

**BRUCE ISAACKS**  
**CRIMINAL DISTRICT ATTORNEY**

**CIVIL DIVISION**

**Carmen Rivera-Worley, Chief**  
**Robert Schell**  
**David L. Finney**  
**Hugh Coleman**

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**OPINION COMMITTEE**

*1450 East McKinney, Suite 3100*  
*P. O. Box 2850*  
*Denton, Texas 76202*  
*(940) 349-2750*  
*Fax (940) 349-2751*

**Via Certified Mail: # 7000 0520 0024 6294 8393**

August 20, 2001

Honorable John Cornyn  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

**FILE #** ML-42113-01  
**I.D. #** 42113

Re: Request for Attorney General's Opinion

Dear General Cornyn:

On behalf of the Denton County Commissioners Court, we respectfully request your opinion concerning the proper interpretation of the statutes governing Juvenile Justice Alternative Education Programs in the State of Texas. The primary statute is Section 37.011 of the Education Code but other statutes are also necessarily involved, at least in our analysis.

**Preliminary Remarks**

Section 37.011 of the Education Code, the statute requiring the establishment of a Juvenile Justice Alternative Education Program ("JJAEP"), and other pertinent statutory provisions provide little specification of the rights and obligations of a juvenile board, a county, a county commissioners court or a school district or districts with regard to a JJAEP. In addition to lacking specificity, key provisions of Section 37.011 are ambiguous. Although Sec. 37.011 details the causes for both mandatory and discretionary expulsions, the statute was apparently intentionally established with few guidelines, the legislature preferring that the rights and duties of the respective entities be established by a

Memorandum Of Understanding ("MOU"). The very few pertinent attorney general opinions and cases are of limited assistance.

An Interlocal Cooperation Agreement ("ICA") was executed by the Denton Independent School District, Denton County ("County"), and the Denton County Juvenile Board ("Board") on February 10, 1998 and has been automatically renewed each year. The MOU for the school year 2000-2001 between all independent school districts ("ISD's") in Denton County and the Board was executed and approved by the Board on July 26, 2000. A copy of both the ICA and the MOU are attached to this request. In both a practical and legal sense, the terms of these two agreements have basically governed the relationship between the ISDs, the County, the Board and the JJAEP at least as much, if not more, than any specific statutory language. The Commissioners Court recognizes that the ICA and MOU will continue in large part to govern the relationship of the parties until amended or terminated as provided by the agreements.

The Commissioners Court originally asked our office for an opinion concerning the various questions the Court had regarding the Denton County Juvenile Alternative Education Program ("JJAEP"). Our opinion is basically contained in the following briefing in support of our request but both the Court and our office believed that an attorney general's opinion was advisable to fill in the statutory gaps, if possible, and to clarify the statutory ambiguities.

### **Questions:**

The questions the Commissioners Court originally asked our office and which we now seek your opinions on are as follows:

- 1) What are Denton County's obligations concerning the JJAEP?**
- 2) What authority do the County and the Independent School Districts (ISDs) have regarding discretionary expulsion referrals to the JJAEP?**
- 3) May the Denton County Juvenile Board (Board) contractually set criteria with the ISDs for discretionary expulsion referrals?**
- 4) What are the ISDs' obligations in funding the building of facilities?**
- 5) Do the current contracts with the ISDs conform to current law?**
- 6) What is the County's obligation or exposure if the discretionary referrals exceed the capacity of the County's facility?**
- 7) May the Juvenile Board purchase real estate or accept donations of real estate to be used as a JJAEP?**

In the event that you do not feel that you are permitted to answer the questions as they relate specifically to Denton County under the statutes and the current agreements, we request your opinion as to the purely statutory obligations and responsibilities of a county, independent school districts, juvenile boards, and commissioners courts in establishing and operating a juvenile justice alternative education program.

### **What is the County's obligation in developing and operating the JJAEP?**

In answering this question and several of the other questions the Court has asked, we must consider both the obligations that may be imposed by statute and those the County may have contractually assumed in the ICA or the Board may have contractually assumed in the MOU.

The principal statute, Section 37.011 of the Education Code, provides that a juvenile board of a county with a population of greater than 125,000 ".... shall develop a juvenile justice alternative education program, subject to the approval of the Texas Juvenile Probation Commission." The requirement of "developing" a JJAEP and thereafter operating it is clearly placed by statute on a juvenile board, not a county.

