



Harold V. Dutton, Jr.
District 142

STATE of TEXAS
HOUSE of REPRESENTATIVES

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Committees:
Public Education, Chair
Judiciary & Civil Jurisprudence

Via email: opinion.committee@oag.texas.gov
Certified Mail, Return Receipt Requested

The Honorable Ken Paxton
Attorney General of Texas
Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RE: Public-private partnerships for state-funded prekindergarten offered by Texas school districts.

Dear Attorney General Paxton,

Pursuant to Texas Government Code section 402.042, as the Chair of the House Public Education Committee, I respectfully request a formal opinion on public private partnerships for state-funded prekindergarten offered by Texas public school districts. The issue is time-sensitive because of the upcoming 2023 session. I am not aware of any pending litigation on the questions presented. My letter brief is incorporated herein.

Questions Presented

1. Whether subsections (d-1) and (g) of Texas Education Code section 29.153, which require that school districts solicit and consider proposals to provide public-private prekindergarten programs from public and private child-care providers, are mandatory or discretionary?
2. Whether school districts may modify the requirements of subsection (g) by adding criteria to the statutory criteria listed under subsection (g) and then declining to solicit proposals when no providers meet the extra-statutory criteria?
3. Whether the Texas Education Agency (TEA) rules and guidelines are consistent with subsections (d-1) and (g)?



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4. Whether Executive Orders on the COVID pandemic authorize the TEA or school districts to suspend subsections (d-1) and (g)?

Background

House Bill 3, passed in the 86th Regular Session of the Texas Legislature in 2019, effective September 1, 2019, made comprehensive and significant changes in the Foundation School Program, specifically in the way public school districts and charter schools are financed and in which public education is provided. *See* Tex. Educ. Code §§47.002, 47.003, 48.002; *see also* Tex. Educ. Code §§44.004, 45.003. The goal of the Bill was two-fold: to improve the uniformity and quality of the free public education provided in Texas and to provide increased transparency and accountability for school district maintenance and operations *ad valorem* tax rates.

The school funding formulas and allotments consider multiple factors, from demographics to disasters. The allotments provided for include, but are not limited to, allotments based on average daily attendance (ADA), *see* Tex. Educ. Code §48.005, and allotments based on new instructional facilities. *See* Tex. Educ. Code §48.152. The Bill also contains direct incentives to encourage school districts to seek additional funding for offering additional instruction days. *See, e.g.*, Tex. Educ. Code §48.0051.

School districts have an incentive to maximize the allotments and incentives allowed. To assure that they are not overzealous in doing so, the Bill contains provisions that allow the Texas Education Agency (TEA) Commissioner to recoup allotments to which a school district is not entitled. *See* Tex. Educ. Code §48.272(e); *see also* Tex. Educ. Code §7.028 (a)(4) (monitoring to assure compliance with Education Code Chapter 48).

In addition, the Bill continues in effect the historic public-private partnerships between school districts and private providers of early childhood care. The Bill effectively prevents school districts from taking unfair advantage of the ADA allotment, the additional instruction day incentive, or the additional allotment for new instructional facilities, among other things, in the area of prekindergarten classes by requiring that school districts solicit and consider proposals from



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public or private child-care providers before seeking exemptions from the program, Tex. Educ. Code §29.153 (d-1), and before constructing, repurposing, or leasing a classroom facility, or issuing bonds for the construction or repurposing of a classroom facility to provide the prekindergarten classes required under section 29.153. Tex. Educ. Code §29.153(g).

These two subsections, §§29.153(d-1) and 29.153(g), form the basis for this opinion request. Apparently, several school districts consider the subsections to be a suggestion as opposed to a requirement for an exemption from the limits and conditions imposed in section 29.153. Some school districts have not progressed even to the point of soliciting proposals because they are adding to the criteria listed in 29.153(g) in order to avoid soliciting proposals. Finally, it has been suggested that the school districts have been relieved from compliance with §§29.153(d-1) and 29.153(g) by general Executive Orders issued in response to the COVID pandemic. The Texas Legislature does not believe the laws it enacts should be ignored.

Statutory Framework

With that overview of House Bill 3 in mind, a more detailed analysis of the specific sections of the Education Code at issue is necessary.

Chapter 29 of the Texas Education Code governs the education programs offered to children by Texas school districts. Subchapters E and E-1 of Chapter 29 govern the kindergarten and pre-kindergarten classes offered. The Education Code provides for state funding (from the Foundation School Program) for classes that meet the requirements of Subchapters E and E-1. Some programs are mandatory, and some are within the discretion of the school districts to offer.

For example, Texas Education Code section 29.151 provides that

The board of trustees of each school district *shall* establish and maintain one or more kindergartens for the training of children residing in the district who are at least *five years of age* on September 1 of the school year.



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Tex. Educ. Code §29.151. Such programs may be half day or full day. Tex. Educ. Code §29.152.

