gender strip searches or body cavity searches only in exigent circumstances);

[114] Sue Burrell, The Nat'l Child Traumatic Stress Network, Youth Law Cent., Trauma and the Environment of Care in Juvenile Institutions (2013), http://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf

[115] Prison Rape Elimination Act National Standards, 28 C.F.R. pt. 115 (2019), https://www.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Final-Rule.pdf

- Youth are screened for trauma, and further assessment occurs where needed;
- Youth receive all of the information they need about their rights and the institutional rules in a form they can understand;
- Youth receive information about how to register complaints or to speak confidentially to someone who can help if problems arise.

1. Early Identification and Assessments

Detention staff are required to perform various assessments of children on admission to the detention facility. Efficient communication of this information is necessary for judges, attorneys, and probation officers to understand and address any special needs a child may have.

Reflection Point

Practitioners should examine the socioeconomic factors that influence release, diversions, and alternatives to detention. For example, families with substantial financial resources may be able to pay for electronic leg monitoring (ELM) devices or provide parental supervision as a result of home based employment or flexible work hours. It is important not to mistake poverty for neglect.

1.1 Detention Intake

There will be an intake officer at the detention facility, or on call, 24 hours a day. The intake officer determines whether the juvenile should be released or detained, based on the facility's policies and in accordance with Texas Family Code section 53.01. Juveniles who are in need of emergency medical care due to injury, illness, intoxication, or mental health crisis will not be admitted into detention. Instead, the officer who transported the juvenile to detention will need to take the juvenile to a health care facility for evaluation and treatment. The juvenile may be admitted later, after written clearance from a health care or mental health care provider. 37 Tex. Admin. Code § 343.400.

Release from Detention

When a child is brought into detention, the intake or other authorized officer of the court must immediately make an investigation and **shall release the child** unless it appears that the child's detention is warranted. The release may be conditioned upon requirements reasonably necessary to insure the child's appearance at later proceedings, but the conditions must be in writing and filed with the office or official designated by the court and a copy furnished to the child. Tex. Fam. Code § 53.02(a).

A child taken into custody may be detained prior to a hearing on the petition only if:

1. The child is likely to abscond or be removed from the jurisdiction of the court;
2. Suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person;
3. The child has no parent, guardian, custodian, or other person able to return the child to the court when required;
4. The child may be dangerous to themselves, or the child may threaten the safety of the public if released;
5. The child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail and is likely to commit an offense if released; or
6. The child's detention is required due to an alleged firearms offense.

Tex. Fam Code § 53.02(b).

1.2 Mandatory Mental Health Screening[116] [117]

The detention facility must administer a mental health screening or provide a clinical assessment conducted by a mental health provider within 48 hours of the juvenile's admission to the facility. The mental health screening tool used in Texas is the Massachusetts Youth Screening Instrument, 2nd Edition, or MAYSI-2. A juvenile who receives a positive screening must be given a secondary screening immediately or referred to a mental health provider by the end of the next workday. If either the secondary screening or the mental health provider recommends further mental health intervention for the juvenile, a referral to a mental health provider or to a physician must occur within 48 hours. *See* 37 Tex. Admin. Code § 343.404.

MAYSI-2[118]

The MAYSI-2 is a brief behavioral health screening tool designed for juvenile justice programs and facilities. 46 states have adopted the MAYSI-2. The tool requires no formal training as a mental health professional and can be administered in approximately 10 minutes. It consists of 52 questions regarding the recent experience of thoughts, feelings or behaviors, to which the juvenile answers YES or NO. The answers provide scores on seven scales: Alcohol/Drug Use, Angry Irritable, Depressed Anxious, Somatic Complaints, Suicide Ideation, Thought Disturbance, and Traumatic Experiences. Scores on each scale allow staff to determine whether the juvenile may need immediate attention for suicide precaution or further assessment by a mental health professional.

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[116] The MAYSI and other detention intake assessments require the child to respond to questioning by a government employee or agent, the detention officer. Texas Family Code section 54.03(e) states that "A child alleged to have engaged in delinquent conduct or CINS need not be a witness against nor otherwise incriminate himself. An extrajudicial statement which was obtained without the requirements of this title or of the constitution of this state or of the United States, may not be used in an adjudication hearing."

[117] *See also,* Tex. Health & Safety Code § 614.017(b) ("Information obtained under this section may not be used as evidence in any juvenile or criminal proceeding, unless obtained and introduced by other lawful means."). Further discussion of this statute appears below, in Section 3: Information Sharing is Mandatory.

[118] More information about the MAYSI can be found at: National Youth Screening & Assessment Partners, http://www.nysap.us/maysi2/index.html (last visited Aug. 7, 2020).

1.3 Mandatory Screening of Juveniles for Suicide

All juveniles must be screened for suicide risk within two hours of admission into a facility, or upon any indication that a juvenile who was previously screened may now, or at other times during their stay, be at moderate or high risk for suicidal behavior. This screening is part of a suicide prevention plan that all facilities, in consultation with a mental health provider, must develop and implement. *See* 37 Tex. Admin. Code § 343.340. The MAYSI-2 can satisfy the suicide screening requirement if it is administered within two hours of the juvenile's admission. 37 Tex. Admin. Code § 343.404(a)(3).

Mental Health Referral of High-Risk Suicidal Youth

The facility must refer a juvenile classified as high risk for suicidal behavior to a mental health provider or agency within 24 hours after the classification is assigned, and document that the referral was made. 37 Tex. Admin. Code § 343.346.

1.4 Mandatory Health Screening

All juveniles must have a health screening within two hours of their admission to the facility. The health screening must include, but is not limited to: mental health conditions, treatment, and hospitalizations; observation of the juvenile's appearance, behavior, state of consciousness, breathing; current medications; use of alcohol or drugs; special health requirements; and any other health concerns reported by the juvenile. If the juvenile requires follow-up care, the facility must contact a health care professional as soon as possible, but no later than 24 hours after the screening. 37 Tex. Admin. Code § 343.406.

1.5 Mandatory Behavioral Screening

All juveniles must be screened for potential vulnerabilities or aggressive behavior. The behavioral screening must consider the juvenile's age, offense history, physical size, state of mind, sexual orientation, prior victimization or abuse, level of emotional and cognitive development, mental or physical disabilities, intellectual or developmental disabilities, and other pertinent information. 37 Tex. Admin. Code § 343.414.

Detention facilities may consider screening vulnerable children and adolescents for additional classifications than the law requires, such as gender identity, to ensure the child's safety.

2. Medication

Interruption of a child's medication regimen should be avoided. A child's existing treatment regimen should be extended into the detention setting to prevent deterioration.

2.1 Continuity of Care

All secure pre-adjudication detention and post-adjudication correctional facilities are required to have a written health service plan. The plan must include procedures:

- For conducting health screenings and assessments;
- For the referral of juveniles in need of medical attention for medical, mental health, and dental services;
- For emergency health care services;
- To ensure continuity of care in accordance with the instructions of the medical provider including the delivery of treatment, medication, referrals, follow up, and medically-modified diets;
- Relating to informed consent as required by Texas Family Code Chapter 32 for medical, dental, psychological, and surgical treatment; immunizations; and counseling services;
- Relating to procurement, distribution, dispensing, disposal, and accounting of prescription and over-the-counter medication;

37 Tex. Admin. Code § 343.322.

2.2 Medication Administration

Stimulants, tranquilizers, and psychotropic medications cannot be administered to juveniles in detention without an order from a physician, physician assistant, dentist, or nurse practitioner. The detention facility is required to adopt a policy concerning the administration of medication to juveniles. The policy must include requirements that any medication brought into the facility by the juvenile's parent or guardian must be in the original container, and the parent or guardian submit a written request to the facility to administer the medication; that all medication prescribed to the juvenile during their stay is administered; and that each administration of the medication is documented. 37 Tex. Admin. Code § 343.336.

Continuing Medication is Critical to Continuity of Care

Continuing a child's prescription medication is critical to preventing mental health deterioration. Intake officers should consult with the child and their parent or guardian regarding current medications. Family members should bring all current medications to the detention center as soon as possible. Judges should inquire about medications at detention hearings and require a doctor's visit if a child's medication needs are not met.

3. Information Sharing is Mandatory

3.1 Considerable confusion has surrounded the issue of sharing personal information in proceedings involving juveniles, and particularly in proceedings involving juveniles with or who may have MI or ID. This subsection identifies some of the key state-law provisions governing that issue.

3.2 Information Regarding Special Needs Offenders

State law requires that agencies share information for purposes of continuity of care and services for "special needs offenders," which includes individuals:

- For whom criminal charges are pending; or
- Who, after conviction or adjudication, are in custody or under any form of criminal justice supervision.

Tex. Health & Safety Code §§ 614.017(a), (c)(2).

3.3 What an Agency is Required to Do

Specifically, an agency must:

- Accept information relating to a special needs offender **or a juvenile with a mental impairment** that is sent to the agency **to serve the purposes of continuity of care and services** regardless of whether other state law makes that information confidential; and
- Disclose information relating to a special needs offender **or a juvenile with a mental impairment**, including information about the offender's or juvenile's identity; needs; treatment; social, criminal, and vocational history; supervision status and compliance with conditions of supervision; and medical and mental health history, **if the disclosure serves the purposes of continuity of care and services**.

Tex. Health & Safety Code § 614.017(a).

3.4 Agencies Must Safeguard Confidentiality

An agency must manage confidential information accepted or disclosed under this section prudently to maintain, to the extent possible, the confidentiality of that information. A person commits an offense if the person releases or discloses confidential information obtained under section 614.017 for purposes other than continuity of care and services, except as authorized by other law or by the consent of the person to whom the information relates. Tex. Health & Safety Code §§ 614.017(d), (e).

3.5 Not for Use as Evidence

Information obtained under this section may not be used as evidence in any juvenile or criminal proceeding, unless obtained and introduced by other lawful evidentiary means. Tex. Health & Safety Code § 614.017(b).

3.6 Agencies Required to Comply

An "agency" includes of the following, a person with an agency relationship with one of the following, and a person who contracts with one or more of the following:

- The Texas Department of Criminal Justice and the Correctional Managed Health Care Committee;
- The Board of Pardons and Paroles;
- The Department of State Health Services;
- The Texas Juvenile Justice Department;
- The Department of Assistive and Rehabilitative Services;
- The Texas Education Agency;
- The Texas Commission on Jail Standards;
- The Department of Aging and Disability Services;
- The Texas School for the Blind and Visually Impaired;
- Community supervision and corrections departments and juvenile probation departments;
- Personal bond pretrial release offices established under article 17.42 of the Texas Code of Criminal Procedure;
- Jails regulated by the Commission on Jail Standards;
- A municipal or county health department;
- A hospital district;
- A judge of this state with jurisdiction over juvenile or criminal cases;
- An attorney who is appointed or retained to represent a special needs offender or a juvenile with a mental impairment;
- The Health and Human Services Commission;
- The Department of Information Resources;
- The Bureau of Identification and Records of the Department of Public Safety, for the sole purpose of providing real-time, contemporaneous identification of individuals in the Department of State Health Services client data base; and
- The Department of Family and Protective Services.

Tex. Health & Safety Code § 614.017(c)(1).

3.7 Continuity of Care for Juveniles with Mental Impairments

The Texas Juvenile Justice Department, the Department of Public Safety, the Department of State Health Services, the Department of Aging and Disability Services, the Department of Family and Protective Services, the Texas Education Agency, and local juvenile probation departments must adopt a memorandum of understanding that establishes their respective responsibilities to institute **a continuity of care and service program for juveniles with mental impairments in the juvenile justice system**. TCOOMMI shall coordinate and monitor the development and implementation of the MOU.

The MOU must establish methods for:

1. Identifying juveniles with mental impairments in the juvenile justice system and collecting and reporting relevant data to the office;
2. Developing interagency rules, policies, and procedures for the coordination of care of and the exchange of information on juveniles with mental impairments who are committed to or treated, served, or supervised

by TJJD, DPS, DSHS, DFPS, DADS, TEA, local juvenile probation departments, LMHAs, LIDDAs, and independent school districts; and

3. Identifying the services needed by juveniles with mental impairments in the juvenile justice system.

Tex. Health & Safety Code § 614.018(b).

In this section, "continuity of care and service program" includes:

1. Identifying the medical, psychiatric, or psychological care or treatment needs and educational or rehabilitative service needs of a juvenile with mental impairments in the juvenile justice system;
2. Developing a plan for meeting the needs identified under subdivision 1; and
3. Coordinating the provision of continual treatment, care, and services throughout the juvenile justice system to juveniles with mental impairments.

Tex. Health & Safety Code § 614.018(c).

Juvenile Records

Certain juvenile justice agencies and juvenile justice service providers are permitted to share certain records regarding a child's personal health information or history of government services provided, for the purposes of coordination of care, prevention of duplication of services, enhancing rehabilitation, and improving and maintaining community safety. Tex. Fam. Code § 58.0052. Juvenile records will be discussed in depth in a later edition of this Bench Book.

3.8 Exempt from the Texas Medical Records Privacy Act (TMRPA)

TMRPA, the state law governing privacy of medical records, expressly excludes an agency described by section 614.017 (set forth above) with respect to the disclosure, receipt, transfer, or exchange of medical and health information and records relating to individuals in the custody of an agency or in community supervision. Tex. Health & Safety Code § 181.057.

4. Restraints

Texas Juvenile Justice Department standards govern the use of restraints in juvenile secure detention and post-adjudication facilities. The standards apply to personal restraints, mechanical restraints, chemical restraints, and non-ambulatory restraints. The frequency of seclusion and restraint practices used in an organization is considered one indicator of how well an organization is implementing trauma-informed practices.[119]

Reflection Point

Consider utilizing restraints in the courtroom setting only as an exception rather than the rule.

4.1 Approved Restraint Techniques

Each facility must adopt a personal restraint technique that has been approved by TJJD. Personal restraints are also considered physical restraints.

[119] The Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families, Statewide Collaborative on Trauma-Informed Care, Building a Trauma-Informed Child Welfare System: A Blueprint 38 (2019), http://texaschildrenscommission.gov/media/84026/building-a-trauma-informed-child-welfare-system-a-blueprint-online.pdf.

- "Handle with Care"[120] and "The Mandt System"[121] are the currently approved restraint techniques. 37 Tex. Admin. Code § 390.9723(j)(1)(B).
- Only juvenile supervision and probation officers may use personal restraints in juvenile facilities. Before participating in a restraint, the officers must be trained in the approved restraint technique and in the facility's specific verbal de-escalation practices and procedures. 37 Tex. Admin. Code §§ 343.800(a), (c).
- The officers must be retrained on the restraint technique at least once every 365 days. 37 Tex. Admin. Code § 343.808(c).

4.2 When Restraints can be Used

- Personal restraints may be used only to prevent imminent or active self-injury, injury to others, serious property damage, or escapes. 37 Tex. Admin. Code § 343.802(d).
- Personal restraints may be used **only as a last resort** and only the amount of force and type of restraint necessary to control the situation may be used. 37 Tex. Admin. Code §§ 343.802(e), (f).
- Personal restraints are required to be implemented in a way to protect the health and safety of the juvenile and to be terminated as soon as the threat has subsided. 37 Tex. Admin. Code §§ 343.802(g), (h).

4.3 Prohibited Uses of Restraints

- Personal restraints may not be used for punishment, discipline, retaliation, harassment, compliance, or intimidation, or as a substitute for appropriate disciplinary seclusion nor may they deprive a juvenile of basic human necessities, including restroom opportunities, food, water, or clothing. 37 Tex. Admin. Code §§ 343.804(1), (2).
- Personal restraints that pose a risk to a juvenile are prohibited, such as restraints intended to inflict pain; restraints that place a juvenile in a prone or supine position with pressure on the neck or head; restraints that obstruct the airway, including placing anything over the mouth or nose; restraints that interfere with the juvenile's ability to communicate; restraints that obstruct the view of the juvenile's face; techniques that do not include monitoring the juvenile's respiration and for signs of physical distress; and percussive or electrical shocking devices (e.g. tasers). 37 Tex. Admin. Code §§ 343.804(3-10).

4.4 Mechanical Restraints

- Only approved mechanical restraints may be used. This includes ankle cuffs, handcuffs, plastic cuffs (in an emergency only), restraint beds, restraint chairs, waist belts, and wristlets. 37 Tex. Admin. Code §§ 343.810(a)(1), (b)(8).
- Unlike personal restraints, mechanical restraints can be used for juvenile, staff, and public safety purposes even when there is no imminent threat. Such preventive restraints are authorized when moving a juvenile from one point to another within a secure facility, when transporting juvenile in a vehicle, or when a juvenile is required to leave the secure confines of the facility. 37 Tex. Admin. Code §§ 343.818(1-3). Under limited circumstances, the documentation of the use of mechanical restraints for routine, preventative use is not required. 37 Tex. Admin. Code § 343.818(4).
- There are several requirements to ensure safety while in mechanical restraints, such as a prohibition on restraining the juvenile to a stationary object or to part of a vehicle or another resident in a vehicle; a prohibition on "hogtying" a juvenile by attaching their arms and legs together behind the back; a requirement that the mechanical restraint not be so tight as to impact circulation or so loose as to cause chafing; and a prohibition on keeping the juvenile in a prone position while in mechanical restraints for any period of time beyond the time necessary to apply the restraints. Additionally, juveniles are prohibited from participating in physical activity while in mechanical restraints. 37 Tex. Admin. Code §§ 343.810(b)(3-7), 343.818(2), 380.9723(k)(G).

4.5 Non-Ambulatory Mechanical Restraints

It is sometimes necessary to use a non-ambulatory mechanical restraint for a juvenile. This type of restraint prohibits a juvenile's ability to stand upright and walk. Examples include a four-point restraint and a restraint chair.

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[120] *See* HANDLE WITH CARE, https://handlewithcare.com/ (last visited Aug. 14, 2020)

[121] *See* THE MANDT SYSTEM, HTTPS://WWW.MANDTSYSTEM.COM/ (last visited Aug. 14, 2020)

- Non-ambulatory mechanical restraints may be used only in response to a juvenile's overt self-injurious behavior and only when other less restrictive interventions or other forms of physical restraint have been deemed inappropriate or ineffective. 37 Tex. Admin. Code § 343.812(a).
- Permission from the facility administrator or designee is required for each instance of the use of a non-ambulatory mechanical restraint; standing orders for such use are prohibited. 37 Tex. Admin. Code § 343.812(b).
- These restraints may be used only in an area or room not visible to other residents but that is readily accessible to health care professionals or specifically trained staff with supervisory responsibilities related to non-ambulatory mechanical restraints. 37 Tex. Admin. Code § 343.812(c).
- Constant supervision by a juvenile supervision or probation officer is required, as is an opportunity for expanded physical motion for at least 5 minutes every 30-minues, an opportunity to drink water and use the restroom every hour, and regularly prescribed medications. A written recommendation from a health care professional or a mental health provider is required for a non-ambulatory mechanical restraint to continue longer than one hour. 37 Tex. Admin. Code §§ 343.812(f), (i).
- Non-ambulatory mechanical restraints lasting two hours are considered a behavioral health crisis and result in an immediate referral to a mental health provider or a mental health facility for assessment and possible treatment. Such restraints may not last more than three hours in any 24-hour time period. 37 Tex. Admin. Code §§ 343.812(g), (h).

4.6 Chemical Restraints

A chemical restraint is the use of any chemical, including pharmaceuticals, through topical application, oral administration, injection, or other means, for purposes of restraining an individual and which is not a standard treatment for the individual's medical or psychiatric condition. 25 Tex. Admin. Code § 415.253(3). Antipsychotic and sedative medications are examples of chemical restraints.

- While chemical restraints are permissible, they may be used only in response to a facility riot and, even then, only when other forms of approved restraints are deemed inappropriate or ineffective. 37 Tex. Admin. Code § 343.816(1).
- Chemical restraints require approval from the facility administrator prior to use; standing orders are prohibited. 37 Tex. Admin. Code § 343.816(2).
- Chemical restraints may not be used on juveniles who are already in a personal or mechanical restraint or who are otherwise under control. Neutralizers and decontaminants must be readily available for use on juveniles who have been exposed to chemical restraints. 37 Tex. Admin. Code §§ 343.816(5), (7).

Restraints and Trauma

The Substance Abuse and Mental Health Services Administration (SAMHSA) has found that "the use of seclusion and restraint can result in psychological harm, physical injuries, and death to both the people subjected to and the staff applying these techniques."[122] It is helpful for judges and lawyers to be familiar with the local detention facility's policies and practices for using seclusion and restraints. When seclusion or restraints are used on a youth, inquiries should be made to confirm that use and duration of the seclusion or restraint was proper. Detention facilities may want to adopt policies that require supervisor or administrative review of all restraints and seclusions. All participants in the juvenile court system must have an understanding that youth who have experienced severe or complex trauma may exhibit high-risk behaviors, but that seclusion and restraint as a response to those behaviors can cause additional trauma or re-traumatization of the youth. [123]

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[122] Substance Abuse and Mental Health Services Administration, Promoting Alternatives to the Use of Seclusion and Restraint, Issue Brief #1: A National Strategy to Prevent Seclusion and Restraint in Behavioral Health Services (2010), https://www.samhsa.gov/sites/default/files/topics/trauma_and_violence/seclusion-restraints-1.pdf.

[123] The Supreme Court of Texas Permanent Judicial Commission for Children, Youth, and Families, Statewide Collaborative on Trauma-Informed Care, Building a Trauma-Informed Child Welfare System: A Blueprint 38 (2019), http://texaschildrenscommission.gov/media/84026/building-a-trauma-

Part II: Initial Detention Hearing

The initial detention hearing is the first contact that the child will have with the court. It may be the first time the child has interacted with a judge or a lawyer, or the first time that they have seen a courtroom. The child may have been separated from their parent or guardian for several days and may not know what to expect or how to behave in a courtroom.

Creating a Trauma-Informed Courtroom can ease the anxiety and fear that children may be experiencing. The following bench card,[124] designed by the National Child Traumatic Stress Network,[125] will assist judges and other juvenile court professionals in understanding the behavior of youth, and in making good decisions regarding detention, release, placement, service referrals, and treatment.

1. Initial Detention Hearing

During a hearing, the court and counsel can avoid re-traumatizing youth by phrasing questions in a way to elicit information neutrally. For example, instead of asking whether a parent or guardian wants the youth back in the home, consider asking questions to establish whether the home is a safe environment, and whether there is suitable supervision for the youth.

- If the child was not released by the detention center intake officer, a detention hearing shall be held promptly. Promptly means not later than the second working day after the child is taken into custody; or the first working day if the child was taken into custody on a weekend or holiday.
- Detention hearings are non-jury proceedings and can be heard by a judge, referee or master.
- Reasonable written or oral notice of the hearing must be given to the child, and if located, to the child's parent, guardian, or custodian.
    - If the parent, guardian, or custodian cannot be found, the detention hearing can be held, so long as the court appoints counsel or a guardian ad-litem for the child.
- The court must inform the child of the child's right to remain silent.
    - Statements made by the child during a detention hearing are not admissible against the child at any other proceeding.
- The court may consider written reports and the testimony of witnesses in making the detention decision.
- The court shall find whether there is probable cause to believe that a child who was taken into custody without an arrest warrant or a directive to apprehend has engaged in delinquent conduct, CINS, or conduct that violates an order of probation imposed by the juvenile court.
    - The PC finding must be made within 48 hours of the time the child was taken into custody, including weekends and holidays.

Tex. Fam. Code § 54.01.

informed-child-welfare-system-a-blueprint-online.pdf.

[124] Originals are available for download. The National Child Traumatic Stress Network, NCTSN Bench Card for the Trauma-Informed Judge (2013), https://www.nctsn.org/resources/nctsn-bench-cards-trauma-informed-judge.

[125] The National Child Traumatic Stress Network, https://www.nctsn.org/ (last visited Aug. 7, 2020).

NCTSN The National Child Traumatic Stress Network

NCJFCJ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES

NCTSN BENCH CARD

FOR THE TRAUMA-INFORMED JUDGE

Research has conclusively demonstrated that court-involved children and adolescents present with extremely high rates of traumatic stress caused by their adverse life experiences. In the court setting, we may perceive these youth as inherently disrespectful, defiant, or antisocial, when, in fact, their disruptive behavior may be better understood in the context of traumatic stress disorders. These two Bench Cards provide judges with useful questions and guidelines to help them make decisions based on the emerging scientific findings in the traumatic stress field. These cards are part of a larger packet of materials about child and adolescent trauma available and downloadable from the NCTSN Trauma-Informed Juvenile Justice System Resource Site* and are best used with reference to those materials.

1. **Asking trauma-informed questions can help judges identify children who need or could benefit from trauma-informed services from a mental health professional. A judge can begin by asking, "Have I considered whether or not trauma has played a role in the child's[1] behavior?" Use the questions listed below to assess whether trauma-informed services are warranted.**

   TRAUMA EXPOSURE: Has this child experienced a traumatic event? These are events that involve actual or threatened exposure of the child to death, severe injury, or sexual abuse, and may include domestic violence, community violence, assault, severe bullying or harassment, natural or man-made disasters, such as fires, floods, and explosions, severe accidents, serious or terminal illness, or sudden homelessness.

   MULTIPLE OR PROLONGED EXPOSURES: Has the child been exposed to traumatic events on more than one occasion or for a prolonged period? Repeated or prolonged exposure increases the likelihood that the child will be adversely affected.

   OUTCOMES OF PREVIOUS SANCTIONS OR INTERVENTIONS: Has a schedule of increasingly restrictive sanctions or higher levels of care proven ineffective in this case? Traumatized children may be operating in "survival mode," trying to cope by behaving in a defiant or superficially indifferent manner. As a result, they might respond poorly to traditional sanctions, treatments, and placements.

   CAREGIVERS' ROLES: How are the child's caregivers or other significant people helping this child feel safe or preventing (either intentionally or unintentionally) this child from feeling safe? Has the caregiver been a consistent presence in the child's life? Does the caregiver acknowledge and protect the child? Are caregivers themselves operating in survival mode due to their own history of exposure to trauma?

   SAFETY ISSUES FOR THE CHILD: Where, when and with whom does this child feel safest? Where, when and with whom does he or she feel unsafe and distrustful? Is the home chaotic or dangerous? Does a caregiver in the household have a restraining order against another person? Is school a safe or unsafe place? Is the child being bullied at school or does the child believe that he or she is being bullied?

   TRAUMA TRIGGERS IN CURRENT PLACEMENT: Is the child currently in a home, out-of-home placement, school, or institution where the child is being re-exposed to danger or being "triggered" by reminders of traumatic experiences?

   UNUSUAL COURTROOM BEHAVIORS: Is this child behaving in a highly anxious or hypervigilant manner that suggests an inability to effectively participate in court proceedings? (Such behaviors include inappropriate smiling or laughter, extreme passivity, quickness to anger, and non-responsiveness to simple questions.) Is there anything I, as a judge, can do to lower anxiety, increase trust, and enhance participation?

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This project was funded by the Substance Abuse and Mental Health Services Administration (SAMHSA), US Department of Health and Human Services (HHS). The views, policies, and opinions expressed are those of the authors and do not necessarily reflect those of SAMHSA or HHS.

2. **It is crucial to have complete information from all the systems that are working with the child and family. Asking the questions referenced below can help develop a clearer picture of the child's trauma and assess needs for additional information.**

   COMPLETENESS OF DATA FOR DECISIONS: Has all the relevant information about this child's history been made available to the court, including child welfare and out-of-jurisdiction or out-of-state juvenile justice information?

   INTER-PROFESSIONAL COOPERATION: Who are the professionals who work with this child and family? Are they communicating with each other and working as a team?

   UNUSUAL BEHAVIORS IN THE COMMUNITY: Does this child's behavior make sense in light of currently available information about the child's life? Has the child exhibited extreme or paradoxical reactions to previous assistance or sanctions? Could those reactions be the result of trauma?

   DEVELOPMENT: Is this child experiencing or suffering from emotional or psychological delays? Does the child need to be assessed developmentally?

   PREVIOUS COURT CONTACTS: Has this child been the subject of other court proceedings? (Dependency/Neglect/Abuse; Divorce/Custody; Juvenile Court; Criminal; Other)

   OUT-OF-HOME PLACEMENT HISTORY: How many placements has this child experienced? Have previous placements been disrupted? Were the disruptions caused by reactions related to the child's trauma history? How did child welfare and other relevant professionals manage these disruptions?

   BEHAVIORAL HEALTH HISTORY: Has this child ever received trauma-informed, evidence-based evaluation and treatment? (Well-intentioned psychiatric, psychological, or substance abuse interventions are sometimes ineffective because they overlook the impact of traumatic stress on youth and families.)

3. **Am I sufficiently considering trauma as I decide where this child is going to live and with whom?**

   PLACEMENT OUTCOMES: How might the various placement options affect this child? Will they help the child feel safe and secure and to successfully recover from traumatic stress or loss?

   PLACEMENT RISKS: Is an out-of-home placement or detention truly necessary? Does the benefit outweigh the potential harm of exposing the child to peers who encourage aggression, substance use, and criminal behavior that may possibly lead to further trauma?

