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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78701

RQ-0124-GA

FILE # ML-43323-03
I.D. # 43323

RE: Request for Attorney General's Opinion

Dear General Abbott:

On behalf of the Texas Department of Health (TDH) and the Texas Education Agency (TEA), we respectfully request your opinion concerning the following questions:

Does Texas law grant exclusive authority to the Texas Department of Health to adopt rules relating to the provisional admission of students to Texas primary and secondary schools based upon their immunization status?

May a TDH rule relating to provisional admission under § 38.001 of the Texas Education Code preclude admission of an individual to a Texas public school who is otherwise entitled to enroll under § 25.001 of that code during the 30-day period for providing records under § 25.002(a)(3) of that code?

Background

A student who attends a public primary or secondary school in Texas is required to be immunized against vaccine preventable diseases caused by infectious agents under TEX. EDUC. CODE ANN. § 38.001 (herein referred to as § 38.001). A student who has received all age-appropriate immunizations is considered to be "fully immunized." The agencies agree that a student who is not fully immunized but who has begun the required immunizations must be admitted if the student continues to receive the required immunizations as rapidly as is medically feasible as required under § 38.001(e). They also agree that a student who transfers from another Texas public school is presumed to be fully immunized and must be admitted while awaiting the transfer of the immunization record from the former school.¹ However, TDH and TEA disagree on the admission status of a student who is not fully immunized, who has not begun the required immunizations, or who is unable to demonstrate exemption or produce immunization records upon initial enrollment in a Texas public school.

TDH maintains that the Legislature exclusively delegated authority to TDH to adopt rules under § 38.001 for provisional admission of students. In order to protect the health and safety of students, TDH rules provide for a 30-day provisional admission in only two situations. The first situation is a

¹ The agencies additionally agree that under federal law a student who meets the definitions of "homeless" under the McKinney Homeless Assistance Act (42 U.S.C. 11431 et seq.) must be admitted without regard to the availability of immunization records. See, 42 U.S.C. 11432(g)(2)(C).

student who transfers from another Texas public school. As stated above, the transfer student is presumed to be fully immunized since this was a condition of admission to the former school. The second situation is defined in § 38.001(e) for a student who has begun the required immunizations and is in the process of becoming fully immunized.

TEA maintains that TEX. EDUC. CODE ANN. § 25.002 (herein referred to as § 25.002) allows a 30-day period following enrollment during which the student is required to produce immunization records, proof of exemption from immunization, or entitlement to provisional admission. TEA understands that statute to define a period during which a student may not be excluded from the educational program due to a lack of immunizations or immunization records for the purpose of allowing a parent to either begin immunizations or obtain appropriate records.

TDH Position

TEX. EDUC. CODE ANN. § 38.001 as amended by Act of June 1, 2003, 78th Leg., R.S., H.B. 2292, § 2.160, provides as follows:

(a) Each student shall be fully immunized against diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis, except as provided by Subsection (c).

(b) Subject to Subsection (c), the Texas Board of Health may modify or delete any of the immunizations in Subsection (a) or may require immunizations against additional diseases as a requirement for admission to any elementary or secondary school.

(c) Immunization is not required for a person's admission to any elementary or secondary school if the person applying for admission:

(1) submits to the admitting official:

(A) an affidavit or a certificate signed by a physician who is duly registered and licensed to practice medicine in the United States, in which it is stated that, in the physician's opinion, the immunization required poses a significant risk to the health and well-being of the applicant or any member of the applicant's family or household; or

(B) an affidavit signed by the applicant or, if a minor, by the applicant's parent or guardian stating that the applicant declines immunization for reasons of conscience, including a religious belief; or

(2) is a member of the armed forces of the United States and is on active duty.

(c-1) An affidavit submitted under Section (c)(1)(B) must be on a form described by Section 161.0041, Health and Safety Code, and must be submitted to the admitting official not later than the 90th day after the date the affidavit is notarized.

(d) The Texas Department of Health shall provide the required immunization to children in areas where no local provision exists to provide those services.

(e) A person may be provisionally admitted to an elementary or secondary school if the person has begun the required immunizations and if the person continues to receive the necessary immunizations as

rapidly as is medically feasible. **The Texas Department of Health shall adopt rules relating to the provisional admission of persons to an elementary or secondary school.** (*Emphasis added.*)

(f) A person who has not received the immunizations required by this section for reasons of conscience, including because of the person's religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of public health.