Texas Education Code section 29.153 provides for free prekindergarten classes, i.e., those for children who are at least three years of age but under five years of age, if they meet certain criteria:

(a-1) A district shall offer prekindergarten classes if the district identifies 15 or more children who are eligible under Subsection (b) and are at least four years of age. A school district may offer prekindergarten classes if the district identifies 15 or more eligible children who are at least three years of age. A district may not charge tuition for a prekindergarten class offered under this section.

(b) A child is eligible for enrollment in a prekindergarten class under this section if the child is at least three years of age and:

- (1) is unable to speak and comprehend the English language;
- (2) is educationally disadvantaged;
- (3) is homeless, regardless of the residence of the child, of either parent of the child, or of the child's guardian or other person having lawful control of the child;
- (4) is the child of an active duty member of the armed forces of the United States, including the state military forces or a reserve component of the armed forces, who is ordered to active duty by proper authority;
- (5) is the child of a member of the armed forces of the United States, including the state military forces or a reserve component of the armed forces, who was injured or killed while serving on active duty;
- (6) is or ever has been in:



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(A) the conservatorship of the Department of Family and Protective Services following an adversary hearing held as provided by Section 262.201, Family Code; or

(B) foster care in another state or territory, if the child resides in this state; or

(7) is the child of a person eligible for the Star of Texas Award as:

(A) a peace officer under Section 3106.002, Government Code;

(B) a firefighter under Section 3106.003, Government Code;
or

(C) an emergency medical first responder under Section 3106.004, Government Code.

(c) A prekindergarten class under this section may be operated on a half-day basis for children under four years of age and shall be operated on a full-day basis for children who are at least four years of age. A district is not required to provide transportation for a prekindergarten class, but transportation, if provided, is included for funding purposes as part of the regular transportation system.

(c-1) A prekindergarten class under this section for children who are least four years of age must comply with the program standards required for high quality prekindergarten programs under Subchapter E-1.

(d) *Subject to Subsections (d-1) and (d-2)*, on application of a district, the commissioner shall exempt a district from the application of all or any part of this section, including all or any part of Subchapter E-1 for a prekindergarten class described by Subsection (c-1), if the commissioner determines that:

(1) the district would be required to construct classroom facilities in order to provide prekindergarten classes; or



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(2) implementing any part of this section would result in fewer eligible children being enrolled in a prekindergarten class under this section.

(d-1) A district may not receive an exemption under Subsection (d) unless the district has solicited proposals for partnerships with public or private entities regarding prekindergarten classes required under this section in accordance with guidance provided by the agency regarding soliciting partnerships and considered submitted proposals at a public meeting. A decision of the board of trustees regarding a partnership described by this subsection is final.

(d-2) An exemption under Subsection (d) may not be granted for a period longer than three school years and may be renewed only once.

. . . .

(g) Before a school district or open-enrollment charter school may construct, repurpose, or lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility, to provide the prekindergarten classes required under this section, the district or school must solicit and consider proposals for partnerships to provide those classes with community-based child-care providers who:

- (1) are a Texas Rising Star Program provider with a three-star certification or higher;
- (2) are nationally accredited;
- (3) are a Head Start program provider;
- (4) are a Texas School Ready! participant; *or*
- (5) meet the requirements under Section 29.1532.

Tex. Educ. Code §29.153 (emphasis added).



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Although subsections (d-1) and (g) were added in 2019, the concept of requiring that school districts consider the possibility of a public-private contract to provide early childhood care existed long before 2019. Education Code §29.1533 provides as follows:

Before establishing a new prekindergarten program, a school district *shall consider* the possibility of sharing use of an existing Head Start or other child-care program site as a prekindergarten site.

Tex. Educ. Code §29.1533 (emphasis added). This section has remained unchanged since 2003. *See* Acts 2003, 78th Leg., ch. 790, § 1, eff. Sept. 1, 2003.

Providing these services through a public-private contract often proves to be the most efficient, cost-effective way to provide prekindergarten classes. Licensed childcare facilities are already regulated by the state. *See* Tex. Human Resources Code §42.042. The TEA describes the potential benefits in its one-page description “Public –Private Prekindergarten Partnerships”:

- Expanded access to prekindergarten programs
- Additional funding resources
- Continuity of care for children attending at their ELP
- Extended hours of care/holiday and year-round program options
- Greater access to high quality curriculum and instructional materials
- Increased high-quality professional development opportunities
- Ability to offer more choice in programs to families
- Increased student enrollment
- Shared wrap around services: health care, family support or mental health services
- The most significant benefit. . .
- Increased alignment between early childhood stakeholders to elevate program quality and improve school readiness for children and families in the community.

(Exhibit 1)



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Given the importance of parent choice and of the intent of House Bill 3, adding the requirement that school districts solicit and consider proposals from private child-care providers before seeking exemptions from the requirements of section 29.153 and before committing tax revenue to new classroom facilities makes sense.

Questions Restated

1. Mandatory or Discretionary?

The courts' primary objective in construing a statute is to determine the legislature's intent. *Texas Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 135-36 (Tex. 2018). Intent is discerned from the language of the statute. *Id* (citing *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016)). A statute's unambiguous language is the surest guide to the Legislature's intent because "the Legislature expresses its intent by the words it enacts and declares to be the law." *Texas Health*, 569 S.W.3d at 136 (quoting *Prairie View A & M Univ. v. Chatha*, 381 S.W.3d 500, 507 (Tex. 2012)); *Molinet v. Kimbrell*, 356 S.W.3d 407, 414 (Tex. 2011).