The term "county" is only used twice in Section 37.011 and no burden is specifically placed on a county with regard to a JJAEP. Subsections (j) and (o) provide that, in the development of a JJAEP, "a juvenile board and a county and a commissioners court are immune from liability to the same extent as a school district and the juvenile board's or county's professional employees and volunteers are immune from liability to the same extent as a school district's professional employees and volunteers". This grant of immunity essentially means that a county, a juvenile board, and a commissioners court are immune from state law actions with the exception of claims of excessive use of force or negligence resulting in bodily injury to students when they are deciding matters involving the use of discretion and judgment. Sec. 22.051, Education Code. It would seem that this statutory grant of immunity to a county and a commissioners court would be unnecessary if the statute did not envision some participation or possible participation by a county and a commissioners court in the development and operation of a JJAEP but nowhere does the statute specify the role, duties, responsibilities or obligations of either a county or a commissioners court.

There is no specific requirement under Section 37.011 that any entity - whether it be a juvenile board, school district, county or commissioners court - must provide, construct, build, furnish, or lease a facility for the operation of the JJAEP other than the language that a juvenile board shall "develop" a JJAEP. Although some facility is obviously required in which to develop and operate a JJAEP, the only statutory reference to the provision of a facility is Section 37.011 (e) stating that a JJAEP "may be provided in a facility owned by a school district" (Emphasis added). It should be noted that this statutory language does not require the use of a facility owned by a school district but simply permits such use. A juvenile board may, without question, use facilities under its jurisdiction for development of a JJAEP.

A county or a commissioners court, at least those in a county without a statutorily designated family district court, does not have a specific statutory obligation to provide facilities for a JJAEP. Section 152.0054, Human Resources Code, however, states that in counties with a statutorily designated family district court:

The commissioners court shall provide the physical facilities necessary to operate the juvenile board on the board's recommendation.

This statute predates the establishment of JJAEPs but would, we believe, be used in counties with a statutorily designated family district court to place the obligation of providing the physical facilities for a JJAEP on the commissioners court since a JJAEP is a program within the jurisdiction of a juvenile board. Since Denton County has only a district court giving preference to family law cases under Chapter 24, Subchapter C, Government Code, as opposed to a statutorily designated family district court under Chapter 24, Subchapter D, Government Code, this statute does not apply to the County.

If the Commissioners Court does not presently have a specific statutory obligation to provide the physical facilities for a JJAEP, does it have any obligation to otherwise provide either funding or physical facilities for the JJAEP? Funding for mandatory expulsions is provided by state funds from the Texas Juvenile Probation Commission ("TJPC") at a present rate of \$59.00 per student per day. Under Sec. 37.012, Education Code, a school district pays the juvenile board/ JJAEP for discretionary expulsions in an amount that is determined by a MOU between the school district or districts and the board. The rate for discretionary referrals under the current 2000-2001 MOU is also \$59.00 per student per day. In the event the school district(s) and the juvenile board are unable to agree upon a daily rate for discretionary expulsions, the rate is to be determined by binding arbitration. Sec. 37.011(p).

The development and operation of the JJAEP over the past few years by the Board with funding being provided by the TJPC and the school districts has resulted in a present "excess" of slightly over \$400,000. Because of the "excess", there has previously been no need to consider whether the County may have an obligation to provide funding for the JJAEP. If, however, the Board should in the future make a good faith determination that TJPC and school district funds were insufficient to cover the necessary operations of the JJAEP, would the County and/or the Commissioners Court have an obligation to provide funding for the JJAEP? These questions have not been directly asked of or answered by the Attorney General [See Tex. Atty. Gen. Op. DM-412 (1996), FN17], nor have they been considered in any case we have been able to find.

To reiterate, Section 37.011 mandates that a juvenile board in a county having a population of greater than 125,000 shall establish a JJAEP. As a general rule, juvenile boards of this state are statutorily created entities comprised of members designated by statute and are entities with an existence separate and apart from their counties and commissioners courts. Chapter 152, Human Resources Code; Tex. Atty. Gen. Op. Nos. JC-209 (2000); JC-0085 (1999); DM-460 (1997). A juvenile board may contract with the Texas Youth Commission, another political subdivision, or a private vendor for juvenile probation services. Sec. 142.003 (b) and (c), Human Resources Code. A juvenile board may also establish a youth boot camp or contract with a private vendor for the financing, construction, operation, maintenance or management of a such a camp in the same manner as the state. Sec. 152.0011, Human Resources Code. In the absence of a statute to the contrary, a juvenile board may, as a general rule, enter into contracts without commissioners court approval. Tex. Atty. Gen. Op. Nos. JC-209; DM-460. It should be remembered that a juvenile board is also a specialized local entity and, as a general rule, is subject to limited control by a county acting through its commissioners court. Section 140.003 (b), Local Government Code; Texas Attorney General Opinions JC-0209 (2000); JC- 0085(1999); DM-460 (1996) and DM-412 (1996). Being a specialized local entity and there being no requirement in Sec. 37.011 to obtain approval of the commissioners court, a juvenile board may enter into contracts with school districts to provide a JJAEP without approval of the commissioners court. Sec. 140.003, Local Government Code; Tex. Atty. Gen. Op. DM-460 (1996). The statute establishing the Denton County

