



# TEXAS EDUCATION AGENCY

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Robert Scott  
Commissioner

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**OPINION COMMITTEE**

FILE # ML-45667-08  
I.D. # 45667

April 30, 2008

**RQ-0709-GA**

Honorable Greg Abbott  
Texas Attorney General  
P.O. Box 12548  
Austin, Texas 78711

Re: Licensing Requirements for Pre-Kindergarten Classrooms

Dear General Abbott:

On behalf of the Spring Branch Independent School District, I am requesting your opinion regarding the implementation of certain administrative rules of the Department of Family and Protective Services, as applied to certain pre-Kindergarten classes and associated activities of the district. I have attached the request of the district which sets out the relevant facts.

We appreciate your attention to this matter. Should you need any additional information, please feel free to contact me or the following TEA staff: David Anderson, General Counsel at (512) 463-9720 or Holland Timmins, PSF Executive Administrator at (512) 463-9159.

Sincerely,

Robert Scott  
Commissioner of Education

Cc:  
Mr. Carey Cockerell, Commissioner  
Texas Department of Family and Protective Services

Enclosed Attachments

**BRACEWELL  
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April 14, 2008

*Via Facsimile*

Mr. Robert Scott  
Commissioner of Education  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701

Re: Spring Branch Independent School District Pre-Kindergarten Educational Classrooms

Dear Commissioner Scott:

We are the attorneys for the Spring Branch Independent School District ("Spring Branch ISD" or "District"). The District is in a dispute with the local office of the Texas Department of Family and Protective Services ("TDFPS") regarding District pre-kindergarten educational classrooms and childcare licensing requirements. The District seeks an opinion from the Attorney General confirming that the childcare licensing requirements do not apply to the pre-kindergarten educational classrooms of the District. The District asks that you, as the State Commissioner of Education, request the Attorney General's opinion on the District's behalf.

**I. BACKGROUND**

The District operates pre-kindergarten educational classrooms at Tiger Trail School for Early Learning ("Tiger Trail") and Bear Boulevard School for Early Learning ("Bear Boulevard"). Both Tiger Trail and Bear Boulevard are District facilities staffed by District employees, and the District has *sole* control over the educational programs operated in these two facilities. At each facility, there are pre-kindergarten educational classrooms in which a Head Start agency, Neighborhood Centers Inc. ("NCI"), collaborates with the District to provide supplemental services to children who are eligible for Head Start services. The District calls these "collaborative classrooms." The local office of the TDFPS has taken the position that these collaborative classrooms must meet childcare licensing requirements. This interpretation is contrary to the law and to TDFPS's own guidelines. The District seeks an opinion from the Attorney General confirming that these classrooms are exempt from the childcare licensing requirements.

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## II. THE TEXAS ADMINISTRATIVE CODE

Based on the language in Volume 40 of the Texas Administrative Code Section 745.119(1), the key to determining the exempt status of the collaborative classrooms is evaluating the educational facility where they are located.

The Texas Administrative Code states that an accredited educational facility for grades pre-kindergarten and above is exempt from the TDFPS licensing requirements if it meets the following criteria:

- (A) The educational facility operates primarily for educational purposes;
- (B) The educational facility operates the program;
- (C) All children in the program are at least pre-kindergarten age; and
- (D) The Texas Education Agency (TEA), the Southern Associates of Colleges and Schools (SACS), or the Texas Private School Accreditation Commission (TEPSAC) accredits the educational facility.

40 TEX. ADMIN. CODE § 745.119(1) (emphasis added).

## III. THE TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES LICENSING POLICY HANDBOOK

The TDFPS Licensing Policy Handbook addresses collaborative classrooms and childcare licensing requirements. The section is entitled "Collaborative Programs Head Start/PreK," and is located in Appendix 2002-2. According to this section:

An ISD operating a Head Start program or a program combining Head Start and Pre-K and meeting all of the criteria of 40 TAC § 745.119(1) is exempt from regulation by Licensing unless the program also uses subsidized public funding (such as CCMS funding) that requires an operation to be licensed by Licensing in order to receive funding.