Taking section 29.1533, quoted above, first, there can be no question that the term "shall" consider is mandatory. *See S.C. v. M.B.*, ---S.W.3d ---, 2022 W.L. 2192167 (Tex. June 17, 2022) In addition, the language is preceded with "[b]efore establishing a new kindergarten program." Tex. Educ. Code §29.1533(emphasis added). The inclusion of a condition or consequence of a failure to do that which is directed emphasizes the mandatory nature of the requirement.

Although subsection (d-1) of section 29.153 does not contain the magic word "shall," reading it in context makes it clear that school districts have a mandatory duty to solicit proposals and to consider the proposals in a public meeting. School districts may not have to accept the proposals, but they must solicit them and consider them in a way that makes their decision transparent to the public. Completely ignoring the section is not an option.

In fact, the clause in subsection (d-1) that "[a] district may not receive an exemption under Subsection (d)" makes it clear that the TEA should not accept



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an application for exemption until and unless the school district submitting its application for exemption demonstrates its compliance with section 29.153(d-1). The TEA may not be able to review the school district's decisions on particular proposals under subsection (d-1), but the TEA must require compliance with the process set forth.

Subsection (g) of section 29.153 contains the word "must," which, like the word "shall," has a plain meaning of requiring action – imposing a mandatory duty. *See Davis v. Taylor*, 930 S.W.2d 581, 584 (Tex. 1996). There is no need to go farther than the plain language of subsection (g):

Before a school district or open-enrollment charter school may construct, repurpose, or lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility, to provide the prekindergarten classes required under this section, the district or school *must* solicit and consider proposals for partnerships to provide those classes with community-based child-care providers[.]

Tex. Educ. Code §29.153(g) (emphasis added).

The process -- soliciting and considering proposals -- is a mandatory prerequisite to a school district constructing, repurposing, or leasing a facility, or issuing bonds for the construction or repurposing of a classroom facility to provide a prekindergarten program described in section 29.153. As noted, under House Bill 3, the TEA should review such action, refuse to approve the program, and deny approval for a new program or facility that fails to follow subsections (d-1) and (g).

As a result, we ask that you issue an opinion that subsections (d-1) and (g) are mandatory.

2. What criteria must be met under subsection (g)?

There exists some confusion regarding the list of criteria included in subsection (g) of section 29.153. 2. Some school districts have effectively modified the requirements of subsection (g) by adding criteria to the statutory criteria listed



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under subsection (g). These school districts then decline to solicit proposals, claiming that there are no child-care providers that meet the extra-statutory criteria.

The requirement under subsection (g) is to solicit and consider proposals for partnerships with community-based child-care providers who meet one of the following criteria:

- (1) are a Texas Rising Star Program provider with a three-star certification or higher;
- (2) are nationally accredited;
- (3) are a Head Start program provider;
- (4) are a Texas School Ready! participant; **or**
- (5) meet the requirements under Section 29.1532.

Tex. Educ. Code §29.153 (g) (emphasis added).

Some school districts are applying the criteria in a different section, section 29.171, the section that governs the requirements for public-private contracts. Tex. Educ. Code §29.171. Section 29.171 provides as follows:

- (a) A school district that offers a prekindergarten program under this subchapter may *enter into a contract with an eligible private provider* to provide services or equipment for the program.
- (b) To be *eligible to contract* with a school district to provide a program or part of a program, a private provider must be licensed by and in good standing with the Department of Family and Protective Services. For purposes of this section, a private provider is in good standing with the Department of Family and Protective Services if the department has not taken an action against the provider's license under Section 42.071, 42.072,



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or 42.078, Human Resources Code, during the 24-month period preceding the date of a contract with a school district. The private provider must also:

- (1) be accredited by a research-based, nationally recognized, and universally accessible accreditation system approved by the commissioner;
- (2) be a Texas Rising Star Program provider with a three-star certification or higher;
- (3) be a Texas School Ready! participant;
- (4) have an existing partnership with a school district to provide a prekindergarten program not provided under this subchapter; or
- (5) be accredited by an organization that is recognized by the Texas Private School Accreditation Commission.

(c) A prekindergarten program provided by a private provider under this section is subject to:

- (1) the requirements of this subchapter; and
- (2) the class size requirement for prekindergarten classes imposed under Section 25.112(a).

Tex. Educ. Code §29.171 (emphasis added).

As a preliminary matter, section 29.171 applies only to prekindergarten programs for four years olds. Section 29.164 provides that “[i]n this subchapter, ‘program’ means a high quality prekindergarten program required under Section 29.153(c-1) to be provided free of tuition or fees in accordance with this subchapter.” Tex. Educ. Code §29.164. Section 29.153(c-1) provides that



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A prekindergarten class under this section *for children who are least four years of age* must comply with the program standards required for high quality prekindergarten programs under Subchapter E-1.