Based upon the authority cited above, TDH adopted rules in 25 TEX. ADMIN. CODE § 97.71 (2002)(Tex. Dept. of Health, Provisional Enrollment) that provides:

§ 97.71. The law requires that students be fully immunized against the specified diseases. A student may, however, be admitted provisionally if he or she has begun the required immunizations and if he or she continues to receive necessary immunizations as rapidly as is medically feasible. The school granting provisional enrollment must ensure that the required immunizations are received on schedule. If a student transfers from one school to another, a grace period of no more than 30 days may be allowed at the new school while awaiting the transfer of the immunization record, during which the student may be enrolled provisionally.

Agencies are creatures of the legislature and have no inherent authority. *Public Util. Comm'n v. City Public Service Bd.*, 53 S.W.2d 310, 316 (Tex. 2001); *Public Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 406 (Tex. 1995); *State v. Public Util. Comm'n*, 883 S.W. 2d 190, 194 (Tex. 1994). They may only exercise those specific powers that the law confers upon them in "clear and convincing language." *GTE-Southwest*, 901 S.W.2d 407, quoting *Kawasaki Motors Corp. U.S.A. v. Texas Motor Vehicle Comm'n*, 855 S.W.2d 792, 797 (Tex. App.- Austin 1993, writ denied). TDH maintains that the Legislature exclusively delegated authority to TDH to adopt rules for provisional admission of students based upon their immunization status. In fact, the legislative authorization for TDH rulemaking is in the Education Code and not the Health and Safety Code. This indicates clear and express legislative intent that TDH, as the state's health agency, would regulate the health and safety of students in primary and secondary schools through school admission procedures. In addition, § 38.001(c) enumerates the sole exceptions to the immunization requirements for admission.

TEA argues *infra* that §§ 25.002 and 38.001 should be read together in a manner that avoids conflict and gives meaning to both. In construing a statute, specific provisions control over general provisions. TEX. GOV'T CODE ANN. § 311.026 provides as follows:

§ 311.026. Special or Local Provision Prevails Over General

- (a) If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.
- (b) If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail.

TDH believes that § 38.001 is the special provision and is controlling. As further assistance in construing these provisions, TEX. GOV'T CODE ANN. § 311.023 provides:

§ 311.023. Statute Construction Aids

In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- 1) Object sought to be attained;
- 2) circumstances under which the statute was enacted;
- 3) legislative history;
- 4) common law or former statutory provisions, including laws on the same or similar subjects;
- 5) consequences of a particular construction;
- 6) administrative construction of the statute; and
- 7) title (caption), preamble, and emergency provision.

At least four of the above factors favor construction of §§ 38.001 and 25.002 in the manner suggested by TDH.

First, the object to be attained by §38.001 is the vaccination of all school children in Texas against vaccine preventable diseases. Such mandatory vaccination programs have reduced or eliminated many infectious diseases that once routinely killed or harmed many children and adults. Immunization also slows down or stops disease outbreaks. Those who cannot be vaccinated for medical reasons, those who cannot make an adequate response to vaccination, and immune-compromised individuals are all protected when vaccination coverage levels in schools and the community are high.

Second, the consequence of TEA's construction of §§ 38.001 and 25.002 to allow unvaccinated children into school for 30 days creates a hazard to other children, defeating the very purpose of requiring all children to be vaccinated. This construction creates a consequence opposite of the object sought to be obtained.

Third, in § 38.001(e), the Legislature directed TDH "to adopt rules relating to provisional admission of persons to an elementary or secondary school". The legislature could have directed TEA to adopt rules, but instead chose TDH. Therefore, TDH's administrative construction of the statutes and its own rules are controlling.

Fourth, the title or caption of the chapters is an aid in construing §§ 38.001 and 25.002. Chapter 38 of the Texas Education Code, on which TDH relies, is entitled "Health and Safety". Section 38.001 contains specific provisions regarding immunization of students in elementary and secondary schools. Chapter 25 of the Texas Education Code, on which TEA relies, is entitled "Admission, Transfer, and Attendance". The only provision of Chapter 25 that mentions immunizations is § 25.002(a)(3) that requires "a *record* showing that the child has the immunization as required under § 38.001 ... or proof that the child is entitled to provisional admission *under that section* (i.e. § 38.001) and *under rules adopted under that section*"(i.e. by TDH). (Emphasis added).

