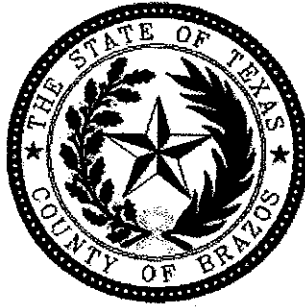


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OPINION COMMITTEE



FILE # ML-45903-08  
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November 6, 2008

Honorable Greg Abbott  
Texas Attorney General  
Opinions Committee  
P. O. Box 12548  
Austin, Texas 78711-2548

RQ-0762-GA

Re: Request for a written opinion on the following question:

On a plea of guilty or nolo contendere or on a finding of guilt on the charge of failure to attend school under TEX. EDUC. CODE ANN. §25.094, may a justice of the peace defer further proceedings, place the individual on probation, and enter an order requiring the individual to wear an electronic monitoring device as a reasonable condition of the deferral under TEX. CODE CRIM. PROC. ANN. art. 45.051(b)(10)?

Dear General Abbott:

Pursuant to the Texas Government Code Ann. §402.042, I am respectfully requesting your written opinion on a question affecting the public interest and concerning the official duties of a Brazos County Justice of the Peace.

**FACTUAL BACKGROUND:**

A Brazos County Justice of the Peace wants to initiate a program whereby he would order a defendant to wear an electronic monitoring device ("EM") during

the period of deferral of final disposition of a case charging the defendant with failure to attend school. The EM condition would be imposed pursuant to the authority of article 45.051 of the Code of Criminal Procedure which authorizes a judge to require a defendant to comply with any reasonable condition during the deferral period. The EM device, which uses global positioning system technology, would be programmed to send alerts on school days and during school hours so the court could determine whether the defendant is attending school as required by the Texas law.<sup>1</sup> The Brazos County Juvenile Probation Department has agreed to monitor the defendant's compliance.

#### **BRIEF ON THE ISSUES:**

##### **A. FAILURE TO ATTEND SCHOOL IS A CLASS C MISDEMEANOR WHICH MAY BE PROSECUTED IN THE JUSTICE COURT .**

Under the Education Code §25.094, failure to attend school is a Class C misdemeanor offense which may be prosecuted in justice court.<sup>2</sup> Justice court proceedings on a complaint charging an individual with failure to attend school under §25.094 are governed by Chapter 45 of the Code of Criminal Procedure.<sup>3</sup> Chapter 45 contains a comprehensive compilation of provisions related to justice and municipal courts.<sup>4</sup> Its purpose is to establish procedures for processing cases that come within the criminal jurisdiction of the justice and municipal courts.<sup>5</sup>

The Education Code §25.094 provides that, upon a finding by the justice court that an individual has failed to attend school, the justice court is authorized to enter an order that includes one or more of the requirements of article 45.054 of the Code of Criminal Procedure.<sup>6</sup> Article 45.054 applies exclusively to failure to attend school proceedings.<sup>7</sup> Under article 45.054 a court may enter an order that includes a requirement to attend school without unexcused absences, to attend a preparatory school, to attend certain special programs determined by the court to be in the best interest of the individual, to perform community service, and an order that both the individual and the individual's parent attend a class for students

<sup>1</sup> TEX. EDUC. CODE ANN. §25.085 (Vernon Supp. 2008).

<sup>2</sup> An individual commits the offense of failure to attend school if the individual: (1) is required to attend school under §25.085, and (2) fails to attend school on ten or more days or parts of days within a six-month period in the same school year or on three or more days or parts of days within a four-week period. TEX. EDUC. CODE ANN. §25.094(a)(b) (Vernon Supp. 2008).

<sup>3</sup> *Id.*, §25.0952; TEX. FAM. CODE ANN. §54.021(c)(Vernon Supp. 2008).

<sup>4</sup> TEX. CODE CRIM. PROC. ANN. art. 45.002 (Vernon Supp. 2008).

<sup>5</sup> *See id.* art. 45.001.

<sup>6</sup> TEX. EDUC. CODE ANN. §25.094.