Tex. Educ. Code §29.153 (c-1) (emphasis added).

Section 29.153(d-1) and (g) do not distinguish between programs for three-year-olds and four-year-olds. Section 29.153 (d-1) and (g) apply to both programs for three-year-olds and to programs for four-year-olds: under subsection (d-1) when those programs are “new” and under subsection (g) when the school district proposes to “construct, repurpose, or lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility” in order to provide the prekindergarten classes required under section 29.153.

More important, section 29.153 (d-1) and (g) and section 29.171 serve different purposes that must both be given effect. The criteria for eligibility to submit a proposal are different and distinct from the more stringent criteria for eligibility to actually enter into a public-private contract under Subchapter E-1.

Subsection (g) lists five alternative criteria to be eligible to submit a proposal. Any licensed child-care provider likely to respond would at least meet the criteria in subsection (g)(5) of section 29.153, i.e., meeting the requirements of Section 29.1352. Section 29.1352 provides in part that

(b) If a school district *contracts* with a private entity for the operation of the district’s prekindergarten program, the program must *at a minimum* comply with:

(1) the applicable child-care licensing standards adopted by the Department of Family and Protective Services under Section 42.042, Human Resources Code; and

(2) the class size requirement for prekindergarten classes imposed under Section 25.112(a).

Tex. Educ. Code §29.1532(b)(emphasis added).



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Subsection (b) of section 29.1532 establishes a minimum, a minimum that is only one of the five criteria under subsection (g). As with section 29.171, the criteria for a contract may be more stringent than the criteria to submit a proposal. Reading sections 29.153(g) and 29.1532(b) together provides further support for the contention that school districts are not free to ignore subsection (g) at the proposal stage.

Obviously, it would be prudent for private providers to specify in their proposals how they plan to meet the additional criteria *for a contract* under section 29.1532 or the additional criteria under section 29.171 *for a contract* under Subchapter E-1, but subsection (g) does not contain a requirement that they meet those criteria as a condition of submitting a proposal.

The private provider may have a larger than 1 teacher to 11 students' ratio, the class size requirement under section 25.112(a), which is referenced in section 29.171(c)(2), but the provider's proposal may specify how the required ratio will be established if the provider is selected. Likewise, the curriculum currently offered by the private provider may differ in some respects from that required under Subchapter E-1, but the provider's proposal could demonstrate that the quality of curriculum required under Subchapter E-1 would be adopted and implemented for programs for four year olds.

The private provider may have additional unused space available for expansion, expansion that would be justified if the provider were selected for a public-private contract. That would make it unnecessary for the school district to "construct, repurpose, or lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility." That could ultimately save taxpayers money, one of the goals of House Bill 3.

The possibility of a public-private contract might cause the private provider to make a great number of changes, at its expense. That is part of why public-private contracts reduce costs and risks to government entities. The private provider assumes costs and risks in providing services that may be uncertain. The governmental body, however, has a fixed limit in the contract on its costs.



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As a result, we ask that you issue an opinion that school districts may not add to the five alternative conditions listed in subsections (1) through (5) of subsection (g) as a condition for submitting a proposal or fail to solicit proposals based on criteria that are not listed in subsection (g). School districts should not be able to evade section 29.153(g) by surveying which childcare providers, if any, meet extra-statutory criteria at the time proposals are solicited.

3. Are TEA rules and guidelines consistent with subsections (d-1) and (g)?

The TEA has some rules in place that govern some prekindergarten programs school districts may offer. *See* 19 T.A.C. §§102.1001, 102.1002, 102.1003.¹ Section 102.1002 provides in part as follows:

(c) Application and grant award.

(1) An eligible applicant must submit a Prekindergarten Early Start Grant Program application in accordance with the instructions provided by the Texas Education Agency (TEA).

(2) An applicant must document in the grant application its locally adopted procedures for:

(A) determining which eligible students will participate in the program;

(B) implementing a strategic plan encouraging eligible students to attend the program; and

(C) sustaining the level of program quality and services following the term of the grant period.

¹ The TEA also has a number of informative “guidelines” that it has not passed as rules that may be found at <https://tea.texas.gov/academics/early-childhood-education/early-learning-public-private-partnerships>.



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(3) Each applicant shall provide evidence that before establishing a new prekindergarten program, the school district considered the possibility of sharing use of an existing Head Start or other licensed childcare prekindergarten site as a prekindergarten site.

See 19 T.A.C. §102.1002 (c)(3)(emphasis added).

Subsection (c)(3) of the Rule reflects section 29.1533 as opposed to the new, more specific and stringent requirements under subsections (d-1) and (g) of section 29.153. Section 102.1002 was last amended in 2011. As part of its regular review of its rules in 2021, the TEA readopted Rule 102.1002 without change. See 47 Tex. Reg. 3278 (June 3, 2022). Sections 29.162 and 29.172 of the Education Code provide that the TEA “may” adopt rules to implement Subchapters E and E-1 of the Education Code. Tex. Educ. Code §§29.162(Rules for Subchapter E), 29.172(Rules for Subchapter E-1). Given that the word “may” is ordinarily deemed to be discretionary, amending the rule was not required.

