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Greg Abbott, Attorney General
Office of the Attorney General
209 W. 14th Street
Austin, Texas 78701

FILE # ML-46275-09
I.D. # 46275

RQ-0846-GA

Dear General Abbott:

Pursuant to section 402.042 of the Texas Government Code, I seek your opinion on the following matter brought to my attention by the Chancellor of San Jacinto College. A memorandum by San Jacinto College accompanies this opinion request.

San Jacinto College offers an associate's degree in early childhood development. As part of this program, the College operates a child development laboratory school on two of its campuses. It also operates a day care center which serves as a classroom laboratory facility on a third campus. The centers are licensed by the Texas Department of Protective and Regulatory Services and accredited by the National Association for the Education of Young Children (NAEYC). NAEYC's accreditation criteria require such centers to carry liability insurance. Further, pursuant to section 42.049 of the Texas Human Resources Code, licensed child-care centers must also have such insurance.

Given that Texas law makes San Jacinto College immune to personal injury tort claims, the College wishes to know whether its compliance with such requirements would violate article III, section 52(a) of the Texas Constitution, which forbids the expenditure of public funds for private purposes. The College further seeks general guidance on the interplay between the Tort Claims Act, the Human Resources Code, and article III, section 52(a).

Thank you for your attention to this matter.

Sincerely,

Raymund A. Paredes

MEMORANDUM

TO: Texas Attorney General
Commissioner of Higher Education

FROM: San Jacinto College
Pasadena, Texas

DATE: November 4, 2009

RE: Request for Opinion

The San Jacinto College respectfully requests an opinion on whether the purchase of liability insurance to cover claims arising from the operation of a child-care center violates the Texas Constitution. This memorandum provides an overview of the legal issues pertaining to this question.

Factual Background

Like many community colleges, San Jacinto College offers an associate's degree in early childhood development. As part of this program, the College operates a child development laboratory school on two of its campuses. A third campus operates a day-care center. The children in these programs are served by regular employees of the College as well as students who are enrolled in child development courses. The centers are licensed by the Texas Department of Protective and Regulatory Services and are accredited by the National Association for the Education of Young Children (NAEYC).

The NAEYC's accreditation criteria require the maintenance of liability insurance. (See Exhibit A.) Additionally, the Texas Legislature, through Section 42.049 of the Texas Human Resources Code, requires licensed child-care centers to maintain liability insurance "in the amount of \$300,000 for each occurrence of negligence." (See Exhibit B.) The policy must cover injuries that occur "while the child is on the premises" of the child-care center. TEXAS HUMAN RESOURCES CODE § 42.049(a).

Legal Background

Community colleges have substantial immunity from tort claims. The NAEYC accreditation criteria and the Human Resources Code require the purchase of insurance for claims that are barred by sovereign immunity. The San Jacinto College is a public community college. See generally TEX. EDUC. CODE § 130.197. The general rule is that sovereign immunity protects the state and its political subdivisions from both suit and liability for damages unless the Legislature, by clear and unambiguous language, has waived immunity. See *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999); *City of LaPorte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995). Under the Texas Tort Claims Act, community colleges and school districts are immune from all

personal injury tort claims except those claims arising from the negligent operation of a motor vehicle. See TEX. CIV. PRAC. & REM. CODE § 101.051; *Goston v. Hutchison*, 853 S.W.2d 729, 733 (Tex. App. – Houston [1st Dist.] 1993, no writ) (“when the allegations of negligence are related to the direction, control and supervision of the students, the suit is barred; when the allegations of negligence are related to the negligent use of the motor-driven vehicle itself, the suit is not barred”); *Thomas v. White*, 102 S.W.3d 318 (Tex. App. – Beaumont 2003, writ denied) (tort claim against district based on failure to supervise child in after-school day care was barred by immunity); see also *Ozolins v. North Lake Community Coll.*, 805 S.W. 2d 614 (Tex. App. – Fort Worth 1991, no writ); *Chapman v. Dallas County Community Coll.*, 2007 WL 1544377 (N. D. Tex., May 29, 2007) (unpublished); *Looper v. Houston Community College*, 2007 WL 4200642 (Tex. App. – Houston [14th Dist.], Nov. 29, 2007, pet. denied); *Newman v. College of the Mainland*, 2006 WL 322584 at *2 (S.D. Tex., Feb. 6, 2006) (unpublished); *Freeman v. Del Mar College*, 716 S.W.2d 729 (Tex. App.—Corpus Christi 1986, no writ).

