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TO: Appleton Common Council, Safety and Licensing Committee

From: ACA Zak Buruin

Date: May 21, 2026

RE: Implementation and Prosecution of Truancy Ordinance Citations

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The following memorandum is intended to provide information which may be relevant to the discussion of ACC 10-42. Some of this information is taken from general observations during the time for which this section was reinstated. Other information is provided to address what appear to be points of confusion regarding the administration of ACC 10-42.

Though this memorandum is not devoid of legal analysis intended to advise the Common Council, it is primarily offered from the perspective of the writer's role as the primary prosecutor for municipal citations for the City of Appleton. Neither the Legal and Administrative Services Department nor the writer of this memo take a position on what action, if any, the Common Council should take regarding ACC 10-42.

Separation of Powers

There are no fewer than three distinct governmental entities involved in the implementation of ACC 10-42: the Appleton Area School District, Outagamie County, and the City of Appleton. Outagamie County, specifically its judicial apparatus, is responsible for the administration of its courts. This includes decisions regarding local court rules, the assignment of cases, intake processes, and innumerable other aspects of the allocation of scarce judicial resources. I will return to this topic below.

The Appleton Area School District (AASD) is responsible for setting and administering school policies, keeping and reporting appropriate records, administering in-school disciplinary policies and procedures and, when appropriate, referring matters to outside agencies for enforcement or intervention. The City of Appleton has no authority to dictate to the AASD how it conducts its lawful duties.

The City of Appleton, by way of the Appleton Police Department (APD), is responsible for the enforcement of the City's code. In the present context, AASD has no authority to dictate when and to whom a municipal citation is issued for truancy. They may request one. They must provide necessary documentation as required by the City's code and state statute.

The decision to issue a citation remains firmly within the discretion of the City by way of APD and the assigned School Resource Officer(s).

The prosecution of any such citation also remains firmly under the purview of the City of Appleton by way of the City Attorney's Office. The exercise of prosecutorial discretion is one of the most fundamental and valuable aspects of the court system. It is the responsibility of the prosecutor to use sound professional judgment to follow the evidence and the law to seek a just outcome in every case. It is not the responsibility of a prosecutor to maximize convictions, punishments, or other sanctions when situation does not merit it.

The authority of the various entities involved in the implementation and enforcement of ACC 10-42 are separate, distinct, and independent of each other. These powers are separated not only between distinct units of government (City, County, District), but along the lines of the branches of government (legislative, judicial, executive). In short, the City has no ability to dictate that which is under the authority of the AASD or the Outagamie County Courts. The AASD has no authority to dictate that which is under the authority of the City or the Courts. The Courts do exercise oversight authority over both the City and the AASD, but that is within confines provided for by state law.

I draw attention to this issue because separation of powers has appeared to be a point of confusion and / or miscommunication throughout discussion of ACC 10-42. It also serves as a primer for some of the more specific information that I will share below.

Terminology

Certain terms have been used during the discussion of ACC 10-42 that have specific legal meanings or implications. These are not always equivalent to their colloquial meanings, and the distinction can become significant depending on the context and application. As this is a discussion of law and its application, linguistic precision with respect to such terms is likely to be important.[1]

"Criminal" (Courts, Justice, Record, etc.)

Various references to the "criminal" justice system or "criminal" penalties have been made during discussions on this matter. Though the courts in which Appleton municipal citations are heard are the same courts which hear criminal matters, no municipal citations are criminal in nature in the State of Wisconsin.

Crimes are offenses prohibited by state law and punishable by fine, forfeiture, or both. Conduct punishable by forfeiture is not a crime. Wis. Stat. §939.12. Wisconsin municipalities are not authorized to enact criminal statutes. Municipal ordinance violation cannot be crimes, nor can aspects of their implementation and enforcement be described

[1] The distinction between the colloquial and legal definition of these terms is not always relevant. Unless otherwise indicated, highlighting this distinction is meant only to inform the discussion and correct any misstatements or misconceptions. Unless explicitly stated otherwise, it is not my intent to bolster or weaken the underlying arguments in which such terms may have been erroneously utilized.

as “criminal” in nature as that term is defined by state law.

“Expungement”

The term “expungement” has been utilized in the discussions of ACC 10-42. The manners in which it has been used suggest at least the possibility that this term is being confused with and / or conflated with other concepts which are more applicable.