More important, the rule does not appear to be inconsistent with subsections (d-1) and (g) of section 29.153. *But see* 19 T.A.C. §102.1002 (f)(allowing expenditures for leases for facilities for prekindergarten programs without expressly requiring compliance with subsections (d-1) and (g)) Nothing prevents the TEA, however, from reviewing the “evidence” submitted by school districts under the existing section 102.1002 for compliance with subsections (d-1) and (g) of section 29.153.

The TEA “guidelines,” however, may present a different issue.

The first paragraph of the TEA’s *Public-Private Prekindergarten Partnership Proposal Solicitation Guidance* provides as follows:

LEAs² must solicit and consider proposals from community-based childcare providers for partnerships to provide prekindergarten classes prior to constructing, repurposing, or leasing a classroom facility, or

² “LEA” means a Local Education Agency.



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issuing bonds for the construction or repurposing of a classroom facility, to provide prekindergarten classes. TEC§29.153 (g)

(Exhibit 2) The quoted language that references subsection (g) of section 29.153 is consistent with the statute.

The second paragraph of the *Proposal Solicitation Guidance* provides as follows:

LEAs with full-day prekindergarten exemptions that request an exemption renewal must share documentation verifying increased numbers of eligible four-year-olds served in full-day prekindergarten programs during each year of the exemption term or solicit proposals for partnerships with public or private entities regarding prekindergarten classes and consider submitted proposals at a public meeting. TEC§29.153(d-1)

(Exhibit 2) The quoted language suggests that subsection (d-1) is far more limited than described in the statute.

Section 29.153 provides in pertinent part that

(d) Subject to Subsections (d-1) and (d-2), on application of a district, the commissioner shall exempt a district from the application of all or any part of this section, including all or any part of Subchapter E-1 for a prekindergarten class described by Subsection (c-1), if the commissioner determines that:

(1) the district would be required to construct classroom facilities in order to provide prekindergarten classes; or

(2) implementing any part of this section would result in fewer eligible children being enrolled in a prekindergarten class under this section.

(d-1) A district may not receive an exemption under Subsection (d) unless the district has solicited proposals for partnerships with public or private entities regarding prekindergarten classes required under this section in



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accordance with guidance provided by the agency regarding soliciting partnerships and considered submitted proposals at a public meeting. A decision of the board of trustees regarding a partnership described by this subsection is final.

Tex. Educ. Code §29.153 (d), (d-1) (emphasis added).

Subsections 29.153 (d) and (d-1) are not limited to “LEAs with full-day prekindergarten exemptions” nor is soliciting proposals an alternative to the school district submitting documentation. Subsection (d-1) is a statutory prerequisite to all requests for exemption from the requirements of section 29.153. As result, the TEA guideline is inconsistent with the statute.

The TEA’s *Early Learning Partnership Provider Eligibility Guidance* also appears to be inconsistent with the statute. For example, it appears to remove the mandatory nature of subsections (d-1) and (g) of the section 29.153. The guideline states, in part, that

Further, TEC Sec. 29.153(g) requires before an LEA may construct, repurpose, lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility to provide prekindergarten classrooms, the LEA must solicit and consider proposals for partnerships to provide those classes with community-based child-care providers. *LEAs interested in participating in partnerships must adhere to statute when soliciting proposals from Early Learning Programs.* LEAs may establish partnerships with ELPs that meet specific eligibility standards to ensure they provide high quality prekindergarten for eligible children in Texas.

(Exhibit 3)

As correctly noted in the first sentence of the quoted guideline, the LEA “must solicit and consider proposals,” prior to a decision to “construct, repurpose, or lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility” to provide the prekindergarten classes required under section 29.153. The second sentence, however, waters down the statutory requirement.



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Subsections (d-1) and (g) of the section 29.153 are not limited to school districts that are “interested” in participating in partnerships. They are mandatory.

TEA has a vast number of different duties, and the drafters of the guidelines may never have anticipated that every word would be analyzed in this manner. School districts and stakeholders, however, have only the guidelines. The guideline could easily be misinterpreted by school districts to mean that the mandatory prerequisites in subsection (d-1) to exemptions under section 29.153(d) apply only when a school district is “interested” in having a public-private partnership.

In addition, and perhaps more importantly, the *Provider Eligibility Guidance* appears to mix and confuse the requirements under section 29.153(g) for soliciting proposals and the eligibility requirements for the award of contracts. As indicated above, the requirements differ. The criteria listed in section 29.171 are not applicable at the solicitation phase. The guideline contains both the 29.153(g) solicitation criteria and the contract award criteria. The guideline could easily be misinterpreted to allow school districts to consider the contract criteria as additional factors to be considered under subsection (g) of section 29.153 as a condition of eligibility to submit a proposal. For all the reasons stated above, under section 2 of this letter brief, that is not correct.

