



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 5, 2021

The Honorable James White
Chair, House Committee on Homeland
Security & Public Safety
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Opinion No. KP-0359

Re: Whether subsection 38.001(f) of the Education Code and title 25, section 97.62 of the Administrative Code allow school districts, during an epidemic, to exclude students who decline vaccinations for reasons of conscience even when such vaccinations are unrelated to the epidemic (RQ-0364-KP)

Dear Representative White:

You ask whether Texas law allows a school district, during an epidemic, to exclude students who decline vaccinations for reasons of conscience even when such vaccinations do not relate to the epidemic.¹ Your question arises amidst the backdrop of the novel COVID-19 epidemic, for which the Governor declared a state of disaster on March 13, 2020, and that disaster declaration continues today.²

State law generally requires students to obtain immunizations for certain diseases, not including COVID-19, as a requirement for admission to any elementary or secondary school. TEX.

¹Letter from Honorable James White, Chair, House Comm. on Corrs., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (July 17, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0364KP.pdf> (“Request Letter”). Although you ask about title 25, section 97.62 of the Administrative Code, that rule implements the Legislature’s vaccine requirements found in subsection 38.001(f) of the Education Code. *Compare* TEX. EDUC. CODE § 38.001(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.”), *with* 25 TEX. ADMIN. CODE § 97.62(2) (Tex. Dep’t State Health Servs., Exclusions from Compliance) (“A child or student, who has not received the required immunizations for reasons of conscience, including religious beliefs, may be excluded from school in times of emergency or epidemic declared by the commissioner of the department.”). We therefore address the statute alongside the rule about which you ask.

²*See* OFFICE OF THE TEXAS GOVERNOR, DISASTER PROCLAMATION (Mar. 13, 2020), <https://gov.texas.gov/news/post/governor-abbott-declares-state-of-disaster-in-texas-due-to-covid-19>. On February 4, 2021, the Governor renewed the disaster declaration. *See* <https://gov.texas.gov/news/post/governor-abbott-extends-covid-19-disaster-declaration-february-2021>.

EDUC. CODE § 38.001(a) (“Each student shall be fully immunized against diphtheria, rubeola, rubella, mumps, tetanus, and poliomyelitis, except as provided by Subsection (c).”). The Department of State Health Services (“Department”) may require immunization against additional diseases beyond those listed in statute. *Id.* § 38.001(b); *see also* TEX. HEALTH & SAFETY CODE § 161.004(a) (“Every child in the state shall be immunized against vaccine preventable disease caused by infectious agents in accordance with the immunization schedule adopted in department rules.”).³ The Legislature created exemptions to the immunization requirements, including one for students who decline an immunization “for reasons of conscience, including a religious belief.” TEX. EDUC. CODE § 38.001(c)(1)(B); *see also* TEX. HEALTH & SAFETY CODE § 161.004(d)(1); 25 TEX. ADMIN. CODE § 97.62(2) (Tex. Dep’t of State Health Servs., Exclusions from Compliance). To obtain this exemption, students must submit an affidavit to the admitting official of their elementary or secondary school stating the reasons for their declining the immunization.⁴ Under normal circumstances, submission of the affidavit will allow the student to attend school without the required immunizations. But the Legislature created an exception to the exemption:

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.

TEX. EDUC. CODE § 38.001(f).⁵ You question whether this provision allows a school district to exclude students with an affidavit on file for any vaccine, or only the vaccine that prevents the disease causing the declared epidemic. Request Letter at 1.

In construing a statute, we aim to give effect to the Legislature’s intent, which requires first looking to a statute’s plain meaning. *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017). “We presume the Legislature included each word in the statute for a purpose and that words not included were purposely omitted.” *Id.* The exception allowing for the exclusion of non-immunized students in subsection (f) applies to any “person who has not received the *immunizations* required by [section 38.001].” TEX. EDUC. CODE § 38.001(f) (emphasis added). The language chosen by the Legislature does not explicitly mention a nexus between the required vaccines and the emergency or epidemic allowing for the exclusion.