TEA Position

TEX. EDUC. CODE ANN. § 25.001 creates an entitlement to enroll in a Texas public school to each student meeting the residency requirements set out in that statute. § 25.002(a) requires provision of certain documents within 30 days of enrollment:

§ 25.002 Requirements for Enrollment

- (a) Not later than the 30th day after the date a parent or other person with legal control of a child under court order enrolls the child in a public school, the parent or other person or the school district in which the child most recently attended school shall furnish to the school district:

- (1) the child's birth certificate or another document suitable as proof of the child's identity;
- (2) A copy of the child's records from the school the child most recently attended if the child has been previously enrolled in a school in this state or another state; and
- (3) A record showing that the child has the immunizations as required under Section 38.001, in the case of a child required under that section to be immunized, proof as required by that section showing that the child is not required to be immunized, or proof that the child is entitled to provisional admission under that section and under rules adopted under that section.

TEA understands the 30-day period during which a parent must provide proof of immunization exemption or qualification for provisional admission to entitle any student to remain enrolled and attend school for 30 days as a means of enabling the parent to either begin immunizations or secure the necessary records.

Where possible, two statutes will be read in a manner that harmonizes their provisions and avoids a determination that they conflict, particularly when they deal with the same subject.¹ § 38.001(e) grants TDH rulemaking authority "relating to ... provisional admission." §25.002 provides parents 30 days in which to provide immunization records, proof of exemption, or qualification for provisional admission. TEA believes that those statutes can be construed in a manner that gives effect to both by recognizing the 30-day period while granting rulemaking authority to TDH to define the pace and sequence of immunizations following enrollment.

TEA agrees that TDH has authority to define the immunizations required and their sequence, as well as the conditions of provisional enrollment. TEA disagrees with an exercise of rulemaking that excludes students from an educational program during the 30-day period provided under § 25.002. Were that authorized, a student could on the one hand be entitled to enroll and have 30 days to produce immunization, exemption or provisional admission-qualifying records, while on the other be denied admission for lack of the same records. Having statutorily granted the 30-day period, a rulemaking delegation should not be construed to negate that grace period. "What the legislature requires by statute, an administrative agency cannot gainsay by rule." Op. Tex. Att'y Gen. No. GA-60 (2003).²

TEA believes that both § 25.002 and § 38.001 deal specifically with admission to Texas public schools insofar as immunization is concerned. Both evidence a policy decision by the Legislature and both can be implemented without a determination that a conflict exists, requiring one enactment to prevail over the other. § 25.002 requires that a period of time be allowed for obtaining certain records, specifically referencing § 38.001 and records necessary to qualify for provisional enrollment under TDH rules. § 38.001 does not by its terms preclude a 30 day grace period to obtain records or begin immunizations. Only the provisions of a rulemaking under that section appear, in some instances, to override the 30-day period granted all parents in Section 25.002.

It may also be relevant that the addition of § 25.002(a)(3) is the more recent Legislative enactment.³ TEA's conclusion has been that the two statutes are capable of being read without conflict. A parent enrolling a student

¹ *Freels v. Walker*, 26 S.W.2d 627 (Comm'n App. 1930), reh'g den, 35 S.W.2d 408.

² Citing *R.R. Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679 (Tex. 1992).

³ Subsection 25.002(a)(3) was added during the 1995 Education Code revision. See, Acts 74th Leg. Sess., Ch. 260. § 38.001 was renumbered (from prior section 2.09) but not substantively amended. Both sections have been amended since 1995, although not in a manner that implicates either the grant of rulemaking in § 38.001 or the 30-day period under § 25.002. The substantive provisions of the TDH rule also appear to predate the enactment of § 25.002(a)(3). See, 19 Tex. Reg. 9711, adopting 25 TEX. ADMIN. CODE § 97.71.

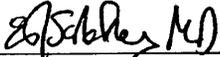
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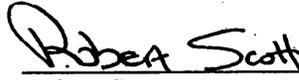
in a Texas public school is entitled to the 30 days provided in § 25.002 to obtain records or immunization, but thereafter is also subject to any requirements adopted for provisional enrollment under § 38.001.

TDH and TEA respectfully request your consideration. Please feel free to contact Susan K. Steeg, TDH General Counsel, (512) 458-7236 or David Anderson, TEA General Counsel, (512) 463-9720 if additional information is needed.

Sincerely,



Eduardo J. Sanchez, M.D., M.P.H.
Commissioner of Health



Robert Scott
Chief Deputy Commissioner of
Education