   PREVENTION: If placement, detention or hospitalization is required, what can be done to ensure that the child's traumatic stress responses will not be "triggered?" (For example, if placed in isolation or physical restraints, the child may be reminded of previous traumatic experiences.)

   DISCLOSURE: Are there reasons for not informing caregivers or staff at the proposed placement about the child's trauma history? (Will this enhance care or create stigma and re-victimization?)

   TRAUMA-INFORMED APPROACHES: How does the programming at the planned placement employ trauma-informed approaches to monitoring, rehabilitation and treatment? Are staff knowledgeable about recognizing and managing traumatic stress reactions? Are they trained to help children cope with their traumatic reactions?

   POSITIVE RELATIONSHIPS: How does the planned placement enable the child to maintain continuous relationships with supportive adults, siblings or peers?

4. **If you do not have enough information, it may be useful to have a trauma assessment done by a trauma-informed professional. Utilizing the NCTSN BENCH CARD FOR COURT-ORDERED TRAUMA-INFORMED MENTAL HEALTH EVALUATION OF CHILD, you can request information that will assist you in making trauma-informed decisions.**

[1] The use of "child" on this bench card refers to any youth who comes under jurisdiction of the juvenile court.
*http://learn.nctsn.org/course/view.php?id=74

Guardian Ad Litem

The court's authority under Tex. Fam. Code § 51.11 to appoint a guardian ad litem when the child's parent is unable or unwilling to act in the child's best interests is consistent with the goals of the Juvenile Justice Code under Tex. Fam. Code § 51.01, which include the best interests of the child and the protection of the community.

Reflection Point

Ask yourself, as a judge, has equity been considered in the prior intercept points? Has release or evaluation by a mental health provider been overlooked by the arresting officer or education systems? What assumptions have I made about the cultural identity, genders, profession, and background of this family? Have I made assumptions about who is present in the courtroom, overlooking transportation or other concerns in favor of shortcuts and assumptions about whether the family cares about the well-being of their child? How might my assumptions (or, the assumptions of those involved at prior intercept points) influence my decision-making?

1.1 Right to Counsel

Before the first detention hearing, the court must notify the child and the child's parent, guardian, or custodian of the child's right to legal counsel. Tex. Fam. Code §§ 51.10(a)(1), 54.01(b). The court shall appoint an attorney after a finding that the child's family is indigent unless the appointment is not feasible due to exigent circumstances. Tex. Fam. Code § 54.01(b-1). Once an attorney is appointed to represent a child, the attorney must continue representation of the child until the case is terminated, the family retains an attorney, or a new attorney is appointed. Tex. Fam. Code § 51.10(a).

The court shall provide the attorney with all written material to be considered in making the detention decision. Tex. Fam. Code § 54.01(c).

Best Practices for Appointing Counsel

Promptly appoint counsel. If there is a question about the parent's or guardian's ability to retain counsel, an attorney should be appointed first, and an inquiry regarding the financial situation of the family should be explored later. Consider appointing counsel with specialized MI or ID training, when possible.

1.2 Presumption of Release

At the conclusion of the hearing, the court shall order the child released from detention unless it finds that:

- The child is likely to abscond or be removed from the jurisdiction of the court;
- Suitable supervision, care, or protection for the child is not being provided by a parent, guardian, custodian, or other person;
- The child has no parent, guardian, custodian, or other person able to return the child to court when required;
- The child may be dangerous to themselves or may threaten the safety of the public if released; or
- The child has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

Tex. Fam. Code § 54.01(e).

1.3 Setting and Enforcing Conditions of Release

A release may be conditioned on requirements reasonably necessary to insure the child's appearance at later proceedings. Tex. Fam Code § 54.01(f). The conditions of release must be in writing, and a copy must be given to the child. *Id*. Possible conditions include meeting with a probation officer or a counselor, living with a particular relative, following a curfew, attending school, or avoiding contact with a peer or alleged victim.

When a child has previously been found unfit to proceed, judges should consider whether that child has the capacity to understand and abide by conditions of release.

If the child violates a condition of release, the order of release may be revoked, and the child can be taken into custody again. Tex. Fam. Code § 52.01.

Considerations for Conditions of Release

Some judges order children, as a condition of release from the detention facility, to participate in psychological evaluations, assessments, counseling sessions, or intake interviews for entry into programs; or to attend medical appointments for medical evaluation or medication management. There are many good reasons for engaging in services at an early stage of a juvenile case, but also some considerations to keep in mind.

It is possible that the child could incriminate themselves during an evaluation or treatment. Defense attorneys may find it necessary to instruct their juvenile clients to avoid discussing the alleged offense during evaluation or services that occur prior to adjudication. Attorneys may consider postponing these activities until they determine how the case will proceed and discuss possible outcomes with the client. Agreements can be made between the parties that anything revealed during such an evaluation will not result in juvenile prosecution. If no agreements are made, the child and their attorney should acknowledge that fact in writing.

Service providers should clearly explain to children whether the assessment or interview is confidential, and to whom the report will be distributed. Service providers can provide the reports directly to defense counsel, to ensure the child's rights were protected and privileges were upheld.

The court and all parties should be aware that any documents or reports that the juvenile probation officer receives directly from a service provider could be items that the prosecution must produce for the defense under the Michael Morton Act.[126]

2. Physical or Mental Examination

The initial detention hearing is usually the first time that the judge and the child's attorney will interact with the child and the child's parent, guardian, or custodian. Although these hearings can be brief and informal, they are an opportunity to gather information about any diagnoses or special needs that the child may have.

At any stage of the proceedings, the juvenile court can, at its own discretion or at the request of the child's parent or guardian, order a physical or mental examination of the child to determine whether the child has a mental illness, has an intellectual disability, or suffers from chemical dependency. Tex. Fam Code § 51.20(a).

If, after the examination, there is reason to believe the child has MI, ID, or suffers from chemical dependency, the probation department must refer the child to the LMHA, LIDDA, or other provider for evaluation and services, *unless the prosecuting attorney has filed a petition under section 53.04*. Tex. Fam. Code § 51.20(b).

[126] Tex. Code of Crim. Proc. art. 39.14.

Reflection Point

Ask yourself, as a judge, has equity been considered in prior intercept points? Has a previous or current diagnosis of MI or IDD been overlooked? Are there education records that document diagnoses? Has any party previously sought evaluations for MI or IDD? If not, could the cultural identity, profession, or background of the youth and family be clouding their appropriateness or access to services for MI or IDD?

Has trauma affected the family's ability to access services in any system, including education or juvenile probation? How have I challenged any assumptions I might have made based on cultural identity, profession, or background? Is my jurisdiction gathering local data on whether BIPOC youth are assessed and/or diagnosed with a MI or IDD at higher rates than non-BIPOC youth?

2.1 Who May Conduct the § 51.20 Physical or Mental Examination

The examination must be performed by a disinterested expert, including a **physician, psychiatrist, or psychologist**, qualified by education and clinical training in mental health or [intellectual disability][127] and experienced in forensic evaluation, to determine whether the child has a mental illness as defined by Section 571.003, Health and Safety Code, is a person with [intellectual disability] as defined by Section 591.003, Health and Safety Code, or suffers from chemical dependency[128] as defined by Section 464.001, Health and Safety Code. Tex. Fam. Code § 51.20(a).

Judges may consider ordering a trauma-informed examination. The bench card[129] on **page 77** contains considerations for eliciting trauma-specific information during an examination, assessment, or report.

A Juvenile Can Have MI or ID and be Fit to Proceed Under Chapter 55

It is important to understand that that a judge may receive information that may not suggest that a juvenile is unfit to proceed under Chapter 55 of the Texas Family Code, but that may suggest that the juvenile has a MI or ID. Such a condition may not render the juvenile unfit to proceed, but it may warrant special consideration and management of the juvenile's case.

[127] Note that the actual text of Texas Family Code section 51.20(a) uses the outdated term "mental retardation." S.B. 219 (84th Reg. Sess. (2015)), amended many sections of the Family Code to substitute "intellectual disability" for "mental retardation." For the purposes of consistency, we choose to use "intellectual disability" here.

[128] "Chemical dependency" means: abuse of alcohol or a controlled substance; psychological or physical dependence on alcohol or a controlled substance; or addiction to a controlled substance. Tex. Health & Safety Code § 464.001(1).

[129] The National Child Traumatic Stress Network, NCTSN Bench Card for Court-Ordered Trauma-Informed Mental Health Evaluation of Child: Sample Addendum (2013), https://www.nctsn.org/resources/nctsn-bench-cards-trauma-informed-judge.

Child with Mental Illness, Disability, or Lack of Capacity and Class C Misdemeanors

Texas Penal Code section 8.08 gives courts that have jurisdiction over Class C misdemeanors and municipal ordinance violations a mechanism for the dismissal of cases involving children with diminished capacity.

- When a motion is made, the court must determine whether **probable cause** exists to believe that a child, including a child with a mental illness or developmental disability[130] :
  1. Lacks the capacity to understand the proceedings in criminal court or to assist in the child's 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 the child's conduct to the requirement of the law.
- The state, the defendant, the defendant's parent or guardian, or the court can make the motion.
- If the court determines that probable cause exists that the child is unfit to proceed or lacks substantial capacity, the court can dismiss the case after providing notice to the state.

Tex. Penal Code § 8.08.

[130] The statute provides that when a child has diminished capacity, the case against the child can be dismissed. The statute specifically mentions children with a mental illness or a developmental disability, but it does not exclude children who have diminished capacity due to other conditions, e.g., traumatic brain injury, autism spectrum disorder, intellectual disability, or severe emotional disturbance.

NCTSN The National Child Traumatic Stress Network

NCJFCJ NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES

NCTSN BENCH CARD

FOR COURT-ORDERED TRAUMA-INFORMED MENTAL HEALTH EVALUATION OF CHILD: SAMPLE ADDENDUM

This Court has referred this child[1] for mental health assessment. Your report will assist the judge in making important decisions. Please be sure the Court is aware of your professional training and credentials. In addition to your standard psychosocial report, we are seeking trauma-specific information. Please include your opinion regarding the child's current level of danger and risk of harm. The Court is also interested in information about the child's history of prescribed psychiatric medications. We realize that you may be unable to address every issue raised below, but the domains listed below are provided as an evidence-based approach to trauma-informed assessment.

1. SCREENING AND ASSESSMENT OF THE CHILD AND CAREGIVERS

Please describe the interview approaches (structured as well as unstructured) used for the evaluation. Describe the evidence supporting the validity, reliability, and accuracy of these methods for children or adolescents. For screens or tests, please report their validity and reliability, and if they were designed for the population to which this child belongs. If feasible, please report standardized norms.

Discuss any other data that contributed to your picture of this child. Please describe how the perspectives of key adults have been obtained. Are the child's caregivers or other significant adults intentionally or unintentionally preventing this child from feeling safe, worthy of respect, and effective? Are caregivers capable of protecting and fostering the healthy development of the child? Are caregivers operating in "survival mode" (such as interacting with the child in a generally anxious, indifferent, hopeless, or angry way) due to their own history of exposure to trauma? What additional support/resources might help these adults help this child?

2. STRENGTHS, COPING APPROACHES, AND RESILIENCE FACTORS

Please discuss the child's existing strengths and coping approaches that can be reinforced to assist in the recovery or rehabilitation process. Strengths might include perseverance, patience, assertiveness, organization, creativity, and empathy, but coping might take distorted forms. Consider how the child's inherent strengths might have been converted into "survival strategies" that present as non-cooperative or even antisocial behaviors that have brought this child to the attention of the Court.

Please report perspectives voiced by the child, as well as by caregivers and other significant adults, that highlight areas of hope and recovery.

3. DIAGNOSIS (POST TRAUMATIC STRESS DISORDER [PTSD])

Acknowledging that child and adolescent presentations of PTSD symptoms will differ from adult presentations, please "rule-in" or "rule-out" specific DSM-V criteria for PTSD for adolescents and children older than six years, which include the following criteria:

- Exposure to actual or threatened death, serious injury, or sexual violence, either experienced directly, witnessed, or learning that the event occurred to a close family member or friend (Criteria A)
- Presence of intrusion symptoms such as intrusive memories, distressing dreams, flashbacks, physical reactions, trauma-specific re-enactment through play, psychological distress at exposure to cues (Criteria B)
- Avoidance of stimuli or reminders associated with the traumatic event, including avoidance of internal thoughts and feelings related to the event, as well as external activities, places, people, or situations that arouse recollections of the event (Criteria C)

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This project was funded by the Substance Abuse and Mental Health Services Administration (SAMHSA), US Department of Health and Human Services (HHS). The views, policies, and opinions expressed are those of the authors and do not necessarily reflect those of SAMHSA or HHS.

- Negative changes in cognition, mood, and expectations; diminished interest in, detachment, and estrangement from others; guilt and shame; socially withdrawn behavior; reduction in positive emotions (Criteria D)
- Alterations in arousal and reactivity, including irritable or aggressive behavior, angry outbursts, reckless or self-destructive behavior, hypervigilance, exaggerated startle response, concentration problems, and sleep disturbance (Criteria E)
- Exhibiting these disturbances in behavior, thoughts and mood for over a month (Criteria F)
- Significant distress or impairment in relationships with parents, siblings, peers, or other caregivers or with school behavior (Criteria G)
- The disturbed behavior and mood cannot be attributed to the effects of a medication, street drug, or other medical condition (Criteria H)

PTSD can also be present for children ages six and younger. Criteria include exposure; intrusive symptoms, including distressing memories or play re-enactment and physiological reactions to reminders; avoidance of people, conversations or situations; negative emotional states such as fear, sadness, or confusion, sometimes resulting in constriction of play; irritable behavior and hypervigilance; and impairment in relationships with parents, siblings, peers or other caregivers.

Even if an official DSM-V diagnosis of PTSD is not warranted, traumatic stress reactions can definitely or potentially contribute to the child's behavioral, emotional, interpersonal, or attitudinal problems. Traumatic stress reactions may contribute to problems with aggression, defiance, avoidance, impulsivity, rule-breaking, school failure or truancy, running away, substance abuse, and an inability to trust or maintain cooperative and respectful relationships with peers or adults.

4. TRAUMA-INFORMED SERVICES

Has this child ever received Trauma-Focused, Evidence-Based Treatment?*** Sometimes well-intentioned psychiatric, psychological, social work, or substance abuse evaluations and treatment are incomplete and of limited effectiveness because they do not systematically address the impact of children's traumatic stress reactions.

The Court is interested in potential sources of trauma-informed services in your area and your thoughts about the likelihood that the child can receive those services.

In the meantime, what can be done immediately for and with the family, school, and community to enhance safety, build on the child's strengths, and to provide support and guidance? How can this child best develop alternative coping skills that will help with emotional and behavioral self-regulation?

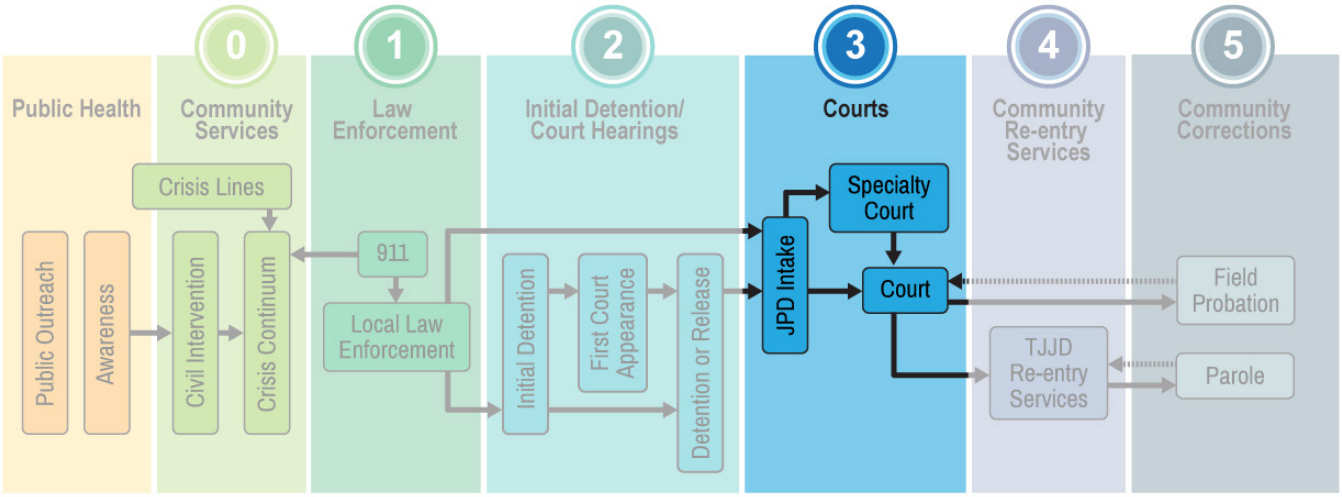
5. SUGGESTIONS FOR STRUCTURING PROBATION, COMMUNITY SUPERVISION AND/OR PLACEMENT OPTIONS.

Structured case plans for probation, community supervision, and/or placement should consider the ability of the setting and the people involved to assist the child in feeling safe, valued, and respected. This is especially important for traumatized children. Similarly, the plan for returning home, for continuing school and education, and for additional court or probationary monitoring should also clearly address each child's unique concerns about safety, personal effectiveness, self-worth, and respect. Please consider where, when, and with whom this child feels most safe, effective, valued and respected. Where, when, and with whom does the child feel unsafe, ineffective, or not respected? What out-of-home placements are available that can better provide for this child's health and safety, as well as for the community's safety? What placements might encourage success in school, relationships, and personal development?

[1] The use of "child" on this bench card refers to any youth who comes under jurisdiction of the juvenile court.

*** Trauma-Focused, Evidence-Based (TF-EB) Treatment is science-based, often requires training in a specific protocol with careful clinical supervision, and emphasizes the treatment relationship, personal/psychological safety, emotional and behavioral self-regulation, development of coping skills, specific treatment of child traumatic experiences, and development of self-enhancing/pro-social thinking, feeling, decision-making, and behaving. TF-EB treatments include: Trauma-Focused Cognitive Behavioral Therapy, Parent-Child Interaction Therapy, Trauma Affect Regulation: Guidelines for Education and Therapy, Child Parent Psychotherapy and more. See website: http://www.nctsn.org/resources/topics/treatments-that-work/promising-practices

3 Intercept 3: Courts



Intercept 3: Courts is historically where the majority of justice system responses to mental health issues occur. At this intercept, the legal, practical, and health consequences for individuals with MI and ID are detrimental and life changing. As a result, judicial support of community-based mental health responses and court-based interventions such as specialty courts and dockets are critical. A supportive, trauma-informed, and developmentally appropriate judicial response that seeks to engage and encourage youth will result in increased trust, compliance, and better outcomes. A bench card from the National Child Traumatic Stress Network [131] is included on **page 71 and 72** to assist judges in gathering the information needed to make good decisions for the children who appear in their courts.

Chapter 55 of the Family Code deals with children with mental illness or an intellectual disability who are also respondents in the juvenile court process. There are three types of proceedings under Chapter 55: one in which the child is believed to have a mental illness; one in which the child is believed to be unfit to proceed in the juvenile system because he or she lacks the ability to understand the proceedings or to assist in [their] defense due to a mental illness or intellectual disability; and one in which the child should not be held responsible for [their] conduct because the child could not appreciate its wrongfulness or conform [their] conduct to the law's requirements at the time the offense was committed due to a mental illness or intellectual disability.[132] Attorneys and probation officers will have more contact with the child than the judge. A checklist to assist in identifying a child's potential mental health or intellectual disability issues is included on **page 149**.

While communications with a child in juvenile court should always be matched to the age and maturity level of the child, when mental health or intellectual disability concerns have been or may be raised, judges should focus extra attention on how they interact with the child. In order to reduce shame and stigmatization, judges are encouraged to be thoughtful when discussing a child's mental health or intellectual disability diagnosis or symptoms in open court. The following best practices are recommended for courtroom interactions with youth who have MI or IDD:

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[131] The National Child Traumatic Stress Network, NCTSN Bench Card for the Trauma-Informed Judge (2013), https://www.nctsn.org/sites/default/files/resources/nctsn_bench_cards_for_the_trauma_informed_judge.pdf

[132] Robert Dawson, Texas Juvenile Law 333 (Nydia Thomas and Kaci Singer, eds., 9th ed. 2018).

Take your time. Consider scheduling extra time for an adjudication or disposition hearing involving a child with MI or IDD. Allow time for questions, processing, and rephrasing of admonishments and conditions. Be mindful of signs that the child may be overwhelmed and take a break if needed. Review the outcome of the hearing and use open-ended questions to determine the child's level of understanding.

Give information more than once. Be prepared to repeat and rephrase concepts. It may be helpful for attorneys to meet with their child client several times before the court hearing.

Avoid legalese and jargon. Keep language simple and appropriate for the child's developmental level. Explain procedures step by step. Be concrete and avoid abstract concepts.

Meet children where they are. Minimize distractions in the courtroom. Allow the child to bring a sensory or calming object in the courtroom. Talk to the child, not at or around them. Listen actively. Give the child the opportunity to communicate through alternative means. Highlight successes.

Reflection Point

Ask yourself, as a judge, has trauma created a lack of ability to access services by the family in any system including education or juvenile probation? Has any party sought deferred prosecution in favor of outpatient treatment in the community? Has any party filed a Chapter 55 motion? Have I helped to destigmatize mental health and intellectual and developmental disability? Have I made assumptions about who is present in the courtroom, overlooking transportation or other concerns in favor of shortcuts and assumptions about whether the family cares about the well- being of their child? What assumptions am I making without asking the child who are the important people in their life and who the court should invite to assist the family with the child?

Have I made assumptions based on the social media accounts, pictures, or posts of an adolescent as if they were an adult? How might my assumptions influence my decision making? How have I challenged any assumptions I might have made based on cultural identity, profession, or background?

1. Mental Health Services When a Juvenile Case is Pending

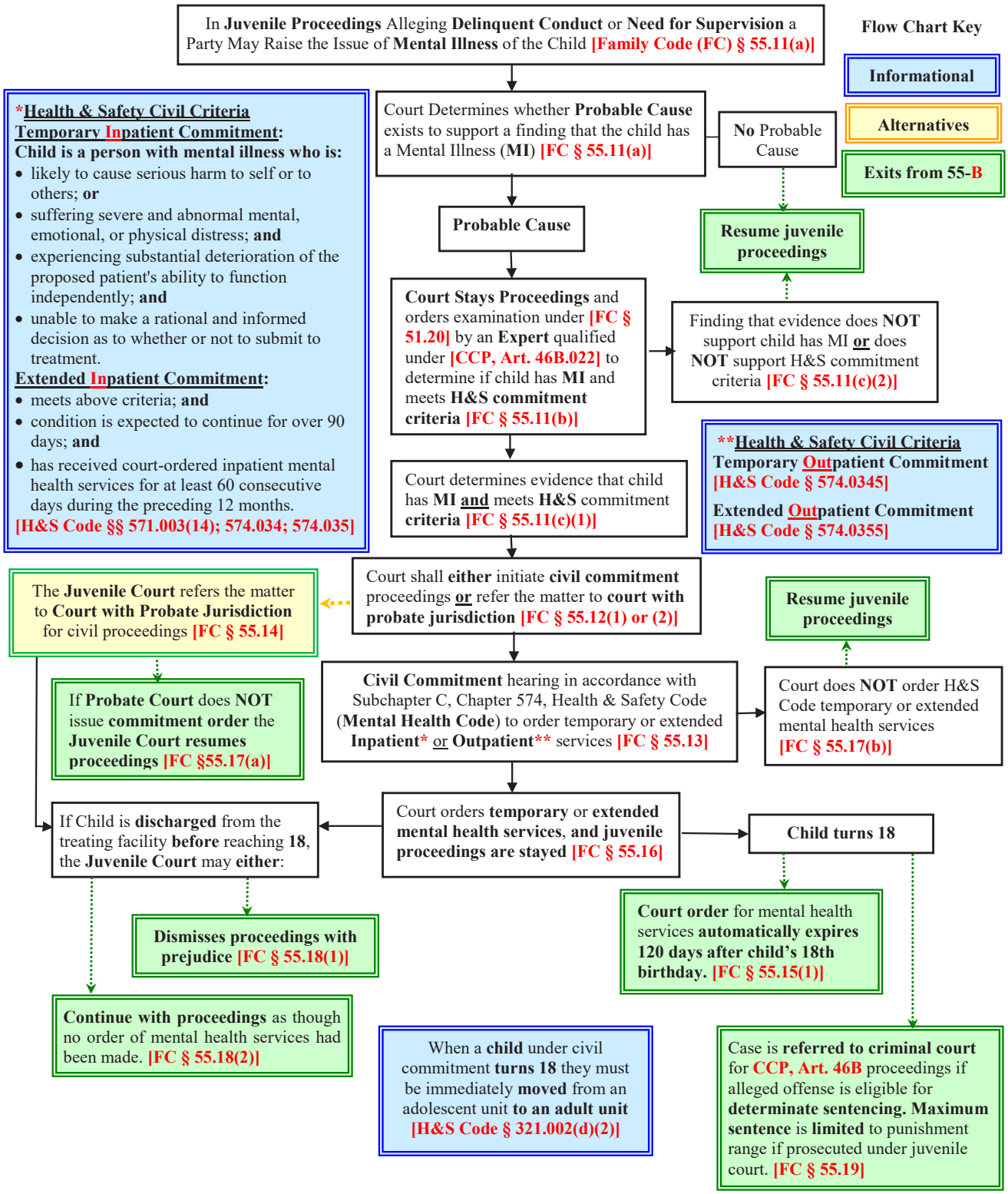
When used in Texas Family Code Chapter 55, "mental illness" means "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." Tex. Fam. Code § 55.01, Tex. Health & Safety Code § 571.003(14). At any stage of the proceedings, the juvenile court may order a child to be examined for mental illness, an intellectual disability, or chemical dependency. Tex. Fam. Code § 51.20(a).

- If a child is referred to the juvenile department for delinquent conduct or a CINS offense, but the prosecutor does not file a petition alleging the conduct, the juvenile department must refer the case to the LMHA/LBHA or LIDDA for evaluation and services if there is reason to believe the child has mental illness or an intellectual disability. Tex. Fam. Code § 51.20(b).
- If the prosecutor has already filed a petition, the matter is handled under Texas Family Code Chapter 55.

1.1 Diversion from Juvenile Court to Court-Ordered Mental Health Services

When a child has a mental illness, as defined above, but is not necessarily unfit to proceed or not responsible for their conduct due to mental illness, juvenile court proceedings can be stayed while the child receives court-ordered mental health treatment. The mechanism for this process is Subchapter B of Texas Family Code Chapter 55. A flowchart to aid in understanding the process can be found on **page 81**.

Texas Family Code – Chapter 55, Subchapter B
Child with Mental Illness ("55-B")



Flowchart developed by Chris Lopez, Texas Health and Human Services Commission

1.1.a Raising the Issue

- When a child is alleged by petition or found to have engaged in delinquent conduct or CINS, any party may raise the issue of mental illness. Tex. Fam. Code § 55.11(a).
- Once the motion is filed, the court must conduct a hearing to determine whether or not **probable cause** exists to believe that the child has a mental illness. In making its determination on the issue of probable cause, the court can consider the motion, supporting documents, professional statements of counsel, witness testimony, and the court's own observation of the child. Tex. Fam. Code § 55.11(a).

Observation of the Child

Because the statute allows for the court to use observations of the child in its probable cause determination, it is important that the court monitor how the child interacts with others, including parents, guardians, caregivers, lawyers, as well as other court participants. The court can also observe the child's physical appearance, including whether the child is appropriately dressed, well-nourished, and practicing proper hygiene.

- If the court determines that probable cause exists to believe that the child has a mental illness, then all juvenile court proceedings must be temporarily stayed, and the judge must order the child to be examined for mental illness. Tex. Fam. Code § 55.11(b).
  - The information obtained from the examination must include: expert opinion[133] as to whether the child has a mental illness; and whether the child meets the commitment criteria under Texas Health and Safety Code Subtitle C (sections 574.034, 574.0345, 574.045, and 574.0455). Tex. Fam. Code § 55.11(b).
  - The information may also include expert opinion as to whether or not the child is unfit to proceed with the juvenile court proceedings. However, the court must specifically order the determination of fitness to proceed, and this issue is neither automatically raised by the suggestion of mental illness, nor is unfitness to proceed a prerequisite for mental health services. Tex. Fam. Code §§ 51.20, 55.11(b), (c).
- Once the court receives the report from the examination of the child, and after considering all relevant information, including the report, the court must determine whether or not evidence exists to support a finding that the child has a mental illness and that the child meets commitment criteria under Texas Health and Safety Code Subtitle C (sections 574.034, 574.0345, 574.045, and 574.0455).
- If the court determines that evidence does not exist to support a finding that the child has a mental illness or that the child does not meet the commitment criteria, the judge must **dissolve the stay** and continue the juvenile court proceedings as if the issue had not been raised. Tex. Fam. Code § 55.11(c)(2).