³In addition to the statutorily required vaccinations, Department rules require vaccinations for pertussis, Haemophilus influenzae type b (Hib), hepatitis B, hepatitis A, invasive pneumococcal, varicella, and meningococcal diseases. 25 TEX. ADMIN. CODE § 97.63 (Tex. Dep’t State Health Servs., Immunization Requirements in Texas Elementary and Secondary Schools and Institutions of Higher Education).

⁴The affidavit must be submitted on a form promulgated by the Department. TEX. HEALTH & SAFETY CODE § 161.0041(a).

⁵In conjunction with the Governor’s disaster declaration, the Commissioner of Public Health declared a public health disaster due to COVID-19 on March 19, 2020, and has done so each month since, most recently on February 12, 2021. *See* <https://www.dshs.state.tx.us/coronavirus/docs/DECLARATION-PublicHealthDisaster.pdf>, <https://www.dshs.state.tx.us/coronavirus/docs/PHDD-021221.pdf>. Both the COVID-19 pandemic and the Commissioner’s repeated issuance of public health declarations for the same disaster create novel circumstances with no precedent.

Notwithstanding the foregoing, the exception must be read in context. *In re Ford Motor Co.*, 442 S.W.3d 265, 280 (Tex. 2014) (“In determining a statute’s meaning, we consider statutes as a whole rather than their isolated provisions.”) (quotation marks omitted). Education Code section 38.001 has a narrow scope. It establishes vaccination requirements for Texas public-school students, provides exemptions from those requirements, and sets forth a limited exception to those exemptions. The vaccination exemptions—and the exceptions thereto—do not exist in a vacuum; they are inextricably tied to the list of required vaccines. Section 38.001 does not broadly address the State’s response to an epidemic, an issue addressed at length elsewhere in statute.⁶ Only once does section 38.001 reference an “epidemic,” and only in the exception to the exemption to vaccination requirements. *See* TEX. EDUC. CODE § 38.001(f). Read in context, the statute does not support a reading that school districts are vested with broad authority under subsection 38.001(f) to exclude students from school based on risks to public health unrelated to the diseases covered by the State’s vaccination schedules. *See Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm’n*, 518 S.W.3d 318, 325 (Tex. 2017) (recognizing that courts enforce the plain meaning of a statute’s words unless another meaning “is apparent from the context, or the plain meaning of the words leads to absurd or nonsensical results”). A court likely would conclude that this exception does not permit exclusion of students who lack vaccinations unrelated to an existing epidemic contemplated by subsection 38.001(f).⁷

The U.S. Supreme Court has considered laws requiring vaccinations during times of an emergency or epidemic and has concluded that generally it is within the police power of a state to provide for compulsory vaccination to protect the public health and the public safety. *Zucht v. King*, 260 U.S. 174, 175–76 (1922) (considering a San Antonio ordinance that excluded students from school who had not been vaccinated against smallpox), *Jacobson v. Mass.*, 197 U.S. 11, 25, 39 (1905) (upholding a state law imposing a fine upon adults who refused to be vaccinated during a smallpox epidemic); *see also* Tex. Att’y Gen. Op. No. GA-0178 (2004) at 6. In considering a predecessor statute to section 38.001, the Texas Supreme Court likewise found the statute constitutional as a proper exercise of the police power to protect the health and safety of Texas citizens. *Itz v. Penick*, 493 S.W.2d 506, 509 (Tex. 1973) (upholding the vaccination requirements with exceptions during times of non-emergencies).

The U.S. Supreme Court has explained that a state’s police power to compel vaccinations may not be wielded arbitrarily. The Court has recognized “that an acknowledged power of a local community to protect itself against an epidemic” could be “exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.” *Jacobson*, 197 U.S. at 28. In *Jacobson*, the individual at issue refused a vaccination directly related to the pending health emergency. *Id.* at 13. Both *Zucht* and *Itz* involved general challenges to the State’s ability to enforce a compulsory vaccine requirement. *Zucht*, 260 U.S. at 175–76; *Itz*, 493 S.W.2d at 507. We find no case standing

⁶*See* TEX. GOV’T CODE §§ 418.001–.261 (Texas Disaster Act); TEX. HEALTH & SAFETY CODE §§ 81.001–.408 (Communicable Disease Prevention and Control Act).