In addition, to be enforceable, state agency “rules” must comply with the Administrative Procedure Act (APA), Tex. Gov. Code §§2001.001 *et seq.* A “rule” is defined as follows:

- (A) means a state agency statement of general applicability that:
 - (i) *implements, interprets, or prescribes law or policy*; or
 - (ii) describes the procedures or practice requirements of a state agency;
- (B) includes the amendment or repeal of a prior rule; and



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(C) does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures.

Tex. Gov't Code §2001.003(6) (emphasis added).

A rule by any other name is still a rule. A state agency cannot avoid the APA procedural requirements by calling a rule a “guideline.” *See El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm’n*, 247 S.W.3d 709, 714 (Tex. 2008) (commission’s cutoff date for submitting paid-claims data to determine Medicaid reimbursement rates was “rule” because it interpreted and applied particular statute and affected all hospitals receiving Medicaid reimbursements); *Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 620 (Tex. App.—Austin 2014, pet. denied) (Texas Medical Board’s pronouncements in letter sent to health-care business “are tantamount to amendments to the existing text of” rule); *Combs v. Entertainment Publ’ns, Inc.*, 292 S.W.3d 712, 721 (Tex. App.—Austin 2009, no pet.) (letters Comptroller issued to fundraising firm constituted “rule” because they informed recipients of how Comptroller would enforce and construe tax statute concerning who is considered “sales agent”); *Texas Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 660 (Tex. App.—Austin 1999, pet. dismissed w.o.j.) (agency memorandum was a “rule” because it imposed binding instructions affecting private rights of all similarly situated persons).

Much of the TEA guidelines at issue either restates the statute or provides helpful suggestions on how to implement public-private partnerships for prekindergarten programs. But parts of the guidelines interpret the requirements of subsections (d-1) and (g) and do so in way that is not consistent with the statute. Had these guidelines been proposed as rules, stakeholders could have commented in a manner that might have resulted in modifications that would avoid any misunderstandings about the requirements of subsections (d-1) and (g).

For these reasons, we ask that you issue an opinion that TEA must implement and give effect to subsections (d-1) and (g) of section 29.153. Although the TEA does not have a mandatory duty to issue new rules, parts of its guidelines



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amount to *de facto* rules and are inconsistent with subsections (d-1) and (g) of section 29.153. If TEA decides to interpret the statute in a way that has state-wide general effect, it must do so through APA notice and comment rule making.

4. Do Executive Orders on the COVID pandemic suspend subsections (d-1) and (g)?

A number of school districts have contended that Executive Orders on the COVID pandemic authorize the TEA and/or school districts to suspend, or have effectively suspended, subsections (d-1) and (g) of section 29.153. The original declaration of disaster issued by the Honorable Greg Abbott, Governor of Texas, suspended contract or procurement statutes and rules that “would impede any state agency’s emergency response that is necessary to cope with the declared disaster” for the duration of the disaster “for that limited purpose.” Abbott, *Declaration of Disaster* (March 13, 2020). Suspending subsections (d-1) and (g) of section 29.153 does not fall in the category of impeding an emergency response.

On July 29, 2021, Governor Abbott issued Executive Order GA-38 which included a provision that states

Public schools may operate as provided by and under the minimum standard health protocols found in guidance issued by the Texas Education Agency.

Abbott, *Executive Order GA-38* (July 29, 2021). Suspending subsections (d-1) and (g) of section 29.153 have nothing to do with “health protocols.” The TEA has done nothing that purports to suspend subsections (d-1) and (g).

Moreover, Article I, section 28, of the Texas Constitution provides:

No power of suspending laws in this State shall be exercised except by the Legislature.

Tex. Const. Art. I, §28. Only the Texas Legislature has the authority to suspend the law.



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Previous versions of the Texas Constitution included the phrase “or its authority,” which arguably authorized a delegation by the Texas Legislature to the Texas Governor of the power to suspend the law. The deletion of that phrase, however, took with it the legislature’s authority to delegate the power to suspend state law. *Burton v. Dupree*, 19 Tex. Civ. App. 275, 46 S.W. 272 (1898, no writ); *see also Constantin v. Smith*, 57 F.2d 227 (E.D. Texas -- Tyler Div., 1932), affirmed, *Sterling v. Constantin*, 287 U.S. 378 (1932). As a result, the Texas Legislature cannot authorize the TEA or school districts to suspend the law.³

We ask that you issue your opinion that no Executive Order purports to suspend, or to authorize the TEA to suspend, subsections (d-1) and (g) of section 29.153.

Conclusion

I request that you issue an opinion as requested herein. Please let me know if you need additional information or briefing.

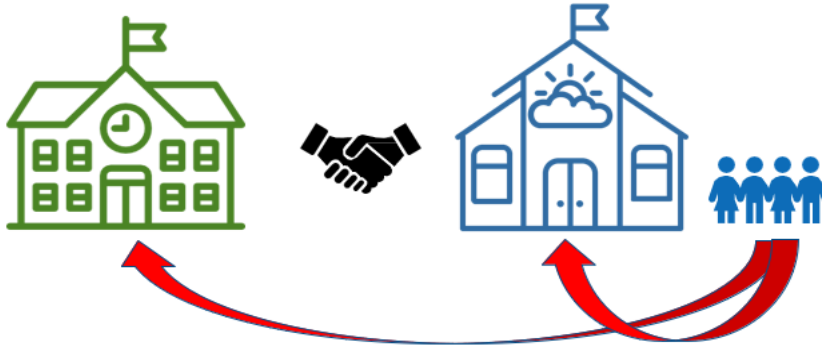
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Harold V. Dutton, Jr.", written in a cursive style.