<sup>7</sup> TEX. CODE CRIM. PROC. ANN. art. 45.054.

at risk of dropping out of school.<sup>8</sup> In addition, the court may order the Department of Public Safety to suspend the individual's driver's license or permit or to deny the issuance of a license or permit if the individual does not have a license or permit.<sup>9</sup>

In addition to the article 45.054 proceedings for failure to attend school, Chapter 45 includes general rules of procedure applicable to all proceedings in justice court.<sup>10</sup> Article 45.002 as the general rule of procedure makes article 45.051 applicable to all proceedings in justice court. "Criminal proceedings in the justice and municipal courts shall be conducted in accordance with this chapter, including any other rules of procedure specifically made applicable to those proceedings by this chapter."<sup>11</sup> Article 45.051 would thus apply to the offense of failure to attend school. Article 45.051(b)(10) authorizes a justice court to order an offender to "comply with any other reasonable condition."<sup>12</sup> As stated previously, the Brazos County justice court wants to impose EM as a condition of the deferral of disposition under article 45.051(b)(10) as a means to monitor an individual's compliance with the compulsory school attendance laws.

B. ELECTRONIC MONITORING IS A REASONABLE CONDITION OF PROBATION  
UNDER ARTICLE 45.051 OF THE TEXAS CODE OF CRIMINAL PROCEDURE.

Electronic monitoring is not specifically authorized under Chapter 45 of the Code of Criminal Procedure for offenses which come under the jurisdiction of the justice or municipal courts. It is authorized under article 42.12 for individuals

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<sup>8</sup> TEX. CODE CRIM. PROC. ANN. art. 45.054(a) On a finding by a county, justice, or municipal court that an individual has committed an offense under Section 25.094, Education Code, the court has jurisdiction to enter an order that includes one or more of the following provisions requiring that: (1) the individual: (A) attend school without unexcused absences; (B) attend a preparatory class for the high school equivalency examination administered under Section 7.111, Education Code, if the court determines that the individual is too old to do well in a formal classroom environment; or (C) if the individual is at least 16 years of age, take the high school equivalency examination administered under Section 7.111, Education Code; (2) the individual attend a special program that the court determines to be in the best interest of the individual, including: (A) an alcohol and drug abuse program; (B) a rehabilitation program; (C) a counseling program, including self-improvement counseling; (D) a program that provides training in self-esteem and leadership; (E) a work and job skills training program; (F) a program that provides training in parenting, including parental responsibility; (G) a program that provides training in manners; (H) a program that provides training in violence avoidance; (I) a program that provides sensitivity training; and (J) a program that provides training in advocacy and mentoring; (3) the individual and the individual's parent attend a class for students at risk of dropping out of school designed for both the individual and the individual's parent; (4) the individual complete reasonable community service requirements; or (5) for the total number of hours ordered by the court, the individual participate in a tutorial program covering the academic subjects in which the student is enrolled provided by the school the individual attends.

<sup>9</sup> See *id.* art. 45.054 (f).

<sup>10</sup> See *id.* art. 45.002.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* art. 45.051(b)(10).

placed on community supervision under Chapter 42 of the Code of Criminal Procedure. Under Chapter 42 electronic monitoring may be used to assist in the supervision of individuals.<sup>13</sup> A trial court may also authorize electronic monitoring of a defendant who has been ordered to serve a jail sentence.<sup>14</sup> Courts have imposed EM as a means to monitor an individual's compliance with home curfew<sup>15</sup> and to track the movements of a defendant convicted of stalking.<sup>16</sup> A magistrate may order a defendant to submit to EM as a condition of release from jail on bond.<sup>17</sup>

Justices of the peace have jurisdiction over criminal cases which are punishable by fine only.<sup>18</sup> Although a justice court may order sanctions as allowed by statute, a sentence of confinement or imprisonment is prohibited.<sup>19</sup> EM as an alternative to house arrest or confinement would thus be prohibited as a sanction in the justice court. The Brazos County Justice of the Peace seeks to impose EM as a condition of deferral of final disposition under article 45.051(b)(10).

Under article 45.051, justice and municipal courts have the authority to defer the disposition of a sentence for up to 180 days.<sup>20</sup> Article 45.051 allows a court to place defendants under supervision in much the same way as allowed by section 5 of article 42.12.<sup>21</sup> In Attorney General Opinion JM-898, your office concluded that a justice of the peace could require a defendant to perform community service as a reasonable condition of the deferral of a fine under article 45.54 (now redesignated as article 45.051). Your decision relied on the reasonableness standard of *Tamez v. State* in which the Court of Criminal Appeals held that a condition of community supervision, to be valid, must have a reasonable relationship to the treatment of the accused and the protection of the public.<sup>22</sup> Applying the reasonableness standard of *Tamez* to a Chapter 45 deferral, your office observed, "the requirement that the condition be reasonable mandates that there be a correlation between the amount of required community service, the severity of the crime, and the penalty."<sup>23</sup> The conditions must be reasonably

<sup>13</sup> See *id.* art. 42.12 §2(4).