⁷While the U.S. Food and Drug Administration has recently approved a COVID-19 vaccine for emergency use, it is not broadly available nor approved for use by children.

for the proposition that the State may punitively exercise its public-health police power against an individual who lacks an immunization entirely unrelated to a public health emergency.

Given the express limitation in *Jacobson* on a state’s general police power during a public health emergency—it may not be wielded in an “arbitrary” or “unreasonable” manner—a court likely would refuse to read Education Code subsection 38.001(f) to allow exclusion of a student who lacks immunizations unrelated to the current COVID-19 pandemic.⁸ See TEX. GOV’T CODE § 311.021(1) (“In enacting a statute, it is presumed that . . . compliance with the constitutions of this state and the United States is intended”); *In re Green*, 221 S.W.3d 645, 649 (Tex. 2007) (per curiam) (“We must of course avoid a construction of a statute that renders it unconstitutional.”); *HEB Ministries, Inc. v. Tex. Higher Educ. Coord. Bd.*, 235 S.W.3d 627, 658 (Tex. 2007) (“We realize we must construe statutes to avoid constitutional problems when we can”). This result is all the more likely given that a student’s exclusion from school implicates the State’s public education obligations under the Texas Constitution. The Texas Supreme Court has held that the constitutional requirement that the Legislature establish “an efficient system of public free schools” is a guarantee that “extends not only to school children but to the public at large.” TEX. CONST. art. VII § 1; *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005).

Furthermore, to the extent students refuse vaccination on religious grounds, Texas law provides broad protections for those students’ religious freedom. See TEX. CONST. art. I, § 6; TEX. CIV. PRAC. & REM. CODE §§ 110.001–.012. The Texas Constitution provides: “No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.” TEX. CONST. art. I, § 6. Some courts have opined that article I, section 6 of the Texas Constitution “provides greater protections for the free exercise of one’s religion than does the federal constitution.” *Ex parte Herrera*, No. 05-14-00598-CR, 2014 WL 4207153, at *4 (Tex. App.—Dallas Aug. 26, 2014, no pet.) (mem. op.) (citing *Howell v. State*, 723 S.W.2d 755, 758 (Tex. App.—Texarkana 1986, no writ)).

The Texas Legislature, through the process of drafting the Texas Constitution, had a debate on the floor regarding the language that would become article 1, section 6 quoted above, and there were two different provisions being debated – one more restrictive and one more broad. The Legislature knowingly rejected the restrictive language and chose the broader provision in drafting the language that was to become article I, section 6. In fact, one of the framers of the Texas Constitution offered a resolution creating an express exception for “good order, peace, or safety of this State.” See *Journal of the Constitutional Convention of the State of Texas* 47 (Sept. 10, 1875) (quoting resolution offered by Mr. Russell, of Harrison, which would have added language to article I, section 6 stating “but the liberty of conscience hereby secured shall not . . . justify

⁸Briefing submitted in response to this request argues that “the compounding effect of multiple disease outbreaks on community health and local health department resources can . . . overwhelm health care systems,” and that “children . . . at risk for more severe outcomes from COVID-19 may include those who are unable to receive necessary vaccinations for medical reasons.” See Brief from Donald P. Wilcox, Vice President & Gen. Counsel, Tex. Med. Ass’n, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Aug. 7, 2020) (on file with the Op. Comm.). Those concerns may be factors a court would consider in determining whether a decision to exclude a student was arbitrary or unreasonable.

practices inconsistent with the good order, peace, or safety of this State, or with the rights of others”). Such restrictive language was not adopted by the framers.

However, the Texas Supreme Court has previously rejected an argument that an individual may rely on article I, section 6 of the Texas Constitution to assert a religious objection to mandatory vaccinations for an epidemic in the relevant jurisdiction as a condition for public-school attendance. *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 308–09 (Tex. 1918) (“[T]he religious freedom, guaranteed by the U.S. Constitution, does not deprive Congress of legislative power, whereby actions may be reached which violate social duties. No more does section 6 of the Bill of Rights in our state constitution relieve one from obedience to reasonable health regulations, enacted under the police power of the state, because such regulations happen not to conform to one’s religious belief.”). Given the purpose of an Attorney General opinion is to advise on how Texas courts would rule on the legal question presented by the opinion request, we are bound to follow Texas Supreme Court precedent. *See* Tex. Att’y Gen. Op. No. GA-1003 (2013) at 1. While the above quoted language is broad, the Texas Supreme Court did not directly rule on your narrow question – i.e., whether a student could be excluded from public school if he or she had not taken vaccinations unrelated to an epidemic on the basis of religious belief.

