

SCHOOLS:  
PROSECUTING ATTORNEY:

Duty of the Prosecuting Attorney  
to prosecute for violation of  
compulsory school attendance law.  
(Chapter 164, RSMo 1949).



February 13, 1953

Honorable Leon McAnally  
Prosecuting Attorney of Dunklin County  
Kennett, Missouri

Dear Sir:

We have received your request for an opinion of  
this department, which request is as follows:

"I would like your opinion as to  
whether Section 164.060 R. S. Mo.  
1949 relieves the prosecuting attorney  
of the duty of prosecuting violations  
for non-attendance of school."

Section 164.060, RSMo 1949, provides in part as  
follows:

"2. The county superintendent shall  
immediately have an investigation  
made by his county school attendance  
officer, and any parent or guardian  
or person who, having charge, control  
or custody of any child between the  
ages of seven and sixteen years, vio-  
lates any provision of sections 164.010  
to 164.090, shall be warned by said  
officer as soon as possible after the  
beginning of the public school term  
of the district in which such child  
resides and also at any time thereafter  
to place and keep said child in regular  
attendance at some day school within  
three days from the service of said  
written or printed notice.

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"3. After the lapse of three days from the date of the service of said notice of warning, unless such child has been placed in school, said parent or guardian or person having charge, control or custody of any such child shall be deemed guilty of a misdemeanor, and said school attendance officer shall make complaint against said parent, guardian or other person in charge of such child before the judge of the juvenile division of the circuit court or before a magistrate in the county where the party resides for refusal or neglect to send such child or children to school; said judge or magistrate shall issue a warrant upon said complaint, returnable forthwith, and upon the appearance of the defendant, shall proceed to hear and determine the same in the same manner as is provided by the statutes for other cases under his jurisdiction, and upon conviction of violation of sections 164.010 to 164.090 said parent, guardian or other person having control or custody of such child shall pay a fine of not less than ten dollars and not more than twenty-five dollars, or to be imprisoned for not less than two days and not more than ten days, or by both such fine and imprisonment; provided, that said sentence of fine or imprisonment, or both, may be suspended and finally remitted by the court, with or without the payment of costs, at the discretion of the court, if the said child be immediately placed and kept in regular attendance in some day school as aforesaid, and if such fact of regular attendance is proven subsequently to the satisfaction of said court by a properly attested certificate of attendance by the superintendent, principal or person in charge of said day school."

Section 164.040, RSMo 1949, provides in part as follows:

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"1. The county superintendent of schools in each county shall act as school attendance officer for the county without additional compensation for such services. The county superintendent of schools shall have the power of a deputy sheriff in the performance of the duties of school attendance officer in all school districts of the county except as herein provided; provided, that the board of education in school districts organized under the provisions of sections 165.263 to 165.653, RSMo 1949, may appoint and remove at pleasure one or more school attendance officers and shall pay them from the public school funds; and provided further, that, if any board of education in any school district organized under the provisions of sections 165.263 to 165.653, RSMo 1949, does not appoint a school attendance officer, the county superintendent of schools shall act in such district.

"2. The attendance officer or officers, as aforesaid, \* \* \* shall serve in the cases which they prosecute without further fee or compensation than that paid by the board as aforesaid, and shall carry into effect such other regulations as may lawfully be required by the board appointing them."

Section 164.090, RSMo, 1949, provides as follows:

"It shall be the duty of the state commissioner of education, of superintendents of instruction, of boards of education in this state, of the county superintendents of schools, of the county superintendents of public welfare, and of every school attendance and probation officer, to enforce all laws relating to compulsory school attendance."

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Section 164.110, RSMo 1949, provides as follows:

"Prosecutions under sections 164.010 to 164.090 shall be brought in the name of the state of Missouri. The circuit court shall have concurrent jurisdiction with the court having general jurisdiction over misdemeanors to try and determine any cases of violation of the provisions of sections 164.010 to 164.090 and shall also have jurisdiction to determine exemptions under section 164.020 and a general supervisory jurisdiction over the enforcement of the provisions of sections 164.010 to 164.090."

Section 56.060, RSMo 1949, provides in part:

"The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; \* \* \*"

Refusal to place a child in school after warning, is expressly made a misdemeanor by Section 164.060, supra. Section 17 of Article I, Constitution of Missouri, 1945, provides in part: "That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, \* \* \*."

Section 164.060, RSMo 1949, authorizes the school attendance officer merely to "make complaint". He is not authorized to file an information which, under Section 17 of Article I, is essential in prosecution for a misdemeanor. The courts in numerous cases have drawn the distinction between a complaint and an information. In the case of State v. Kyle 166 Mo. 287, l.c. 303, the court stated:

"The terms 'information' and 'indictment' as used in the Constitution, are to be understood in their common-law sense.