Additionally, college employees generally are immune and are not personally liable for acts and omissions within the scope of their employment that involve the exercise of judgment or discretion. See *Campbell v. Jones*, 264 S.W.2d 425 (Tex. 1954); *Eakle v. Texas Dept. of Human Services*, 815 S.W.2d 869 (Tex. App. – Austin 1991, writ denied); *Govant v. Houston Community College System*, 72 S.W.3d 69, 74 (Tex. App. – Houston [14th Dist.] 2002, no pet.); Thank you for your consideration of this request.

Section 42.049 of the Human Resources Code requires community colleges to purchase insurance to cover injuries that occur “while the child is on the premises” of the child-care center. TEXAS HUMAN RESOURCES CODE § 42.049(a). Under the Tort Claims Act, however, a community college is not liable for personal injuries occurring on its premises; liability is permissible only for injuries resulting from the negligent operation of a motor vehicle. See TEX. CIV. PRAC. & REM. CODE § 101.051. Because the purchase of insurance does not waive immunity, see *Barr v. Bernhard*, 562 S.W.2d 844, 848 (Tex. 1978), the practical effect of the Human Resources Code is to require the purchase of insurance for claims for which a community college cannot be held liable.

The Texas Constitution restricts the expenditure of public monies. The general rule is that it is “well settled that when a governmental entity is not liable on a claim, the payment of that claim constitutes a ‘pure gift or donation’” in violation of Article III, Section 52(a) of the Texas Constitution. Texas Atty. Gen. Opinion No. GA-0062 (2003). Article III, Section 52(a) prohibits the Legislature from authorizing a political subdivision to spend public money in a manner that primarily benefits individuals, associations, or corporations. See *Texas Municipal League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm.*, 74 S.W.3d 377, 383-384 (Tex. 2002); Tex. Atty. Gen. Opinion DM-326 (1995). Local governments must ensure that the predominant purpose of their expenditures is to accomplish a legitimate public purpose. *Texas Municipal League*, 74 S.W.3d at 383. An expenditure is not gratuitous and does not violate the Texas Constitution if the political subdivision receives adequate consideration. *Id.*

Texas courts and the Texas Attorney General have issued a number of opinions analyzing whether the purchase of insurance violates the Texas Constitution. For example, in *City of Tyler v. Texas Employers' Insurance Association*, 288 S.W. 409 (Tex. Comm'n App. 1926, judgment

adopted), the court held that a city could not be a subscriber under the former workers' compensation act because it would allow employees to receive compensation regardless of the culpability of the city. The law unlawfully granted public money "by way of premiums for insurance" to benefit employees. *Id.* at 412.¹ Compare Texas Atty. Gen. Opinion No. H-1042 (1977) (opining that a statute requiring the purchase of professional liability insurance for a county clerk was permissible because the insurance coverage was, in effect, a form of compensation); Texas Atty. Gen. Opinion JM-1092 (1989) (overruling Opinion H-1042 and opining that a governmental entity may purchase of insurance on behalf of a public servant to cover claims that are not barred by immunity even if the expenditure is not a form of compensation); Texas Atty. Gen. Opinion No. GA-0076 (2003) (recognizing that Section 33.085 and 45.105(c) of the Texas Education Code authorize school districts to purchase insurance to cover a student's medical expenses for injuries sustained during athletics and to make other expenditures necessary to accomplish the school district's public purpose).

The San Jacinto College seeks an opinion regarding the interplay between the Human Resources Code, the Tort Claims Act, and Article III, Section 52(a) of the Texas Constitution.