Key question to determine who operates the program: Who is responsible for hiring, supervising and firing staff?

Head Start agencies and early care and education operations that do not meet the exemption criteria in § 745.119(1) must be licensed and regulated by Licensing.

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#### IV. TIGER TRAIL AND BEAR BOULEVARD SATISFY THE REQUIREMENTS UNDER THE TEXAS ADMINISTRATIVE CODE FOR EXEMPT STATUS

The collaborative classrooms at Tiger Trail and Bear Boulevard satisfy each of the requirements for exempt status as outlined in the Texas Administrative Code. Accordingly, the District's collaborative classrooms are exempt from the TDFPS licensing requirements.

##### *Educational Facility Operates Primarily for Educational Purposes*

Pursuant to the first prong of Section 745.119(1), the Spring Branch ISD educational facilities where the collaborative classrooms are located operate for educational purposes. The Tiger Trail School and the Bear Boulevard School are educational facilities that contain numerous pre-kindergarten educational classrooms. These are Spring Branch ISD campuses focused on the education of pre-kindergarten age students. In many of the classrooms, there is no collaboration with NCI. Collaboration occurs only in the classrooms where there are children eligible for Head Start services. The collaboration with NCI in those classrooms is not with regard to the educational program, which operates based on the same curriculum and scope and sequence as the other pre-kindergarten educational classrooms. Rather, the collaboration concerns the supplemental services received by the Head Start-eligible children, which consists of things such as vision and hearing screenings, screenings for other physical needs, transportation to the doctor, and parent training. The NCI person assigned to the collaborative classroom acts as a liaison with the parents of Head Start-eligible children regarding the supplemental social services available for the child and the family, but is not in charge of that classroom; the District's employees at all times remain in control of the classroom. The collaborative classrooms at Tiger Trail and Bear Boulevard, as the other pre-kindergarten classrooms, operate primarily for educational purposes. The supplemental Head Start services are simply additional support for those children who are eligible. The collaborative classrooms would continue to operate as pre-kindergarten classrooms even if the District had no agreement with NCI.

##### *Educational Facility Operates the Program*

Additionally, the Tiger Trail and Bear Boulevard Schools for Early Learning operate all the pre-kindergarten educational classrooms, including the collaborative classrooms. Spring Branch ISD receives *no funding* from NCI to operate any of the pre-kindergarten classrooms. The collaborative pre-kindergarten classrooms are funded by state educational funds from TEA, just like any other public school classroom in the state of Texas. One-half of the funding is provided via TEA's general education fund, while one-half of the funding is provided via a pre-kindergarten expansion grant awarded to Spring Branch ISD by TEA approximately seven (7) years ago. The funding that Spring Branch ISD receives from the

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pre-kindergarten expansion grant allows the District to extend its half-day pre-kindergarten classes to full day pre-kindergarten classes by compensating Spring Branch ISD teachers for the additional time obligations.

As all the funding to compensate Spring Branch ISD teachers in all the District's pre-kindergarten classrooms is provided by Spring Branch ISD due to funding it receives from TEA—with no funding from NCI—all pre-kindergarten classrooms are operated by Spring Branch ISD teachers. These teachers are in charge of the classroom and are *solely* responsible for the children. The Spring Branch ISD teacher implements the scope and sequence of the pre-kindergarten curriculum, determines the progress of the children, reteaches as necessary to secure understanding and evaluates the children's performance. These teachers are always present in the collaborative classrooms. NCI provides a staff person to assist in the collaborative classroom. This person provides social services to the Head Start-eligible students and is a liaison with their parents. Day to day, the NCI staff person assists the District teacher. However, the Spring Branch ISD teacher is *solely* responsible for the care, supervision, and education of all the children in these collaborative classrooms. If the District teacher is absent, the District provides a substitute as it would in any other class. The NCI staff person does not take over the classroom. Moreover, the collaborative classrooms at Tiger Trail and Bear Boulevard operate on the same curriculum and procedures as the Spring Branch ISD pre-kindergarten classrooms whose student population does not include Head Start-eligible children. Spring Branch ISD, through the campus administration, hires, supervises, evaluates, and terminates the District teachers who care for, supervise, and educate the children in the collaborative classrooms. Because Spring Branch ISD (1) is responsible for compensating, hiring, supervising, evaluating and terminating the teachers, (2) employs the teachers who are solely responsible for the children in the collaborative classrooms, (3) provides the facilities where the children are educated, and (4) is responsible for the curriculum that the students are taught, it is clear that Spring Branch ISD operates the program.