In addition to article I, section 6, the Texas Religious Freedom Restoration Act provides another layer of protection for religious freedom in Texas. *See* TEX. CIV. PRAC. & REM. CODE §§ 110.001–.012. To the extent a student declined required immunizations due to a sincere religious belief and a school decided to exclude such student during an emergency, a court would likely consider whether that student’s exclusion from school violates that Act. Subsection 110.003(a) of the Civil Practice and Remedies Code generally provides that “a government agency may not substantially burden a person’s free exercise of religion.” *Id.* § 110.003(a). The fact that the government has declared a disaster does not change this. *See In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (“The Constitution is not suspended when the government declares a state of disaster.”). A substantial burden on an individual’s free exercise will be upheld only if the government agency imposing the burden demonstrates that it: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest.” TEX. CIV. PRAC. & REM. CODE § 110.003(b); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny when a law targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation).

Government agencies have a compelling interest in preventing the spread of disease and protecting the health of their citizens, but such regulations must also be narrowly tailored if they concern religious freedom. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 63, 67, 2020 WL 6948354 (Nov. 25, 2020) (“Stemming the spread of COVID-19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as ‘narrowly tailored.’”). When government agencies take an action in furtherance of that interest that also burdens an individual’s free exercise of religion, the government agency must use the least restrictive means to further that interest. TEX. CIV. PRAC. & REM. CODE § 110.003(b)(2).

The right to freely exercise one's religion could include refusing a vaccine if receiving it conflicts with a person's sincerely held religious belief. *See Horvath v. City of Leander*, 946 F.3d 787, 793 (5th Cir. 2020). To the extent a student refuses vaccination on religious grounds, the question then becomes whether that student's exclusion from school for refusing a vaccination for a disease not related to a current health emergency is the least restrictive means of preventing the spread of such disease and protecting public health. Whether exclusion from school is the least restrictive means of furthering a compelling government interest will involve numerous factual questions that are beyond the scope of an Attorney General opinion. *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013); Tex. Att'y Gen. Op. No. GA-0864 (2011) at 2 (explaining that factual inquiries are beyond the scope of an Attorney General opinion). But to the extent a court finds less restrictive means exist, a court could conclude that a specific student's exclusion from school under Education Code subsection 38.001(f) violates the Texas Religious Freedom Restoration Act.

S U M M A R Y

Pursuant to subsection 38.001(f) of the Education Code, the Legislature provided that a student who has not received the immunizations required by law “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.” Read in context, a court likely would conclude that this exception does not permit exclusion of students who lack vaccinations unrelated to an existing “epidemic” contemplated by subsection 38.001(f).

Depending on the particular facts at issue, a court could find exclusion from school for refusal to obtain a vaccine unrelated to the existing epidemic to be arbitrary and unreasonable and overturn the exclusion for this purpose.

Further, to the extent a school was to exclude a student who had declined required immunizations unrelated to an existing epidemic due to a sincere religious belief, a court could find this to be a substantial burden on the student’s religious freedom and potentially a violation of the U.S. and Texas constitutions. Accordingly, subsection 110.003(a) of the Civil Practice and Remedies Code requires that only the least restrictive means of furthering a compelling government interest may be utilized in placing such a substantial burden. If less restrictive means exist to accomplish that objective, a court could find that a specific student’s exclusion in such circumstances from school under Education Code subsection 38.001(f) violates the Texas Religious Freedom Restoration Act.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
Attorney General of Texas

BRENT E. WEBSTER
First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

MURTAZA F. SUTARWALLA
Deputy Attorney General for Legal Counsel

VIRGINIA K. HOELSCHER
Chair, Opinion Committee