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July 31, 1992

The Honorable Dan Morales
Attorney General, State of Texas
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Dear Attorney General Morales,

Division Committee

Pursuant to V.T.C.A., Government Code § 402.043, this office requests an opinion on the following questions:

1. Is a juvenile court required to hold a hearing prior to waiving its exclusive original jurisdiction in a truancy case and transferring the case to a justice of the peace under Texas Family Code § 54.021?
2. Is a child entitled to appointed counsel in a truancy case before a justice of the peace?
3. Is a tardiness to class an "unexcused voluntary absence" under Texas Family Code § 51.03(b) (2) and Texas Education Code § 4.25.

Please see the attached brief in support of suggested responses.

These questions have repeatedly come up in cases being handled by our prosecutors practicing before justices of the peace. Thank you for your help in these matters.

Sincerely,

John B. Holmes, Jr.
District Attorney
Harris County, Texas

SYNOPSIS OF SUGGESTED RESPONSES

1. No. Texas Family Code § 54.021 conditions a juvenile court's discretionary transfer of truancy cases to justice of the peace courts only upon the filing of a petition alleging a child to be truant within the meaning of Texas Family Code § 51.03(b) (2). Inasmuch as justices of the peace have very limited authority in handling truancy cases and there are considerable prefiling protections inherent in a juvenile case, this literal interpretation is sound.

2. No. A child has no constitutional right to appointed counsel before a justice of the peace. Furthermore, Texas Family Code § 51.10 merely provides that a child may be represented before a justice of the peace to appoint counsel. Moreover, in light of the limited action a justice can take in a truancy case, as well as the ultimate review of a case a juvenile court retains, there simply is not a compelling argument for a child to have appointed counsel before a justice of the peace.

3. No, not unless the portion of the school day missed rises to the level that the school records the child as "absent" for that day. The school must provide notice of what portion of a day it regards as constituting an absence. Mere tardiness does not qualify as an "unexcused voluntary absence."

ANALYSIS OF SUGGESTED RESPONSES

1. No hearing is required to transfer a truancy case from a juvenile court to a justice of the peace.

Upon the filing of a petition alleging a child to be truant under Texas Family Code § 51.03(b) (2), a juvenile court has the discretion to waive its jurisdiction and transfer the case to an appropriate justice of the peace. Texas Family Code § 54.021. By contrast, Texas Family Code § 54.02 permits a juvenile court to waive its jurisdiction and transfer a child who is 15 years or older to an adult felony court only after a rather elaborate hearing . The comparison of these two transfer provisions considered against the potential punishment in each instance supports the legislature's apparent decision to forgo hearings prior to the transfer of truancy cases to justices of the peace.

First, the Texas juvenile statutory scheme is designed in part to "remove from children . . . the taint of criminality and the consequences of criminal behavior" Texas Family Code § 51.01(3). A truancy case before a justice of the peace has not lost its civil character merely because of the transfer from juvenile court. This is evident because a justice court has no authority to fine a child or otherwise penalize its conduct with a criminal sanction.

Second, under the present structure of Texas' juvenile statutes, a juvenile court does not lose the ultimate disposition of a truancy case by transferring it to a justice of the peace. Texas juvenile statutes classify truancy as "conduct indicating a need for supervision," as contrasted to "delinquent conduct." Texas Family Code § 51.03. In the former instance, a juvenile court is authorized after an adjudication to place a child on probation for up to one year with subsequent one year extensions and to remove the child from its home for placement in a foster home or suitable institution other than the Texas Youth Commission. Texas Family Code

§ 54.04(d). A justice of the peace is not permitted to make a formal "adjudication" of a child's conduct such that it is determined to be "conduct indicating a need for supervision." Nor is a justice of the peace empowered to place a child on probation or to remove the child from its home. Instead, a justice of the peace can enter an "order appropriate to the nature of the conduct" after "finding" a child to be truant. Texas Family Code § 54.021(c). Presumably, this means the judge can enter an interim order that the child properly attend school and then reset the case to monitor the child's progress.