<sup>14</sup> See *id.* art. 42.035.

<sup>15</sup> *Thomas v. State*, No. 01-04-00596 CR, 2005 Tex. App. LEXIS 5291 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2005).

<sup>16</sup> *Woodson v. State*, 191 S.W. 3d 280 (Tex. App. – Waco 2006, p.d.r. ref'd).

<sup>17</sup> Tex. Code Crim. Proc. art. 17.43.

<sup>18</sup> See *id.* art. 4.11(a)(1)

<sup>19</sup> See *id.* art. 4.11(a)(1)(B).

<sup>20</sup> See *id.* art. 45.051(a).

<sup>21</sup> TEX. CODE CRIM. PROC. ANN. arts. 42.12 §5, 45.051; *Jamshedji v. State*, 230 S.W. 3d 224 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2006, p.d.r. ref'd).

<sup>22</sup> *Tamez v. State*, 534 S.W. 2d 686 (Tex. Crim. App. 1976).

<sup>23</sup> TEX. ATTY. GEN. OP. JM-898 (1988).

related to the treatment of the individual and the protection of the general public.<sup>24</sup> Similar standards have been applied to conditions of probation imposed by the juvenile justice court in determining a suitable disposition for a juvenile.<sup>25</sup> We have found no Texas cases on the reasonableness of conditions required by the judge on the deferral of a Class C misdemeanor.

Texas has compulsory school attendance laws.<sup>26</sup> A child must attend school each school day for the entire period the program of instruction is provided.<sup>27</sup> An EM condition imposed on an individual who has failed to attend school would permit the justice court to verify the attendance or non-attendance of an individual at school during school day hours and to assure compliance with school attendance mandates. It is a less restrictive alternative to placement in a juvenile justice program that could include confinement or removal from home. It is rationally related to rehabilitation by providing the motivation to attend school faithfully or otherwise to face a warrant for contempt and referral to the juvenile justice court. Electronic monitoring may also serve to deter future criminality.

At least three justice court jurisdictions in Texas have reported the creation of an electronic monitoring program to reduce truancy by tracking students who have failed to attend school as required.<sup>28</sup> Midland County, for example, is touted as a "leader in innovative truancy reduction programs." The Honorable Tommy A. Munoz, the Brazos County Justice of the Peace who hears truancy cases, anticipates that the students who wear monitors will be more compliant in attending school.<sup>29</sup> The program will involve parents to the extent that they will be required to report any movement of their children that may cause the monitor to send an alert, thus making parents more aware of the child's whereabouts. The program would also encourage parents to be more involved in their child's activities, foster communication skills, and create a partnership for success between parent and child to comply with the court's orders. The requirement that

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<sup>24</sup> *Fielder v. State*, 811 S.W. 2d 131 (Tex. Crim. App. 1991).

<sup>25</sup> *In re J.M.*, 25 S.W. 3d 364 (Tex. App. – Fort Worth 2000, no pet.) ("Juvenile courts are granted broad powers and discretion in determining a suitable disposition for a juvenile who has been adjudicated to have engaged in conduct indicating a need for supervision.")

<sup>26</sup> TEX. EDUC. CODE ANN. art. 25.085.

<sup>27</sup> *See id.* art. 25.085(a).

<sup>28</sup> Bexar County <http://www.bexar.org/cmacs/CM/P/Rel%20-%20ElecMonitoringTruancy082208.pdf>; Midland County <http://www.reuters.com/article/pressRelease/idUS118497+25-Mar-2008+BW20080325>; and Dallas County [http://www.nytimes.com/2008/05/12/education/12dallas.html?\\_r=1&ref=education&oref=slogin](http://www.nytimes.com/2008/05/12/education/12dallas.html?_r=1&ref=education&oref=slogin).

<sup>29</sup> Press Release, Tommy A. Munoz, Justice of the Peace, Pct. 2, Place 2, Local Justice Court Looks at New Ways to Solve Truancy Problems (undated)(attached); Letter from Judge Tommy A. Munoz, Brazos County Justice of the Peace, Precinct 2, Place 2, Brazos County Justice Court Alternative Sentencing Program (October 15, 2008) (attached)

an individual be electronically monitored for compliance with attendance at school as required by law will meet the needs of the individual, of the court and of the school.

### SUMMARY

A Brazos County Justice of the Peace has the authority under article 45.051(b)(10) of the Texas Code of Criminal Procedure to defer further proceedings without entering an adjudication of guilt of an individual charged with failure to attend school, and to enter an order requiring the individual to wear an electronic monitoring device as a reasonable condition of probation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. W. Anderson". The signature is fluid and cursive, with the first letter of each name being capitalized and prominent.