1.2 Mental Illness Plus Commitment Criteria

If the court determines that evidence exists to support a finding that the child has a mental illness and that the child meets the commitment criteria as discussed below, the judge must proceed as follows:

- Initiate proceedings in juvenile court to order temporary or extended mental health services, as provided in Texas Health and Safety Code Subchapter C (sections 574.034, 574.0345, 574.045, and 574.0455); or
- Refer the child's case to the appropriate probate court for the initiation of proceedings in that court for commitment of the child under Texas Health and Safety Code Subchapter C (sections 574.034, 574.0345, 574.045, and 574.0455).

Tex. Fam. Code § 55.12.

[133] The expert opinion can be from a psychologist (*see* Texas Family Code section 51.20(a)); however, if the child meets the criteria for hospitalization, it will be necessary to have a medical doctor evaluate the child, as a Certified Medical Examination (CME) is required.

Juvenile Court or Probate Court

The choice of whether to proceed with commitment in juvenile court or to refer the proceedings to a county or probate court rests exclusively with the juvenile court. A juvenile court that hears commitment proceedings infrequently may prefer to have the county or probate court conduct them. The standards for commitment are the same, regardless of which court holds the hearing. County or probate courts may have more frequent interaction with community-based treatment options, private placements, and state facilities. Judges in a community can discuss available resources to determine which approach is advantageous for their constituents.

1.3 Commitment Proceedings Referred to Appropriate County or Probate Court

If the case is referred to an appropriate county or probate court, the judge of that court completes the commitment hearing process. The juvenile court must send all papers relating to the child's mental illness to both the clerk of the court to which the case is referred, and to the office of the appropriate county or district attorney. Tex. Fam. Code §§ 55.14(a)(1), (2). The papers sent to the clerk of a court constitute an application for mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.15(b).

If the child is in detention, the judge has three options:

- Order the child released from detention to the child's home or another appropriate place;
- Order the child detained in an appropriate place other than a juvenile detention facility; or
- If an appropriate place is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.

Tex. Fam. Code § 55.14(a)(3).

The juvenile court proceedings are stayed until the proceedings in county or probate court are completed with a finding of no mental illness, or the child is returned from temporary or extended mental health services. Tex. Fam. Code §§ 55.16(a), 55.17(a).

1.4 Application for Court-Ordered Mental Health Services

- Either the prosecutor or the child's attorney can file an application for court-ordered mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.13(a).
- The application must be filed in the county where the child resides or is found. Tex. Health & Safety Code § 574.001(b).
- If the child is in the custody of the Texas Juvenile Justice Department, the application can be filed in the county in which the child's commitment to TJJD was ordered. Tex. Health & Safety Code § 574.001(f).

What Should be Included in the Application

An application must:

- Be styled using the child's initials and not the proposed patient's full name;
- State whether the application is for temporary or extended services;
- The child's name, address, and county of residence in Texas;
- A statement that the child is a person with mental illness and meets the criteria in Chapter 574 for court-ordered mental health services; and
- Whether the child is charged with a criminal offense.

Tex. Health & Safety Code §§ 574.002(b), (c).

Application Requirements for Extended v. Temporary Court-Ordered Services

Applications for **extended** court-ordered services have several statutory requirements that applications for **temporary** court-ordered services do not require.

- An application for **extended inpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either **this subtitle** or under Chapter 46B, Subchapter D of the Texas Code of Criminal Procedure (Procedures after Determination of Incompetency) or Subchapter E (Civil Commitment: Charges Pending) for *at least 60 consecutive days during the prior 12 months*.
- An application for **extended outpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either **this subtitle** or under Chapter 46B, Subchapter D or E of the Texas Code of Criminal Procedure for *a total of at least 60 days during the prior 12 months*; OR
  - *Court-ordered outpatient mental health services* **under this subtitle** or Chapter 46B, Subchapters D or E *during the preceding 60 days*.

Tex. Health & Safety Code § 574.002(b).

1.5 Appointment and Duties of an Attorney under HSC 574.004

- The judge **must** appoint an attorney for the child within 24 hours after the application is filed unless the child already has an attorney. Tex. Health & Safety Code § 574.003(a).
- Texas codifies the duties that an attorney has toward a client in a court-ordered services proceeding in section 574.004, and the court is required to give a copy of these duties to every court-appointed attorney. Tex. Health & Safety Code § 574.003(b).

The Statutory Responsibility of Attorneys in Commitment Cases

The requirements set forth in section 574.004 of the Texas Health and Safety Code were the result of publicity surrounding the actions of some court-appointed lawyers who were not communicating with **adult** clients before hearings, or were conducting group interviews with multiple adult clients. "The publicity surrounding such inappropriate and inadequate representation caused the Legislature to strengthen the rights of patients."[134]

Note that the Rules of Professional Conduct governing attorneys comment specifically on the attention and respect that is to be given to every client, regardless of whether the client has with a mental illness. Comment 5 to Rule 1.02 of the TDRPC states: "When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being... the fact that a client [has] a disability does not diminish the desirability of treating the client with attention and respect."

- Included in the list of duties owed by the attorney to the proposed patient is that the attorney must respect the client's decision to agree or resist the efforts to provide mental health services, even though they may personally disagree with the client's wishes. Though the attorney may provide counsel, the attorney must abide by the client's final decision on the matter. Tex. Health & Safety Code § 574.004(c).

[134] Hon. Guy Herman, Mental Health Law 8 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

1.6 Setting the Hearing

- The court must set a hearing within 14 days of the date the application was filed but may not hold a hearing within the first three days after the application is filed, if the child or their attorney objects. Tex. Health & Safety Code §§ 574.005(a), (b).
  - There are witnesses who may appear at the hearing to present evidence, who may be unknown to the parties prior to the hearing date. If either party wishes, they may request a continuance based on surprise and the court may continue the hearing date. Tex. Health & Safety Code § 574.006(d).
- While the court may grant continuances of the hearing, the final hearing must be held no later than 30 days from the date the application was filed. The only exception is for extreme weather or disaster, in which case the judge may, by a written order each day, postpone the hearing for 24 hours. Tex. Health & Safety Code § 574.005(c).

1.7 Notice of the Hearing

- The child and their attorney are entitled to receive a copy of the application and written notice of the court hearing immediately after it is set. Notice must also be delivered in person or via certified mail to the child's:
  - **Parent, if a minor**; or
  - Appointed guardian, if applicable; or
  - **Each managing and possessory conservator**, if applicable. Tex. Health & Safety Code § 574.006(b).
- If a parent cannot be located, and the child does not have a guardian or conservator, the notice may be given to the proposed patient's next of kin. Tex. Health & Safety Code § 574.006(c).

1.8 Medical Examination Requirement

- The judge must appoint the number of physicians necessary (at least two) to examine the child and to complete the certificates of medical examination (CMEs) for mental illness required by Section 574.009, Health and Safety Code. Tex. Fam. Code § 55.13(c).
  - The two CMEs must be completed by different physicians, from examinations that occurred within the preceding 30 days, and are required to be on file with the court. At least one of the physicians must be a psychiatrist, if a psychiatrist is available in the county. Tex. Health & Safety Code § 574.009(a).
- The court also has the authority to order an independent evaluation of the child, by a psychiatrist of the child's choosing, if the court feels it will assist the finder of fact. If the child is indigent, the county may reimburse the child's appointed attorney for any expenses incurred in securing the psychiatrist's testimony. Tex. Health & Safety Code §§ 574.010(a), (b).

What Should a CME for Mental Illness Include?

1. Name and address of examining physician
2. Name and address of the child examined
3. Date and place of examination
4. Brief diagnosis of the child's physical and mental condition
5. The time period, if any, the child has been under the physician's care
6. A description of the mental health treatment the examining physician has given to the child, if any
7. The examining physician's opinion that:
    a. The child is a person with mental illness; and
    b. As a result of that illness the child is likely to cause serious harm to the child or to others or is:
        i. Suffering severe and abnormal mental, emotional, or physical distress;
        ii. Experiencing substantial mental or physical deterioration of the child's ability to function independently, exhibited by the inability to provide for basic needs; and
        iii. Not able to make a rational and informed decision as to whether to submit to treatment.

The examining physician must be as specific and detailed as possible as to which criterion forms the basis of their opinion, and if it is offered in support of an application for extended court-ordered services, must state that the child's condition is likely to continue for more than 90 days. Tex. Health & Safety Code § 574.011.

1.9 Proceedings for Court-Ordered Mental Health Services

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) added sections 574.0345 and 574.0355 of the Texas Health and Safety Code. The bill took the temporary and extended inpatient, and the temporary and extended outpatient commitment procedures that were contained in sections 574.034 and 574.035 and divided them so that there is now one section for each procedure.

- Section 574.034: Order for Temporary Inpatient Mental Health Services
- Section 574.0345: Order for Temporary Outpatient Mental Health Services
- Section 574.035: Order for Extended Inpatient Mental Health Services
- Section 574.0355: Order for Extended Outpatient Mental Health Services

1.9a General Hearing Provisions

- The child is entitled to be present at the hearing, but the child or their attorney may waive this right. Tex. Health & Safety Code § 574.031(c).
- The hearing must be open to the public unless the child or their attorney request that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 574.031(d).
  - Generally, juvenile court proceedings are open to the public unless good cause is shown to exclude the public. Tex. Fam. Code § 54.08(a).
  - If a child is under the age of 14 at the time of the hearing, the court **shall close** the hearing to the public, unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public. Tex. Fam. Code § 54.08(c).
- In a hearing for *temporary* inpatient or outpatient mental health services, the child or their attorney may waive the right to cross-examine witnesses by filing a written waiver with the court. If that right is waived, the court may admit the CMEs as evidence, the CMEs will constitute competent medical or psychiatric testimony, and the court can make its findings based solely on the CMEs. Tex. Health & Safety Code § 574.031(d-1).
- In a hearing for *extended* inpatient or outpatient mental health services, the court must hear testimony and cannot make findings solely from the CMEs. Tex. Health & Safety Code § 574.031(d-2).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) added subsections (d-1) and (d-2) to section 574.031 of the Texas Health and Safety Code. These provisions about the right to waive cross-examination of witnesses were originally in sections 574.034 and 574.035 but were pulled out as separate subsections. Additionally, the original statute stated that a patient AND a patient's attorney may, by written document, waive the right to cross-examination of witnesses. The amended statute replaces AND with OR, but as stated above in the duties of the attorney, attorneys must consult and comply with their client's wishes.

The bill also removed subsections in 574.034 and 574.035 regarding admitting the CME as evidence and consolidates the language into subsections 574.031(d-1) and (d-2).

- Unlike the probable cause hearing, the final hearing is governed by the Texas Rules of Evidence unless otherwise stated in this subtitle. Tex. Health & Safety Code § 574.031(e).
- Each element of the applicable criteria must be proven by **clear and convincing evidence**, and the hearing must be on the record. Tex. Health & Safety Code § 574.031(g).
- The court may consider the testimony of a non-physician mental health professional in addition to medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(f).
- The hearing for *temporary* mental health services must be before the court unless the child or their attorney requests a jury trial. A hearing for *extended* mental health services must be in front of a jury unless waived by the child or their attorney. The waiver must be sworn and signed unless orally made in the court's presence. Tex. Health & Safety Code §§ 574.032(a), (b), and (c). The court may allow a jury waiver to be withdrawn for good cause shown no later than the eighth day before the hearing. Tex. Health & Safety Code § 574.032(d).
  - If the hearing is before a jury, the jury must determine if the child is a person with mental illness and meets the criteria for court-ordered services; however, the jury cannot make a finding regarding the type of services to be provided. Tex. Health & Safety Code § 574.032(f).
- The party who filed the application has the burden of proof. Tex. Fam. Code § 55.13(b).
- After conducting the hearing, the juvenile court shall:
  - If the criteria under **Section 574.034 or 574.0345**, Health and Safety Code, are satisfied, order temporary

mental health services for the child; or

- If the criteria under **Section 574.035 or 574.0355**, Health and Safety Code, are satisfied, order extended mental health services for the child.

Tex. Fam. Code § 55.13(d).

1.10a Order for Temporary Inpatient Mental Health Services under HSC 574.034

- The judge may order a child to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from **clear and convincing evidence**, that:
  - The child is a person with mental illness; and
  - As a result of that mental illness the child:
    - Is likely to cause serious harm to themselves;
    - Is likely to cause serious harm to others; or
    - Is:
      - Suffering severe and abnormal mental, emotional, or physical distress;
      - Experiencing substantial mental or physical deterioration of their ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and
      - unable to make a rational and informed decision as to whether or not to submit to treatment.
    - Tex. Health & Safety Code § 574.034(a).
- The judge or jury must specify which criteria form the basis for the decision, should the judge or jury decide the child meets the commitment criteria. Tex. Health & Safety Code § 574.034(c).

Orders that Clearly Specify Commitment Criteria

The Health and Safety Code requires that orders for temporary or extended inpatient treatment must specify upon which criteria the judge or jury is basing their decision. There is conflicting case law in this area. Some appellate courts have allowed an order to submit the criteria in the disjunctive (i.e. listing the criteria with OR), while other courts have found that listing the criteria in the conjunctive (with AND) is the only way to ensure that there are specific findings.[135]

A suggested practice to avoid any confusion is to take the word "or" out of any order for temporary or extended inpatient treatment, thus requiring specific findings on any of the criteria listed.

- In order for the judge or jury to make a finding on the above requirements by a **clear and convincing evidence** standard, the evidence must include expert testimony and evidence of a recent overt act[136] or a continuing pattern of behavior that tends to confirm:
  - The likelihood of serious harm to the child or others; or
  - The child's distress and the child's deterioration of ability to function. Tex. Health & Safety Code § 574.034(d).
- An order for temporary inpatient services must include a treatment period of not more than 45 days, except that the judge may order 90 days if they find the longer period necessary. Tex. Health & Safety Code § 574.034(g).

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[135] Hon. Guy Herman, Mental Health Law 8 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

[136] Note that the Texas Supreme Court in *State v. K.E.W.*, clarified the "overt act" requirement. The Court held that the act does not have to be actually harmful or demonstrate that harm to others is imminent. The case also states that speech alone may be considered an overt act. State v. K.E.W., 315 S.W.3d 16, 24 (Tex. 2010).

- A judge may not issue an order for temporary inpatient mental health services for a proposed patient who is charged *with a criminal offense* that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.034(h).
    - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) amended section 574.034(g) of the Texas Health and Safety Code. The court must now provide a definitive time period in its order for temporary inpatient treatment not to exceed 45 days, or 90 days if the judge finds it necessary.

The bill also amended subsection 574.035(h) of the Texas Health and Safety Code, requiring that for extended inpatient treatment, the court must also include a definitive time period in its order not to exceed 12 months. This allows the court to consider a shorter time period than 12 months, which was previously not allowed under the statute.

Note that a facility must still release a person if they no longer meet commitment criteria, even if the court-mandated time period has not elapsed. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75(1975) ("even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.")

1.10b Order for Temporary Outpatient Mental Health Services under HSC 574.0345

- The judge may order a child to receive court-ordered temporary outpatient services only if:
    - The judge finds that appropriate mental health services are available to the child; and
    - The judge or jury finds, from **clear and convincing evidence**, that:
        - The child is a person with severe and persistent mental illness;
        - As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
        - Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others; and
        - The child has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
            - Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or
            - Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.

      Tex. Health & Safety Code § 574.0345(a).

    - In order for the judge or jury to make a finding on the above requirements by a **clear and convincing** evidence standard, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
        1. The deterioration of ability to function independently to the extent that the child will be unable to live safely in the community;
        2. The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
        3. The child's inability to participate in outpatient treatment services effectively and voluntarily.

      Tex. Health & Safety Code § 574.0345(a).

- An order for temporary outpatient mental health services must state that treatment is authorized for not longer than 45 days, but the judge may specify a period up to 90 days if they find it necessary. Tex. Health & Safety Code § 574.0345(c).
- A judge may not issue an order for temporary outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.0345.
    - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) removed the former requirement for outpatient treatment that a court must find the patient "will continue to suffer severe and abnormal mental, emotional, or physical distress" and replaced it with the requirement in new sections 574.0345 and 574.0355 that the court find "outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others."

New sections 574.0345 and 574.0355 also change the requirement for a court to order outpatient treatment; previously the court had to find that the patient's clinical condition "makes impossible" the ability to make rational and informed decisions. As amended, a court must find that the patient's condition "significantly impairs" that ability.

1.10c Order for Extended Inpatient Mental Health Services under HSC 574.035

- The judge may order a child to receive court-ordered extended inpatient mental health services only if the jury, or the judge if the right to a jury is waived, finds, from **clear and convincing evidence**, that:
    1. The child is a person with mental illness;
    2. As a result of that mental illness the child:
        A. Is likely to cause serious harm to the child;
        B. Is likely to cause serious harm to others; or
        C. Is:
            i. Suffering severe and abnormal mental, emotional, or physical distress;
            ii. Experiencing substantial mental or physical deterioration of the child's ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and
            iii. Unable to make a rational and informed decision as to whether or not to submit to treatment;
    3. The child's condition is expected to continue for more than 90 days; and
    4. The child has received court-ordered inpatient mental health services under this subtitle or under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.

Tex. Health & Safety Code § 574.035(a).

- If the jury or judge finds that the child meets the commitment criteria listed above, the jury or judge must specify which criterion listed in Subsection (a)(2) forms the basis for the decision. Tex. Health & Safety Code § 574.035(c).
- The jury or judge is not required to make the finding under Subsection (a)(4) if the child has already been subject to an order for extended mental health services. Tex. Health & Safety Code § 574.035(d).

- To be **clear and convincing** under Subsection (a), the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
    1. The likelihood of serious harm to the child or others; or
    2. The child's distress and the deterioration of the child's ability to function.

Tex. Health & Safety Code § 574.035(e).

- An order for extended inpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.035(h).
- A judge may not issue an order for extended inpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.035(i).
    - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

1.10d Order for Extended Outpatient Mental Health Services under HSC 574.0355

- The judge may order a child to receive court-ordered extended outpatient mental health services only if:
    1. The judge finds that appropriate mental health services are available to the child; and
    2. The judge or jury finds, from **clear and convincing evidence**, that:
        A. The child is a person with severe and persistent mental illness;
        B. As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
        C. Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others;
        D. The child has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
            i. Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or
            ii. Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment;
        E. The child's condition is expected to continue for more than 90 days; and
        F. The child has received:
            i. Court-ordered inpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, for a total of at least 60 days during the preceding 12 months; or
            ii. Court-ordered outpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, during the preceding 60 days.

Tex. Health & Safety Code § 574.0355(a).

- The jury or judge is not required to make the finding under Subsection (a)(2)(F) if the child has already been subject to an order for extended mental health services. Tex. Health & Safety Code § 574.0355(b).
- To be **clear and convincing** under Subsection (a)(2), the evidence must include expert testimony and evidence of a recent over act or a continuing pattern of behavior that tends to confirm:
    1. The deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community;

2. The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
3. The child's inability to participate in outpatient treatment services effectively and voluntarily.

Tex. Health & Safety Code § 574.0355(c).

- An order for extended outpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.0355(d).
- A judge may not issue an order for extended outpatient mental health services for a child who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.0355(e).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Open and Frequent Communication Between Courts and LMHAs/LBHAs

In order to maintain the most up-to-date information about the availability of outpatient commitment services, courts should ensure that they are familiar with their LMHA/LBHA and have a contact person who can provide them with available resources.

1.11 Mental Health Services Not Ordered

- If the juvenile court, or the county or probate court to which the child's case was referred does not order temporary or extended **inpatient** mental health services for the child, the court must dissolve the stay and continue the juvenile court proceedings. Tex. Fam. Code § 55.17(b).
- The § 51.20 report should be helpful to the parties in determining how to proceed with the case, and in considering what disposition or treatment options would be beneficial for the child.
  - Options include: evaluation for inclusion in a specialty court, diversion program, Deferred Prosecution Program, or deferral of the finding of True / Not True while the child receives treatment.

1.12 Discharge from Mental Health Facility Before Reaching 18 Years of Age

- If the child is discharged from the mental health facility before reaching 18 years of age, the juvenile court **may dismiss** the juvenile court proceedings with prejudice; or continue with proceedings as though no order of mental health services had been made. Tex. Fam. Code § 55.18.

1.13 Transfer to Criminal Court on 18th Birthday

- If the child is not discharged or furloughed from the inpatient mental health facility before reaching 18 years of age; and is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 of the Texas Family Code (Offenses Eligible for Determinate Sentence) and no adjudication concerning the alleged conduct has been made, the juvenile court shall transfer all pending proceedings from the juvenile court to a criminal court on the child's 18th birthday. Tex. Fam. Code § 55.19(a).
  - The juvenile court has to notify the mental health facility of the transfer. Tex. Fam. Code § 55.19(b).
  - Within 90 days of the transfer, the criminal court has to initiate competency proceedings under Chapter 46B, Code of Criminal Procedure, or the case is dismissed. If the person is competent to stand trial, they cannot receive a punishment that results in confinement for a period longer than what they could have received, had they been adjudicated in juvenile court. Tex. Fam. Code § 55.19(b).

2. Specialty Courts

Specialty courts focus on treating the underlying issues that may be causing delinquent behavior. Mental health courts are a type of specialty court. Both pre-adjudication and post-adjudication mental health courts are in practice in Texas. They combine accountability through judicial supervision with treatment and other support services to prevent recidivism and improve the lives of their participants. Although counties with a population of more than 200,000 are required to establish a mental health court under section 125.005 of the Texas Government Code, the requirement does not appear to apply to juvenile courts.

The benefits of a juvenile mental health court are many: such a program will keep children close to home and family, provide services in the community, connect families to resources that they can use after the program concludes, and reduce recidivism by treating the cause of the behavior instead of the symptoms. Finally, an effective juvenile mental health court can save a jurisdiction the high costs associated with placing a child in a Residential Treatment Center or committing a child to TJJD.

Reflection Point

Consider whether family resources impact which youth are provided with opportunities to participate in diversion programs or services.

2.1 Statutory Requirements

A "mental health court program" has the following essential characteristics:

- Integrates and provides access to MI and ID treatment services in processing cases in the court system;
- Uses a non-adversarial approach involving prosecutors and defense attorneys to both promote public safety and to protect the due process rights of program participants;
- Promotes early identification and prompt placement of eligible participants in the program;
- Requires ongoing judicial interaction with program participants;
- Diverts people with MI or ID to needed services in lieu of prosecution;
- Monitors and evaluates program goals and effectiveness;
- Facilitates continuing interdisciplinary education on effective program planning, implementation, and operations; and
- Develops partnerships with public agencies and community organizations, including LMHAs/LBHAs.

Tex. Gov't. Code § 125.001(a).

Regional Mental Health Courts

Note that the commissioners courts of two or more counties may elect to establish a regional mental health court program for the participating counties. Tex. Gov't. Code § 125.0025. Smaller jurisdictions may find it advantageous to collaborate on the creation of a mental health court to share costs and resources.

In addition to the statutory requirements, an effective juvenile mental health court will feature developmentally appropriate and trauma-informed procedures and services.

Seven Common Characteristics of Juvenile Mental Health Courts[137]

Following a national study funded by the National Institute of Justice, seven common characteristics of a juvenile mental health court were identified:

1. Regularly-scheduled special docket;
2. Less formal style of interaction among court official and participants;
3. Age-appropriate screening and assessment for trauma, substance use, and mental disorder;
4. Team management of participant's treatment and supervision;
5. System-wide accountability enforced by the juvenile court;
6. Use of graduated incentives and sanctions; and
7. Defined criteria for program success.

Creating a Juvenile Mental Health Court

Money, time, and community support: establishing a specialty court brings many challenges, but none that are insurmountable. These resources provide guidance on creating a mental health court in your jurisdiction:

- Developing a Mental Health Court: https://csgjusticecenter.org/projects/mental-health-courts/learning/learning-modules/
- List of Specialty Courts in Texas: https://gov.texas.gov/uploads/files/organization/criminal-justice/Specialty-Courts-By-County.pdf
- Specialty Court Program Registration: https://www.txcourts.gov/about-texas-courts/specialty-courts/
- Texas Association of Specialty Courts: http://www.tasctx.org/
- Funding Opportunities: https://egrants.gov.texas.gov/Default.aspx
- Juvenile Mental Health Court Forms Bank: http://texasjcmh.gov/publications/bench-book-and-cards/forms-bank/

If starting a mental health court isn't yet possible, try creating a comprehensive trauma-informed courtroom.[138]Court staff, attorneys, and probation officers can engage in trainings and read literature that focus on trauma-informed care, risk and protective factors in children, and the importance of a child's ACEs score. Good places to start are: The Karen Purvis Institute of Child Development's program: Trust-Based Relational Intervention[139] training, The Meadows Mental Health Institute's "Trauma-Informed Care Final Report,"[140] the Committee for Public Counsel Services' "Trauma Fact Sheet for Working with Court-Involved Youth,"[141] and SAMHSA's "Essential Components of Trauma-Informed Judicial Practice."[142]

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[137] Lisa Callahan & Lindsay Gerus, Juvenile Mental Health Courts, National Association of Drug Court Professionals Annual Conference (2013), https://www.prainc.com/wp-content/uploads/2018/06/JMHC_NADCP_7-15-13.pdf.

[138] Hon. Peggy Hora, *The Trauma-Informed Courtroom,* Justice Speakers Institute (July 31, 2018), http://justicespeakersinstitute.com/the-trauma-informed-courtroom/.

[139] *Trust-Based Relational Intervention,* Karen Purvis Institute of Child Development, https://child.tcu.edu/about-us/tbri/#sthash.nJiDaSuw.dpbs (last visited Aug. 31, 2020).

[140] The Meadows Mental Health Policy Inst. for Tex., Trauma-Informed Care Final Report (2017), https://www.texasstateofmind.org/wp-content/uploads/2018/07/Trauma-Informed-Care-Final-Report.pdf.

[141] Comm. for Pub. Counsel Serv., Children and Family Law Div. & Youth Advocacy Div., Trauma Fact Sheet for Working with Court-Involved Youth (June 2016) https://www.publiccounsel.net/ya/wp-content/uploads/sites/6/2015/02/Trauma-Fact-Sheet-June-2016.pdf.

[142] Substance Abuse and Mental Health Services Administration, Essential Components of Trauma-Informed Judicial Practice (2013), https://www.nasmhpd.org/sites/default/files/JudgesEssential_5%201%202013finaldraft.pdf

3. Pretrial Intervention Programs

Many of the same mental health interventions that are available to children on juvenile probation are available to children who participate in deferred prosecution or other diversion programs. If a child has yet to receive any kind of interventions, it is usually in the child's best interest to address their needs through the least restrictive means available.

Most of the juvenile probation departments in Texas act as the "Intake" office, under a local agreement with the prosecutor's office and approved by the juvenile board. These agreements allow juvenile probation officers to screen and divert certain non-serious cases out of the juvenile court system.

The intake officer is required to determine whether the person referred to juvenile court is a child; and whether there is probable cause to believe that the person engaged in delinquent conduct or CINS. Tex. Fam. Code § 53.01(a). After those determinations are made, the intake officer can take several actions to close or divert a child's case.

3.1 Supervisory Caution

Supervisory Caution, sometimes known as "counsel and release," is a non-legal term for a variety of informal, non-judicial dispositions that can occur in a juvenile case. Supervisory caution can involve referring the child to a social services agency, contacting parents to inform them of the child's activities, or simply warning the child about their behavior.[143]

3.2 Deferred Prosecution Programs

Deferred prosecution programs (DPPs) are an alternative to formal adjudication of delinquent conduct or CINS, and involve a six-month supervision period. A child can receive up to two 6-month terms of DPP, not to exceed a total of 12 months.

- DPP must be in the best interest of the public and the child;
- The child and their parent, guardian, or custodian must consent to DPP, with knowledge that consent is voluntary;
- The child and their parent, guardian, or custodian must be informed that they can terminate DPP at any time and ask the court for a court hearing in the case.

Tex. Fam. Code § 53.03(a).

A **probation officer** can offer DPP for any offense that is not disqualified by these requirements:

- any offense that is required to be forwarded to the prosecutor: felonies, misdemeanors involving violence to a person, and misdemeanors involving the use or possession of a firearm, location-restricted knife, club, or prohibited weapon;
- a child who has been previously adjudicated of a felony, unless the prosecutor gives written approval.

Tex. Fam. Code § 53.03(e).

A **prosecutor** can offer DPP to any child, unless the child is alleged to have engaged in conduct that that constitutes the following intoxication-related offenses:

- DWI, Flying While Intoxicated, Boating While Intoxicated, Intoxication Assault, Intoxication Manslaughter, Consumption of Alcohol by a Minor 3rd, or Driving or Operating Watercraft under the Influence of Alcohol by a Minor 3rd.

Tex. Fam. Code § 53.03(g).

A **judge** can offer DPP at any time that is:

- Before the jury is sworn, for an adjudication to be decided by jury trial;
- Before the first witness is called, for an adjudication to be decided by the court;
- Before the child pleads to the petition or before the stipulation of evidence, for an uncontested adjudication.

Tex. Fam. Code § 53.03(i).

[143] Robert Dawson, Texas Juvenile Law 90 (Nydia Thomas and Kaci Singer, eds., 9th ed. 2018).

In determining whether to grant DPP, the court can consider professional representations by the parties concerning the nature and background of the case. These representations are not admissible against the child at trial, should the court reject the request for DPP. Tex. Fam. Code § 53.03(k). The court can add a period of time to a previous order of DPP, but the total combined length of DPP cannot exceed one year.