If a child continues to remain truant, after a "finding" that the truancy "is of a recurrent nature," the justice of the peace can impose additional interim sanctions such as community service or counseling designed to compel school attendance. Texas Family Code § 54.021(d). Logically, the case would again be reset to monitor the child's attendance. In the event the child still remains truant or does not comply with the court's order requiring community service or counseling, the justice of the peace could hold the child in contempt of court. This would have the practical result of sending the entire case back to the juvenile court for a determination of whether the child has engaged in delinquent conduct because contempt of a justice of the peace is punishable by a \$100 fine and/or up to 3 days in jail. Government Code § 21.002(c). Furthermore, by characterizing the justice of the peace's orders as "interim" the child's case would not be appealed or returned to the juvenile court prior to a finding of contempt. Of course, once the case returns to the juvenile court the child would have the right to appointed counsel under Texas Family Code § 51.10.

Finally, in addition to the justice of the peace's limited jurisdiction and the juvenile court's potential overview in truancy cases, a pretransfer hearing is not necessary because there is a

substantial intake screening process required under Texas Family Code § 53.01 prior to the filing of a juvenile court petition wherein a juvenile probation department or analogous agency assesses the case and determines whether an alternative disposition is appropriate. This procedural protection should not only make a transfer hearing unnecessary, but permit juvenile courts to enter standing orders transferring truancy cases to justices of the peace upon the filing of a truancy petition.

2. A child is not entitled to an appointed counsel in a truancy case before a justice of the peace.

A juvenile before a justice of the peace in a truancy case has no federal or state constitutional right to appointed counsel. It is inapposite to label such a juvenile a "criminal defendant." Consequently, the right to counsel in criminal cases provided by the Sixth Amendment of the U. S. Constitution and Article I, § 10 of the Texas Constitution should not be applicable. Even if these constitutional provisions did apply, however, a juvenile would still have no right to appointed counsel before a justice of the peace because the U. S. Supreme Court and the Court of Criminal Appeals have squarely held that the right only attaches when a criminal defendant faces potential incarceration for an alleged offense. See Disheroon v. State, 687 S.W. 2d 332, 333-34 (Cr.App. 1985). Consequently, Texas Family Code § 51.10 is a juvenile's only claim for appointed counsel.

Texas Family Code § 51.10(a) provides in part that "[a] child may be represented by an attorney at every stage of proceedings under this title" This permissive language is followed by two subsections that allow a juvenile court to either appoint counsel or require a child's "parent or other person responsible" to retain counsel. Texas Family Code §§ 51.10 (d), (f). These provisions do not require a justice of the peace to take a similar course of action when a child's truancy case is transferred from juvenile court. In fact, a justice of the peace is given no

authority to appoint counsel to represent a child in a truancy case. Thus, Texas Family Code § 51.10 as applied to Texas Family Code § 54.021 merely states that a juvenile may be represented by counsel before a justice of the peace. This does not mean, however, the child has the right to have counsel appointed. This conclusion is prudent. In a truancy case, a justice of the peace is limited to essentially admonishing the child to properly attend school. Texas Family Code § 54.021(c). If a child's truancy is found to be "of a recurrent nature," a justice is given a few additional measures that are clearly rehabilitative in nature. Texas Family Code § 54.021(d). If the child absolutely refuses to properly attend school, a justice of the peace's only recourse is to find the child in contempt which will essentially ship the case back to juvenile court. There, the child will be entitled to appointed counsel prior to a finding that he or she has engaged in either delinquent conduct or conduct indicating a need for supervision.

3. If a child misses so much of a day that the school counts him or her absent, that day counts as an "unexcused voluntary absence" for truancy law purposes.

Texas Family Code § 51.03(b)(2) includes truancy under the definition of "conduct indicating a need for supervision." Truancy is specifically defined to include:

the unexcused voluntary absence of a child on 10 or more . . . parts of days within a six-month period or three or more . . . parts of days within a four-week period from school without the consent of his parents.

Texas Family Code § 51.03(b)(2). This same language is employed in § 4.25(a) of the Texas Ed. Code titled "Thwarting Compulsory Attendance," a class C misdemeanor filed against a child's parents. The language in both of these statutes suggests that the Texas Legislature envisioned something less than a full day as being a sufficient basis for filing charges. Though the Legislature did not define what portion of a day would be sufficient, policy

considerations dictate that a day should only be counted for statutory purposes if the child misses so much of the day that the school counts him or her "absent" for record keeping purposes. The school would, of course, have to provide notice of what portion of a day will constitute an absence. By interpreting the statutes this way, two things are accomplished. First, we prevent a flooding of the courts with cases filed every time a child is simply late to class. Second, we allow the schools to pursue children (or their parents) who are missing so much of the day as to not get anything out of that day of school.