Juvenile Board does not alter this relationship or provide the Commissioners Court with special authority to approve the Board's contracts. Sec. 152.06711, Human Resources Code.

The development of a JJAEP is a statutory duty of a juvenile board and a JJAEP is, therefore, a program within its jurisdiction. Section 152.0012, Human Resources Code, provides:

The juvenile board shall prepare a budget for the juvenile probation department and the other facilities and programs under the jurisdiction of the juvenile board. The commissioners court shall review and consider only the amount of county funds derived from county taxes, fees, and other county sources in the budget. The commissioners court may not review any part of the budget derived from state funds. (Emphasis added)

The juvenile board/juvenile probation department is funded with both state and county funds. Sections 141.081, 141.084, 152.004, 152.005, 152.0012, Human Resources Code. Although a juvenile board is required to submit its budget to the commissioners court, the authority of the commissioners court over the budget is limited. Sections 142.002, 152.007, Human Resources Code; Section 111.019, Local Government Code; Texas Attorney General Ops. JC-0209 (2000); JC-0085 (1999); DM-460 (1996); DM-412 (1996). A commissioners court has no authority to consider or review the portion of a board or department's budget funded with state funds. Sec. 152.0012, *id.* The commissioners court's role is limited to setting the dollar amount of county funds allocated to the juvenile probation department or other programs within the jurisdiction and control of the juvenile board and to reviewing county-funded programs on an abuse of discretion standard. Section 111.094, Local Government Code; Texas Attorney General Ops. JC-0209 (2000); JC-0085 (1999). The payments or funds received from either TJPC or the school district have never been "county" funds allocated to the Board by the Commissioners Court, are not presently "county" funds, and are not subject to the control of the County or the Commissioners Court. These funds in particular and all other funds placed in the Board's annual budget are to be disbursed in accordance with the instructions of the Board. A commissioners court may not determine how the funds are to be expended since it has no general supervisory authority over the board or over those matters within the board's jurisdiction. Once county funds are budgeted for a juvenile department and the other programs within a juvenile board's jurisdiction, the funds lose their character as "county funds" and must be disbursed in accordance with the directions of the juvenile board. Section 140.003, Local Government Code; Texas Attorney General Op. JC-0209 (2000).

The combined effect of the statutes and attorney general opinions greatly influence our opinion as to potential future obligations of the County to provide funding and/or facilities for the JJAEP. Should the Board at some time determine that insufficient funding or facilities for the required operation of the JJAEP is provided by TJPC and school district funds and present County facilities and submit either an amendment to an authorized budget or submit a new annual budget request to the Commissioners Court demonstrating that fact, the Commissioners Court would, in our opinion, have an obligation to provide funding and/or facilities unless it could be shown that the Board had abused its discretion in making its determination that such funding was necessary.

For the present school year, both the County and the Board have agreed in the continuing ICA to provide a JJAEP facility for the Denton ISD. The Board has properly agreed in the MOU with all the

ISDs in the County to provide a JJAEP facility. Unless the contractual commitments are amended or changed, the Board, and, perhaps to a limited extent, the Commissioners Court, must decide what facility will, in fact, be provided for use as the JJAEP for the balance of the present school year and the next school year.

**What authority do the County and the ISDs have regarding discretionary referrals to the JJAEP?**

Statutorily, each ISD, of course, has the sole authority to expel one of its students for misconduct. An expulsion may be mandatory under Sec. 37.007 (a), (d), and (e) or it may be discretionary under Sec. 37.007 (b), (c), and (f) of the Education Code. Section 52.041 (e), Family Code, provides:

In any county where a juvenile justice alternative education program is operated, no student shall be expelled without written notification by the board of the school district or its designated agent to the juvenile board's designated representative. The notification shall be made no later than two business days following the board's determination that the student is to be expelled. Failure to timely notify the designated representative of the juvenile board shall result in the child's duty to continue attending the school district's educational program, which shall be provided to that child until such time as the notification to the juvenile board's designated representative is properly made.