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(Ex Parte Slater, 72 Mo. 102; State v. Kelm, 79 Mo. 515.) In the Kelm case it was held that the term 'information' as used in article 2, of section 12 of the State Constitution of 1875, was to be understood in its common-law sense, that is, a criminal charge which at common law is presented by the Attorney-General, or if that office is vacant, then by the Solicitor-General of England and in this State by the prosecuting attorneys of the respective counties who exercise the same powers as are exercised by the Attorney-General or Solicitor-General of England, that is, the power to present informations under their official oaths."

In the case of City of Richland v. Null, 194 Mo. App. 176, l.c. 181, the court stated:

"\* \* \* That 'complaint' is a technical term descriptive of proceedings before magistrates was held in Commonwealth v. Davis, 11 Pick. (Mass.) 432,436. In 8 Cyc. 407 we find this definition; 'A form of legal process which consists of a formal allegation or charge against a party, made or presented to the appropriate court or officer, as for a wrong done or crime committed; in the latter case generally under oath . . . . In criminal practice, a charge, preferred before a magistrate having jurisdiction, that a person named (or an unknown person) has committed a specific offense, with an offer to prove the fact, to the end that a prosecution may be instituted.' (Emphasis ours)

In the case of McNeely v. State, 122 Tex. Cr. R. 173, 54 S.W. (2d) 512, the court stated:

"\* \* \* The complaint is the affidavit of some individual setting up facts upon which the charge is based. The informa-

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tion is the official charge of crime  
issued upon the authority of the state.  
\* \* \*

Our statutes relative to criminal procedure have recognized the distinction between a complaint and an information. Thus Section 543.020, RSMo 1949, provided in part:

" \* \* \* (W)hen any person has actual knowledge that any offense has been committed that may be prosecuted by information, he may make complaint, verified by his oath or affirmation, before any officer authorized to administer oaths, setting forth the offense as provided by this section, and file same with the magistrate having jurisdiction of the offense, or deliver same to the prosecuting attorney; and whenever the prosecuting attorney has knowledge, information or belief that an offense has been committed, cognizable by a magistrate in his county, or shall be informed thereof by complaint made and delivered to him as aforesaid, he shall forthwith file an information with the magistrate having jurisdiction of the offense, founded upon or accompanied by such complaint." (Emphasis ours.)

Section 543.030, RSMo 1949, provided in part:

" \* \* \* (C)omplaints subscribed and sworn to by any person competent to testify against the accused may be filed with any magistrate, and if the magistrate be satisfied that the accused is about to escape, or has no known place of permanent residence or property in the county likely to restrain him from leaving for the offense charged, he shall immediately issue his warrant and have the accused arrested and held until the prosecuting attorney shall have time to file an information." (Emphasis ours.)

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See Sections 21.03 and 21.04, Supreme Court Rules of Criminal Procedure.

This distinction between a "complaint" and an "information" is deemed significant in answering your question. The school attendance officer is authorized merely to "make complaint." Nowhere is he authorized to file an information, which under our Constitutional provision is essential in prosecution for a misdemeanor. Only the Prosecuting Attorney is authorized to file an information.

We feel therefore, that the requirement of Section 164.060, RSMo 1949, that the judge or magistrate "shall proceed to hear and determine the same, in the same manner as is provided by the statutes for other cases under his jurisdiction" means that he should transmit the complaint to the Prosecuting Attorney, who would then proceed as in any other prosecution, for a misdemeanor. Section 21.04 Supreme Court Rules of Criminal Procedure.

Attention is also called to the fact that upon the adoption of a predecessor to the present Section 164.060, RSMo 1949, the Legislature provided, following the words "in the same manner as provided by the statutes," "except that the county school attendance officer shall act as the prosecuting officer in all such cases." Laws of 1919, page 684. This provision was eliminated in Laws of 1921, page 635. The caption of the section as amended and found in the Laws of 1921, is "Teachers to be furnished lists-- county attendance officer to act as prosecuting officer." This caption was used for the first time in the Laws of 1921, despite the fact that the only change made by the act was elimination of the provision that the attendance officer should act as the prosecuting officer. The same caption was carried forward in the 1929 Revision (Section 9436), the 1939 Revision (10591) and in the 1949 Revision (Section 164.060). The caption is not, however, part of the statute. State v. Maurer, 255 Mo. 152, l.c. 160. We feel that the Legislature's removal of the provision in 1921 is ample evidence that they did not intend for the attendance officer to supersede the Prosecuting Attorney in prosecutions for enforcement of the law.

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CONCLUSION

Therefore, it is the opinion of this department that the Prosecuting Attorney is not, under Section 164.060, RSMo 1949, relieved of the duty of prosecuting on violation of the compulsory school attendance law.

This opinion, which I hereby approve, was prepared by my Assistant, Mr. Robert R. Welborn.

Yours very truly,

JOHN M. DALTON  
Attorney General

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