3.3 Referral to a Community Resource Coordination Group (CRCG)

The community referral and service plan is one method for diverting the youngest children out of the juvenile court system.

- The intake officer must refer the child's case to a CRCG if it is determined that:
  - The child is younger than 12 years of age;
  - There is probable cause to believe the child engaged in delinquent conduct or CINS;
  - The child's case does not require referral to the prosecutor under an alternate referral plan;
  - The child is eligible for DPP under Section 53.03; and
  - The child and their family are not currently receiving services from a CRCG and would benefit from receiving the services.

Tex. Fam. Code § 53.01(b-1).

- The CRCG must evaluate the child's case and make recommendations to the juvenile probation department for appropriate services for the child and their family. Tex. Fam. Code § 53.011(b).
- The probation officer must create a service plan or system of care for the child or their family that incorporates the CRCG's recommendations. The child and their parent, guardian, or custodian must consent to the services with knowledge that consent is voluntary. Tex. Fam. Code § 53.011(c).
- The probation officer can hold the child's case open for up to three months to monitor compliance with the service plan and can adjust the plan as needed. If the child fails to successfully participate in the services, the probation officer can refer the child to the prosecutor. Tex. Fam. Code § 53.011(d).

3.4 Teen Dating Violence Program

A Teen Dating Violence Program must be approved by the juvenile court and the commissioners court, and must include:

- A 12-week program designed to educate children who engage in dating violence and encourage them to refrain from engaging in that conduct;
- A dedicated teen victim advocate who assists teen victims by offering referrals to additional services, providing counseling and safety planning, and explaining the juvenile justice system;
- A court-employed resource coordinator to monitor children's compliance with the 12-week program;
- One judge who presides over all of the cases in the jurisdiction that qualify for the program; and
- A prosecuting attorney who is assigned to the program.

Tex. Fam Code § 54.0325(a).

On the prosecutor's recommendation, the court can defer adjudication proceedings for not more than 180 days if the child is a first offender who is alleged to have engaged in conduct that is a misdemeanor and involves dating violence. Tex. Fam. Code § 54.0325(b). A child is a "first offender" if they have not been previously referred to juvenile court for allegedly engaging in conduct constituting dating violence, family violence, or an assault. Tex. Fam. Code § 54.0325(c).

- The child must complete the program before the end of the deferral period and appear in court for monthly monitoring. Tex. Fam. Code § 54.0325(e).
- Upon evidence of successful completion of the program, the case is dismissed with prejudice. Tex. Fam. Code § 54.0325(f).

3.5 Trafficked Persons Program

A juvenile court can defer adjudication proceedings *until the child's 18th birthday*, and require a child to participate in a program established under Section 152.0017, Human Resources Code, if the child is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision, and may be a victim of Human Trafficking under Section 20A.02, Penal Code; and makes an oral or written request to the court to participate in the program. Once the court receives evidence of successful completion of the program, the court shall dismiss the case with prejudice. Tex. Fam. Code § 54.0326.

Commercial Sexual Exploitation – Identification Tool

75% of trafficked youth are exploited for two or more years before their abuse is recognized.[144] Most trafficked youth are under the age of 14 when first exploited, unaware of the dangerousness of their situation, and unaware of the exploitative nature of their relationship with their pimp or exploiter.[145] When youth do not recognize that they are being abused, they cannot disclose the abuse to a trusted adult. Intake interviews conducted by juvenile probation departments and juvenile detention centers provide an opportunity for youth to be screened for trafficking.

WestCoast Children's Clinic[146] developed the Commercial Sexual Exploitation – Identification Tool (CSE-IT – pronounced "see it"), a screening tool that aids in detection of risk of sexual exploitation.[147] Already in use by 35 child welfare agencies and 29 juvenile probation departments across the country, the CSE-IT is validated[148] and it works.[149] Over 88,400 youth have been screened for signs of sex trafficking, and 8200 youth have been identified with clear indicators of trafficking.[150]

WestCoast provides *free* training and technical support to organizations seeking to implement the CSE-IT. DFPS personnel in Bexar, Dallas, Harris, Tarrant, and Travis counties already use the CSE-IT as part of their Human Trafficking Response Protocol.[151] More information on the CSE-IT can be found at: https://www.westcoastcc.org/cse-it/

The Texas Human Trafficking Resource Center[152] and the HHSC "Provider Guidebook: Services for Victims of Human Trafficking in Texas"[153] offer additional guidance and resources for those who work with youth at risk of human trafficking.

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144 WestCoast Child. Clinic, Research to Action: Sexually Exploited Minors (SEM) Needs and Strengths (2012), https://www.westcoastcc.org/wp-content/uploads/2012/05/WCC_SEM_Needs-and-Strengths_FINAL.pdf.

145 *Id.*

146 WestCoast Child. Clinic, https://www.westcoastcc.org/ (last visited Aug. 13, 2020).

147 CSE-IT, WestCoast Child. Clinic, https://www.westcoastcc.org/cse-it/ (last visited Aug. 13, 2020).

148 Danna Basson, Validation of the Commercial Sexual Exploitation-Identification Tool (CSE-IT) Technical Report (2017), https://www.westcoastcc.org/wp-content/uploads/2015/04/WCC-CSE-IT-PilotReport-FINAL.pdf.

149 CSE-IT, WestCoast Child. Clinic, https://www.westcoastcc.org/cse-it/ (last visited Aug. 13, 2020).

150 *Id.*

151 Tex. Dep't of Fam. & Protective Serv., Human Trafficking Response Protocol (2019), https://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/Human_Trafficking_Response_Protocol.pdf

152 *Texas Human Trafficking Resource Center,* Tex. Health & Hum. Serv. Comm'n, https://hhs.texas.gov/services/safety/texas-human-trafficking-resource-center (last visited Aug. 13, 2020).

153 Tex. Health & Hum. Serv. Comm'n, Tex. Hum. Trafficking Res. Ctr, Provider Guidebook: Services for Victims of Human Trafficking in Texas (2020) https://hhs.texas.gov/sites/default/files/documents/services/safety/human-trafficking/provider-guidebook-services-victims-human-trafficking-texas.pdf.

4. Justice and Municipal Courts

Justice and municipal courts have jurisdiction over fine-only misdemeanors that are not punishable by confinement in jail or imprisonment. Tex. Code Crim. Proc. arts. 4.11, 4.14. These cases consist of traffic offenses, fine-only misdemeanors more commonly known as "Class C Misdemeanors," alcohol and tobacco violations, and truancy cases. In Texas, most cases alleging law violations by children are filed in justice or municipal courts.[154] Generally, these cases can be efficiently handled by justice and municipal courts and are not serious enough to involve the juvenile court.[155]

Detailed information on justice and municipal court procedures can be found in the Texas Municipal Courts Education Center's *2020 Bench Book*,[156] and in the Texas Justice Court Training Center's *Criminal Procedure, 2nd Edition*.[157] Justice and municipal court procedures specifically relating to juveniles are covered in *Texas Juvenile Law, 9th Edition*.[158]

This bench book focuses on diversions, supports, and services for justice system-involved youth with MI or ID. Justice and municipal courts face the challenge of a disproportionately large caseload and a small pool of diversions, supports, and resources with which to work. Compounding the challenge, the majority of children who appear in justice and municipal courts are not represented by counsel and are accompanied only by their parent or guardian.

It is imperative that the court ask whether the child intends to hire an attorney, and, if the answer is no, explain the child's rights, the charge, the plea options, and the possible dispositions. The court can remind the parent or guardian that the case can be reset to a later date to allow time to retain counsel. In addition to making sure that child understands the consequences of each plea, the court must explain the expunction process to the parent and child and provide a copy of the expunction statute. Once the judge is satisfied that the process has been carefully and thoroughly explained, the court should request the juvenile to enter a plea of either not guilty, no contest, or guilty.

In some instances, it may be apparent either from case facts or interaction with the child that there is a MI or IDD issue at play. In those circumstances, consider asking questions that could bring MI or IDD issues to the surface for consideration in setting rehabilitative sanctions. These questions may include:

- Do you receive any services at school?
- Do you have an IEP or a BIP?
- Do you receive any support at your school that I should know about?
- Does the support you receive affect your education?
- Do you go to an ARD committee?

If the judge feels the issue requires more attention, the court can order school records and an evaluation. An evaluation may already exist where the child is receiving services. In some cases, it may be apparent the child is affected by MI or IDD, but that their issues are going unaddressed, and the judge should ask why the child is not receiving services. If the judge feels that there is a legitimate concern for the child's welfare, the judge has a duty to make a report to DFPS.

4.1 Age Affecting Criminal Responsibility

Texas Penal Code section 8.07 gives children between the ages of 10 and 14 the presumption of being incapable of committing fine-only misdemeanors, other than traffic offenses and curfew ordinance violations.

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[154] Robert Dawson, Texas Juvenile Law 633 (Nydia Thomas and Kaci Singer, eds., 9th ed. 2018).

[155] *Id.*

[156] Tex. Mun. Courts Training Cent., 2020 Bench Book (13th ed. 2020), https://www.tmcec.com/files/6315/8091/6725/Bench_Book_2020.pdf.

[157] Tex. Justice Court Training Cent., Criminal Procedure (2nd ed. 2020) https://gato-docs.its.txstate.edu/jcr:5662afb1-faac-4ba4-a610-ecf2a2e2c-c8f/Criminal%20Deskbook%202nd%20Edition.pdf.

[158] Robert Dawson, Texas Juvenile Law (Nydia Thomas and Kaci Singer, eds., 9th ed. 2018) https://www2.tjjd.texas.gov/publications/legal/texas-juvenile-law-9.pdf.

This presumption can be refuted if the prosecution proves by a **preponderance of the evidence** that the child had sufficient capacity to understand that the conduct engaged in was wrong at the time the conduct was engaged in. Tex. Penal Code § 8.07(e).

Note: the prosecutor can meet their burden by holding a brief hearing at the bench, before the child enters a plea. This hearing is not about the facts of the case, so the prosecutor should not be permitted to ask questions about the facts of the case. The prosecutor can ask questions of the child, about their understanding of right and wrong; and of the parent or guardian as well. Questions about the child's mental or emotional health, diagnoses, and school accommodations or plans may also assist the court in determining whether the burden has been met to proceed.

4.2 Child with Mental Illness, Disability, or Lack of Capacity and Class C Misdemeanors

Texas Penal Code section 8.08 gives courts that have jurisdiction over Class C misdemeanors and municipal ordinance violations a mechanism for the dismissal of cases involving children with diminished capacity.

- When a motion is made, the court must determine whether **probable cause** exists to believe that a child, including a child with a mental illness or developmental disability [159]:
  1. Lacks the capacity to understand the proceedings in criminal court or to assist in the child's 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 the child's conduct to the requirement of the law.
- The state, the defendant, the defendant's parent or guardian, or the court can make the motion.
- If the court determines that probable cause exists that the child is unfit to proceed or lacks substantial capacity, the court can dismiss the case after providing notice to the state.

Tex. Penal Code § 8.08.

4.3 Child with Mental Illness and Truancy Cases

Texas Family Code section 65.065 gives courts that have jurisdiction over truancy cases a mechanism for the dismissal of cases involving children with mental illness, as defined by Section 571.003, Health and Safety Code.[160]

- When a motion is made, the court must temporarily stay the proceedings to determine whether **probable cause** exists to believe that the child has a mental illness. The court may:
  1. Consider the motion, supporting documents, professional statements of counsel, and witness testimony; and
  2. Observe the child.
- If the court determines that probable cause exists that the child has a mental illness, the court must dismiss the case. If the court does not so find, then the court must dissolve the stay and continue with truancy court proceedings.

Tex. Fam. Code § 65.065.

4.4 Deferred Disposition of Class C Misdemeanors

Following a plea of guilty or no contest, the court can defer further proceedings without entering an adjudication of guilt and place the youth on probation for up to 180 days. In issuing the order of deferral, the judge may impose a fine... the judge may elect not to impose the fine for **good cause shown** by the defendant. Tex. Code Crim. Proc. art. 45.051(a).

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[159] The statute provides that when a child has diminished capacity, the case against the child can be dismissed. The statute specifically mentions children with a mental illness or a developmental disability, but it does not exclude children who have diminished capacity due to other conditions, e.g., traumatic brain injury, autism spectrum disorder, intellectual disability, or severe emotional disturbance.

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

As an alternative to requiring the defendant to pay fines and court costs, the judge may:

- Allow the defendant to enter into [a payment plan];
- Require the defendant to perform community service or attend a tutoring program under Article 45.049 or 45.0492;
- **Waive** all or part of those fines and court costs under Article 45.0491; or
- Take any combination of the actions above.

Tex. Code Crim. Proc. art. 45.051(a-1).

As conditions of the probation, the justice of the peace or municipal judge can require a defendant, including a juvenile defendant, to:

- Submit to professional counseling;
- Submit to a psychosocial assessment;
- Present to the court satisfactory evidence that they have complied with each requirement imposed by the court; and
- Comply with any other reasonable condition.

Tex. Code Crim. Proc. art. 45.051(b).

At the time the juvenile defendant is placed on deferred disposition, the court can impose requirements to continue treatment, participate in any assessments reasonably related to providing mental health or IDD services, and to comply with all prescribed medications.

4.5 Teen Court

Teen Court is a disposition option after a child has pleaded guilty or no contest to an offense in justice or municipal court in which a jury of the teen's peers decides what disposition is appropriate. Teen court "requires the teen to answer personally for [their] wrongdoing. This helps prevent repeat offenses as the defendant will not want to spend more time doing community service or going to teen court. Also when a case is tried in front of juries and lawyers comprised on one's peers there can be a profound effect on the defendant."[161]

Article 45.052 of the Code of Criminal Procedure sets out the rules for teen courts:

a. A justice or municipal court can defer proceedings against a defendant who is under the age of 18 or enrolled full time in an accredited secondary school in a program leading toward a high school diploma for not more than 180 days if the defendant:
    1. Is charged with an offense that the court has jurisdiction of under Article 4.11 or 4.14;
    2. Pleads nolo contendere or guilty to the offense in open court with the defendant's parent, guardian, or managing conservator present;
    3. Presents to the court an oral or written request to attend a teen court program or is recommended to attend the program by a school employee under Section 37.146, Education Code; and
    4. Has not successfully completed a teen court program in the year preceding the date that the alleged offense occurred.
b. The teen court program must be approved by the court.
c. A defendant for whom the proceedings are deferred under Subsection (a) shall complete the teen court

[161] *Teen Court*, Tex. Mun. Courts Education Cent., https://www.tmcec.com/mtsi/teen-court/ (last visited Aug. 7, 2020).

program not later than the 90th day after the date the teen court hearing to determine punishment is held or the last day of the deferral period, *whichever date is earlier*. The justice or municipal court shall dismiss the charge at the time the defendant presents satisfactory evidence that the defendant has successfully completed the teen court program.

The following provisions of Article 45.052 of the Code of Criminal Procedure pertain to court costs associated with teen courts:

- The justice or municipal court may require a person who requests a teen court program to pay a reimbursement fee not to exceed $10 that is set by the court to cover the costs of administering this article. Reimbursement fees collected by a municipal court shall be deposited in the municipal treasury. Reimbursement fees collected by a justice court shall be deposited in the county treasury of the county in which the court is located. A person who requests a teen court program and fails to complete the program is not entitled to a refund of the fee. Tex. Code Crim. Proc. art. 45.052(e).
- In addition to the reimbursement fee authorized by Subsection (e), the court may require a child who requests a teen court program to pay a $10 reimbursement fee to cover the cost to the teen court for performing its duties under this article. The court shall pay the fee to the teen court program, and the teen court program must account to the court for the receipt and disbursal of the fee. A child who pays a fee under this subsection is not entitled to a refund of the fee, regardless of whether the child successfully completes the teen court program. Tex. Code Crim. Proc. art. 45.052(g).
- A justice or municipal court **may exempt a defendant** for whom proceedings are deferred under this article from the requirement to pay a court cost or fee that is imposed by another statute. Tex. Code Crim. Proc. art. 45.052(h).
- Notwithstanding Subsection (e) or (g), a justice or municipal court that is located in the Texas-Louisiana border region, as defined by Section 2056.002, Government Code, may charge a reimbursement fee of $20 under those subsections. Tex. Code Crim. Proc. art. 45.052(i).

4.6 Juvenile Case Managers (JCMs)

Juvenile Case Managers are employed by some, but not all, justice and municipal courts to assist in administering the court's juvenile docket and provide prevention and intervention services to children. Tex. Code Crim. Proc. art. 45.056(a)(2). JCMs are not probation officers; however, they use case management as a tool to reduce recidivism and to prevent children from becoming further involved in the justice system. During an intake meeting with the child and their family, JCMs gather information about the family's needs, identify relevant services, and develop goals.

JCMs can be full-time or part-time employees; can serve several courts; and can serve courts in different counties. Tex. Code Crim. Proc. art. 45.056(a).

Early Identification of MI or IDD

Because the family intake meetings typically occur before any court appearance, the JCM is well-positioned to assess the child's strengths and deficits, elicit the family's experience and perspective, and share any concerns for MI or IDD with all parties. Once the court is aware, the judge can determine the voluntariness of any plea that is entered. Once the prosecutor is aware, they can determine how to appropriately resolve the case, so that all parties' interests are best served.

Community Resources

JCMs are often experts in the services, supports and resources offered by their local communities. Community resource awareness is an essential component in accessing services for children. Community resources encourage the healthy development of juveniles and families through direct services, by addressing the causes of delinquent behavior, reinforcing accountability, removing barriers to access, and reducing recidivism. Services may be accessed through court referrals, school referrals, and community referrals. Ultimately, recommending services and rehabilitation specific to the child aids the judge, who may have a significantly more limited view of the case at the time it comes before the court. Consideration of services and rehabilitation likewise serves the community protection component of the prosecutor's job by addressing the potential for future conduct problems.

4.7 Early Youth Intervention Services

On a finding by a justice or municipal court that a child committed an offense that the court has jurisdiction of, the court has jurisdiction to enter an order referring the child or the child's parent for services under Section 264.302, Family Code. Tex. Code Crim. Proc. art. 45.057(b)(1).

The Department of Family and Protective Services is authorized to provide services for children who are referred to it by justice and municipal courts as "at-risk." The services may include: crisis family intervention; emergency short-term residential care for children 10 years of age or older; family counseling; parenting skills training; youth coping skills training; advocacy training; and mentoring. Tex. Fam. Code §§ 264.302(e), (f).

4.8 Fines and Court Costs

See 5.4b below for information about fines and court costs in justice and municipal courts.

5. Juvenile Probation

When setting the terms and conditions of probation, judges should consider the need for terms to be individualized to the child and their intellectual and developmental capacity. Recovery and rehabilitation are a process and require skill development and practice by the child and their family. Probation conditions should allow for opportunities for skill-building and prosocial activities, as well as for setbacks. For children with MI or ID, the goal of probation should be the creation of a network of services and interventions to avoid re-referral to the juvenile court.

For children with a trauma history and trauma-related reactions, consider the propriety of a proposed service or treatment program by questioning whether the program:

- Educates youth about trauma and its effects on thoughts, feelings, and behavior;
- Increases a youth's sense of physical and psychological safety;
- Identifies reminders that trigger trauma reactions;
- Accounts for how seemingly "non-compliant" behavior can be related to trauma, rather than willfulness or lack of cooperation, and addresses the behavior correctly;
- Develops emotional regulation skills (i.e., skills to help control and strong feelings or to respond to difficult situations);
- Promotes trauma-informed parenting skills;
- Addresses grief and loss (when appropriate);
- Teaches youth to manage traumatic memories;
- Identifies and cultivates existing supports and strengths that promote recovery.[162]

Reflection Point

As a judge, identify different services to address trauma as an alternative to anger management classes.

[162] Nat'l Child Traumatic Stress Network, Trauma-Informed Legal Advocacy: A Resource for Juvenile Defense Attorneys 15 (2018), https://www.nctsn.org/sites/default/files/resources/resource-guide/trauma_informed_legal_advocacy_a_resource_for_juvenile_defense_attorneys.pdf.

No Disposition

Texas Family Code section 54.04(c) states that, "No disposition may be made under this section unless the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made. If the court or jury does not so find, the court shall dismiss the child and enter a final judgment without any disposition."

5.1 General Probation Conditions

- The court or the jury may... place the child on probation on such reasonable and lawful terms as the court may determine. Tex. Fam. Code § 54.04(d)(1).
- If the court places a child on probation under Section 54.04(d), the court shall require... that the child work a specified number of hours at a community service project... unless the court determines that:
  - The child is physically or mentally incapable of participating in the project;
  - Participating in the project will be a hardship on the child or the family of the child; or
  - The child has shown good cause that community service should not be required.

Tex. Fam. Code § 54.044(a).

5.2 Requiring Psychological Treatment as a Condition of Probation

- The court must order psychological treatment as a condition of probation for Animal Cruelty offenses, under Section 42.09 or 42.092, Texas Penal Code. Tex. Fam. Code § 54.0407.
- The court *may* order psychological treatment as a condition of probation for offenses that would require sex offender registration. Tex. Fam. Code § 54.0405(a)(1).
  - If the court orders the child to attend psychological counseling under Texas Family Code Subsection 54.0405(a), the court *may* order the child's parent or guardian to participate in monthly treatment groups related to the child's psychological counseling, and to attend four sessions of instruction relating to sexual offenses, family communication skills, sex offender treatment, victims' rights, parental supervision, and appropriate sexual behavior. Tex. Fam. Code § 54.0405(g).
- The court *may* order any person living in the same household with the child to participate in social or psychological counseling to assist in the rehabilitation of the child and to strengthen the child's family environment. Tex. Fam. Code § 54.041(a)(3).
- The court *may* order a child who is believed to be a victim of Human Trafficking under Section 20A.02, Penal Code, to participate in a program established under Section 152.0017, Human Resources Code. Tex. Fam. Code § 54.04012(b).

Reflection Point

Ask yourself, as a judge, has equity been considered in prior intercept points? Have I helped to destigmatize MI and IDD? Have I asked myself about the child before me having race-based trauma, such as witnessing the videos of people being murdered in the news and other traumas in the traditional sense, resulting in acting out behavior and mental health challenges? What assumptions have I made about people based on their cultural identity, profession, or background? How might my assumptions influence my decision-making? How have I challenged any assumptions I might have made based on cultural identity, profession, or background?

Multisystemic Therapy (MST)

MST is a family- and community-based treatment for at-risk youth with intensive needs and their families.[163]It has proven most effective for treating youth who have committed violent offenses, have serious mental health or substance abuse concerns, are at risk of out-of-home placement, or who have experienced abuse and neglect.[164]

The overriding goal of MST is to keep adolescents who have exhibited serious clinical problems (e.g., drug use, violence, severe criminal behavior) at home, in school, and out of trouble. Through intense involvement and contact with the family, MST aims to uncover and assess the functional origins of adolescent behavioral problems. It works to alter the youth's ecology in a manner that promotes prosocial conduct while decreasing problem and delinquent behavior.[165]

MST has been proven to reduce violent crimes by 75%, compared to routine congregate[166] and other care.[167] The reduction is long-term, lasting two decades post-treatment.[168] MST is one of only three proven programs[169] that addresses family functioning and association with deviant peers, key risk factors for reducing violence, other antisocial behaviors, and juvenile justice involvement.[170]

Learn more about implementing MST in your jurisdiction at: https://www.mstservices.com/

5.3 Referral to LMHA or LIDDA Before Probation Expires

A juvenile probation officer must refer a child who has been determined to have a mental illness or [intellectual disability] to an appropriate LMHA or LIDDA at least three months before the child is to complete the juvenile probation term, unless the child is currently receiving treatment from the LMHA or LIDDA of the county in which the child resides. Tex. Fam. Code § 54.0408.

5.4 Fines and Court Costs

5.4a Fines and Court Costs in Juvenile Court

The juvenile court can impose certain fines and court costs during the disposition of a case. The court also has the authority to waive fines and court costs based on the child's and family's inability to pay by making specific findings.

Deferred Prosecution: the juvenile board can adopt a fee schedule for DPP services, and rules for waiving fees due to financial hardship, in accordance with guidelines from TJJD. The maximum fee is $15 per month, and the

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[163] Scott W. Hengeller & Sonja K. Shoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 Soc. Pol'y Rep. 1, 1-20 (2011).

[164] MST Services, Multisystemic Therapy Research at a Glance: Published MST Outcome, Implementation and Benchmarking Studies (2020), https://cdn2.hubspot.net/hubfs/295885/MST%20Redesign/Marketing%20Collateral/Case%20Study%20and%20Reports/R@aG%20Long%202020.pdf?__hstc=220415175.049a79e508be909cf4fd20627154121c.1596924462462.1596924462462.1596924462462.1&__hssc=220415175.1.1596924462463&__hsfp=4188746094.

[165] Youth.gov, https://youth.gov/content/multisystemic-therapy-mst (last visited Aug. 7, 2020).

[166] The term "congregate care" represents a wide array of out-of-home placement settings, including group homes, childcare institutions, residential treatment facilities, emergency shelters, and inpatient hospitals. U.S. Dep't of Health & Hum. Serv., Admin. for Children and Families, Children's Bureau, Capacity Building Center for States, Working with Children and Youth with Complex Clinical Needs: Strategies in the Safe Reduction of Congregate Care (2017), https://library.childwelfare.gov/cwig/ws/library/docs/capacity/Blob/112660.pdf?r=1&rpp=10&upp=0&w=+NATIVE%28%27recno%3D112660%27%29&m=1.

[167] *See* Meadows Mental Health Pol'y Inst., Multisystemic Therapy for Texas Youth 1 (2020), https://mmhpi.org/wp-content/uploads/2020/09/MSTin-Texas.pdf

[168] *Id.*

[169] *Id.* (citing MST Services, Multisystemic Therapy Research at a Glance, Published MST Outcome, Implementation, and Benchmarking Studies (2020), https://cdn2.hubspot.net/hubfs/295885/MST%20Redesign/Marketing%20Collateral/Case%20Study%20and%20Reports/R@aG%20Long%202020.pdf?__hstc=220415175.049a79e508be909cf4fd20627154121c.1596924462462.1596924462462.1596924462462.1&__hssc=220415175.1.1596924462463&__hsfp=4188746094 (explaining the efficacy of MST has been established through 28 highly rigorous random control trials carried out over the last thirty years)).

[170] Scott W. Hengeller & Sonja K. Shoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies that Support Them*, 25 Soc. Pol'y. Rep. 1, 1-20 (2011).

fees can only be used to fund juvenile probation or community-based juvenile corrections services or facilities. If the juvenile board does not adopt a fee schedule and rules for waiving fees, then no fee for DPP can be imposed. Tex. Fam. Code § 53.03(d).

Court Costs: If a disposition hearing is held, the juvenile court, after giving the child, parent, or other person responsible for the child's support a reasonable opportunity to be heard, must order the child, parent, or other person, **if financially able** to do so, to pay a fee of $20. Tex. Fam. Code § 54.0411(a).

- The state comptroller deposits this money into the juvenile probation diversion fund. Tex. Fam. Code § 54.0411(g).
- The legislature sends money from this fund to TJJD to pay for services that are necessary for the diversion of youth who are at risk of being committed to TJJD. Tex. Fam. Code § 54.0411(h).

Graffiti Fee: If a child is adjudicated delinquent of a graffiti offense, the court must order the child, parent, or other person responsible for the child's support to pay a $50 juvenile delinquency prevention fee, which goes into a county juvenile delinquency prevention fund. Tex. Fam. Code §§ 54.0461(a), (b).

- The fee can be waived if the court finds that the child, parent, or other person responsible for the child's support is unable to pay it. Tex. Fam. Code § 54.0461(c).

DNA Testing Fee: If a child is adjudicated delinquent of a felony that requires a DNA sample be taken, the court must order the child, parent, or other person responsible for the child's support to pay a fee of: either $50, if the disposition includes a commitment to TJJD or to a facility operated by TJJD; or $34, if the disposition does not include a commitment to TJJD or to a facility operated by TJJD. Tex. Fam. Code § 54.0462(a).

- The state comptroller sends this money to the Department of Public Safety to pay for the testing of DNA samples provided by children required to pay the fee. Tex. Fam. Code § 54.0462(b).
- The fee can be waived if the court finds that the child, parent, or other person responsible for the child's support is unable to pay it. Tex. Fam. Code § 54.0462(c).

Restitution: the court can order restitution to be made by the child and the child's parents. Tex. Fam. Code § 54.048(a).

- If the child, child's parent, or other person responsible for the child's support is unable to make the restitution in a graffiti case, the court can order the child to perform a specific number of hours of community service to satisfy the restitution. Tex. Fam. Code § 54.0481(b).
- If the child is financially unable to make restitution in a Criminal Mischief case under Code of Criminal Procedure 28.03(f), or an Abuse of a Corpse case under Code of Criminal Procedure 42.08, the court can order the child to perform a specific number of hours of community service, or order a parent or other person responsible for the child's support to make the restitution. Tex. Fam. Code § 54.049(b).