HAROLD V. DUTTON, JR.

³ Even the delegation to the Governor under Chapter 418 of the Government Code is of questionable constitutionality. Because no Executive Order purports to suspend, or to authorize the TEA to suspend, subsections (d-1) and (g) of section 29.153, however, it is not necessary to reach the issue of the Governor’s authority under Chapter 418.

School districts or charter schools and child care providers can work together to increase access to high-quality prekindergarten programs that better serve families and children in their communities through partnerships.



Students attend ELP but are enrolled in ELP and LEA.

Public-Private PreK Partnerships are collaborations between local education agencies (LEAs) and private early learning programs (ELPs) or Head Start programs. The resulting partnership allows programs to dual enroll children and provide prekindergarten and/or additional comprehensive wrap-around services. Each partnership is uniquely created to leverage the strengths of the LEA and ELP.

Potential PreK Partnership Benefits

- ✓ Expanded access to prekindergarten programs
- ✓ Additional funding resources
- ✓ Continuity of care for children attending at their ELP
- ✓ Extended hours of care/holiday and year-round program options
- ✓ Greater access to high quality curriculum and instructional materials
- ✓ Increased high-quality professional development opportunities
- ✓ Ability to offer more choice in programs to families
- ✓ Increased student enrollment
- ✓ Shared wrap around services: health care, family support or mental health services
- ✓ **The most significant benefit...**



Increased alignment between early childhood stakeholders to elevate program quality and improve school readiness for children and families in the community

When must Local Education Agencies (LEAs) solicit proposals for public-private prekindergarten partnerships with local child care providers?

LEAs must solicit and consider proposals from community-based child care providers for partnerships to provide prekindergarten classes prior to constructing, repurposing, or leasing a classroom facility, or issuing bonds for the construction or repurposing of a classroom facility, to provide prekindergarten classes.

TEC§29.153 (g)

LEAs with full-day prekindergarten exemptions that request an exemption renewal must share documentation verifying increased numbers of eligible four-year-olds served in full-day prekindergarten programs during each year of the exemption term **or** solicit proposals for partnerships with public or private entities regarding prekindergarten classes and consider submitted proposals at a **public meeting**. TEC§29.153(d-1)

Tips for solicitation of public-private prekindergarten partnerships

The partnership proposal solicitation process should foster relationships between LEAs and their local Early Learning Providers. When the process is implemented thoughtfully, it can be the first step in expanding the capacity of High-Quality Prekindergarten in a community. Here are tips for implementing a successful process.

Spread The Word



- Post notice of solicitation on social media
- Post notice of solicitation on the LEA website
- Share with local Early Childhood stakeholder groups
- Share with local Workforce Boards
- Share with child care associations or networks

Allow Time



- Interested child care providers need time to create a proposal
- Consider holding several informational sessions for interested providers
- Provide LEA contact phone and/or email address for interested providers to reach out with questions

Be Flexible



- Be open to partnership opportunities
- While a proposal may not meet your needs, consider other ways to partner
- Be open to engaging in partnership conversation at any time of year

Set Clear Goals



- Make partnership goals clear in the solicitation
- Encourage interested providers to include their goals as part of the proposal
- Partnership goals must be developed collaboratively during the planning phase

Provider Eligibility Guidance Overview

An Early Learning Partnership is a collaboration between a LEA (Local Education Agency) and an ELP (Early Learning Program) or Head Start to provide high quality prekindergarten for eligible children in Texas. These partnerships serve as a cooperative way to support the needs of the community, families, and schools. TEC Sec. 29.1533 requires Local Education Agencies (LEAs) to consider the possibility of sharing use of an existing Head Start or other child-care program site as a prekindergarten site before establishing a new prekindergarten program. Further, TEC Sec. 29.153 (g) requires before an LEA may construct, repurpose, lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility to provide prekindergarten classrooms, the LEA must solicit and consider proposals for partnerships to provide those classes with community-based child-care providers. LEAs interested in participating in partnerships must adhere to statute when soliciting proposals from Early Learning Programs. LEAs may establish partnerships with ELPs that meet specific eligibility standards to ensure they provide high quality prekindergarten for eligible children in Texas.

What is required before an LEA (Local Education Agencies) can establish a new prekindergarten program?

- Before an LEA can *establish a new prekindergarten program*, a school district shall consider the possibility of sharing use of an existing Head Start or another child-care program site as a prekindergarten site. TEC 29.1533

What is required before an LEA can construct, repurpose, lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility to provide prekindergarten classrooms?