Expungement is a “special disposition” available in criminal cases and juvenile delinquency cases. Wis. Stat §973.015. Wis. Stat. §938.355. It is not a disposition available in forfeiture matters such as municipal citations. When applicable, expungement is ordered after a defendant or juvenile defendant is convicted (adjudicated delinquent in the case of juveniles), meaning that they are formally found to have committed the law violation in question. When ordered, expungement (or purging) of the court’s record of the conviction or adjudication occurs if the defendant or juvenile defendant meets the statutory conditions and completes the terms of their sentence or dispositional order.

Expungement of civil forfeiture violations, such as municipal citations, is not available under Wisconsin Statute.

It is possible that this term has been wrongly applied to refer to dismissal of citations and the stronger confidentiality associated with juvenile court records. Dismissal of citations does result in there being no “guilty” finding on the defendant’s record. It does not remove the fact that the citation was issued from the defendant’s record. This is the same as when a criminal charge is dismissed. The court record of what occurred is maintained, though no finding of guilt is made, and the legal presumption of innocence is maintained.

Additionally, juvenile court records are subject to stricter confidentiality rules than most court records. Juvenile records are protected from the general presumption of open records by statute. Wis. Stat. §938.396. Specific exceptions must be applicable for such record to be made available to uninvolved parties.

I am not aware of representations made that expungement could or would be available in truancy citation matters, or any municipal citation matters. Confidentiality provisions apply, as do legal presumptions associated with a citation being dismissed before an adjudication of guilt is made. These are powerful legal principles, arguably more powerful than expungement. However, they should not be conflated with the expungement of court records.

“Hold Open”

A citation matter can be “held open” at two different stages. When a matter held open by an officer, that occurs before a citation is issued. The officer utilizes their discretion to withhold a decision of whether to issue a citation, typically to determine if the behavior at issue continues. Specific details about this practice are best obtained from APD. My experience is that when officers provide this chance to avoid a citation, it is typically offered

to juveniles where intervention may not be needed, and it is conditioned upon them maintaining lawful behavior for a specified period.

I am not aware of this process being utilized by APD with respect to prospective truancy violations.

After a citation is issued and makes it to court, it may be held open at that stage. This would typically be done with the consent of the parties, and of the court. This practice will be discussed further below.

Prosecutorial Discretion

Once issued, a citation is prosecuted by the City Attorney's Office. Prosecutors have significant discretion in what cases they prosecute and how they prosecute them. Within the boundaries of the law and professional ethics, that discretion can be described as emphasizing the duty to administer justice rather than merely secure convictions.

Every individual case is factually distinct and must be evaluated on its own merits. However, there appears to be no meaningful dispute about the optimal outcome of truancy citation cases. That outcome would involve the student being in school, connected with any services that they need, and no citation conviction or associated penalties. This is consistent with my observations of the Court's practice in truancy matters from other jurisdictions as well.

Involvement of the Circuit Court Commissioner(s)

As noted above, the City is not able impose requirements for the administration of the Circuit Court. The vast majority of matters that come before the Circuit Court in Outagamie County are first heard by a Court Commissioner. This includes matters ranging from small claims civil actions to First Degree Intentional Homicide. Court commissioners have more limited authority than judges, but they assist in the efficient administration of judicial business within the circuit court.

In relevant part, court commissioners may generally conduct initial appearances, receive noncontested forfeiture pleas, order revocation or suspension of driving privileges as permitted by law, and impose monetary penalties permitted by law within any further limitations set by the circuit court judges of the county. Decisions by a court commissioner are subject to review by the assigned circuit court.

Most citation (forfeiture) cases never progress beyond proceedings with a court commissioner because most citation matters are resolved without the need for a contested hearing or trial. This leaves circuit court judges with more ability to address matters which cannot be addressed by a court commissioner, including maters which are contested. This is how civil citation matters are handled by the Outagamie County Circuit Court, including truancy citations for municipalities other than the City of Appleton.

I am not aware of any representations made by the Courts, or anyone else, that the typical court intake process would be bypassed with respect to Appleton truancy citations. I am aware that the Outagamie Circuit Court judges were considering ways in which to handle Appleton truancy matters should they become contested, necessitating the need for direct involvement of a judge. I am not aware of what decision, if any, was reached on that issue. I have never been apprised of any intent, goal, or possibility of having any judicial official (judge or court commissioner) receive any kind of specialized training for handling truancy matters.

