



April 12, 2000

Mr. James Nelson
Commissioner of Education
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Opinion No. JC-0207

Re: Whether a school district may charge tuition
for students attending a prekindergarten program,
and related question (RQ-0107-JC)

Dear Commissioner Nelson:

Your predecessor in office asked two questions regarding a school district's authority to charge tuition in certain circumstances. He asked first whether an independent school district may charge tuition for students under the age of five who attend a prekindergarten program if the students are not "eligible for state-paid pre-kindergarten programs" under section 29.153 of the Education Code. Letter from Mike Moses, Commissioner of Education, to Honorable John Cornyn, Attorney General (Aug. 25, 1999) (on file with Opinion Committee) [hereinafter "Request Letter"]. Your predecessor also asked whether an independent school district may charge tuition for students enrolled in a kindergarten program who are not yet five years of age or who are twenty-two years of age or older. *Id.*

We conclude that a school district may not charge tuition for either a prekindergarten student or a kindergarten student who is not between the ages of five and twenty-two. Your predecessor's first inquiry assumes that a prekindergarten student who is not "eligible" under section 29.153(b) of the Education Code is not entitled to the benefits of the available school fund and foundation school program. Because we can address a school district's authority to charge tuition without weighing the validity of this assumption, we do not consider it here. *Compare* Request Letter, *supra*, at 1 ("All other children are . . . excluded from participation in the state-funded programs."), and Texas Education Agency, *Frequently Asked Questions and Answers Prekindergarten* (last modified Jan. 13, 2000) <<http://www.tea.state.tx.us/curriculum/early/prekfaq.html>> (stating that "ineligible children are not entitled to the benefits of the Foundation School Program"), *with* Tex. Att'y Gen. Op. No. DM-196 (1993) at 2, 4 (concluding that "[c]hildren enrolled in prekindergarten classes are entitled to the benefits of the available school fund," as well as "the benefits of the Foundation School Program").

Section 29.153 of the Education Code authorizes, and in some cases requires, a school district to establish a prekindergarten program:

- (a) Any school district may offer prekindergarten classes, but a district shall offer prekindergarten classes if the district identifies 15 or more *eligible* children who are at least four years of age. A school

district may offer prekindergarten classes if the district identifies 15 or more *eligible* children who are at least three years of age.

(b) A child is *eligible for* enrollment in a prekindergarten class if the child is at least three years of age and is:

- (1) unable to speak and comprehend the English language;
- (2) educationally disadvantaged; or
- (3) homeless, as defined by 42 U.S.C. Section 11302, regardless of the residence of the child, of either parent of the child, or of the child's guardian or other person having lawful control of the child.

TEX. EDUC. CODE ANN. § 29.153(a), (b) (Vernon Supp. 2000) (emphasis added); *see id.* § 5.001(4) (defining “[e]ducationally disadvantaged” as “eligible to participate in the national free or reduced-price lunch program established under 42 U.S.C. [§] 1751 et seq.”).

A school district must admit to free kindergarten in the district a child residing in the district who is at least five years old on September 1 of the school year. *See id.* § 29.151 (Vernon 1996). Section 25.001(b) of the Education Code requires a school district to admit, “free of tuition,” into its public schools “a person who is” at least five but not yet twenty-one years of age on the first day of September of the school year in which admission is sought. *See id.* § 25.001(b) (Vernon Supp. 2000). A school district may admit a child younger than five years of age if the district has adopted a policy for doing so, *see id.* § 42.003(d) (Vernon 1996), but it is not clear whether students younger than five years of age must be admitted to a prekindergarten program or may be admitted to a kindergarten program. We assume for the purpose of this opinion that a school district may admit a child younger than five to a kindergarten program if the district has adopted a policy for doing so.

Your predecessor's first question asks whether a school district may charge tuition for prekindergarten students who are “ineligible” for purposes of section 29.153 of the Education Code. *See Request Letter, supra*, at 1. The second question likewise asks whether a school district may charge tuition for kindergarten students who are not between the ages of five and twenty-two years of age. *See id.* Both questions presented for our consideration ask, in effect, whether a district may charge tuition in the absence of any statute expressly authorizing a district to do so.

As a public entity, a school district may charge a fee or tuition only if it is specifically authorized to do so, either by statute or under the constitution. *See Tex. Att’y Gen. Op. No. DM-22 (1991) at 1; accord Moore v. Sheppard*, 192 S.W.2d at 559, 561 (Tex. 1946). A statute must be “strictly construed against allowing a fee by implication.” *Moore*, 192 S.W.2d at 561; *accord Tex. Att’y Gen. Op. No. MW-104 (1979) at 1.*

We conclude that a school district may not charge tuition for prekindergarten students, solely on account of the students' status as prekindergarten students, because no statute expressly authorizes a school district to do so. Likewise, because no statute expressly authorizes a school district to charge tuition for kindergarten students who are not between the ages of five and twenty-two, we conclude that a school district may not charge tuition for these students solely on account of their ages.

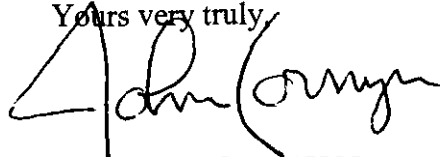
Nonetheless, if a particular prekindergarten or kindergarten student falls into a category of students for which a school district is authorized to charge tuition, the school district may do so. Several statutes expressly authorize a school district to charge tuition for certain specific categories of students, and a student's status as a prekindergarten student or as an under- or overage kindergarten student does not exempt him or her from that authority. Thus, for instance, a school district must charge tuition under section 25.003 of the Education Code for a prekindergarten or kindergarten student "who resides at a residential facility and whose maintenance expenses are paid in whole or in part by another state or the United States." TEX. EDUC. CODE ANN. § 25.003(a) (Vernon Supp. 2000); *see also id.* § 25.004 (Vernon 1996) (authorizing school district to charge tuition for "a student who is not domiciled in this state and resides in military housing that is exempt from taxation by the district"); *id.* § 25.038 (permitting district to charge tuition fee for transfer students in certain circumstances); *id.* § 25.039 (Vernon Supp. 2000) (requiring school district that does not offer kindergarten to pay district with which it has contract to educate kindergartners resident in that district). In addition, a school district may charge prekindergarten and kindergarten students any of the fees enumerated in section 11.158 of the Education Code. *See id.* § 11.158(a). *But see id.* § 11.158(b) (listing items for which school district may not charge).

Our conclusion comports with your agency's understanding of the law. In 1966 the Commissioner of Education held that fees could not be assessed "[i]n the absence of specific authority expressly granted, constitutional or otherwise." *See* Tex. Att'y Gen. Op. No. H-702 (1975) at 2. And your predecessor states that the Texas Education Agency assumes that fees may be charged only if they have been expressly authorized by statute. *See* Request Letter, *supra*, at 1. The construction placed upon a statute by the agency charged with its administration, while not binding, is entitled to substantial weight. *See Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994).

S U M M A R Y

Unless it has express statutory authority to do so, a school district may not charge tuition for any student attending a prekindergarten program or for a student who is not between the ages of five and twenty-two years old.

Yours very truly,

A handwritten signature in black ink, appearing to read "John Cornyn", written over a vertical line that extends from the "Yours very truly," text above.

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