Even when a claim is not barred by immunity, the Texas Tort Claims Act limits a community college's liability. Under the Texas Tort Claims Act, when damages are permitted against a local government, liability is limited to "a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death." TEX. CIV. PRAC. & REM. CODE § 101.023(b); *see also* TEX. CIV. PRAC. & REM. CODE § 102.003 (payments on behalf of an employee may not exceed "\$100,000 to any one person or \$300,000 for any single occurrence in the case of personal injury or death"). In contrast, Section 42.049 of the Human Resources Code requires the purchase of liability insurance "in the amount of \$300,000 for each occurrence of negligence." This provision, as worded, appears to contemplate recovery by a single person in an amount that exceeds the maximum specified in the Tort Claims Act. The College seeks guidance on how to comply with these two statutory provisions.

¹ The Texas Constitution subsequently was amended to permit cities and other political subdivisions to provide workers' compensation coverage. *See* TEX. CONST. art. III, sec. 60.

Exhibit A

Standard 10: NAEYC Accreditation Criteria for Leadership and Management Standard

The following chart presents the accreditation criteria for this topic area. Each criterion provides specific details to guide program plans, policies and practices. The criteria are numbered (01, 02, 03, etc.) within their topic area. Each criterion within each program standard is identified by its relevant age group (or groups). Many criteria are identified as "universal" (U), meaning that all classrooms and programs pursuing NAEYC Accreditation must address these criteria. These aspects of quality should be seen in any programs or classrooms serving birth through kindergarten, though they may look somewhat different in practice depending on the children's age.

Age Groups:

U = universal
I = infant
T = toddlers/twos
P = preschool
K = kindergarten

10.B. Management Policies and Procedures

10.B.1

U I T P K

Policies detail staff responsibilities, planning time, training and resources, address the importance of families and professionals across disciplines, and emphasize the need to work as teams and to build community partnerships.

10.B.02

U I T P K

All components of program operation are guided by written policies and are carried out through articulated plans, systems, and procedures that enable the program to run smoothly and effectively and that guide the program toward achieving its goals.

10.B.03

U I T P K

Technology-based information management systems are in place. Procedures guide staff in collecting and analyzing data that are used to monitor the operation of the program and to inform program improvement. (This criterion is an Emerging Practice.)

10.B.04

U I T P K

The program and facility are licensed to operate or are regulated by the applicable state and local regulatory systems. The program maintains documentation showing that it is considered in good standing by its regulatory bodies, and it can document all certifications, approvals, and corrections of violations and deficiencies. (This is a required criterion.)

10.B.05

U I T P K

Accident and liability insurance coverage is maintained for children and adults. A certificate of insurance is available for review.

10.B.06

U I T P K

If a program is led or governed by a board of directors, advisory group, council, or other similar group, written policies define their roles and responsibilities along with those of the program staff who work directly with those entities.

10.B.07

U I T P K

The program has a strategic planning process that outlines actions the program will take to

- implement the program's vision and mission.
- achieve outcomes desired for children.
- maintain high-quality services to children and families.
- provide long-term resources to sustain the operation of the program.

Exhibit A

10.B.08

U I T P K

The program has written policies and procedures that demonstrate how the program prepares for, orients, and welcomes children and families. These policies and procedures are shared verbally and in writing with families of enrolled children and are available in languages that families use and understand.

Policies address

- the program's philosophy and curriculum goals and objectives,
- the program's commitment to welcome children and families; and
- guidance and discipline.

Procedures address

- the variety of strategies used by the program for ongoing communication with families, including communication in their preferred language or through translation;
- how IFSPs, IEPs, and other individualized plans will be addressed for children with disabilities and other special learning needs;
- health and safety precautions and requirements that affect families and their children including building security and access, medications, inclusion or exclusion of ill children, and emergency plans;
- the variety of techniques used by the program to negotiate difficulties and differences that arise in interactions between families and program staff;
- payment, meals and snacks, and sleeping arrangements;
- how the program ensures confidentiality of child and family information;
- how and when children are scheduled for field trips;
- safety precautions that will be used to safeguard the children on trips, including having a communication device to call for help whenever necessary while on the trip, having first-aid supplies on the trip, and alternate transportation arrangements if there is a problem with the transportation vehicles during the trip.