The Family Code makes no distinction between mandatory and discretionary expulsions. Chapter 37 of the Education Code does, however, make a distinction between the types of expulsions. Section 37.011 (b) provides that, if a student is the subject of a mandatory expulsion, the juvenile court shall order or require the student to attend the JJAEP unless the child is placed in a post-adjudication facility. Section 37.010 (a) provides, in pertinent part:

.....In a county that operates a program under Section 37.011, an expelled student shall, to the extent provided by law or by the memorandum of understanding immediately attend the educational program from the date of expulsion; provided, however, that in a county with a population greater than 125,000 every expelled student who is not detained or receiving treatment under an order of the juvenile court must be enrolled in an educational program....(Emphasis added)

Subsections (k) and (m) of Sec. 37.011 not only authorize but require a school district and a juvenile board to enter into an annual memorandum of understanding for the operation of the JJAEP. The statute clearly contemplates that the memorandum of understanding will include both mandatory expulsions and those discretionary expulsions that are eligible for admission into the JJAEP in accordance with the applicable memorandum of understanding. A school district may elect, at least for immediate educational programs and perhaps for all discretionary expulsions, to operate its own system for discretionary expulsions or may contract with a juvenile board, a private provider, or one or more school districts for such a system. Sec. 37.011 (l). Statutorily speaking, the statute appears to allow the Board to impose or at least negotiate eligibility standards for discretionary referrals in a memorandum of understanding. Since the County and the Board are two essentially separate and distinct units, the

County has, in fact, no statutory authority regarding either mandatory or discretionary referrals to the JJAEP.

The ICA makes no reference to discretionary or mandatory expulsions but appears to assume that both discretionary and mandatory expulsions are included in the provision of “educational programs for students expelled pursuant to Tex. Educ. Code § 37.007”. Although the County was not a party to the MOU, the MOU clearly requires the JJAEP to provide educational services for both mandatory and discretionary expulsions so that there is little or no distinction made between mandatory and discretionary referrals in the MOU.

**May the Juvenile Board contractually set criteria with the ISDs for discretionary referrals?**

Yes, but the extent of the statutory authority or discretion of a juvenile board to contractually set criteria in the memorandum of understanding under the statutes regarding discretionary referrals is ambiguous and is subject to at least two substantially different interpretations.

Both interpretations begin with the statutory requirement of Sec. 37.011(k) that each school district and the county juvenile board “shall annually enter into a joint memorandum of understanding” that 1) outlines the responsibilities of the juvenile board concerning the establishment and operation of a JJAEP; 2) defines the amount and conditions on payments from the school district to the juvenile board for discretionary referrals; and 3) identifies those categories of conduct that the school district has defined in its student code of conduct as constituting serious or persistent behavior for which a student may be placed in the JJAEP. (There are additional matters to be covered by the memorandum of understanding but they are not material to your questions.)

One interpretation would be that the language of subsection (k) confers considerable authority and/or discretion in the Juvenile Board as to its responsibilities concerning discretionary referrals and the terms and conditions of such referrals. This interpretation would say that Sec. 37.010 (a) which provides, in pertinent part, that an expelled student shall to the extent provided by law or by the memorandum of understanding immediately attend an educational program from the date of expulsion confirms that the Board has discretion in such referrals. Under this interpretation, the “provided by law” provision would cover mandatory expulsions and the “by the memorandum of understanding” provision would cover discretionary expulsions. Further enhancement would be provided by the first sentence of Sec. 37.011 (l) which appears to provide or imply that a juvenile board and a school district may agree to eligibility standards for admission of discretionary referrals to the JJAEP:

The school district shall be responsible for providing an immediate education program to students who engage in behavior resulting in expulsion under Section 37.007 (b), (c), and (f) but who are not eligible for admission into the juvenile justice alternative education program in accordance with the memorandum of understanding required under this section.(Emphasis added)

This interpretation would place considerable authority and/or discretion in a juvenile board in negotiating eligibility standards in a memorandum of understanding with the school districts concerning students it would accept as discretionary referrals to a JJAEP. Age, mental status, special needs or

requirements might be included in such eligibility standards although the statute is totally silent in this regard.