### ***Program Children are at Least Pre-Kindergarten Age***

All of the children in the Tiger Trail and Bear Boulevard collaborative pre-kindergarten classrooms are kindergarten age. This same requirement applies to the collaborative classrooms.

### ***Educational Facility is Accredited***

Finally, the Spring Branch ISD is accredited by the Texas Education Agency. As such, its pre-kindergarten educational classrooms at Tiger Trail and Bear Boulevard are accredited by TEA.

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## V. TIGER TRAIL AND BEAR BOULEVARD SATISFY THE CRITERIA IN THE TDFPS LICENSING POLICY HANDBOOK

In addition to meeting the requirements for exemption in the Texas Administrative Code, the Tiger Trail and Bear Boulevard facilities also meet the guidelines for exemption outlined in the TDFPS Licensing Policy Handbook. First, as discussed in detail above, Spring Branch ISD operates an educational program in which some pre-kindergarten classes have Head Start eligible children who also receive Head Start supplemental services from an NCI staff person. These classes meet all of the criteria of 40 TAC § 745.119(1). Moreover, the collaborative classrooms do not use subsidized public funding (such as CCMS funding) that requires an operation to be licensed in order to receive funding. To the contrary, the funding for these collaborative pre-kindergarten classrooms is provided by TEA, as fully discussed above. Finally, as illustrated in detail above, Spring Branch ISD is responsible for hiring, supervising, evaluating and terminating the District teachers in these classrooms who are solely responsible for the care, supervision and education of the students. Accordingly, the TDFPS exemption requirements are satisfied.

## VI. CONCLUSION

Your assistance seeking an opinion of the Attorney General is vital to ensuring the continued operation of these very successful pre-kindergarten classrooms. The Child Care Licensing Division ("CCL") of the TDFPS has informed Spring Branch ISD that its collaborative classrooms are not entitled to exemption. Despite all information provided to it, the CCL Division has concluded that NCI "governs" the collaborative classrooms. When the CCL Division first contacted NCI about the collaborative classrooms, NCI did not advise the District of the inquiry. Rather, NCI responded to the CCL Division apparently in such a way as to lead the CCL Division to believe NCI operates these classrooms. Any such representations by NCI were wrong. The District teachers are solely responsible for these collaborative classrooms which operate just as all other pre-kindergarten educational classrooms. All attempts by the District to correct this misinterpretation with the CCL Division have been in vain. The CCL Division has ignored all information from the District that these collaborative classrooms meet all the requirements of 40 TAC § 745.119(1) as well as the TDFPS's own Licensing Policy handbook and are exempt from childcare licensing requirements. It appears an interpretation from the Attorney General may be the most efficient way to resolve this dispute.

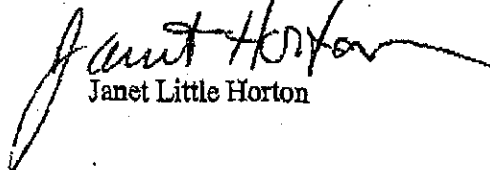
Thank you for your attention to this important matter. If you have any questions, do not hesitate to contact me at 713-221-1217. The District would be happy to provide any more detailed information you may determine is necessary. With kindest regards, I am

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Very truly yours,

Bracewell & Giuliani LLP



Janet Little Horton

JLH/ljs

cc: Mr. David Anderson  
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*Via Facsimile*

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