10.B.09

U I T P K

The program has plans and policies to attract and maintain a consistently qualified, well-trained staff and reduce staff turnover.

10.B.10

U I T P K

Policies guide the appropriate use of specialized consultants to support staff's efforts to meet the needs of children and families to participate fully in the program, including children with disabilities, behavior challenges, or other special needs. Procedures address expected consultant skills, payment, access, availability, and working relationships with staff as well as how the program will arrange with other agencies to use their consultants for children who are eligible for their services. (This criterion is an Emerging Practice.)

10.B.11

U I T P K

Policies prescribe that each group be assigned teaching staff who have primary responsibility for working with that group of children. These teaching staff provide ongoing personal contact, meaningful learning activities, supervision, and immediate care as needed to protect children's well-being.

10.B.12

U I T P K

Written procedures address the maintenance of developmentally appropriate teaching staff-child ratios within group size to facilitate adult-child interaction and constructive activity among children.

Teaching staff-child ratios within group size (see ratios) are maintained during all hours of operation, including indoor time, outdoor time, and during transportation and field trips (when transporting children, the teaching staff-child ratio is used to guide the adult-child ratio).

Groups of children may be limited to one age or may include multiple ages. (A group or classroom consists of the children assigned to a teacher or a team of teaching staff for most of the day and who occupy an individual classroom or well-defined space that prevents intermingling of children from different groups within a larger room or area.)

- Teaching staff-child ratios within group size (see ratios) are maintained during all hours of operation, including indoor time, outdoor time, and during transportation and field trips (when transporting children, the teaching staff-child ratio is used to guide the adult-child ratio).
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10.B.13

Exhibit A

U I T P K

The program is organized and staffed to minimize the number of group, teaching staff, and classroom transitions experienced by an individual child during the day and program year. Every attempt is made to maintain continuity of relationships between teaching staff and children and among groups of children.

10.B.14

U I T P K

Procedures address transition planning by administrators, teachers, and families to facilitate children's transition from one teacher to another, from one group to another, from one classroom to another, and from one program to another.

10.B.15

I T

Policies encourage keeping infants and toddlers/twos together with their teaching staff for nine months or longer.

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EXHIBIT B

Sec. 42.049. LIABILITY INSURANCE REQUIRED. (a) A license holder shall maintain liability insurance coverage in the amount of \$300,000 for each occurrence of negligence. An insurance policy or contract required under this section must cover injury to a child that occurs while the child is on the premises of the license holder or in the care of the license holder.

(b) A license holder shall file with the department a certificate or other evidence from an insurance company showing that the license holder has an unexpired and uncanceled insurance policy or contract that meets the requirements of this section.

(c) Should the license holder for financial reasons or for lack of availability of an underwriter willing to issue a policy be unable to secure the insurance required under Subsection (a) or should the policy limits be exhausted, the license holder shall notify the parent or a person standing in parental relationship to each child for whom the license holder provides care a written notice that the liability coverage is not provided and there will not be a ground for suspension or revocation of the license holder's license under this chapter. The license holder shall also notify the department that the coverage is not provided and provide the reason for same. In no case shall the inability to secure coverage serve to indemnify the license holder for damages due to negligence.

(d) The insurance policy or contract shall be maintained at all times in an amount as required by this section. Failure by a license holder to renew the policy or contract or to maintain the policy or contract in the required amount is a ground for suspension or revocation of the license holder's license under this chapter.

(e) This section does not apply to a group day-care home or a listed or registered family home.

Added by Acts 1993, 73rd Leg., ch. 1002, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1997, 75th Leg., ch. 1217, Sec. 7, eff. Sept. 1, 1997. Renumbered from Human Resources Code, Sec. 42.0491 and amended by Acts 1997 75th Leg., ch. 1063, Sec. 7, eff. Sept. 1, 1997.