The second interpretation also begins with the recognition of the statutory requirement that the school districts and a juvenile board must enter into a memorandum of understanding concerning the operation of the JJAEP. Sec. 37.011 (k) and (m). This interpretation notes that Sec. 37.011 (k) (2) does not provide that all terms and conditions of discretionary referrals be defined in the memorandum of understanding but only that “the amount and conditions on payments” be so defined. Further, the first sentence of subsection (l) should not be considered separate and apart from the complete subsection which provides:

The school district shall be responsible for providing an immediate educational program to students who engage in behavior resulting in expulsion under Section 37.007 (b), (c), and (f) but who are not eligible for admission into the juvenile justice alternative education program in accordance with the memorandum of understanding required under this section. The school district may provide the program or the school district may contract with a county juvenile board, a private provider, or one or more school districts to provide the program. The memorandum of understanding shall address the circumstances under which such students who continue to engage in serious or persistent misbehavior shall be admitted into the juvenile justice alternative education program. (Emphasis added)

This interpretation of subsection (l) is that a school district has the discretion to provide an immediate educational program for discretionarily expelled students or that it may contract with a juvenile board, a private provider, or other school districts for such programs. Under this interpretation the Board would have no choice but to contract to accept all discretionary referrals. If an immediate educational program for discretionary expulsions were established by the school district or districts, students who thereafter continue to engage in serious or persistent misbehavior could still be admitted to the JJAEP as provided in the third sentence of subsection (l) and the memorandum of understanding. While a school district may exercise its discretion under subsection (l) to provide its own or to contract for an immediate educational program, it is clearly the school district’s responsibility to provide such a program.

**What is the County’s obligation or exposure if the discretionary referrals exceed the capacity of the County’s facility?**

Again, distinguishing between the County and the Board, the County would not have any obligation at the present time because it could not be shown that county funds would be needed if the discretionary referrals exceeded capacity in view of the excess funds presently deposited. The Board would have the obligation of providing additional capacity in some manner but, in addition to using the excess funds, would be paid the student per diem rate by the individual school district for the extra referrals. Until the combination of “excess” funds and additional payments were exhausted or were insufficient to cover the costs of the extra referrals, the County would clearly have no liability for those referrals. Even if school district funds were insufficient to cover the costs of the extra students, the liability of the County for “failure” to provide funds would be highly questionable. The County should be able to assert its statutory immunity in any state law court action. Only a consistent pattern, practice,



or custom of repeated failure to provide funds in response to properly submitted and reasonable Board requests for funding demonstrating a clear need for said funding might subject the County to possible federal civil rights liability.

**Does the Juvenile Board's current Memorandum of Understanding conform to current law?**

While changes can and are recommended to be made in future MOUs and changes could also be made to the ICA with the Denton ISD, it can not be said that the present ICA and MOU are in conflict with current law. You should remember that Section 37.011, Education Code, lacks specificity and leaves much to be agreed upon between the school districts and the juvenile board in the MOU. The problem is that the school districts have been given every advantage, apparently without serious negotiation, and particularly with regard to having the JJAEP receive all discretionary expulsions.

**What are the ISDs' obligation in funding the building of facilities for the JJAEP?**

The independent school districts have no obligation or requirement to fund or assist in funding the building of facilities for the JJAEP. The school districts are required and have an unconditional obligation to provide funding for all discretionary referrals to the JJAEP. Sec. 37.012, Education Code; Tex. Atty. Gen. Op. DM-412 (1996). If the school districts and the juvenile board can not agree as to the student per diem rate, the amount of the funding per student is determined by binding arbitration. Section 37.011(p), Education Code.


As stated earlier, a school district, while not required to do so, may provide a facility in which to operate a JJAEP. Section 37.011(e). The same subsection provides that a school district may but is not required to provide personnel and services for a JJAEP under a contract with a juvenile board.

**May the Juvenile Board purchase or accept donations of real estate to be used as the JJAEP?**

We have been unable to find any authority to support any claim that a juvenile board may either purchase or accept donations of real estate for any purpose, including use as a JJAEP. There is no authority provided under the Family Code or under either the Human Resources Code's general provisions for juvenile boards or the specific provisions relating to the Denton County Juvenile Board. Section 140.003, Local Government Code, only authorizes a specialized entity such as a juvenile board to make competitively bid purchases under the County Purchasing Act, Chapter 262, Subchapter C, Local Government Code, and does not provide authority for purchases of real estate. It is our opinion that the County may accept donations on behalf of the Juvenile Board with title remaining in the County although the use of the real estate as a JJAEP or other uses within the jurisdiction of the Board would be controlled by the Board.

Thank you for your consideration of this request.

Bruce Isaacks  
Criminal District Attorney  
Denton County, Texas

  
Carmen Rivera-Worley  
Assistant District Attorney

pc: Denton County Commissioners Court  
Denton County Juvenile Board  
Peggy Fox, Director Juvenile Probation Services