5.4b Fines and Court Costs in Municipal Court

Judges are permitted, but not required, to waive payment of all or part of a fine imposed on a defendant if the court determines that the defendant:

- **is a child**, is indigent, or does not have sufficient resources or income to pay all or part of the fine; and
- each alternative method of discharging the fine (community service, payment at a later date, or installment payments) would **impose a hardship on the defendant**.

Tex. Code Crim. Proc. arts. 43.091(c); 45.0491(d).

In making the determination of undue hardship, the court may consider, among other things, the defendant's significant physical or mental impairment or disability. Tex. Code Crim. Proc. arts. 43.091(b); 45.0491(c).

Legislative Change

H.B. 80 (87th Reg. Sess. (2021)) amended Texas Code of Criminal Procedure article 45.041 to prohibit the payment of fines and court costs by "a defendant who is under the conservatorship of the Department of Family and Protective Services or in extended foster care[171] as provided by Subchapter G, Chapter 263, Family Code…" The defendant can be ordered to perform community service in lieu of the payment of fine and costs.

5.5 Post-Discharge Services

Provided that existing resources are available, a juvenile board or juvenile probation department can provide post-discharge services to a child for up to six months after the child is discharged from probation, regardless of the child's age. 10 Tex. Admin. Code § 142.007(b).

"Post-discharge services" means community-based services to support the child's vocational, educational, behavioral, or other goals and to provide continuity for the child as they transition out of a juvenile probation services. The term includes:

1. Behavioral health services;
2. Mental health services;
3. Substance abuse services;
4. Mentoring;
5. Job training; and
6. Educational services.

10 Tex. Admin. Code § 142.007(a).

6. Fitness to Proceed

All states have a statutory standard for determining whether a person is incompetent to stand trial. This standard comes from *Dusky v. U.S.*, a 1960 United States Supreme Court case, which held that the test of a defendant's competency to stand trial is whether the person has "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding – and whether [they have] a rational as well as factual understanding of the proceedings against [them]."[172] Fitness to proceed is the juvenile court equivalent to competency to stand trial.

A juvenile respondent who, as a result of mental illness or an intellectual disability, lacks capacity to understand the proceedings in juvenile court or to assist in their own defense is unfit to proceed and cannot be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition, as long as the incapacity lasts. Tex. Fam. Code § 55.31(a). A flowchart to aid in understanding the fitness to proceed process can be found on **pages 108 and 109**. It should also be noted that the fitness to proceed and restoration process may not cover all possible causes of a child's incapacity, such as a developmental disability or a lack of chronological maturity. A checklist to assist in identifying possible MI or ID can be found on **page 149**.

Fitness proceedings can be costly and can lengthen a juvenile respondent's involvement in the juvenile justice system. The goal of the fitness restoration process is different than the goals of treatment and services. Fitness is

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[171] "Extended foster care" means a residential living arrangement in which a young adult voluntarily delegates to the department responsibility for the young adult's placement and care and in which the young adult resides with a foster parent or other residential services provider that is:

(A) licensed or approved by the department or verified by a licensed or certified child-placing agency; and

(B) paid under a contract with the department.

Tex. Fam. Code § 263.601(1).

[172] Dusky v. U.S., 362 U.S. 402 (1960).

not the ideal pathway into behavioral health treatment, although it is one. Judges and all parties should consider whether fitness is the real issue, and the effect that the fitness restoration process could have on the child. For example, dismissal or a referral to community-based services may be more appropriate.

Recall that when used in Texas Family Code Chapter 55, "mental illness" means "an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." Tex. Fam. Code § 55.01, Tex. Health & Safety Code § 571.003(14). Intellectual disability means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Code Crim. Proc. art. 46B.001(8); Tex. Health & Safety Code § 591.003.

Developmental Period

Children who are referred to the juvenile court are, by definition, "in their developmental period" (under age 18); therefore, a child who has a diagnosis of having a pervasive developmental disorder in a psychological or psychiatric report probably qualifies as having an intellectual disability.[173]

Obtaining a diagnosis of intellectual disability from the LIDDA can facilitate a child's lifetime access to state-funded services.

6.1 Raising the Issue

- Unless a child has previously been found to be unfit to proceed, the child is presumed to be fit to proceed.
- When a child is alleged by petition or found to have engaged in delinquent conduct or CINS, **the court or any party** can raise the issue of unfitness as a result of mental illness (MI) or intellectual disability (ID). Tex. Fam. Code § 55.31(b). *It is almost never too late to raise the issue.*
- The issue of unfitness can be raised prior to an adjudication hearing, a disposition hearing, a motion to modify hearing, or a discretionary transfer hearing. Tex. Fam. Code § 55.31(a).
- Once the motion is filed, the court must determine whether or not **probable cause** exists to believe that the child is unfit to proceed. In making its determination on the issue of probable cause, the court can consider the motion, supporting documents, **professional statements of counsel**,[174] witness testimony, and the court's own observation of the child. Tex. Fam. Code § 55.31(b).

Observation of the Child

Since the statute allows for the court to use observations of the child for its probable cause determination, it is important that the court monitor how the child interacts with others, including parents, guardians, caregivers, lawyers, the court, as well as other court participants. The court can also observe the child's physical appearance, including whether the child is appropriately dressed, well-nourished, and practicing proper hygiene.

[173] William R. "Bill" Cox, Texas Family Code Chapter 55: Mental Health Proceedings, 26th Annual Robert O. Dawson Juvenile Law Institute (2013), https://juvenilelaw.org/wp-content/uploads/2017/06/07_Cox.pdf.

[174] For assistance, a Chapter 55 Issues Checklist is provided on page 149 of this Bench Book.

Texas Family Code – Chapter 55, Subchapter C
Child Unfit to Proceed ("55-C")

A child is **Unfit to Proceed** if the child, due to **Mental Illness (MI)** or **Intellectual Disability (ID)** lacks capacity:
- To **understand the proceedings** in juvenile court; or
- To **assist in** the child's **own defense**

[FC § 55.31(a)]

A **Party** to a Juvenile Proceeding may raise the issue of **Unfitness to Proceed**; whereupon the **Court shall** determine if **Probable Cause** exists to believe the Child is unfit to proceed **due to MI** or **ID**. The **Court may** consider the motion, supporting documents, professional statement of counsel, witness testimony and its own observation of the child. **[FC § 55.31(b)]**

Flow Chart Key

Informational

Alternatives

Exits from 55-C

No Probable Cause

Resume Juvenile Proceedings

If **Probable Cause** exists to believe child is unfit to proceed the **Court shall Temporarily Stay Proceedings** and **Order Examination** of Child under **[FC §51.20]** by **Expert** qualified under **CCP, Art. 46B.022** to render **Expert Opinion** on **Unfitness** due to **MI** or **ID** **[FC § 55.31(c)]**

*source law continues to cite to agencies which no longer operate the **State Hospitals** or **SSLC's**. **[Tex. Gov't Code § 531.0011(a)]** substitutes **HHSC** for named agency

After **Court** receives Expert's Report and **determines** that **evidence exists** that **child is Unfit to Proceed** **[FC § 55.31(d)(1)]**

Court receives Expert's Report but it **determines** that **evidence does not exist** that **child is Unfit to Proceed** **[FC § 55.31(d)(2)]**

Fitness to Proceed hearing **before Court** (unless **Jury** demand 10+ days before hearing) **[FC § 55.32(a-c)]** **Moving party** must prove the child is unfit to proceed by a **Preponderance of the Evidence** **[FC § 55.32(d)]**

Resume Juvenile Proceedings

The director of the facility is likely not an expert qualified to render an opinion **[FC § 51.20] on fitness to proceed. However, under a parallel provision in **[CCP, Art. 46B.079]** a report by a qualified expert is routinely provided by the facility

Court (or jury) determines child is **Unfit to Proceed** due to **MI** or **ID** the Court **shall stay proceeding** for as long as incapacity endures **[FC § 55.32(f)(1)]**

Court (or jury) finds Child is **Fit to Proceed** **[FC § 55.32(e)]**

If the child is unfit to proceed as a result of **MI** or **ID** and the **Court determines**, after consulting with the probation department and local treatment or service providers, that the **child may be adequately treated or served in an alternative setting**, order the child to receive treatment on an **Outpatient** basis for a period of **not more than 90 days** (order may not specify a shorter period). **[FC § 55.33(a)(3)/(c)]**

Provided that the child meets the civil commitment criteria under **Subtitle C** or **D**, Title 7, **Health & Safety Code** (**MH Code** or Persons with Intellectual Disabilities Act [**PIDA**], respectively), the Court **orders the child placed** in a facility designated by **HHSC*** for a period of **not more than 90 days** (order may not specify shorter timeframe) **[FC § 55.33(a)(1)]**

On application by the child's parent, guardian, or guardian ad litem, the Court may order the child placed in a **private psychiatric inpatient facility** for a period of not more than **90 days** (order may not specify a shorter period) but only **if the placement is agreed to** in writing by **the administrator of the facility** **[FC 55.33 § (a)(2)]**

Not later than the **75th day after** the date the Court issues a **placement order**, the facility shall submit a **Report** to the **Court** that:
- **Describes treatment** or **services** of the child **provided**; and
- States the **opinion** of the **director of the facility**** **whether** the child **is fit** or **unfit to proceed** **[FC § 55.35(b)]**

The **Court shall provide** the facility's **report on fitness** to the **prosecution** and **attorney for the child** **[FC § 55.35(c)]**

Court is to order the **child be returned to Court** within **10 days** of their receipt of the facility's **Report**. If child is not returned to court within that time, facility shall return child and the county must pay for costs of transportation **[FC § 55.34(b)/(c)]**

Unfitness to Proceed - continued on next page

Flowchart developed by Chris Lopez, Texas Health and Human Services Commission

Texas Family Code – Chapter 55, Subchapter C
Child Unfit to Proceed ("55-C")

A child is **Unfit to Proceed** if the child, due to **Mental Illness (MI)** or **Intellectual Disability (ID)** lacks capacity:
- To **understand the proceedings** in juvenile court; or
- To **assist in** the child's **own defense**

[FC § 55.31(a)]

A **Party** to a Juvenile Proceeding may raise the issue of **Unfitness to Proceed**; whereupon the **Court shall** determine if **Probable Cause** exists to believe the Child is unfit to proceed **due to MI** or **ID**. The **Court may** consider the motion, supporting documents, professional statement of counsel, witness testimony and its own observation of the child. **[FC § 55.31(b)]**

Flow Chart Key

Informational

Alternatives

Exits from 55-C

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Resume Juvenile Proceedings

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On application by the child's parent, guardian, or guardian ad litem, the Court may order the child placed in a **private psychiatric inpatient facility** for a period of not more than **90 days** (order may not specify a shorter period) but only **if the placement is agreed to** in writing by **the administrator of the facility** **[FC 55.33 § (a)(2)]**

Not later than the **75th day after** the date the Court issues a **placement order**, the facility shall submit a **Report** to the **Court** that:
- **Describes treatment** or **services** of the child **provided**; and
- States the **opinion** of the **director of the facility**** **whether** the child **is fit** or **unfit to proceed** **[FC § 55.35(b)]**

The **Court shall provide** the facility's **report on fitness** to the **prosecution** and **attorney for the child** **[FC § 55.35(c)]**

Court is to order the **child be returned to Court** within **10 days** of their receipt of the facility's **Report**. If child is not returned to court within that time, facility shall return child and the county must pay for costs of transportation **[FC § 55.34(b)/(c)]**

Unfitness to Proceed - continued on next page

- If the court determines that probable cause exists to believe that the child is unfit to proceed, then all juvenile court proceedings must be stayed, and the judge must order the child to be examined under Texas Family Code § 51.20. Tex. Fam. Code § 55.31(c).
    - The information obtained from the examination must include: expert opinion as to whether the child is unfit to proceed as a result of MI or ID. Tex. Fam. Code §§ 51.20, 55.31(c).
        - The expert opinion can be from a physician, psychiatrist, or psychologist; however, the expert must also be qualified by education and clinical training in mental health or [intellectual disability] and experienced in forensic evaluation. Experts who determine fitness to proceed must also be qualified under Subchapter B, Chapter 46B, Code of Criminal Procedure, to examine a defendant in a criminal case, and the examination and report resulting under an examination under § 51.20 must comply with the requirements under Subchapter B, Chapter 46B, Code of Criminal Procedure, for the examination and resulting report of a defendant in a criminal case. Tex. Fam. Code § 51.20(a).
- Once the court receives the report from the examination of the child, and after considering all relevant information, including the report, the court must determine whether or not evidence exists to support a finding that the child is unfit to proceed. Tex. Fam. Code § 55.31(d)(1).
- If the court determines that evidence does not exist to support a finding that the child is unfit to proceed, the judge must **dissolve the stay** and continue the juvenile court proceedings as if the issue had not been raised. Tex. Fam. Code § 55.31(d)(2).

6.2a Qualifications of Experts

Judges should critically vet the experts they appoint. This minimally entails verifying that an expert meets the statutory qualifications prior to appointment. A psychiatrist or psychologist appointed to examine a person and/or testify regarding fitness to proceed must generally:

- Be a psychiatrist who is a physician licensed in Texas or a psychologist licensed in Texas who has a doctoral degree in psychology;
- Have the following certification or training:
    - If a psychiatrist, certification by the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or
    - If a psychologist, certification by the American Board of Professional Psychology in forensic psychology; or
        - At least 24 hours of specialized forensic training relating to incompetency or insanity evaluations; and
        - At least eight hours of continuing education relating to forensic evaluations, completed in the 12 months preceding the appointment; and
        - Have completed six hours of required continuing education in courses in forensic psychiatry or psychology, respectively, in either of the reporting periods in the 24 months preceding the appointment.

Tex. Code Crim. Proc. art. 46B.022(a)-(b).

Appointment of an expert psychiatrist or psychologist who does not meet the above requirements may only occur if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise that would not ordinarily be possessed by a psychiatrist or psychologist who meets the above requirements. Tex. Code Crim. Proc. art. 46B.022(c). This is a narrow exception. One example is a case in which the adult defendant not only appeared to lack competency because of either MI or IDD, but was also deaf.[175] Therefore, the court needed an expert who was knowledgeable about the defendant's hearing disability, but that expert might not have met the statutory requirements for an expert.[176]

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[175] Brian D. Shannon & Daniel H. Benson, Texas Criminal Procedure and the Offender with Mental Illness 65 (6th ed. 2019), http://texasjcmh.gov/media/1801/shannon-6th-edition-oct-2019-for-nami-texas-website-1.pdf

[176] *Id.*

6.2b Factors Considered in the Examination

In addition to other issues determined to be relevant by the expert, the following factors must be considered during a fitness examination and in any report based on that examination:

- The capacity of the juvenile respondent during criminal proceedings to:
  - Rationally understand the charges against them and the potential consequences of the pending juvenile proceedings;
  - Disclose to counsel pertinent facts, events, and states of mind;
  - Engage in a reasoned choice of legal strategies and options;
  - Understand the adversarial nature of juvenile proceedings;
  - Exhibit appropriate courtroom behavior; and
  - Testify;
- Whether the juvenile respondent is a person with MI or ID, as supported by current indications and the juvenile respondent's personal history;
- The degree of impairment resulting from the MI or ID, if existent, and the specific impact on the juvenile respondent's capacity to engage with counsel in a reasonable and rational manner; and
- If the juvenile respondent is taking psychoactive or other medication:
  - Whether the medication is necessary to maintain the juvenile respondent's [fitness]; and
  - The effect, if any, of the medication on the juvenile respondent's appearance, demeanor, or ability to participate in the proceedings.

Tex. Code Crim. Proc. art. 46B.024.

6.2c Expert's Report

The court shall direct an expert to provide the expert's report to the court and the appropriate parties in the form approved by TCOOMMI under section 614.0032(b) of the Health and Safety Code (*see* page 152 of this Bench Book).[177]

Additional Required Information in the Expert's Report

In addition to the factors in article 46B.024 that must be considered during an examination and in any report based on that examination, article 46B.025 requires specific, detailed information in the expert's report. An expert's report must:

- State an opinion on a juvenile respondent's [fitness or unfitness to proceed] (or explain why the expert is unable to do so);
- Identify and address specific issues referred to the expert for evaluation;
- Document that the expert explained to the juvenile respondent
  - The purpose of the evaluation,
  - The persons to whom a report on the evaluation is provided, and
  - The limits on rules of confidentiality applying to the relationship between the expert and the juvenile respondent;
- Specifically describe procedures, techniques, and tests used in the examination, the purpose of each of those, and the conclusions reached;
- State the expert's clinical observations, findings, and opinions on each specific issue referred to the expert by the court;

[177] *Certification of Competency Evaluator Credentials Form,* TXCOURTS.GOV, https://www.txcourts.gov/media/518971/templatecompetencyeval.pdf (last visited July 29, 2020).

- State the specific criteria supporting the expert's diagnosis; and
- State specifically any issues on which the expert could not provide an opinion.

Tex. Code Crim. Proc. art. 46B.025(a).

In addition, if it is the opinion of the expert that the juvenile respondent is [unfit to proceed], the expert shall state in the report:

- The symptoms, exact nature, severity, and expected duration of the deficits resulting from the juvenile respondent's MI or ID, if any;
- The impact of the identified condition on the factors listed in article 46B.024;
- An estimate of the period needed to restore the juvenile respondent's [fitness], **including whether the respondent is likely to be restored to [fitness] in the foreseeable future**; and
- The prospective treatment options, if any, appropriate for the juvenile respondent.

Tex. Code Crim. Proc. art. 46B.025(b).

Note: Judges should know what to look for in an expert's report. The court does not have to accept a report that is of poor quality and can ensure the statutory requirements are met by ordering amendment of the report. It is also important to note that the determination of fitness or unfitness is the role of the fact finder (usually the judge). This role should not be abdicated to the expert.[178]

Beyond Statutory Requirements: Marks of a Quality Expert's Report[179]

- Conveys all relevant information concisely, unambiguously, and clearly, including the facts and reasoning the expert used in formulating the opinion.
- Goes beyond describing signs and symptoms of mental illness and discusses how those signs and symptoms affect functional abilities relevant to the legal construct of fitness.
- Describes the juvenile respondent's abilities and deficits concerning the tasks that they must perform during a juvenile defense.
- Is a stand-alone document in that it provides or reproduces the data needed to support the opinions the expert expresses.
- States clearly any limitations or qualifications of which the expert is aware.
- Contains clinical data regarding the nature of the juvenile respondent's mental and emotional condition that are specifically relevant to the fitness analysis.
- Comments on any contradictions or inconsistencies.
- Provides specific examples that illustrate the juvenile respondent's strengths or weaknesses with respect to reasoning and understanding, based on a competence-assessment instrument as well as other types of data.
- Opines concerning restorability and the appropriate setting for restoration.
- Is free of gratuitous comments about the juvenile respondent's behavior, need for [removal from society], dangerousness, lack of remorse, or other legal matters.

Note: The expert's opinion on the juvenile respondent's fitness or unfitness to proceed may not be based solely on the respondent's refusal to communicate during the examination. Tex. Code Crim. Proc. art. 46B.025(a-1).

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[178] For an example of a poor examination and report, *see* Turner v. State, 422 S.W.3d 676 (Tex. Crim. App. 2013).

[179] Adaptation of: Douglas Mossman, M.D., et al., *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. OF THE AM. ACAD. OF PSYCHIATRY & THE L. ONLINE, no. 4, (SUPP.) (2007), http://jaapl.org/content/jaapl/35/Supplement_4/S3.full.pdf.

6.3 Hearing on Issue of Fitness to Proceed

If the court determines that evidence exists to support a finding that the child is unfit to proceed as a result of MI or ID, the court shall set the case for a hearing on the issue. Tex. Fam. Code § 55.32(a).

- The issue of whether the child is unfit to proceed must be determined at a hearing separate from any other hearing. Tex. Fam. Code § 55.32(b).
- The court determines the issue of whether the child is unfit to proceed unless the child or their attorney demands a jury 10 days before the hearing. Tex. Fam. Code § 55.32(c).
- Unfitness to proceed must be proven by **a preponderance of the evidence**. Tex. Fam. Code § 55.32(d).
- If the child is found fit to proceed, the court must dissolve the stay and continue with juvenile proceedings. Tex. Fam. Code § 55.32(e).
- If the child is found unfit to proceed, the juvenile proceedings continue to be stayed for as long as the incapacity lasts; and proceed under § 55.33. Tex. Fam. Code § 55.32(f).

A Juvenile Can Have MI or ID and be Fit to Proceed Under Chapter 55

It is important to understand that that a judge may receive information that may not suggest that a juvenile is unfit to proceed under Chapter 55 of the Texas Family Code, but that may suggest that the juvenile has a MI or ID. Such a condition may not render the juvenile unfit to proceed, but it may warrant special consideration and management of the juvenile's case.

6.4 Proceedings Following Finding of Unfitness to Proceed

Once the child has been found unfit to proceed, a temporary commitment of up to 90 days is required, provided that the child meets the commitment criteria under Subtitle C[180] or D,[181] Title 7, Health and Safety Code. Tex. Fam. Code § 55.30.

Legislative Change

H.B. 2107 (87th Reg. Sess. (2021)) added the option for a child who is unfit to proceed due to an intellectual disability to receive services or treatment in an outpatient setting. Before this change, a child who was unfit to proceed due to ID could only receive services or treatment at an inpatient facility.

- If the unfitness is due to MI, there are three placement options:
  - Placement with the [Texas Health and Human Services Commission][182] (state hospital);
  - Placement in a private psychiatric facility,[183] on application by the child's parent, guardian, or guardian ad litem, so long as the facility administrator agrees in writing; or
  - Placement in an **outpatient** program, if the court approves of the treatment setting.
- If the unfitness is due to ID, there are two placement options:

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[180] *See* Tex. Health & Safety Code § 574.034 for Temporary Inpatient Mental Health Services criteria; and *see* Tex. Health & Safety Code § 574.0345 for Temporary Outpatient Mental Health Services criteria; or see below, under 7.7.1f.

[181] *See* Tex. Health & Safety Code § 593.052 for Intellectual Disability criteria, or see below, under 7.8.1f.

[182] Note that the text of the statute indicates the placement is with the Department of State Health Services (DSHS). The 84th Legislature made structural changes to the Health and Human Services system, including transferring some DSHS functions to HHSC. As of September 2017, all state hospitals transferred to HHSC from DSHS.

[183] If funding is specifically budgeted for it, the court can order the state to pay for the cost of placing a child in a private psychiatric facility, regardless of whether the unfitness is due to MI or ID. Tex. Fam. Code § 55.33(b).

- Placement with the [Texas Health and Human Services Commission][184] (state supported living center); or
- Placement in an **outpatient** program, if the court approves of the treatment setting.

Tex. Fam. Code § 55.33(a).

- If the child is unfit to proceed due to a condition other than MI or ID, and thus does not meet the commitment criteria under Subtitle C or D, Title 7, Health and Safety Code, no court-ordered commitment is possible. The juvenile proceedings are stayed indefinitely.

6.4.1 Transportation

- If the court issues a placement order, the court must order the probation department or the sheriff's department to transport the child to and from the designated facility. Tex. Fam. Code §§ 55.34(a), (b).
  - Upon receipt of a report from a facility, the child shall be returned to juvenile court. If the child is not transported back to juvenile court by the 11th day after the date of the court's order, then the facility is required to transport the child to the court, at the county's expense. Tex. Fam. Code §§ 55.34(b), (c).

6.4.2 Information Required to be Sent to the Facility

- The court must order the probation department to send copies of any information in their possession that is relevant to the issue of the child's MI or ID to the treatment provider. Tex. Fam. Code § 55.35(a). This may include information in the court's file, the probation department's file, the detention facility file, and/or medical or mental health files maintained by the probation department and/or its medical or mental health providers.

6.4.3 Report due to the Court

- Before the 75th day after the commitment order, the treatment provider must submit its report to the court. The report must describe the treatment or services provided to the child and state the facility director's opinion as to whether the child is fit or unfit to proceed. Tex. Fam. Code § 55.35(b).
  - The court must provide a copy of the facility's report to the prosecutor and to the child's attorney. Tex. Fam. Code § 55.35(c).

6.5 Report that Child is Fit to Proceed

- If the facility report states the child is fit to proceed, the court must find that the child is fit to proceed, **unless the child's attorney objects in writing or in open court not later than two days after the attorney receives the report.** Tex. Fam. Code § 55.36(a).
  - If a proper objection is made, the court must promptly hold a fitness hearing. Tex. Fam. Code § 55.36(b).
  - The fitness hearing is before the court unless the child or their attorney demands a jury 10 days before the hearing. Tex. Fam. Code § 55.36(b).
  - If the child is found fit to proceed, the court must **dissolve the stay** and continue with juvenile proceedings. Tex. Fam. Code § 55.36(c).
  - If the child is found unfit to proceed, the court must proceed to a commitment hearing. Tex. Fam. Code § 55.36(d).

[184] Note that the text of the statute indicates the placement is with the Department of Aging and Disability Services (DADS). As part of the changes made by the 84th Legislature, all remaining DADS functions were transferred to HHSC in September 2017.

Best Practices for Reviewing Fitness Reports[185]

It is important that the attorneys who receive the child's fitness report understand it and determine whether it is an accurate portrayal of the child. It may help to question whether the language attributed to the child matches the lawyer's own observations. Lawyers should be aware of descriptions such as those listed below, and object to the fitness determination if necessary. Lawyers should talk to the child at least by phone prior to determining if they need to object to the report. It may be necessary to object to the report and request additional time to consult with the child, to preserve the two-day deadline for objections.

Fitness to proceed is not a sliding scale. A child is either fit or is not fit. The following are examples of statements which may indicate, contrary to the report's conclusion, that the child is not currently fit to proceed:

- "The child appears at least marginally fit to proceed at this time."
- "The child's cognitive functioning is within the borderline range, but their adaptive behavioral functioning is noticeably below expectation."
- "The child was partially oriented to time."
- "The child did not know the name of the home where they were living."
- "The child's communication was rated within the severely impaired range."

6.6 Report that Child is Unfit

At this point the procedures for commitment due to MI and ID become separate: §§ 55.37 through 55.39 govern mental illness while §§ 55.40 through 55.42 govern intellectual disability.[186]

6.7.1 Commitment Proceedings in Juvenile Court for Mental Illness

The juvenile court has the option of hearing the commitment proceeding or referring it to an appropriate county or probate court. Tex. Fam. Code § 55.37.

Juvenile Court or Probate Court

The choice of whether to proceed with commitment in juvenile court or to refer the proceedings to a county or probate court rests exclusively with the juvenile court. A juvenile court that hears commitment proceedings infrequently may prefer to have the county or probate court conduct them. The standards for commitment are the same, regardless of which court holds the commitment hearing. County or probate courts may have more frequent interaction with community-based treatment options, private placements, and state facilities. Judges in a community can discuss available resources to determine which approach is advantageous for their constituents. If the juvenile court chooses to refer the case to a county or probate court, it is important to maintain ongoing communication concerning the child's progress and case status.

6.7.11 Application for Court-Ordered Mental Health Proceedings

For commitment proceedings in juvenile court, the prosecutor must file an application for court-ordered mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.38(a).

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[185] William R. "Bill" Cox, Deputy Public Defender, El Paso County Public Defender's Office, Presentation on Fitness to Proceed and Lack of Responsibility in the Juvenile Justice System at The 32nd Annual Robert O. Dawson Juvenile Law Institute (2019), https://juvenilelaw.org/wp-content/uploads/2019/02/Chapter-55.pdf

[186] William R. "Bill" Cox, Texas Family Code Chapter 55: Mental Health Proceedings, 26th Annual Robert O. Dawson Juvenile Law Institute (2013), https://juvenilelaw.org/wp-content/uploads/2017/06/07_Cox.pdf.

What Should be Included in the Application

An application must:

- Be styled using the child's initials and not the proposed patient's full name;
- State whether the application is for temporary or extended services;
- Contain the child's name, address, and county of residence in Texas;
- Include a statement that the child is a person with mental illness and meets the criteria in Chapter 574 for court-ordered mental health services; and
- State whether the child is charged with a criminal offense.

Tex. Health & Safety Code §§ 574.002(b), (c).

Application Requirements for Extended Court-Ordered Services

Applications for **extended** court-ordered services have several statutory requirements that applications for **temporary** court-ordered services do not require.

- An application for **extended inpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either this subtitle or under Chapter 46B, Subchapter D of the Texas Code of Criminal Procedure (Procedures after Determination of Incompetency) or Subchapter E (Civil Commitment: Charges Pending) for *at least 60 consecutive days during the prior 12 months*.
- An application for **extended outpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either this subtitle or under Chapter 46B, Subchapter D or E of the Texas Code of Criminal Procedure for *a total of at least 60 days during the prior 12 months*; OR
  - *Court-ordered outpatient mental health services* under this subtitle or Chapter 46B, Subchapters D or E *during the preceding 60 days*.

Tex. Health & Safety Code § 574.002(b).

6.7.12 Appointment and Duties of an Attorney under HSC 574.004

- The judge must appoint an attorney for the child within 24 hours after the application is filed unless the child already has an attorney. Tex. Health & Safety Code § 574.003(a).
- Texas codifies the duties that an attorney has toward a client in a court-ordered services proceeding in section 574.004, and the court is required to give a copy of these duties to every court-appointed attorney. Tex. Health & Safety Code § 574.003(b).