Operational Insights

Thus far, the court process associated with truancy citations has been consistent with my expectations. These expectations are based upon my longstanding observations of the court process, and my knowledge of virtual consensus on the optimal outcome. While I cannot share information about any specific case(s), my general expectations are set forth below.

When a student is issued a citation, they are given a court date with a requirement to appear. If they do not appear as required, a default judgement is entered and a monetary penalty is imposed, consistent with the statute and ordinance.[2] No warrant or capias is issued for their arrest.

If the student appears as required, there would typically be inquiry by both the court and by the prosecutor about what is keeping them from attending school. Ideally, this prompts a discussion that gives some insight into what kind of services or motivation are needed for improving school attendance. Depending on what information comes to light during this discussion, the student may be directed to particular services, often with the input of a parent (if present), to aid in the improvement of their attendance.

From there, a review hearing would be scheduled. The court would typically direct the student to return for that hearing with documentation showing an improvement to their school attendance. Information about academic progress may be sought as well. The student would typically be told, with the agreement of the prosecutor, that if they show improvement in their attendance the citation would be dismissed. This would mean no monetary (or other judicially imposed) penalty, no citation conviction on their record, and no finding of guilt.

My expectation would be that if improvement efforts were ongoing but not yet coming to fruition at the time of the review hearing, that more time would typically be given to allow those efforts to continue. My expectation is that without a factual dispute about the student being unlawfully truant, or a situation where no earnest effort by the student could be seen, every reasonable opportunity would be given so that they have the time they need to improve their attendance and address the issues preventing them from doing so.

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[2] Local court rules and court practice are relatively permissive about reopening cases, if the request is made within six months. If a case is reopened, it is returned to its pre-disposition posture and can be negotiated or litigated from that point.

With citations of this nature, it is typically my goal to be able to dismiss the citation. To the extent there is a "victory" to be achieved in such situations, it is typically achieved when I can move the court for dismissal of the citation.[3]

Early Lessons

AASD has made repeated note of the various internal services available to help address barriers to school attendance. AASD has also noted that where they cannot establish or maintain engagement with students and / or their guardians, these services cannot come into play. The desire for additional means to motivate that engagement is, according to AASD, part of why a reinstatement ACC 10-42 was sought.

In addition to an instrument of motivation, the court process is also being looked at as an opportunity to directly connect the student with AASD personnel and services. AASD personnel are now better able to establish contact with students and / or parents that they have previously been unable to speak with. They can start to open a dialogue, explain what services might be available, and begin to establish a plan to address attendance barriers, hopefully improving their chance of success in both the court process and with school more broadly.

The timetables for an initial appearance and potential review hearing dates is also being evaluated on an ongoing basis. The intent is for the pace of scheduling to align with the needs of the situation. Given the small number of citations issued, I cannot provide further general information about this without discussing confidential information or providing numerous hypotheticals.

Observations and Conclusions

Consistent with the representations made during the initial discussions of reinstating ACC 10-42, it appears to me that AASD requests for citations are being used as a last resort option, when there is no engagement or communication with the student. When evaluating any data which may be collected that looks at the outcomes of citations issued, it is worth consideration that any such students would be a self-selected sample of students for which the other offered interventions have not been successful.

Additionally, the existence of ACC 10-42 does provide two distinct interventions which warrant distinct consideration. The issuance of a citation is an intervention in the most conventional and direct sense. However, the possibility of a future citation is an intervention in and of itself, albeit an unconventional one. The motivational impact of such an intervention may be difficult to ascertain within the time, resource, and ethical boundaries that apply in the instant case.

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[3] I don't represent that this philosophy would be shared by all prosecutors who may follow me in the task of prosecuting these citations, though I absolutely hope they would share it. As I am currently charged with this task, I thought it relevant to share my general approach to such matters. This general approach is always subject to the specifics of any given case / situation.

However, the City of Appleton is responsible for the enforcement of its ordinances. What those ordinances are is determined by the sound judgement of the Common Council. The fair and just application of those rules, other applicable laws, and professional and ethical judgement remains the duty of the APD and the City Attorney's Office.

The City Attorney's Office takes no position on potential action on the current version of ACC 10-42. Regardless of any changes resulting from the current legislative process, the City Attorney's Office will continue to discharge its duties to the best of its ability, and I am confident that the same is true of APD.