



TEXAS EDUCATION AGENCY

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MIKE MOSES
COMMISSIONER OF EDUCATION

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AUG 31 1999

August 25, 1999

Opinion Committee

The Honorable John Cornyn
Attorney General
P.O. Box 12548
Austin, Texas 78711

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Dear General Cornyn:

RQ-0107-JC

OFFICE OF THE ATTORNEY GENERAL
Executive Administration (001)

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Austin, TX 78711

Liz Robinson

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I.D. # 40968

The Texas Education Agency has been asked to determine whether school districts have the authority to charge tuition for students to attend pre-kindergarten programs when those students are not eligible for state-paid pre-kindergarten programs provided by statute. Additionally, the Agency has been asked whether school districts can charge tuition to students enrolled in a kindergarten program who have not reached five years of age or who are over the age of 21. Due to ambiguities in the statute and the legal history of this issue, the Agency has been unable to bring this matter to a resolution. Therefore, the Agency respectfully requests an Attorney General's opinion to resolve this matter.

Section 11.158 of the Texas Education Code establishes items for which school districts may charge fees. Absent from this list is any provision authorizing a school district to charge tuition. Consequently, the Agency has interpreted this section of the Education Code as precluding such charges. Additionally, a long-standing Attorney General's opinion states that school districts do not have inherent authority to charge fees. Pursuant to Opinion No. H-702, issued on October 1, 1975, school districts do not have the authority to charge tuition for programs or services related to "normal academic, vocational or physical education classroom instruction or training". Accordingly, we have assumed that fees may be charged only if they have been expressly authorized by statute.

Section 29.153 of the Education Code limits the eligibility of students to participate in a state-funded pre-kindergarten program to those students who are at least three years of age and who are either unable to speak and comprehend English, educationally disadvantaged,¹ or who are homeless. All other children are therefore excluded from participation in the state-funded programs.² However, a number of Texas school districts offer voluntary pre-kindergarten

¹ Section 5.001, Texas Education Code, defines educationally disadvantaged as those students eligible to participate in the national free or reduced price lunch program established under 42 U.S.C. Section 1751.

² Section 29.153, Texas Education Code, grants school districts the option of creating a pre-kindergarten program. However, such a program is required if 15 or more eligible students who are at least four years of age reside in the district. Eligibility is limited to children who are homeless, educationally disadvantaged, or unable to speak or comprehend English. Students eligible for pre-kindergarten programs are treated the same as school-aged children for state funding purposes.

programs for those students who are willing to pay the cost for such services. Pre-kindergarten programs for students otherwise ineligible to attend are often designed as an early-intervention tool for at-risk students and are a valued mechanism to provide critical services in the early years of child development. Prior to 1995, Section 21.040 of the Education Code allowed school districts to admit students who were either over or under the school age according to such terms as the district considered "just and proper". Many Texas school districts appear to be continuing this practice.³

Section 25.001(b) of the Education Code specifies that admission shall be granted "free of tuition" to a person who is over five years of age and younger than 21 years of age. A presumption that the defined age groups listed in this section are the only persons eligible for tuition-free public education may lead to the conclusion that all other persons can be charged tuition.⁴ Thus, Sections 11.158 and 29.153 may be read as an exemption to Section 25.001 as it applies to school-aged persons.

As you know, the re-write of the Education Code in 1995 provided for a substantial shift of control from the state to the local level. It has been the consistent opinion of the Texas Education Agency that the intent of the Education Code is substantially deferential to local decision-making. Section 7.003 of the Education Code states that an educational function not specifically delegated to the Agency or Board shall be performed by the school district. Thus, in the absence of an express prohibition for school district action, the "spirit" of the Education Code has been interpreted to afford school districts with a great deal of discretion in making such decisions. The Agency does not believe that school districts should be completely free to charge fees irrespective of Section 11.158. However, in this specific instance, the question of whether school districts can charge tuition for pre-kindergarten programs or for under-age students in kindergarten appears to be in need of review.

Should you require additional information, please do not hesitate to contact our General Counsel, Mr. David Anderson at 463-9720. Your assistance in clarifying this matter would be greatly appreciated.

Sincerely yours,



Mike Moses
Commissioner of Education

³ Section 21.040, Texas Education Code was repealed by Senate Bill 1, Added by Acts 1995, 74th Leg. ch. 260, Sec. 1, eff. May 30, 1995.

⁴ This provision also applies to students who are over the age of 21. However, school districts must serve special education students until they reach the age of 22 and continue to receive state funding for such purposes. For state funding purposes, non-special education students who are over the age of 21 would be treated in the same manner as under-aged students attending a pre-kindergarten or kindergarten program.