The Statutory Responsibility of Attorneys in Commitment Cases

The requirements set forth in section 574.004 of the Texas Health and Safety Code were the result of publicity surrounding the actions of some court-appointed lawyers who were not communicating with adult clients before hearings, or were conducting group interviews with multiple **adult** clients. "The publicity surrounding such inappropriate and inadequate representation caused the Legislature to strengthen the rights of patients."[187]

Note that the Rules of Professional Conduct governing attorneys comment specifically on the attention and respect that is to be given to every client, regardless of whether the client has with a mental illness. Comment 5 to Rule 1.02 of the TDRPC states: "When a lawyer reasonably believes a client suffers a mental disability or is not legally competent, it may not be possible to maintain the usual attorney-client relationship. Nevertheless, the client may have the ability to understand, deliberate upon, and reach conclusions about some matters affecting the client's own well-being… the fact that a client [has] a disability does not diminish the desirability of treating the client with attention and respect."

Included in the list of duties owed by the attorney to the proposed patient is that the attorney must respect the client's decision to agree or resist the efforts to provide mental health services, even though they may personally disagree with the client's wishes. Though the attorney may provide counsel, the attorney must abide by the client's final decision on the matter. Tex. Health & Safety Code § 574.004(c).

6.7.13 Setting the Commitment Hearing in Juvenile Court

The juvenile court must set a date for the hearing and provide notice as required under Sections 574.005 and 574.006, Health and Safety Code. Tex. Fam. Code § 55.38(a)(1).

- The court must set a hearing within 14 days of the date the application was filed but may not hold a hearing within the first three days after the application is filed, if the child or their attorney objects. Tex. Health & Safety Code §§ 574.005(a), (b).
  - There are witnesses who may appear at the hearing to present evidence, who may be unknown to the parties prior to the hearing date. If either party wishes, they may request a continuance based on surprise and the court may continue the hearing date. Tex. Health & Safety Code § 574.006(d).
- While the court may grant continuances of the hearing, the final hearing must be held no later than 30 days from the date the application was filed. The only exception is for extreme weather or disaster, in which case the judge may, by a written order each day, postpone the hearing for 24 hours. Tex. Health & Safety Code § 574.005(c).
- The child and their attorney are entitled to receive a copy of the application and written notice of the court hearing immediately after it is set. Notice must also be delivered in person or via certified mail to the child's:
  - **Parent, if a minor**; or
  - Appointed guardian, if applicable; or
  - **Each managing and possessory conservator**, if applicable. Tex. Health & Safety Code § 574.006(b).
- If a parent cannot be located, and the child does not have a guardian or conservator, the notice may be given to the proposed patient's next of kin. Tex. Health & Safety Code § 574.006(c).

6.7.14 Medical Examination Requirement

- The judge must appoint the number of physicians necessary (at least two) to examine the child and to complete the certificates of medical examination (CMEs) for mental illness. Tex. Health & Safety Code §§ 574.009(a), (b).
  - The two CMEs must be completed by the appointed physicians, **within the preceding 30 days**, and

[187] Hon. Guy Herman, Mental Health Law 8 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

are required to be on file with the court. At least one of the physicians must be a psychiatrist if a psychiatrist is available in the county. Tex. Health & Safety Code § 574.009(a).

- The court also has the authority to order an independent evaluation of the child, by a psychiatrist of the child's choosing, if the court feels it will assist the finder of fact. If the child is indigent, the county may reimburse the child's appointed attorney for any expenses incurred in securing the psychiatrist's testimony. Tex. Health & Safety Code §§ 574.010(a), (b).

What Should a CME for Mental Illness Include?

1. Name and address of examining physician
2. Name and address of the child examined
3. Date and place of examination
4. Brief diagnosis of the child's physical and mental condition
5. The time period, if any, the child has been under the physician's care
6. A description of the mental health treatment the examining physician has given to the child, if any
7. The examining physician's opinion that:
    a. The child is a person with mental illness; and
    b. As a result of that illness the child is likely to cause serious harm to the child or to others or is:
        i. Suffering severe and abnormal mental, emotional, or physical distress;
        ii. Experiencing substantial mental or physical deterioration of the child's ability to function independently, exhibited by the inability to provide for basic needs; and
        iii. Not able to make a rational and informed decision as to whether to submit to treatment.

The examining physician must be as specific and detailed as possible as to which criterion forms the basis of their opinion, and, if it is offered in support of an application for extended court-ordered services, must state that the child's condition is likely to continue for more than 90 days. Tex. Health & Safety Code § 574.011.

6.7.15 Commitment Hearing

The court must conduct the hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code. Tex. Fam. Code § 55.38(a)(2).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) added sections 574.0345 and 574.0355 of the Texas Health and Safety Code. The bill took the temporary and extended inpatient, and the temporary and extended outpatient commitment procedures that were contained in sections 574.034 and 574.035 and divided them so that there is now one section for each procedure.

- Section 574.034: Order for Temporary Inpatient Mental Health Services
- Section 574.0345: Order for Temporary Outpatient Mental Health Services
- Section 574.035: Order for Extended Inpatient Mental Health Services
- Section 574.0355: Order for Extended Outpatient Mental Health Services

- The child is entitled to be present at the hearing, but the child or their attorney may waive this right. Tex. Health & Safety Code § 574.031(c).
- The hearing must be open to the public unless the child or their attorney requests that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 574.031(d).
  - Generally, juvenile court proceedings are open to the public unless good cause is shown to exclude the public. Tex. Fam. Code § 54.08(a).
  - If a child is under the age of 14 at the time of the hearing, the court **shall close** the hearing to the public, unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public. Tex. Fam. Code § 54.08(c).
- In a hearing for *temporary* inpatient or outpatient mental health services, the child or their attorney may waive the right to cross-examine witnesses by filing a written waiver with the court. If that right is waived, the court may admit the CMEs as evidence, the CMEs will constitute competent medical or psychiatric testimony, and the court can make its findings based solely on the CMEs. Tex. Health & Safety Code § 574.031(d-1).
- In a hearing for *extended* inpatient or outpatient mental health services, the court must hear testimony and cannot make findings solely from the CMEs. Tex. Health & Safety Code § 574.031(d-2).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) added subsections (d-1) and (d-2) to section 574.031 of the Texas Health and Safety Code. These provisions about the right to waive cross-examination of witnesses were originally in sections 574.034 and 574.035 but were pulled out as separate subsections. Additionally, the original statute stated that a patient AND a patient's attorney may, by written document, waive the right to cross-examination of witnesses. The amended statute replaces AND with OR, but as stated above in the duties of the attorney, attorneys must consult and comply with their client's wishes.

The bill also removed subsections in 574.034 and 574.035 regarding admitting the CME as evidence and consolidates the language into subsections 574.031(d-1) and (d-2).

- Unlike the probable cause hearing, the final hearing is governed by the Texas Rules of Evidence unless otherwise stated in this subtitle. Tex. Health & Safety Code § 574.031(e).
- Each element of the applicable criteria must be proven by **clear and convincing evidence**, and the hearing must be on the record. Tex. Health & Safety Code § 574.031(g).
- The court may consider the testimony of a non-physician mental health professional in addition to medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(f).
- The hearing for *temporary* mental health services must be before the court unless the child or their attorney requests a jury trial. A hearing for *extended* mental health services must be in front of a jury unless waived by the child or their attorney. The waiver must be sworn and signed unless made orally in the court's presence. Tex. Health & Safety Code §§ 574.032(a), (b), and (c). The court may allow a jury waiver to be withdrawn for good cause shown no later than the eighth day before the hearing. Tex. Health & Safety Code § 574.032(d).
  - If the hearing is before a jury, the jury must determine if the child is a person with mental illness and meets the criteria for court-ordered services; however, the jury cannot make a finding regarding the type of services to be provided. Tex. Health & Safety Code § 574.032(f).
- After conducting the hearing, the juvenile court shall:
  - If the criteria under **Section 574.034 or 574.0345**, Health and Safety Code, are satisfied, order temporary mental health services for the child; or
  - If the criteria under **Section 574.035 or 574.0355**, Health and Safety Code, are satisfied, order extended mental health services for the child.

Tex. Fam. Code § 55.38(b).

- A party to a commitment proceeding can appeal the judgment to the appropriate court of appeals. Notice of appeal must be filed no later than 10 days after the date the order is signed. Tex. Health & Safety Code §§ 574.070(a), (b).

Note: If the judge or the jury fails to find, from **clear and convincing evidence**, that the child is a person with mental illness and meets the applicable commitment criteria, the court shall enter an order **denying the application for court-ordered temporary or extended mental health services, and order the immediate release of the child**. Tex. Health & Safety Code § 574.033.

6.7.16 Commitment Orders

Orders Must Clearly Specify Commitment Criteria

The Code requires that orders for temporary or extended inpatient treatment must specify which criteria the judge or jury is basing their decision upon. There has been conflicting caselaw in this area. Some appellate courts have allowed an order to submit the criteria in the disjunctive (i.e. listing the criteria with OR), while other courts have found that listing the criteria in the conjunctive (with AND) is the only way to ensure that there are specific findings.[188]

A suggested practice to avoid any confusion is to take the word "or" out of any order for temporary or extended inpatient treatment, thus requiring specific finding on any of the criteria listed.

Order for Temporary Inpatient Mental Health Services

The judge may order a child to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from **clear and convincing evidence**, that:

1. The child is a person with mental illness; and
2. As a result of that mental illness the child:
   A. Is likely to cause serious harm to themselves;
   B. Is likely to cause serious harm to others; or
   C. Is:
      i. Suffering severe and abnormal mental, emotional, or physical distress;
      ii. Experiencing substantial mental or physical deterioration of the child's ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and
      iii. Unable to make a rational and informed decision as to whether or not to submit to treatment.

Tex. Health & Safety Code § 574.034(a).

- If the judge or jury finds that the child meets the commitment criteria, the judge or jury must specify which criterion listed in Subsection (a)(2) forms the basis for the decision. Tex. Health & Safety Code § 574.034(c).
- To be **clear and convincing**, the evidence must include expert testimony and, unless waived, evidence of a recent overt act[189] or a continuing pattern of behavior that tends to confirm:
  1. The likelihood of serious harm to the child or others; or

[188] Hon. Guy Herman, Mental Health Law 8 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

[189] Note that the Texas Supreme Court, in *State v. K.E.W.*, clarified the "overt act" requirement. The Court held that the act does not have to be actually harmful or demonstrate that harm to others is imminent. The case also states that speech alone may be considered an overt act. *See* State v. K.E.W., 315 S.W. 3d 16, 24 (Tex. 2010).

2. The child's distress and the deterioration of the child's ability to function.

Tex. Health & Safety Code § 574.034(d).

- An order for temporary inpatient services must include a treatment period of not more than 45 days, except that the judge may order 90 days if they find the longer period necessary. Tex. Health & Safety Code § 574.034(g).
  - A judge may not issue an order for temporary inpatient mental health services for a proposed patient who is charged *with a criminal offense* that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.034(h).
    - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Note: The "majority of [appellate courts] find that the requirement of 'overt acts or patterns of behavior' may not be fulfilled merely by citing a patient's refusal of treatment."[190]

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) amended section 574.034(g) of the Texas Health and Safety Code. The court must now provide a definitive time period in its order for temporary inpatient treatment not to exceed 45 days, or 90 days if the judge finds it necessary.

The bill also amended subsection 574.035(h) of the Texas Health and Safety Code, requiring that for extended inpatient treatment, the court must also include a definitive time period in its order, not to exceed 12 months. This allows the court to consider a shorter time period than 12 months, which was previously not allowed under the statute.

Note that a facility still must release a person if they no longer meet commitment criteria, even if the court-mandated time period has not elapsed. *See O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975) ("even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.")

Order for Temporary Outpatient Mental Health Services

The judge may order a child to receive court-ordered temporary outpatient mental health services only if:

1. The judge finds that appropriate mental health services are available to the child; and
2. The judge or jury finds, from **clear and convincing** evidence, that:
   A. The child is a person with severe and persistent mental illness;
   B. As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
   C. Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others; and
   D. The child has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
      i. Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or
      ii. Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.

[190] Hon. Guy Herman, Mental Health Law 13 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

Tex. Health & Safety Code § 574.0345(a).

- To be **clear and convincing**, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  1. The deterioration of ability to function independently to the extent that the child will be unable to live safely in the community;
  2. The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
  3. The child's inability to participate in outpatient treatment services effectively and voluntarily.

Tex. Health & Safety Code § 574.0345(b).

- An order for temporary outpatient mental health services must state that treatment is authorized for not longer than 45 days, *but the judge may specify a period up to 90 days if the judge finds that the longer period is necessary*. Tex. Health & Safety Code § 574.0345(c).
- A judge may not issue an order for temporary outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.034(h).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Legislative Change

S.B. 362 (86th Reg. Sess. (2019)) removed the former requirement for outpatient treatment that a court must find the patient "will continue to suffer severe and abnormal mental, emotional, or physical distress" and replaced it with the requirement in new section 574.0345 and 574.0355 that the court find "outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the proposed patient or others."

New section 574.0345 and 574.0355 also change the requirement for a court to order outpatient treatment; previously the court had to find that the patient's clinical condition "makes impossible" the ability to make rational and informed decisions. As amended, a court must find that the patient's condition "significantly impairs" that ability.

Open and Frequent Communication Between Courts and LMHAs

In order to maintain the most up-to-date information about the availability of outpatient mental health services, courts should ensure that they are familiar with their LMHA and have a contact person who can provide the court with information on available resources.

Order for Extended Inpatient Mental Health Services

The judge may order a child to receive court-ordered extended inpatient mental health services only if the judge or the jury finds, from **clear and convincing evidence**, that:

1. The child is a person with mental illness;
2. As a result of that mental illness the child:
   A. Is likely to cause serious harm to themselves;
   B. Is likely to cause serious harm to others; or
   C. Is:

i. Suffering severe and abnormal mental, emotional, or physical distress;

ii. Experiencing mental or physical deterioration of the child's ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and

iii. Unable to make a rational and informed decision as to whether or not to submit to treatment;

3. The child's condition is expected to continue for more than 90 days; and
4. The child has received court-ordered inpatient mental health services under this subtitle or under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.

Tex. Health & Safety Code § 574.035(a).

- If the judge or the jury finds that the child meets the commitment criteria, the judge or jury must specify which criterion listed in Subsection (a)(2) forms the basis for the decision. Tex. Health & Safety Code § 574.035(c).
- To be **clear and convincing**, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  1. The likelihood of serious harm to the child or others; or
  2. The child's distress and the deterioration of the child's ability to function.

Tex. Health & Safety Code § 574.035(e).

- An order for extended inpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.035(h).
- A judge may not issue an order for extended inpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.035(i).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Order for Extended Outpatient Mental Health Services

The judge may order a child to receive court-ordered extended outpatient mental health services only if:

1. The judge finds that appropriate mental health services are available to the child; and
2. The judge or jury finds, from **clear and convincing evidence**, that:
   A. The child is a person with severe and persistent mental illness;
   B. As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
   C. Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others;
   D. The child has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:
      i. Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or
      ii. Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment;
   E. The child's condition is expected to continue for more than 90 days; and
   F. The child has received:
      i. Court-ordered inpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, for at least 60 days during the preceding 12 months; or

ii. Court-ordered outpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, during the preceding 60 days.

Tex. Health & Safety Code § 574.0355(a).

- To be **clear and convincing**, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  1. The deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community;
  2. The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
  3. The child's inability to participate in outpatient treatment services effectively and voluntarily.

Tex. Health & Safety Code § 574.0355(c).

- An order for extended outpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.0355(d).
- A judge may not issue an order for extended outpatient mental health services for a child who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.0355(e).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

6.7.2 Referral for Commitment Proceedings for Mental Illness

If the case is referred to an appropriate county or probate court, the judge of that court completes the commitment hearing process. The juvenile court must send all papers relating to the child's mental illness to both the clerk of the court to which the case is referred, and to the office of the appropriate county or district attorney. Tex. Fam. Code §§ 55.39(a)(1), (2). The papers sent to the clerk of a court constitute an application for mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.39(b).

If the child is in detention, the judge has three options:

- Order the child released from detention to the child's home or another appropriate place;
- Order the child detained in an appropriate place other than a juvenile detention facility; or
- If an appropriate place is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.

Tex. Fam. Code § 55.39(a)(3).

6.7.3 Standards of Care

The standard of care and treatment is defined by Subtitle C, Title 7 of the Health and Safety Code, with the exception of requiring notice by certified mail from the facility administrator to the committing court 10 days before the child is released. Tex. Fam. Code § 55.45(a).

6.8.1 Commitment Proceedings in Juvenile Court for Intellectual Disability

The juvenile court has the option of hearing the commitment proceeding or referring it to an appropriate county or probate court. Tex. Fam. Code § 55.40.

6.8.11 Application for Court-Ordered Intellectual Disability Proceedings

For commitment proceedings in juvenile court, the prosecutor must file an application for placement under Section 593.041, Health and Safety Code. Tex. Fam. Code § 55.41(a).

- The application must be filed in the county where the child resides. Tex. Health & Safety Code § 593.041(b).

What Should be Included in the Application

An application must include:

- The name, birth date, sex, and address of the proposed resident;
- The name and address of the proposed resident's parent or guardian, if applicable;
- A short, plain statement of the facts demonstrating that commitment to a facility is necessary and appropriate; and
- A short, plain statement explaining the inappropriateness of admission to less restrictive services.
- A copy of the interdisciplinary report if it is completed.

Tex. Health & Safety Code §§ 593.042(a), (b).

6.8.12 Interdisciplinary Team Report

A person may not be committed for placement in a residential care facility unless a report by an interdisciplinary team recommending the placement has been completed during the six months prior to the date of the hearing on the application. If the report and recommendations have not been completed or revised during that period, the court must order the report and recommendations on receiving the application. Tex. Health & Safety Code § 593.041(d).

An interdisciplinary team shall:

1. Interview the person with an intellectual disability, the person's parent **if the person is a minor**, and the person's guardian;
2. Review the person's:
   A. Social and medical history;
   B. Medical assessment, which shall include an audiological, neurological, and vision screening;
   C. Psychological and social assessment; and
   D. Determination of adaptive behavior level;
3. Determine the person's need for additional assessments, including educational and vocational assessments;
4. Obtain any additional assessment necessary to plan services;
5. Identify the person's habilitation and service preferences and needs;
6. Recommend services to address the person's needs that consider the person's preferences.

Tex. Health & Safety Code § 593.013(b).

- The interdisciplinary team shall give the person, the person's parent **if the person is a minor**, and the person's guardian an opportunity to participate in team meetings. Tex. Health & Safety Code § 593.013(c).
- The interdisciplinary team may use a previous assessment, social history, or other relevant record from a school district, public or private agency, or appropriate professional if the interdisciplinary team determines that the assessment, social history, or record is valid. Tex. Health & Safety Code § 593.013(d).
- The interdisciplinary team shall prepare a written report of its findings and recommendations that is signed by each team member and shall promptly send a copy of the report and recommendations to the person, the person's parent **if the person is a minor**, and the person's guardian. Tex. Health & Safety Code § 593.013(e).
- If the court has ordered the interdisciplinary team report and recommendations under Section 593.041, the team shall promptly send a copy of the report and recommendations to the court, the person with an intellectual disability or the person's legal representative, the person's parent **if the person is a minor**, and the person's guardian. Tex. Health & Safety Code § 593.013(f).

6.8.13 Appointment of an Attorney under HSC 593.043

- The child must be represented by an attorney who will represent the rights and legal interests of the child without regard to who has retained the attorney. Tex. Health & Safety Code § 593.043(a).
- If the child is indigent, the judge must appoint an attorney by the 11th day before the hearing. Tex. Health & Safety Code § 593.043(b).

- The parent, **if the proposed resident is a minor**, or the guardian of the person may be represented by legal counsel during the proceedings. Tex. Health & Safety Code § 593.043(d).

6.8.14 Setting the Commitment Hearing in Juvenile Court

The juvenile court must set a date for the hearing and provide notice as required under Sections 593.047 and 593.048, Health and Safety Code. Tex. Fam. Code § 55.41(a)(1).

- The court must immediately set the hearing at the earliest practicable date to determine the appropriateness of the commitment. Tex. Health & Safety Code § 593.047.
- At least 11 days before the hearing, a copy of the application, notice of the time and place of the hearing, and, if appropriate, the order for the determination of an intellectual disability and interdisciplinary team report and recommendations must be served on:
  - The proposed resident or the proposed resident's representative;
  - The parent **if the proposed resident is a minor**;
  - The guardian of the person; and
  - The department.[191]

Tex. Health & Safety Code § 593.048(a).

- The notice must specify in plain and simple language:
  - The right to an independent determination of an intellectual disability under Section 593.007; and
  - The provisions of Sections 593.043[192], 593.047[193], 593.049[194], 593.050[195], and 593.053[196].

Tex. Health & Safety Code § 593.048(b).

6.8.15 Commitment Hearing

The court must conduct the hearing in accordance with Sections 593.049 – 593.056, Health and Safety Code. Tex. Fam. Code § 55.41(a)(2).

- The hearing is before the court but shall be before a jury if any party or the court request a jury trial. The Texas Rules of Civil Procedure apply to all aspects of the proceedings and trial unless the rules are inconsistent with this subchapter. Tex. Health & Safety Code §§ 593.049(a), (b).
- The hearing must be open to the public unless the child or their representative request that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 593.050(a).
  - Generally, juvenile court proceedings are open to the public unless good cause is shown to exclude the public. Tex. Fam. Code § 54.08(a).
  - If a child is under the age of 14 at the time of the hearing, the court **shall close** the hearing to the public, unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public. Tex. Fam. Code § 54.08(c).
- The child is entitled to be present throughout the hearing. If the court determines that the presence of the child would result in harm to the child, the court can waive the requirement in writing clearly stating the reason for the decision. Tex. Health & Safety Code § 593.050(b).
- The child is entitled to and must be provided the opportunity to confront and cross-examine each witness. Tex. Health & Safety Code § 593.050(c).

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[191] Here, "the department" refers to the Department of Aging and Disability Services. Tex. Health & Safety Code § 591.003(7). As all DADS functions were transferred to HHSC on September 1, 2017, it may be advantageous to serve HHSC to satisfy the notice requirement.

[192] Representation by Counsel; Appointment of Attorney.

[193] Setting on Application.

[194] Hearing Before Jury; Procedure.

[195] Conduct of Hearing.

[196] Decision.

- The Texas Rules of Evidence apply. The results of the determination of an intellectual disability and the current interdisciplinary team report and recommendations *shall* be presented in evidence. Tex. Health & Safety Code § 593.050(d).
- The party who filed the application has the burden to prove **beyond a reasonable doubt** that long-term placement of the child in a residential care facility is appropriate. Tex. Health & Safety Code § 593.050(e).
- If long-term placement in a residential care facility is not found to be appropriate, the court shall enter a finding to that effect, **dismiss** the application, and if appropriate, recommend application for admission to voluntary services under Subchapter B. Tex. Health & Safety Code § 593.051.
- In each case, the court shall promptly report in writing the decision and findings of fact. Tex. Health & Safety Code § 593.053.

6.8.16 Commitment Order

A child may not be committed to a residential care facility unless each of the following elements has been proved **beyond a reasonable doubt**:[197]

1. The child is a person with an intellectual disability;
2. Evidence is presented showing that because of the child's intellectual disability, the child:
    A. Represents a substantial risk of physical impairment or injury to themselves or others; or
    B. Is unable to provide for and is not providing for their most basic personal physical needs;
3. The child cannot be adequately and appropriately habilitated in an available, less restrictive setting; and
4. The residential care facility provides habilitative services, care, training, and treatment appropriate to the child's needs.

Tex. Health & Safety Code § 593.052(a).

- If the commitment criteria are met, and long-term placement in a residential care facility is appropriate, the court shall commit the child for care, treatment, and training to a community center or the department[198] when space is available at a residential care facility. Tex. Health & Safety Code § 593.052(b).
- The court shall immediately send a copy of the commitment order to the department or community center. Tex. Health & Safety Code § 593.052(c).
- If placement in a residential facility is necessary, preference shall be given to the facility nearest to the residence of the child unless:
    1. Space in the facility is unavailable;
    2. The child, parent if the resident is a minor, or guardian of the child requests otherwise; or
    3. There are other compelling reasons.

Tex. Health & Safety Code § 593.055.

- A party to a commitment proceeding has the right to appeal the judgment to the appropriate court of appeals. An appeal under this section shall be given a preference setting, and the county court may grant a **stay of commitment** pending appeal. Tex. Health & Safety Code §§ 593.056(a), (c) and (d).

6.8.2 Referral for Commitment Proceedings for ID

If the case is referred to an appropriate county or probate court, the judge of that court completes the commitment hearing process. The juvenile court must send all papers relating to the child's intellectual disability to both the clerk of the court to which the case is referred, and to the office of the appropriate county or district attorney. Tex. Fam. Code §§ 55.42(a)(1), (2). The papers sent to the clerk of a court constitute an application for mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.42(b).

If the child is in detention, the judge has three options:

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[197] *See* Pratt v. State, 907 S.W. 2d 38, 44 (Tex. App.—Dallas 1995, writ denied).

[198] "The department" refers to DADS, which was transferred to HHSC on September 1, 2017.

- Order the child released from detention to the child's home or another appropriate place;
- Order the child detained in an appropriate place other than a juvenile detention facility; or
- If an appropriate place is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.

Tex. Fam. Code § 55.42(a)(3).

6.8.3 Standards of Care

The standard of care and treatment is defined by Subtitle D, Title 7 of the Health and Safety Code, with the exception of requiring notice by certified mail from the facility administrator to the committing court 20 days before the child is released. Tex. Fam. Code § 55.45(b).

- If the child is alleged to have committed an offense listed in Article 42A.054, Code of Criminal Procedure, the facility administrator must apply in writing, to the committing court, for authorization to release or furlough the child for a period of 48 hours or longer, and show good cause. Notice of the request must be provided to the prosecutor. The prosecutor, the child, or the administrator can apply for a hearing on the request. The rules of evidence do not apply to the hearing, and no appeal can be taken. If there is no request for a hearing, the court makes the decision based on the application for authorization. Tex. Fam. Code § 55.45(c).

6.9 Restoration Hearing

The prosecutor can move for a restoration hearing if:

1. The child is found unfit to proceed as a result of MI or ID; and
2. The child:
   A. Is **not**:
      i. Ordered by a court to receive inpatient mental health or intellectual disability services;
      ii. Committed by a court to a residential care facility; or
      iii. Ordered by a court to receive treatment or services on an outpatient basis; or
   B. Is discharged or currently on furlough from a mental health facility or outpatient center before the child reaches 18 years of age.

Tex. Fam. Code § 55.43(a).

- At the restoration hearing, the court shall determine the issue of whether the child is fit to proceed. The hearing is before the court, and the issue of fitness must be proved by a **preponderance of the evidence**. Tex. Fam. Code §§ 55.43(b-d).
- If the court finds that the child is fit to proceed, the court shall **continue** the juvenile court proceedings. If the court finds that the child is not fit to proceed, the court shall **dismiss** the motion for restoration. Tex. Fam. Code §§ 55.43(e), (f).

6.10 Transfer to Criminal Court on 18th Birthday of Child

The juvenile court is required to transfer all pending proceedings from the juvenile court to a criminal court on the 18th birthday of a child for whom a court has ordered inpatient mental health services or residential care if:

1. The child has not been discharged or furloughed from the facility before reaching 18 years of age; and
2. The child is alleged to have engaged in delinquent conduct that included a violation of a penal law listed in Section 53.045 (Offenses Eligible for Determinate Sentence) and no adjudication has occurred.

Tex. Fam. Code § 55.44(a).

- The juvenile court must send notification of the transfer to the facility. The criminal court must, within 90 days of the transfer, institute proceedings under Chapter 46B, Code of Criminal Procedure. If those or any subsequent proceedings result in a determination that the defendant is **competent to stand trial**, the defendant may not receive a punishment for the conduct that results in confinement for a period longer than the maximum period of confinement they could have received if the defendant had

been adjudicated for the delinquent conduct while still a child and within the jurisdiction of the juvenile court[199]. Tex. Fam. Code § 55.44(b).

- Practically, if a child turns 18 while committed to a facility, the child will be transferred to the adult unit of the facility. As the child is now an adult, the child should not be returned to the juvenile detention facility to wait for a bed at the adult unit of the facility. This should be handled by the facility as a direct transfer.

Practical Ideas for Counties to Streamline Fitness Restoration and Save Money[200]

1. Assign One Point-of-Contact Between your County and the State Hospital. Send a letter annually to the state hospital notifying them that your point-of-contact should receive all communication (name, email address and phone number).

2. Communicate with the State Hospital via Email or Fax. Use email or fax to save wait time when the state hospital notifies the county that the juvenile is ready to be transported to or from the hospital.

3. Urge the State and Defense to Continue Working on the Case While Waiting for the Juvenile to Return. Attorneys should continue working on fitness cases to address discovery issues, plea offers, and other tasks during the hospitalization to allow for speedy resolution once returned.

