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Office of the Criminal District Attorney

June 4, 1998

RQ-1147

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JUN 11 1998

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Dear Sirs:

FILE # ML-40303-98
40303

We would like to request an opinion from your office concerning whether the Lubbock County Justice of The Peace has the authority to require constables to serve summons on individuals failing to appear at a truancy hearing. Our questions is as follows:

Does section 25.091 of the Texas Education Code, which grants attendance officers the power and duty to serve legal process, mean that only an attendance officer may serve legal process dealing with the compulsory attendance provisions of the Education Code, thus making it unlawful for a constable to serve the same?

We would appreciate an expedited opinion in this matter as we do not have any guidelines with which to work. Enclosed please find a memorandum brief on this matter. If you have any questions please feel free to contact this office.

Sincerely,

William C. Sowder

William C. "Bill" Sowder
Lubbock County Criminal District Attorney

Enclosure

MEMORANDUM

FACTS:

Lubbock Independent School District has appointed an attendance officer to enforce the compulsory attendance laws of the Texas Education Code.¹ Once a juvenile is suspected of committing an offense under section 25.094 of the Education Code a letter is mailed by the attendance officer, to the parents. In addition to this notice, a letter is also sent home with the student. Both letters specify the time and date that the child is to appear for a truancy hearing. If the student and parents fail to appear at the hearing the Justice issues a summons which is delivered to the constable for service. The constables have argued that they may not legally serve these summons since the Education Code places that power and duty on the attendance officer. Because of the uncertainty of the law we are unable to advise the Justices or the Constables, without your opinion, on whether service of these summons may be required of a Constable.

QUESTIONS PRESENTED:

Does section 25.091 of the Texas Education Code, which grants attendance officers the power and duty to serve legal process, mean that only an attendance officer may serve legal process dealing with the compulsory attendance provisions of the Education Code, thus making it unlawful for a constable to serve the same?

¹ See Tex. Educ. Code Ann. §25.085 (Vernon 1996).

DISCUSSION:

A constable may be compelled to serve legal process as long as two requirements are met.² First, the process must be directed to the constable by a legal officer, and second, the law must provide that the constable may execute the process. Tex. Loc. Gov't. Code Ann. § 86.021 (Vernon 1988 & Supp. 1998). Because the Justice of the Peace is a lawful officer,³ we need only to focus on the second prong to determine whether a constable is legally required to serve a summons, issued under the compulsory attendance provisions of the Education Code.

Under section 25.091 of the Education Code, an attendance officer has the power and duty to serve legal process. The constables believe that because it is the duty of the attendance officer to serve legal process⁴ in these cases, service by any other party is unlawful. If correct, service by constables in these situations would render the service void. See *Harrison v. Dallas Court Reporting College, Inc.*, 589 S.W.2d 813, 816 (Tex. Civ. App.--Dallas 1979, no writ). If section 25.091 is read alone, the constables' interpretation appears correct; however, the Education Code also provides that the compulsory attendance provisions may be enforced by a constable.

Section 25.096 of the Education Code states that "[i]n addition to enforcement by a school attendance officer, the compulsory attendance provisions... may be enforced by any peace

² If the Constable refuses to serve the process he can be held in contempt by the court. Tex. Code Crim. Proc. Ann. art. 2.16 (Vernon 1977)

³ *Medlin v. Seidman*, 88 S.W. 250, 251(Tex. Civ. App. 1905, no writ).

⁴ Legal process sometimes used as the equivalent to "lawful process" means summons, writ, warrant, mandate, or other process issuing from a court. Black's Law Dictionary 1085 (5th ed. 1979).

officer...” Peace officer includes constables and deputy constables. see Tex. Code Crim. Proc. Ann. Art. 2.12 (Vernon 1977). Thus, it may be argued that since a constable may enforce the compulsory attendance provisions, it is lawful for the Justice of the Peace to issue such summons to them for service.

However, since it is not mandatory that constables enforce these provisions, it is their contention that they cannot be compelled to serve the summons. More specifically, they argue that enforcement of the Education Code provisions by them, is discretionary. In the alternative, the Justices believe that since a constable may enforce the attendance provisions, it is lawful for them serve the process, and since it is lawful for them to serve the process they must do so or be held in contempt by the Court.⁵

Our office has been unable to find any case law, or prior Attorney General Opinions specifically dealing with this issue. Therefore, we would ask for an expedited opinion in this matter.

⁵Tex. Loc. Gov't Code Ann. §86.024 (Vernon 1988).