Rodney W. Anderson  
Brazos County Attorney

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# Brazos County Justice Court

## Alternative Sentencing Program

October 15, 2008

Re: GPS Monitoring

The Brazos County Justice Court, Precinct 2, Place 2 will begin using GPS monitors in the Fall 2008 as part of the court's efforts in addressing truancy in Brazos County. The program will utilize 10 Omnilink OM210 monitors that can be assigned to juvenile offenders that have been filed on for violating the State, Compulsory Attendance Laws and/or have shown a pattern of truant and runaway behavior. Monitors are assigned on a case by case basis and are part of the deferred statute process or as part of a pre trial agreement. Monitors are assigned for 30 to 180 days (time frames are dependent on the level of compliance by juvenile offenders). The monitors are very durable, waterproof, and almost indestructible. They are an ankle bracelet type unit that is locked in and can only be removed by authorized program staff or deputies from our Constable Precinct 2 office. Alert pings can be set up for every 30 seconds, up to every 30 minutes depending on need. Once a device has been ordered and assigned, the offender is set into the Omnilink system, zones of activity are set up primarily for school, home, work, and any other place felt necessary to monitor the offender's movement. Zones of activity are set to time frames as well in order to track an offender's movement in and out of these zones and to insure they are where they are supposed to be when they are supposed to be. Once an offender is assigned and the monitor is installed, program staff will receive regular updates by e-mail alerts on phones and PCs. This gives our staff and the constables office instant access to an offender's information, location and to intervene if a student is found to be out of their assigned zone. Location histories can also be viewed in order to track an offender's movement for any period of time in order to identify any patterns of truant or runaway behavior. E-mail alerts are very detailed and include offender profile as well as contact information, parent's names, zone information, device tamper alerts, in/out of zone alerts, etc. Detailed zone activity, history and immediate locates must be done from a PC with internet connection.

Parents of offenders assigned a monitor have a level of accountability. They are required to report any movement of their children that may cause a zone alert to .....

October 15, 2008

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program staff. This seems to help the parent /child relationship. It will make parents more aware of their child's whereabouts and will also make parents and children partners in the whole scheme of things, which in turn will bring them closer together. The GPS monitoring system is a great addition to our truancy program and will help to increase the program success and efficiency. It is like having additional program staff that is working 24 hrs a day, 7 days a week. The monitors will never replace the personal interaction between the court and the offender; however it is a high tech tool that gives program staff valuable information on the spot to help them to hold juvenile offenders accountable for their actions.

Please feel free to contact me for any questions or more information.

Sincerely,

TOMMY A. MUNOZ  
Justice of the Peace Precinct 2, Place 2  
200 S Texas Ave., Suite 114  
Bryan, Texas 77803  
Brazos County, Texas





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Brazos County  
Bryan, Texas 77803

**PRESS RELEASE**

**LOCAL JUSTICE COURT LOOKS AT NEW WAYS TO SOLVE TRUANCY PROBLEMS**

Justice of the Peace Pct 2, Place 2, Judge Tommy Munoz stated that he is excited to report that we are examining a pilot program through Electronic Monitoring as a solution to get students back in school. This particular program is ongoing through the Midland County Justice Court Judge David Cobos in collaboration with the Midland ISD. They are currently having a huge success in their monitoring of students who have been to court and have been placed on electronic monitoring. When they began the program compliance rates were at 20%, now that they are using the electronic monitoring process they have achieved a compliance rate of 95%. Truancy not only keeps students from getting an education, is also acts as a gateway to the commission of illegal activities, such as vandalism, theft or more serious crimes.

Truant students who are sentenced to wear Omnilink's one-piece electronic monitoring bracelet can be monitored 24/7, whether they are outside or inside. This means that the monitoring staff knows exactly where these students are at all times, and they know instantly when a student does not show up for school. Omnilink's Systems provides the real-time location of people and valuable assets through unique location-based services technology that goes beyond traditional GPS.

Another great benefit of this program is that the use of electronic monitoring seems to be reducing truancy in the schools attended by monitored students. Other students can see that skipping school could result in the court monitoring their movements all day every day, and that's a deterrent.

We are currently working with Bryan ISD on the cost factors and who will monitor the student's activity through the use of the electronic monitor.

**TOMMY MUNOZ**  
Justice of the Peace Pct 2, Place 2  
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