4. Coordinate Transportation. Once the contact person has received notice that a juvenile has been restored, prepare any paperwork that is needed to schedule transportation within three days to cut time in getting the juvenile back to your county.

5. Develop a Policy of Quick Court Settings Upon Return from State Hospital. Have the county point-of-contact communicate with the court to set the juvenile's case on a docket within three days of returning from the state hospital.

6. Develop a Policy of No Free Passes. To prevent the juvenile from decompensating, make a judicial policy that an attorney may not pass a setting on a client who has returned from the state hospital unless the attorney appears before the court.

7. Set Weekly Medical Meetings to Review Specific Cases. Utilize Tex. Health and Safety Code § 614.017 to exchange information with the LMHA(s), detention center staff, the prosecuting attorney, and the defense attorney. Use these meetings to review the status of cases with fitness issues. Keep a running list of the following:

  - — Who needs to be on the fitness radar?
  - — Who has improved?
  - — Is outpatient competency restoration an option?
  - — Who needs transportation to or from the state hospital?
  - — Is it time for the prosecutor to consider dismissing the case?
  - — Does the court need to be aware of any juveniles who are decompensating or at risk of decompensating?
- Reconsider juveniles for outpatient restoration services if they have been stabilized in detention. This can shorten your detention center's waitlist for state hospital.
- After medical meetings, email the court any updates or reminders. that action may need to be taken soon. For example, a juvenile who is deteriorating in detention.

[199] *See* Ex Parte S.L.B., 591 S.W.3d 705 (Tex. App.—Fort Worth 2019) (discussing the maximum period of confinement).

[200] *Adapted from* Alyse Ferguson, Improving Competency Restoration Processes, Texas Judicial Commission on Mental Health Collaborative Council Meeting (2020).

7. Lack of Responsibility

Lack of responsibility is akin to insanity in the adult criminal court. While there are a number of similarities, courts and practitioners must also be aware of the differences. In both contexts, it is a defense which must be proved by a preponderance of the evidence. Tex. Fam. Code § 55.51(d), Tex. Code Crim. Proc. art. 46C.153(a)(2). However, adult criminal court has a narrower test focused on whether the defendant knew at the time of the offense, due to mental illness or [intellectual disability], that what they were doing was wrong. Tex. Penal Code § 8.01(a). In contrast, the family code has a broader test that asks whether the juvenile respondent, at the time of the conduct, as a result of mental illness or an intellectual disability, lacked the substantial capacity either to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law. Tex. Fam. Code § 55.51(a).

Unlike fitness to proceed, lack of responsibility is a defensive issue presented to the judge or jury during the adjudication hearing. Tex. Fam. Code § 55.51(c). A finding of lack of responsibility means that juvenile court proceedings regarding the specific conduct, are over. However, commitment proceedings will continue. Tex. Fam. Code § 55.51(g). A flowchart to aid in understanding the lack of responsibility process can be found on **pages 131 and 132**.

Making the Distinction: Fitness, Lack of Responsibility, Mental Illness, and Intellectual Disability

Fitness: relates to a juvenile's mental state and present capacity to stand trial; fitness is not a defense to the charged conduct.

Lack of Responsibility: relates to the juvenile's mental state at the time of the conduct and is an affirmative defense to prosecution.

Mental Illness: an illness, disease, or condition, other than epilepsy, senility, alcoholism, or mental deficiency, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior. Tex. Fam. Code § 55.01, Tex. Health & Safety Code § 571.003(14). *Note that a child can have MI and be fit to proceed; similarly, a child may have MI but not meet the legal standard for lack of responsibility*.

Intellectual Disability: significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period. Tex. Code Crim. Proc. art. 46B.001(8); Tex. Health & Safety Code § 591.003. *As with MI, a child can have ID and be fit to proceed; similarly, a child may have ID but not meet the legal standard for lack of responsibility*.

When a fitness evaluation occurs close in time to the date of the delinquent conduct, it may be advantageous to have the examiner also offer an opinion as to whether the child lacked responsibility at the time of the conduct, so that vital insight into the child's mental condition at the time is documented for future use. It is also important that the expert receive the law enforcement reports in the case so they can effectively assess the child's perceptions and actions in light of the statements by witnesses and other information found during the investigation. Practitioners must carefully review the reports to ensure that there is no mention of the child's risk factors.

A checklist to assist in identifying possible MI or ID can be found on **page 149**.

Texas Family Code (FC) – Chapter 55, Subchapter D
Lack of Responsibility for Conduct ("55-D")

A child is **Not Responsible For Conduct** if, **at the time of the conduct**, the child, due to **Mental Illness (MI)** or **Intellectual Disability (ID)** lacks substantial capacity to:

- **appreciate the wrongfulness of their conduct**; **or**
- **conform their conduct to the requirements of law.**

[FC § 55.51(a)]

A **Party** to a Juvenile Proceeding on motion to the court may raise the issue of **lack of responsibility, due to MI** or **ID, for conduct**; whereupon the **Court shall order** the child to be examined under **[FC §51.20]** by a **Disinterested Expert** (physician, psychiatrist, or psychologist) to render **Expert Opinion** on whether the child is not responsible for conduct due to **MI** or **ID**. **[FC § 55.51(b)]**. If the Expert is also appointed to assess the child's fitness to proceed the Expert must additionally meet qualifications under **CCP, Art. 46B.022**

Flow Chart Key

- **Informational**
- **Alternatives**
- **Exits from 55-D**

The issue of child's lack of responsibility for conduct, as a result of MI or ID, may be tried before **jury** or **court**. The moving party bears the burden to show the child's lack of responsibility by a **preponderance of the evidence**.
The court findings or jury verdict regarding lack of responsibility must state whether the child's conduct was a result of MI or ID. **[FC § 55.51(c)-(e)]**

There are no set timelines in Subchapter for getting Expert's report to the court or in which to hold a hearing on the matter.

There are also no parallel provisions from Subchapters B and C regarding a resumption of proceedings if the burden of proof is not met. However, since all subsequent provisions are contingent upon affirmative findings, a failure to meet burden should logically yield a resumption of proceedings.

*FC currently cites to agencies that no longer operate the **State Facilities**. **[Tex. Gov't Code § 531.0011(a)]** substitutes **HHSC** for named agency.

The **facility director is likely not an expert qualified to render expert opinion regarding MH or ID and whether child meets commitment criteria. Report should include evidence from qualified experts.

Court orders the **child placed** **[FC § 55.52(a)]**

If child is **placed** as a result of **MI** or **ID** and the **Court determines**, after consulting with the probation department and local treatment or service providers, that the **child may be adequately treated or served in an alternative setting**, order the child to receive treatment or services on an **Outpatient** basis for a period of **not more than 90 days** **[FC § 55.52(a)(3)/(c)]**

Provided that the child meets the civil commitment criteria under **Subtitle C** or **D**, Title 7, **H&S Code** (**MH Code** or Persons with Intellectual Disabilities Act [**PIDA**], respectively), the Court **orders the child placed** in an inpatient or residential facility designated by **HHSC*** for a period of **not more than 90 days** **[FC § 55.52(a)(1)]**

On application by the child's parent, guardian, or guardian ad litem, the Court may order the child placed in a **private psychiatric inpatient facility** for a period of not more than **90 days** but **only if** due to child's **MI** and the **placement is agreed to** in writing by **the administrator of the facility** **[FC 55.52 § (a)(2)]**

Not later than the **75th day after** the date the Court issues a **placement order**, the facility shall submit a **Report** to the **Court** that:

- **Describes treatment** or **services provided** to the child; and
- States the **opinion** of the **director of the facility**** whether the child has **MI** or **ID** **[FC § 55.54(b)]**
  - ❖ *While not specified in § 55.54(b), due to requirements in subsequent provisions, the **Report** must also address **whether** the child **meets commitment criteria** under **MH Code** or **PIDA**.*

The **Court shall provide** the facility's **Report** to the **prosecution** and **attorney for the child** **[FC § 55.54(c)]**

Court is to order the **child returned to Court** by county's probation or sheriff's department **within 10 days** of the facility's **Report**. If child is not returned to court within that time, facility shall return child and the county must pay for costs of transportation **[FC § 55.53(b)]**

Lack of Responsibility for Conduct - continued on next page

Flowchart developed by Chris Lopez, Texas Health and Human Services Commission

Lack of Responsibility for Conduct - continued from first page

If the **Report** states the Child **has (MI)** and meets MH Code commitment criteria, the facility shall also provide the Court with two Certificates of Medical Examination **(CME's)** **[FC § 55.56]**

Juvenile Court may **either**:
(1) **Initiate** MH Code proceedings;
or
(2) **Refer case** to civil court with probate jurisdiction for commitment

If the **Report** **[FC § 55.54(b)]** states that the Child does **not** have **MI** or **ID** (*or does not meet commitment criteria*) the **Court shall Discharge** the Child **unless:**
(1) child is charged with Penal Code listed in § 53.045(a); and
(2) **attorney objects** in writing **within 2 days** of receipt of the report **[FC § 55.55(a)]**

No Objection

Objection

Court Discharges Child

The **Court** (no jury) shall hold hearing to determine if Child has **MI** or **ID** and meets commitment criteria under **MH Code** or **PIDA**. State has **clear and convincing** burden of proof **[FC § 55.55(b)/(c)]**.

State **fails** to meet burden **[FC § 55.55(d)]**

State **meets** burden, the court enters order under **MH Code** or **PIDA** **[FC § 55.55(e)]**

If the **Report** states the Child has **(ID)** and meets PIDA commitment criteria the facility shall also provide the Court with an **Affidavit** on the basis of their determinations of diagnosis **[FC § 55.59]**

Juvenile Court may **either**:
(1) **Initiate** proceedings under PIDA: **or**
(2) **Refer case** to civil court for PIDA commitment

Civil Commitment by **Juvenile Court** in accordance with Subchapter C, Chapter 574, Health & Safety Code (**Mental Health Code**) to order temporary or extended **Inpatient** or **Outpatient mental health services** **[FC § 55.57]** **see also** **[H&S Code § 574.034/.0345 or 574.035/.0355]**

Civil Commitment by **Juvenile Court** in accordance with Subchapter C, Chapter 593, Health & Safety Code **(Persons with Intellectual Disabilities Act)** to order commitment to **Residential Care Facility** **[FC § 55.60]** **see also** **[H&S Code § 593.052]**

The **Juvenile Court** refers the matter to **Court** with **Probate Jurisdiction** for **MH** civil proceedings **[FC § 55.58]**

The **Juvenile Court** refers the matter to **Court** with **Probate Jurisdiction** for **PIDA** civil proceedings **[FC § 55.61]**

Developmental Period

Children who are referred to the juvenile court are, by definition, "in their developmental period" (under age 18); therefore, a child who has a diagnosis of having a pervasive developmental disorder in a psychological or psychiatric report probably qualifies as having an intellectual disability.[201]

Obtaining a diagnosis of intellectual disability from the LIDDA can facilitate a child's lifetime access to state-funded disability services.

7.1 Raising the Issue

- **Any party** can raise the issue of lack of responsibility as a result of mental illness (MI) or intellectual disability (ID). Tex. Fam. Code § 55.51(b).
- Once the motion is filed, the court must order the child to be examined under Texas Family Code § 51.20. Tex. Fam. Code § 55.51(b).
    - The information obtained from the examination must include expert opinion as to whether the child is not responsible for their conduct as a result of MI or ID. Tex. Fam. Code § 55.51(b).

Note: While the Family Code permits any party to raise lack of responsibility, a decision by the State to raise the issue may be problematic considering the child's 5th Amendment right against compelled self-incrimination and potential disclosures of the child's defensive theories during an examination.

7.2 Qualifications of Experts

Judges should critically vet the experts they appoint. This minimally entails verifying that an expert meets the statutory qualifications prior to appointment. It should be noted that the qualifications for experts who perform fitness examinations and for experts who perform lack of responsibility examinations are not the same. Experts who perform fitness examinations are required to meet the additional qualifications of Subchapter B, Chapter 46B, Code of Criminal Procedure. **See page 110** of this book for more information about expert qualifications to perform fitness examinations.

- The expert opinion as to whether the child *lacks responsibility* can be from a physician, psychiatrist, or psychologist; however, the expert must also be qualified by education and clinical training in mental health or [intellectual disability] and experienced in forensic evaluation. Tex. Fam. Code § 51.20(a).

[201] William R. "Bill" Cox, Texas Family Code Chapter 55: Mental Health Proceedings, 26th Annual Robert O. Dawson Juvenile Law Institute (2013), https://juvenilelaw.org/wp-content/uploads/2017/06/07_Cox.pdf.

Disinterested Experts and Evaluations

Texas Family Code § 51.20 authorizes the appointment of a "disinterested expert, including a physician, psychiatrist, or psychologist, qualified by education and clinical training in mental health or [intellectual disability] and experienced in forensic evaluation…" Tex. Fam. Code § 51.20(a). It can be difficult to determine what type of assessment is needed when trying to help a child. This is in part due to shared skills that exist across various professions. Below are the general responsibilities of specialized practitioners. As noted above, forensic experience and specialized training are factors to consider when deciding on an evaluator, as well as availability.

Psychiatrist: Medical doctor that focuses on disorders of mood or thinking including depression, anxiety, ADHD, and psychosis. Utilizes clinical interview, self-report measures and review of collateral information as part of assessment. Treatment modalities include medication and referral to psychotherapy. Some psychiatrists also provide therapy themselves.

Psychologist: Doctorate-level clinician that focuses on disorders of mood or thinking including depression, anxiety, ADHD, and psychosis. Utilizes psychological testing, self-report measures, clinical interview and review of collateral information as part of assessment. Treatment modalities include individual, family, and group therapy along with skills training.

Neuropsychologist: Psychologist specializing in disorders of thinking including dementia; developmental, learning or attention disabilities; and traumatic brain injury. Utilizes clinical interview, self-report measures, review of collateral information, and specialized psychological testing including measures of executive, visuospatial, and memory functioning as part of assessment. Treatment modalities include skills training to address neuropsychological challenges and referral to ancillary therapies.

Neurologist: Medical doctor that focuses on disorders of the brain and nervous system including Parkinson's, multiple sclerosis, stroke, muscle weakness, and ADHD. Utilizes physical exam, electroencephalogram (EEG), electromyography (EMG), or imaging as part of assessment. Treatment modalities include medication and referral to ancillary therapies such as physical or occupational therapy.

Finally, it is important that the expert use measures and processes with the youth that are developmentally, academically, culturally, and linguistically appropriate for the child.

7.3 Hearing on Issue of Lack of Responsibility

- The issue of whether the child is not responsible for their conduct as a result of MI or ID shall be tried to the judge or the jury in the adjudication hearing. Tex. Fam. Code § 55.51(c).
- Lack of responsibility must be proven by a **preponderance of the evidence**. Tex. Fam. Code § 55.51(d).
- The judge or jury must state in its findings or verdict whether the child is not responsible for their conduct due to MI or ID. Tex. Fam. Code § 55.51(e).
    - If the case is tried to a jury, the verdict forms must contain a special issue for the jury to indicate whether the child lacked responsibility or did not lack responsibility.
    - **Note**: Because there is no statutory notice requirement for lack of responsibility, it can be raised by either party at any point during the adjudication phase.

7.4 Proceedings Following a Finding of Lack of Responsibility

Once the child has been found to lack responsibility, a temporary commitment of up to 90 days is required, provided that the child meets the commitment criteria under Subtitle C[202] or D,[203] Title 7, Health and Safety Code. Tex. Fam. Code § 55.52.

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[202] *See* Tex. Health & Safety Code § 574.034 for Temporary Inpatient Mental Health Services criteria or *see* page 120; and *see* Tex. Health & Safety Code § 574.0345 for Temporary Outpatient Mental Health Services criteria or *see* page 121.

[203] *See* Tex. Health & Safety Code § 593.052 for Intellectual Disability criteria or *see* page 127.

Legislative Change

H.B. 2107 (87th Reg. Sess. (2021)) added the option for a child who is unfit to proceed due to an intellectual disability to receive services or treatment in an outpatient setting. Before this change, a child who was unfit to proceed due to ID could only receive services or treatment at an inpatient facility.

- If the lack of responsibility is due to MI, there are three placement options:
  - Placement with the [Texas Health and Human Services Commission][204] (state hospital);
  - Placement in a private psychiatric facility,[205] on application by the child's parent, guardian, or guardian ad litem, so long as the facility administrator agrees in writing; or
  - Placement in an **outpatient** program, if the court approves of the treatment setting.
- If the lack of responsibility is due to ID, there are two placement options:
  - Placement with the [Texas Health and Human Services Commission][206] (state supported living center); or
  - Placement in an outpatient **program**, if the court approves of the treatment setting.

Tex. Fam. Code § 55.52(a).

Best Practices After a Finding of Lack of Responsibility

It is recommended for the probation officer to contact the Continuity of Services Coordinator and staff as soon as possible after a child is committed to a State Hospital or State Supported Living Center to advise them of the potential commitment. The Coordinator may then provide guidance to the probation officer regarding preparation of documentation.

As of this writing, the State Hospital Continuity of Services Coordinator is Pam Marroquin, who can be reached at forensicadmissions@hhsc.state.tx.us or (512) 206-5056.

As of this writing, the State Supported Living Center Continuity of Services Coordinator is Nicole Hawk, who can be reached at (512) 438-3076. As soon as an expert opinion concludes that a child presents with an intellectual or developmental disability, the probation officer should request an IDD Determination assessment through the LIDDA. Proactively submitting a referral can help the child and family receive support sooner regardless of whether the child is deemed responsible.

7.5 Transportation

- If the court issues a placement order, the court must order the probation department or the sheriff's department to transport the child to and from the designated facility. Tex. Fam. Code § 55.53(a).
  - Upon receipt of a report from a facility, the child shall be returned to juvenile court by the 11th day after the date of the court's order, then the facility is required to transport the child to the court, at the county's expense. Tex. Fam. Code § 55.53(b), (c).

[204] Note that the text of the statute indicates the placement is with the Department of State Health Services (DSHS). The 84th Legislature made structural changes to the Health and Human Services system, including the transfer of some DSHS functions to HHSC. As of September 1, 2017, all state hospitals transferred to HHSC from DSHS.

[205] If funding is specifically budgeted for it, the court can order the state to pay the cost of placing a child in a private psychiatric facility, regardless of whether the lack of responsibility is due to MI or ID. Tex. Fam. Code § 55.52(b).

[206] Note that the text of the statute indicates the placement is with the Department of Aging and Disability Services (DADS). As part of the changes made by the 84th Legislature, all remaining DADS functions were transferred to HHSC in September 2017.

7.6 Information Required to be Sent to the Facility

- The court must order the probation department to send copies of any information in their possession that is relevant to the issue of the child's MI or ID to the treatment provider. Tex. Fam. Code § 55.35(a). This may include information in the court's file, the probation department's file, the detention facility file, and/or medical or mental health files maintained by the probation department and/or its medical or mental health providers.

A checklist for locating potential materials in the Juvenile Probation Department's possession can be found on **page 151**.

7.7 Report due to the Court

- Before the 75th day after the commitment order, the treatment provider must submit a report to the court. The report must describe the treatment or services provided to the child and state the facility director's opinion as to whether the child has a mental illness or an intellectual disability. Tex. Fam. Code § 55.54(b).
  - The court must provide a copy of the facility's report to the prosecutor and to the child's attorney. Tex. Fam. Code § 55.54(c).

75th Day

The best practice is for the Court to set a status hearing for the 75th day to be sure the report is received and distributed to all parties.

7.8 Report that Child Does Not Have Mental Illness or Intellectual Disability

- If the facility report states the child does not have a mental illness or an intellectual disability, the juvenile court shall *discharge the child* unless **the prosecutor objects in writing** not later than two days after the attorney receives the report, or a **determinate sentence** adjudication hearing was conducted. Tex. Fam. Code § 55.55(a).
- If a proper objection is made, the court must hold a hearing to determine whether the child has a MI or ID and meets the commitment criteria for civil commitment under Subtitle C or D, Title 7, Health and Safety Code. Tex. Fam. Code § 55.55(b).
- This hearing is before the court, without a jury. Tex. Fam. Code § 55.55(b).
- The burden of proof is on the state to prove by **clear and convincing evidence** that the child has a MI or ID and meets the criteria for civil commitment. Tex. Fam. Code § 55.55(c).
- If the court finds that the child does not have a MI or ID and that the child does not meet the criteria for civil commitment, *the court shall discharge the child*. Tex. Fam. Code § 55.55(d).
- If the court finds that the child has a MI or ID and the child meets the criteria for civil commitment, the court shall issue an appropriate commitment order. Tex. Fam. Code § 55.55(e).

7.9 Report that Child has Mental Illness

At this point the procedures for commitment due to MI and ID become separate: §§ 55.56 through 55.58 govern mental illness while §§ 55.59 through 55.61 govern intellectual disability.[207] The director of the facility that supplied the report must submit two certificates of medical examination (CMEs) to the court. Tex. Fam. Code § 55.56. Once the court receives the CMEs, it can initiate commitment proceedings.

Section 7.9e contains a detailed discussion of CMEs. A sample CME form can be found on **page 153**.

[207] William R. "Bill" Cox, Texas Family Code Chapter 55: Mental Health Proceedings, 26th Annual Robert O. Dawson Juvenile Law Institute (2013), https://juvenilelaw.org/wp-content/uploads/2017/06/07_Cox.pdf.

7.9a Commitment Proceedings in Juvenile Court for Mental Illness

The juvenile court has the option of hearing the commitment proceeding or referring it to an appropriate county or probate court. Tex. Fam. Code § 55.56.

Juvenile Court or Probate Court

The choice of whether to proceed with commitment in juvenile court or to refer the proceedings to a county or probate court rests exclusively with the juvenile court. A juvenile court that hears commitment proceedings infrequently may prefer to have the county or probate court conduct them. The standards for commitment are the same, regardless of which court holds the commitment hearing. County or probate courts may have more frequent interaction with community-based treatment options, private placements, and state facilities. Judges in a community can discuss available resources to determine which approach is advantageous for their constituents. If the juvenile court chooses to refer the case to a county or probate court, it is important to maintain ongoing communication concerning the child's progress and case status.

7.9b Application for Court-Ordered Mental Health Proceedings

For commitment proceedings in juvenile court, the prosecutor must file an application for court-ordered mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.57(a).

What Should be Included in the Application

An application must:

- Be styled using the child's initials and not the proposed patient's full name;
- State whether the application is for temporary or extended services;
- Contain the child's name, address, and county of residence in Texas;
- Include a statement that the child is a person with mental illness and meets the criteria in Chapter 574 for court-ordered mental health services; and
- State whether the child is charged with a criminal offense.

Tex. Health & Safety Code § 574.002(b), (c).

Application Requirements for Extended Court-Ordered Services

Applications for **extended** court-ordered services have several statutory requirements that applications for **temporary** court-ordered services do not require.

- An application for **extended inpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either this subtitle or under Chapter 46B, Subchapter D of the Texas Code of Criminal Procedure (Procedures after Determination of Incompetency) or Subchapter E (Civil Commitment: Charges Pending) for *at least 60 consecutive days during the prior 12 months*.
- An application for **extended outpatient** mental health services must state that the child has received:
  - *Court-ordered inpatient mental health services* under either this subtitle or under Chapter 46B, Subchapter D or E of the Texas Code of Criminal Procedure for *a total of at least 60 days during the prior 12 months*; OR
  - *Court-ordered outpatient mental health services* under this subtitle or Chapter 46B, Subchapters D or E *during the preceding 60 days*.

Tex. Health & Safety Code § 574.002(b).

7.9c Appointment and Duties of an Attorney under HSC 574.004[208]

- The judge must appoint an attorney for the child within 24 hours after the application is filed unless the child already has an attorney. Tex. Health & Safety Code § 574.003(a).
- Texas codifies the duties that an attorney has toward a client in a court-ordered services proceeding in section 574.004, and the court is required to give a copy of these duties to every court-appointed attorney. Tex. Health & Safety Code § 574.003(b).

Included in the list of duties owed by the attorney to the proposed patient, is that the attorney must respect the client's decision to agree or resist the efforts to provide mental health services, even though they may personally disagree with the client's wishes. Though the attorney may provide counsel, the attorney must abide by the client's final decision on the matter. Tex. Health & Safety Code § 574.004(c).

Attorney-Client Relationship

An attorney's rapport with the child they represent is critical and can be life altering. Especially for children who have more significant issues, it is important to recognize that attorneys will need to make multiple visits with the child, which may include meeting with him or her immediately before the evaluation appointments with the purpose of reinforcing the significance of the evaluation and how it will impact the child's case.

7.9d Setting the Commitment Hearing in Juvenile Court

The juvenile court must set a date for the hearing and provide notice as required under Sections 574.005 and 574.006, Health and Safety Code. Tex. Fam. Code § 55.57(a)(1).

- The court must set a hearing within 14 days of the date the application was filed but may not hold a hearing within the first three days after the application is filed if the child or their attorney objects. Tex. Health & Safety Code §§ 574.005(a), (b).
  - There are witnesses who may appear at the hearing to present evidence, who may be unknown to the

[208] *See* page 116 for additional comments on the statutory responsibility of attorneys in commitment cases.

parties prior to the hearing date. If either party wishes, they may request a continuance based on surprise and the court may continue the hearing date. Tex. Health & Safety Code § 574.006(d).

- While the court may grant continuances of the hearing, the final hearing must be held no later than 30 days from the date the application was filed. The only exception is for extreme weather or disaster, in which case the judge may, by a written order each day, postpone the hearing for 24 hours. Tex. Health & Safety Code § 574.005(c).

Note: While the hearing must commence within 30 days, the Court retains its plenary authority to continue the hearing as necessary should issues arise.

- The child and their attorney are entitled to receive a copy of the application and written notice of the court hearing immediately after it is set. Notice must also be delivered in person or via certified mail to the child's:
  - **Parent, if a minor**; or
  - Appointed guardian, if applicable; or
  - **Each managing and possessory conservator**, if applicable. Tex. Health & Safety Code § 574.006(b).
- If a parent cannot be located, and the child does not have a guardian or conservator, the notice may be given to the proposed patient's next of kin. Tex. Health & Safety Code § 574.006(c).

7.9e Medical Examination Requirement

- The director of the facility that supplied the report must submit two certificates of medical examination (CMEs)[209] to the court. Tex. Fam. Code § 55.56.
- The two CMEs must be completed **within the preceding 30 days**, and are required to be on file with the court. At least one of the physicians must be a psychiatrist if a psychiatrist is available in the county. Tex. Health & Safety Code § 574.009(a).
- The court also has the authority to order an independent evaluation of the child, by a psychiatrist of the child's choosing, if the court feels it will assist the finder of fact. If the child is indigent, the county may reimburse the child's appointed attorney for any expenses incurred in securing the psychiatrist's testimony. Tex. Health & Safety Code §§ 574.010(a), (b).

Note: Texas Health & Safety Code § 574.009 (a) requires that at least one of the physicians completing the CMEs must be a psychiatrist if a psychiatrist is available in the county. In the event that the Court determines that a psychiatrist is not available in the county, the Court should enter an order finding that a psychiatrist was not available in the County to provide a CME and making specific finds detailing the factual basis supporting that finding.

7.9f Commitment Hearing

The court must conduct the hearing in accordance with Subchapter C, Chapter 574, Health and Safety Code. Tex. Fam. Code § 55.57(a)(2). The commitment hearing is heard by the court, without a jury. Tex. Fam. Code § 55.55(b).

- The child is entitled to be present at the hearing, but the child or their attorney may waive this right. Tex. Health & Safety Code § 574.031(c).
- The hearing must be open to the public unless the child or their attorney requests that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 574.031(d).
  - Generally, juvenile court proceedings are open to the public unless good cause us shown to exclude the public. Tex. Fam. Code § 54.08(a).

[209] *See* page 118 for CME requirements.

Commitment Hearing Considerations

Given the sensitive nature of juvenile proceedings and of mental health and intellectual disability issues, the Court should carefully consider whether it is appropriate for the hearing to be open to the public.

Consideration should also be given as to whether it is appropriate for the child to attend the hearing. It is possible that attending the hearing and listening to testimony could negatively impact the child and the child's current mental state, especially if the child is currently in detention.

If using certain terminology will upset the child or hinder the child's ability to participate in the hearing, acronyms can be used.

Regardless of whether the child attends the hearing, the child's attorney should ensure the child understands the nature of the hearing, the anticipated testimony, and the significance of the testimony to the child's future.

- If a child is under the age of 14 at the time of the hearing, the court **shall close** the hearing to the public, unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public. Tex. Fam. Code § 54.08(c).

- **Note: There are significant differences in *temporary* and *extended* commitment hearings:**
  - In a hearing for *temporary* inpatient or outpatient mental health services, the child or their attorney may waive the right to cross-examine witnesses by filing a written waiver with the court. If that right is waived, the court may admit the CMEs as evidence, the CMEs will constitute competent medical or psychiatric testimony, and the court can make its findings based solely on the CMEs. Tex. Health & Safety Code § 574.031(d-1).
  - In a hearing for *extended* inpatient or outpatient mental health services, the court must hear testimony and cannot make findings solely from the CMEs. Tex. Health & Safety Code § 574.031(d-2).
- The commitment hearing is governed by the Texas Rules of Evidence unless stated otherwise in this subtitle. Tex. Health & Safety Code § 574.031(e).
- Each element of the applicable criteria must be proven by **clear and convincing evidence**, and the hearing must be on the record. Tex. Health & Safety Code § 574.031(g).
- The court may consider the testimony of a non-physician mental health professional in addition to medical or psychiatric testimony. Tex. Health & Safety Code § 574.031(f).
- After conducting the hearing, the juvenile court shall:
  - If the criteria under **Section 574.034 or 574.0345**, Health and Safety Code, are satisfied, order temporary mental health services for the child; or
  - If the criteria under **Section 574.035 or 574.0355**, Health and Safety Code, are satisfied, order extended mental health services for the child.

Tex. Fam. Code § 55.57(b).

  - A party to a commitment proceeding can appeal the judgment to the appropriate court of appeals. Notice of appeal must be filed no later than 10 days after the date the order is signed. Tex. Health & Safety Code §§ 574.070(a), (b).

Note: If the judge fails to find, from **clear and convincing** evidence, that the child is a person with mental illness and meets the applicable commitment criteria, the court shall enter an order **denying the application for court-ordered temporary or extended mental health services, and order the immediate release of the child**. Tex. Health & Safety Code § 574.033.

7.9g Commitment Orders

Orders Must Clearly Specify Commitment Criteria

The Code requires that orders for temporary or extended inpatient treatment must specify which criteria the judge or jury is basing their decision upon. There has been conflicting caselaw in this area. Some appellate courts have allowed an order to submit the criteria in the disjunctive (i.e. listing the criteria with OR), while other courts have found that listing the criteria in the conjunctive (with AND) is the only way to ensure that there are specific findings.[210]

A suggested practice to avoid any confusion is to take the word "or" out of any order for temporary or extended inpatient treatment, thus requiring specific finding on any of the criteria listed.

Order for Temporary Inpatient Mental Health Services

The judge may order a child to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from **clear and convincing evidence**, that:

1. The child is a person with mental illness; and
2. As a result of that mental illness the child:
   A. Is likely to cause serious harm to themselves;
   B. Is likely to cause serious harm to others; or
   C. Is:
      i. Suffering severe and abnormal mental, emotional, or physical distress;
      ii. Experiencing substantial mental or physical deterioration of the child's ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and
      iii. Unable to make a rational and informed decision as to whether or not to submit to treatment.

Tex. Health & Safety Code § 574.034(a).

- If the judge finds that the child meets the commitment criteria, the judge must specify which criterion listed in Subsection (a)(2) forms the basis for the decision. Tex. Health & Safety Code § 574.034(c).
- To be **clear and convincing**, the evidence must include expert testimony and, unless waived, evidence of a recent overt act[211] or a continuing pattern of behavior that tends to confirm:
  1. The likelihood of serious harm to the child or others; or
  2. The child's distress and the deterioration of the child's ability to function.

Tex. Health & Safety Code § 574.034(d).

- An order for temporary inpatient services must include a treatment period of not more than 45 days, *except that the judge may order 90 days if they find the longer period necessary*. Tex. Health & Safety Code § 574.034(g).
- A judge may not issue an order for temporary inpatient mental health services for a proposed patient who is charged *with a criminal offense* that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 571.011(a).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Texas Health & Safety Code § 571.011(a).

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[210] Hon. Guy Herman, Mental Health Law 8 (Aug. 2019) (unpublished manuscript) (on file with the Judicial Commission on Mental Health).

[211] Note that the Texas Supreme Court, in *State v. K.E.W.*, clarified the "overt act" requirement. The Court held that the act does not have to be actually harmful or demonstrate that harm to others is imminent. The case also states that speech alone may be considered an over act. *See* State v. K.E.W., 315 S.W.3d 16, 24. (Tex. 2010).

Note: The "majority of [appellate courts] find that the requirement of 'overt acts or patterns of behavior' may not be fulfilled merely by citing a patient's refusal of treatment."[212]

Order for Temporary Outpatient Mental Health Services

The judge may order a child to receive court-ordered temporary outpatient mental health services only if:

1. The judge finds that appropriate mental health services are available to the child; and
2. The judge finds, from **clear and convincing evidence**, that:
   A. The child is a person with severe and persistent mental illness;
   B. As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
   C. Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others; and
   D. The child has an inability to participate in outpatient services effectively and voluntarily, demonstrated by:
      i. Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or
      ii. Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment.

Tex. Health & Safety Code § 574.0345(a).

- To be **clear and convincing**, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  - The deterioration of ability to function independently to the extent that the child will be unable to live safely in the community;
  - The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
  - The child's inability to participate in outpatient treatment services effectively and voluntarily.

Tex. Health & Safety Code § 574.0345(b).

- An order for temporary outpatient mental health services must state that treatment is authorized for not longer than 45 days, *but the judge may specify a period up to 90 days if the judge finds that the longer period is necessary*. Tex. Health & Safety Code § 574.0345(c).
- A judge may not issue an order for temporary outpatient mental health services for a proposed patient who is charged *with a criminal offense* that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.034(h).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Open and Frequent Communication Between Courts and LMHAs

In order to maintain the most up-to-date information about the availability of outpatient mental health services, courts should ensure that they are familiar with their LMHA and have a contact person who can provide the court with information on available services. Strong and consistent communication between the detention center, LMHA, and state facilities can smoothen a child's transition from community to inpatient facility and ensure continuity of care.

[212] Hon. Guy Herman, Mental Health Law 13 (Aug. 2019)(unpublished manuscript)(on file with the Judicial Commission on Mental Health).

Order for Extended Inpatient Mental Health Services

The judge may order a child to receive court-ordered extended inpatient mental health services only if the judge finds, from **clear and convincing** evidence, that:

1. The child is a person with mental illness;
2. As a result of that illness the child:
    A. Is likely to cause serious harm to themselves;
    B. Is likely to cause serious harm to others; or
    C. Is:
        i. Suffering severe and abnormal mental, emotional, or physical distress;
        ii. Experiencing mental or physical deterioration of the child's ability to function independently, which is exhibited by the child's inability, except for reasons of indigence, to provide for the child's basic needs, including food, clothing, health, or safety; and
        iii. Unable to make a rational and informed decision as to whether or not to submit to treatment;
3. The child's condition is expected to continue for more than 90 days; and
4. The child has received court-ordered inpatient mental health services under this subtitle or under Chapter 46B, Code of Criminal Procedure, for at least 60 consecutive days during the preceding 12 months.

Tex. Health & Safety Code § 574.035(a).

- If the judge finds that the child meets the commitment criteria, the judge must specify which criterion listed in subsection (a)(2) forms the basis for the decision. Tex. Health & Safety Code § 574.035(c).
- To be **clear and convincing**, the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
    1. The likelihood of serious harm to the child or others; or
    2. The child's distress and the deterioration of the child's ability to function.

Tex. Health & Safety § 574.035(e).

- An order for extended inpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.035(h).
- A judge may not issue an order for extended inpatient mental health services for a proposed patient who is charged *with a criminal offense* that involves an act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.035(i).
    - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

Order for Extended Outpatient Mental Health Services

The judge may order a child to receive court-ordered extended outpatient mental health services only if:

1. The judge finds that appropriate mental health services are available to the child; and
2. The judge finds, from **clear and convincing evidence,** that:
    A. The child is a person with severe and persistent mental illness;
    B. As a result of the mental illness, the child will, if not treated, experience deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community without court-ordered outpatient mental health services;
    C. Outpatient mental health services are needed to prevent a relapse that would likely result in serious harm to the child or others;
    D. The child has an inability to participate in outpatient treatment services effectively and voluntarily, demonstrated by:

i. Any of the child's actions occurring within the two-year period that immediately precedes the hearing; or

ii. Specific characteristics of the child's clinical condition that significantly impair the child's ability to make a rational and informed decision whether to submit to voluntary outpatient treatment;

E. The child's condition is expected to continue for more than 90 days; and

F. The child has received:

i. Court-ordered inpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, for at least 60 days during the preceding 12 months; or

ii. Court-ordered outpatient mental health services under this subtitle or under Subchapter D or E, Chapter 46B, Code of Criminal Procedure, during the preceding 60 days,

Tex. Health & Safety Code § 574.0355(a).

- To be **clear and convincing** the evidence must include expert testimony and evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:
  1. The deterioration of the ability to function independently to the extent that the child will be unable to live safely in the community;
  2. The need for outpatient mental health services to prevent a relapse that would likely result in serious harm to the child or others; and
  3. The child's inability to participate in outpatient treatment services effectively and voluntarily.

Tex. Health & Safety Code § 574.0355(c).

- An order for extended outpatient mental health services must provide for a period of treatment not to exceed 12 months. Tex. Health & Safety Code § 574.0355(d).
- A judge may not issue an order for extended outpatient mental health services for a child who is *charged with a criminal offense* that involves and act, attempt, or threat of serious bodily injury to another person. Tex. Health & Safety Code § 574.0355(e).
  - A child alleged to have engaged in delinquent conduct or CINS is **not** considered to be a person charged with a criminal offense. Tex. Health & Safety Code § 571.011(a).

7.10 Referral for Commitment Proceedings for Mental Illness

If the case is referred to an appropriate county or probate court, the judge of that court completes the commitment hearing process. The juvenile court must send all papers relating to the child's mental illness to both the clerk of the court to which the case is referred, and to the office of the appropriate county or district attorney. Tex. Fam. Code § 55.58(a)(1), (2). The papers sent to the clerk of a court constitute an application for mental health services under Section 574.001, Health and Safety Code. Tex. Fam. Code § 55.58(b).

If the child is in detention, the judge has three options:

- Order the child released from detention to the child's home or another appropriate place;
- Order the child detained in an appropriate place other than a juvenile detention facility; or
- If an appropriate place is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.

Tex. Fam. Code § 55.58(a)(3).

7.11 Report that Child has Intellectual Disability

If the report states that the child has an intellectual disability and meets the criteria for civil commitment under Subtitle D, Title 7, Health and safety Code, the director of the residential care facility must submit an affidavit to the court that states the conclusions reached as a result of the diagnosis. Tex. Fam Code § 55.59. Once the court receives the affidavit, it can initiate commitment proceedings.

7.11a Commitment Proceedings in Juvenile Court for Intellectual Disability

The juvenile court has the option of hearing the commitment proceeding or referring it to an appropriate county or probate court. Tex. Fam. Code § 55.59.

7.11b Application for Court-Ordered Intellectual Disability Proceedings

For commitment proceedings in juvenile court, the prosecutor must file an application for placement under section 593.041, Health and Safety Code. Tex. Fam. Code § 55.60(a).

- The application must be filed in the county where the child resides. Tex. Health & Safety Code § 593.041(b).

What Should be Included in the Application

An application must include:

- The name, birth date, sex, and address of the proposed resident;
- The name and address of the proposed resident's parent or guardian, if applicable;
- A short, plain statement of the facts demonstrating that commitment to a facility is necessary and appropriate; and
- A short, plain statement explaining the inappropriateness of admission to less restrictive services.
- A copy of the interdisciplinary report if it is completed.

Tex. Health & Safety Code §§ 593.042(a), (b).

An Application for Court-Ordered Intellectual Disability Proceedings can be found on **page 155**.

7.11c Interdisciplinary Team Report

A person may not be committed for placement in a residential care facility unless a report by an interdisciplinary team recommending the placement has been completed during the six months prior to the date of the hearing on the application. If the report and recommendations have not been completed or revised during that period, the court must order the report and recommendations on receiving the application. Tex. Health & Safety Code § 593.041(d).

An interdisciplinary team shall:

1. Interview the person with an intellectual disability, the person's parent **if the person is a minor**, and/or the person's guardian;
2. Review the person's:
   A. Social and medical history;
   B. Medical assessment, which shall include an audiological, neurological, and vision screening;
   C. Psychological and social assessment; and
   D. Determination of adaptive behavior level;
3. Determine the person's need for additional assessments, including educational and vocational assessments;
4. Obtain any additional assessment necessary to plan services;
5. Identify the person's habilitation and service preferences and needs;
6. Recommend services to address the person's needs that consider the person's preferences.

Tex. Health & Safety Code § 593.013(b).

- The interdisciplinary team shall give the person, the person's parent **if the person is a minor**, or the person's guardian an opportunity to participate in team meetings. Tex. Health & Safety Code § 593.013(c).
- The interdisciplinary team may use a previous assessment, social history, or other relevant record from a school district, public or private agency, or appropriate professional if the interdisciplinary team determines that the assessment, social history, or record is valid. Tex. Health & Safety Code § 593.013(d).

- The interdisciplinary team shall prepare a written report of its findings and recommendations that is signed by each team member and shall promptly send a copy of the report and recommendations to the person, the person's parent **if the person is a minor,** and the person's guardian. Tex. Health & Safety Code § 593.013(e).
- If the court has ordered the interdisciplinary team report and recommendations under Section 593.041, the team shall promptly send a copy of the report and recommendations to the court, the person with and intellectual disability or the person's legal representative, the person's parent **if the person is a minor**, and the person's guardian. Tex. Health & Safety Code § 593.013(f).

7.11d Appointment of an Attorney under HSC 593.043

- The child must be represented by an attorney who will represent the rights and legal interests of the child without regard to who has retained the attorney. Tex. Health & Safety Code § 593.043(a).
- If the child is indigent, the judge must appoint an attorney by the 11th day before the hearing. Tex. Health & Safety Code § 593.043(b).
- The parent, **if the proposed resident is a minor**, or the guardian of the person may be represented by legal counsel during the proceedings. Tex. Health & Safety Code § 593.043(d).

7.11e Setting the Commitment Hearing in Juvenile Court

The juvenile court must set a date for the hearing and provide notice as required under Sections 593.047 and 593.048, Health and Safety Code. Tex. Fam. Code § 55.60(a)(1).

- The court must immediately set the hearing at the earliest practicable date to determine the appropriateness of the commitment. Tex. Health & Safety Code § 593.047.
- At least 11 days before the hearing, a copy of the application, notice of the time and place of the hearing, and, if appropriate, the order for the determination of an intellectual disability and interdisciplinary team report and recommendations must be served on:
  - The proposed resident or the proposed resident's representative;
  - The parent **if the proposed resident is a minor**;
  - The guardian of the person; and
  - The department.[213]

Tex. Health & Safety Code § 593.048(a).

- The notice must specify in plain and simple language:
  - The right to an independent determination of an intellectual disability under Section 593.007; and
  - The provisions of Sections 593.043,[214] 593.047,[215] 593.049,[216] 593.050,[217] and 593.053.[218]

Tex. Health & Safety Code § 593.048(b).

7.11f Commitment Hearing

The court must conduct the hearing in accordance with Sections 593.049 – 593.056, Health and Safety Code. Tex. Fam. Code § 55.60(a)(2).

- The hearing is before the court but shall be before a jury if any party of the court request a jury trial. The Texas Rules of Civil Procedure apply to all aspects of the proceedings and trial unless the rules are

[213] Here, "the department" refers to the Department of Aging and Disability Services. Tex. Health & Safety Code § 591.003(7). As all DADS functions were transferred to HHSC on September 1, 2017, it may be advantageous to serve HHSC to satisfy the notice requirement.

[214] Representation by Counsel; Appointment of Attorney.

[215] Setting on Application.

[216] Hearing Before Jury; Procedure.

[217] Conduct of Hearing.

[218] Decision.

inconsistent with this subchapter. Tex. Health & Safety Code §§ 593.049 (a), (b).

- The hearing must be open to the public unless the child or their representative request that it be closed, and the court finds good cause to do so. Tex. Health & Safety Code § 593.050(a).
  - Generally, juvenile court proceedings are open to the public unless good cause is shown to exclude the public. Tex. Fam. Code § 54.08(a).
  - If a child is under the age of 14 at the time of the hearing, the court **shall close** the hearing to the public, unless the court finds that the interests of the child or the public would be better served by opening the hearing to the public. Tex. Fam. Code § 54.08(c).
- The child is entitled to be present throughout the hearing. If the court determines that the presence of the child would result in harm to the child, the court can waive the requirement in writing clearly stating the reason for the decision. Tex. Health & Safety Code § 593.050(b).
- The child is entitled to and must be provided with the opportunity to confront and cross-examine each witness. Tex. Health & Safety Code § 593.050(c).
- The Texas Rules of Evidence apply. The results of the determination of an intellectual disability and the current interdisciplinary team report and recommendations *shall* be presented in evidence. Tex. Health & Safety Code § 593.050(d).
- The party who filed the application has the burden to prove **beyond a reasonable doubt** that long-term placement of the child in a residential care facility is appropriate. Tex. Health & Safety Code § 593.050(e).
- If long-term placement in a residential care facility is not found to be appropriate, the court shall enter a finding to that effect, **dismiss** the application, and if appropriate, recommend application for admission to voluntary services under Subchapter B. Tex. Health & Safety Code § 593.051.
- In each case, the court shall promptly report in writing the decision and findings of fact. Tex. Health & Safety Code § 593.053.

Note: While the hearing must be commenced within 30 days, the Court retains its plenary authority to continue the hearing as necessary should issues arise.

7.11g Commitment Order

A child may not be committed to a residential care facility unless each of the following elements has been proven **beyond a reasonable doubt**:[219]

1. The child is a person with an intellectual disability;
2. Evidence is presented showing that because of the child's intellectual disability, the child:
   A. Represents a substantial risk of physical impairment or injury to themselves or others; or
   B. Is unable to provide for and is not providing for their most basic personal physical needs;
3. The child cannot be adequately and appropriately habilitated in an available, less restrictive setting; and
4. The residential care facility provides habilitative services, care, training, and treatment appropriate to the child's needs.

Tex. Health & Safety Code § 593.052(a).

- If the commitment criteria are met, and long-term placement in a residential care facility is appropriate, the court shall commit the child for care, treatment, and training to a community center or the department [220]when space is available at a residential care facility. Tex. Health & Safety Code § 593.052(b).
- The court shall immediately send a copy of the commitment order to the department or community center. Tex. Health & Safety Code § 593.052(c).
- If placement in a residential facility is necessary, preference shall be given to the facility nearest to the residence of the child unless:

[219] *See* Pratt v. State, 907 S.W. 2d 38, 44 (Tex. App.—Dallas 1995, writ denied).

[220] "The department" refers to DADS, which was transferred to HHSC on September 1, 2017.

1. Space in the facility is unavailable;
2. The child, parent if the resident is a minor, or guardian of the child requests otherwise; or
3. There are other compelling reasons.

Tex. Health & Safety Code § 593.055.

- A party to a commitment proceeding has the right to appeal the judgment to the appropriate court of appeals. An appeal under this section shall be given a preference setting, and the county court may grant a **stay of commitment** pending appeal. Tex. Health & Safety Code §§ 593.056(a), (c), and (d).

Least Restrictive Environment

It is vital for attorneys, the judiciary, and probation officials to focus on the least restrictive environment in which a youth's needs can be met, and on the importance of youth entering into an appropriate treatment setting outside of detention as quickly as possible.

7.12 Referral for Commitment Proceedings for Intellectual Disability

If the case is referred to an appropriate county or probate court, the judge of that court completes the commitment hearing process. The juvenile court must send all papers relating to the child's intellectual disability to both the clerk of the court to which the case is referred, and to the office of the appropriate county or district attorney. Tex. Fam. Code §§ 55.61(a)(1), (2). The papers sent to the clerk of a court constitute an application for placement under Section 593.04, Health and Safety Code. Tex. Fam. Code § 55.61(b).

If the child is in detention, the judge has three options:

- Order the child released from detention to the child's home or another appropriate place;
- Order the child detained in an appropriate place other than a juvenile detention facility; or
- If an appropriate place is not available, order the child to remain in the juvenile detention facility subject to further detention orders of the court.

Tex. Fam. Code § 55.61(a)(3).

CHAPTER 55 ISSUES CHECKLIST[221]

This checklist's purpose is to help Juvenile Law Practitioners determine if there are issues with a child's mental health or developmental level (intellectual disability) which need to be evaluated by a professional. It is not intended to replace an evaluation by a qualified professional if there are any concerns regarding whether a child is fit to proceed.

First, is there a Chapter 55 Issue?

Can you talk to the client and do they understand what is going on?

If there appears to be an issue, consider the following questions:

Part I – (Short screening test)

Can you have a coherent conversation with your client? Yes / No

Does the Client understand the charges? Yes / No

Does the Client understand the role of the prosecutor? Yes / No

Does the Client understand the role of the judge? Yes / No

Does the Client understand your role (Defense Attorney)? Yes / No

If the answer to any of the above is "No", you may need to go through the full screening questions in Part II.

Part II – (Full screening)

Mental Health History:

Is there a history of mental health or intellectual disability issues?

If so, is it a mental health history, an intellectual disability history, or both?

What, if any treatment(s), has the client received?

(AND: who were the treating physicians, social workers, therapists, etc.; what medications have been prescribed, has the client been hospitalized for treatment or sent to a residential treatment center (RTC))

School History:

Has the client had an ARD (Admission, Review, and Dismissal hearing)?

Are they in special education classes, and if so, which subjects?

Be sure to get all the client's school records. This will probably require 2 or 3 subpoenas, one for academic records including achievement tests, one for counseling records, and a third for disciplinary records.

Parental Questions:

How well does the client understand concepts/assignments?

NOTE: If the answer is that they get it, you just have to tell them 3-4 times, this may indicate an issue of fitness to proceed.

Is there a history of inhalant abuse?

Is there anything of concern in client's developmental history, any accidents with head trauma, any illnesses with high fever, loss of consciousness, etc.?

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[221] William R. "Bill" Cox, Texas Family Code Chapter 55: Mental Health Proceedings, 26th Annual Robert O. Dawson Juvenile Law Institute (2013), https://juvenilelaw.org/wp-content/uploads/2017/06/07_Cox.pdf.

Detailed Conversation With Client:

When talking to a client, be sure to test not only how the client responds to individual questions and legal concepts, but also test the client's short-term memory. For many clients, it will be clear as part of a regular interview that the juvenile understands the charges again them and is able to discuss the charges with you and to prepare a defense. For others, it may be less clear and will require specific probing questions to be sure fitness to proceed is assessed. This is especially true with juveniles who have had prior contact with the mental health system. With an individual who has had prior mental health treatment, especially treatment including competency restoration, practitioners need to ask the child to explain the role of a judge, prosecutor, and lawyer in their own words. Often those who have been through competency restoration treatments will repeat the textbook definition of an attorney, judge, etc., however they may have no understanding of what the words in the memorized definition actually mean.

Practice Tip: The amount of time necessary to test a client's short-term memory will vary with the client and the nature of their issues. In some cases, the damage, especially from inhalant abuse will be so profound that a period of 5 minutes is enough, while other clients' short-term memory deficits may only appear after the passage of 30 minutes or more. It is important to identify the amount of time at which short term memory deficits appear in order to provide the mental health professional insight into those issues so that they can be adequately addressed during the evaluation and in the professional's reports to the court.

Checklist for Required Information

Forwarded to Treatment Facility

This checklist is intended to provide a non-exhaustive list of area where required information about a child's mental health/intellectual disability can be located, as well as best practices to obtain additional information.

- ❑ Juvenile Probation Officer's File
- ❑ Juvenile Electronic Records
- ❑ Detention Records
- ❑ Juvenile Clinical Unit Records
- ❑ Juvenile Medical Unit Records
- ❑ Department's Medical Providers
- ❑ Department's Mental Health Providers
- ❑ Department's Contracted Medical/MH Providers

In addition, best practices would include requesting information about the child's mental health/intellectual disability from:

- ❑ Child's Parent(s)
- ❑ Child's Attorney
- ❑ Child's School(s)
- ❑ Local Mental Health Authority

Certification of Competency Evaluator Credentials

Name:
Address:
Phone number:

Professional Discipline and License #:

Board Certifications:

Continuing Education Meeting Requirements: (note: statute requires the equivalent of 24 hours of continuing education relating to forensic evaluations, including 6 in the two years prior to the current evaluation)

Template for Competency Evaluations

Name of Defendant:
County:
Cause #:
Date of Evaluation:
Date of Report:

Specific Issues Referred for Evaluation:

Disclosures: (Please include, at minimum, that you explained the purpose of the evaluation, persons or entities to whom the report will be provided, and limits of confidentiality.)

Procedures, Techniques, Tests, and Collateral Information Reviewed:

Clinical Observations and Findings:

Diagnoses:

Areas of Competency: (Please describe in detail any deficits in the defendant's capacity during criminal proceedings and the exact nature of the deficits resulting from mental illness or intellectual disability. As required by statute, be certain to consider:
• Capacity to rationally understand the charges and potential consequences of the pending proceedings;
• Capacity to disclose to counsel pertinent facts, events and states of mind;
• Capacity to engage in legal strategies and options;
• Capacity to understand the adversarial nature of the proceedings;
• Capacity to exhibit appropriate courtroom behavior;
• Capacity to testify;
• Capacity to consult with counsel)

Opinion on Competence to Stand Trial: (Please provide a clear statement of whether in your professional opinion the defendant is competent to stand trial, incompetent to stand trial, or why you are unable to formulate an opinion.)

Treatment recommendations: (Please list current medications. If, in your opinion, the defendant is currently competent, the impact of any of these medications on the defendant's appearance, demeanor or ability to participate in the proceedings and whether the medications are necessary to maintain competence. If, in your opinion, the defendant is not currently competent, is treatment/medication likely to restore the person to competence in the foreseeable future. Please include any recommendations you may have as to treatment options.)

Signature:

NO. _____

THE STATE OF TEXAS
FOR THE BEST INTEREST
AND PROTECTION OF:

IN THE _____ COURT OF

ANY COUNTY, TEXAS

_____
(INITIALS ONLY)
D.O.B.: _____

CERTIFICATE OF MEDICAL EXAMINATION

I, the undersigned, a person licensed to practice medicine in the state of Texas, or a person employed by an agency having a license to practice medicine in any state of the United States, do hereby certify, to wit:

1. That my name is _____.
That at ____ a.m./p.m. on the _____ day of _____, 202__ at the following location_____, I evaluated and examined_____ (Proposed Patient).

2. My diagnosis of the physical and mental condition of Proposed Patient is:
_____

3. My prior or current treatment, if any, of Proposed Patient has been as follows:
_____
_____

4. In my opinion, Proposed Patient: (check all that apply)
( ) is mentally ill; and
( ) as a result of that illness is likely to cause serious harm to self; and/or
( ) as a result of that illness is likely to cause serious harm to others; and/or
( ) is suffering severe and abnormal mental, emotional or physical distress experiencing substantial mental or physical deterioration of the ability to function independently which is exhibited by the inability, except for reasons of indigence, to provide for basic needs, including food, clothing, health or safety; and is not able to make a rational and informed decision as to whether or not to submit to treatment; and/or
( ) is unable to participate in out patient treatment services effectively and voluntarily and whose mental illness is severe and persistent, and/or
( ) is chemically dependent and, as a result of that chemical dependence is likely to cause serious harm to self, or is likely to cause serious harm to others, or will, continue to experience deterioration of the ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment, and/or

5. The factual basis for my opinion is as follows ***(Be specific, give all details.)***:
On or about _____ the proposed patient said the following:
_____
_____
_____

5(a) On or about _____, the proposed patient committed the following act(s):
_____
_____
_____

6. ***(Note: Complete this section only if seeking an order of protective custody.)***

I am of the opinion that the Proposed Patient, because of mental illness, presents a substantial risk of serious harm to self or others if not immediately restrained. (Harm may be demonstrated either by the person's behavior or by evidence of severe emotional distress and deterioration in mental condition to the extent that the person cannot remain at liberty until the time of the hearing). The detailed basis for such an opinion is:

_____
_____
_____
_____
_____
_____
_____
_____

7. I recommend that the Proposed Patient receive the following treatment:

_____
_____
_____
_____
_____-

EXECUTED AND SWORN TO UNDER PENALTY OF PERJURY this ___ day of _____, 202__.

_____
(***Signature)***

SUBSCRIBED AND SWORN TO before me on this _____ day of _____, 202___.

_____
NOTARY PUBLIC In and For the **STATE OF TEXAS**

My Commission Expires: _____

CAUSE NO _____

IN THE MATTER OF:	§	IN THE _____ COURT
	§	
CHILD'S INITIALS	§	OF
DOB:	§	
A JUVENILE	§	ANY COUNTY, TEXAS

APPLICATION FOR COURT-ORDERED INTELLECTUAL DISABILITY PROCEEDINGS

Comes now Counsel for the child in the above entitled and numbered matter and presents this APPLICATION FOR COURT-ORDERED INTELLECTUAL DISABILITY PROCEEDINGS, and in support thereof states the following:

I.

Information on Proposed Resident

Name:
Date of Birth:
Sex:
Address:

II.

Parent/Guardian of Proposed Resident

The parent(s)/[guardian] of the proposed resident is/are:

Name(s):
Address(es):

III.

Statement of Facts Demonstrating Need for Commitment

[Provide a short, plain statement of the facts demonstrating that commitment to a facility is necessary and appropriate.]

IV.

Inappropriateness of Less Restrictive Services

[Provide a short, plain statement explaining the inappropriateness of admission to less restrictive services.]

Respectfully Submitted,

Counsel for Petitioner

Certificate of Service.