- Before an LEA *may construct, repurpose, lease a classroom facility, or issue bonds for the construction or repurposing of a classroom facility to provide prekindergarten classrooms*, the LEA must solicit and consider proposals for partnerships to provide those classes with community-based child-care providers who:
 - (1) *are a Texas Rising Star Program provider with a three-star certification or higher;*
 - (2) *are nationally accredited;*
 - (3) *are a Head Start program provider;*
 - (4) *are a Texas School Ready! participant; or*
 - (5) *meet the requirements under Section TEC [29.1532](#)*

What qualifications are required for an Early Learning Program to be eligible to participate in a partnership with an LEA?

The eligibility criteria for Early Learning Programs vary depending on the age of the children served and the circumstances that necessitate a partnership.

- **Early Learning Programs that partner to serve eligible three-year-old children:**
 - The provider program must at a minimum comply with the applicable child-care licensing standards adopted by the Department of Protective and Regulatory Services under Section [42.042](#), Human Resources Code. [TEC Section 29.1532\(b\)](#)
 - This is the minimum standard, but it is highly recommended that whenever possible, LEAs choose to partner with providers that meet an additional quality indicator such as those listed for PK4 classrooms

- **Early Learning Programs that partner to serve eligible four-year-old children, including mixed age classrooms that serve both eligible three-year-old and four-year-old children:**
 - The provider must be licensed by and in good standing with the Department of Family and Protective Services. A private provider is in good standing with the Department of Family and Protective Services if the department has not taken an action against the provider's license during the 24-month period preceding the date of a contract with a school district. The private provider must also be:
 - accredited by a research-based, nationally recognized, and universally accessible accreditation system approved by the commissioner.
 - a Texas Rising Star Program provider with a three-star certification or higher.
 - a Texas School Ready! participant.
 - accredited by an organization that is recognized by the Texas Private School Accreditation Commission; or
 - in an existing partnership with a school district to provide a prekindergarten program not provided under this subchapter. [TEC 29.171\(b\)](#)
 - A prekindergarten program provided by a private provider must meet the requirements of HB3 High-Quality Prekindergarten Programs [TEC 29.171\(c\)](#)

Early Learning Partnership Providers Eligibility Qualifications

(*Head Start is an eligible provider for all partnerships. These qualifications are for public/private child care providers.)

PreK 3 Classrooms	PreK 4 Classrooms	Mixed Age Classrooms
<p>The provider program must at a minimum comply with the applicable child-care licensing standards adopted by the Department of protective and Regulatory Services under Section 42.042, Human Resources code. TEC Section 29.1532(b)</p> <p style="color: red;">This is the minimum standard, but it is highly recommended that whenever possible, LEAs choose to partner with providers that meet an</p>	<p>The provider must be licensed by and in good standing with the Department of Family and Protective Services. A private provider is in good standing with the Department of Family and Protective Services if the department has not taken an action against the provider's license during the 24-month period preceding the date of a contract with a school district. The private provider must also be:</p> <ul style="list-style-type: none"> • accredited by a research-based, nationally recognized, and universally accessible accreditation system approved by the commissioner, * • a Texas Rising Star Program provider with a three-star certification or higher, 	<p>The provider must be licensed by and in good standing with the Department of Family and Protective Services. A private provider is in good standing with the Department of Family and Protective Services if the department has not taken an action against the provider's license during the 24-month period preceding the date of a contract with a school district. The private provider must also be:</p> <ul style="list-style-type: none"> • accredited by a research-based, nationally recognized, and universally accessible accreditation system approved by the commissioner, * • a Texas Rising Star Program provider with a three-star certification or higher,

<p>additional quality indicator such as those listed for PK4 classrooms.</p>	<ul style="list-style-type: none"> • a Texas School Ready! participant, • accredited by an organization that is recognized by the Texas Private School Accreditation Commission; or • in an existing partnership with a school district to provide a prekindergarten program not provided under this subchapter. TEC 29.171(b) 	<ul style="list-style-type: none"> • a Texas School Ready! participant, • accredited by an organization that is recognized by the Texas Private School Accreditation Commission; or • in an existing partnership with a school district to provide a prekindergarten program not provided under this subchapter. • TEC 29.171(b)
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**LEAs may partner with child care providers that are accredited by a research-based, nationally recognized, and universally accessible accreditation system approved by the commissioner.*

Approved research-based, nationally recognized, and universally accessible accreditation systems:

Association of Christian Schools International
 Early Education Services
 719-528-6906, ext. 228
<http://www.acsi.org>

National Accreditation Commission for Early Care and Education Programs (NAC)
 National Association of Child Care Professionals
 512-301-5557 or 800-537-1118
<http://www.naccp.org>

National Association for the Education of Young Children (NAEYC)
 Academy for Early Childhood Program Accreditation
 NAEYC Academy for Early Childhood Program Accreditation
 202-232-8777 or 800-424-2460
<http://www.naeyc.org/academy/>

National Early Childhood Program Accreditation (NECPA)
 The NECPA Commission, Inc.
 800-505-9878
<http://www.necpa.net>

National Association for Family Child Care (NAFCC)
 202-796-5700
<http://www.nafcc.org/accreditation>

Council on Accreditation (COA)
<http://www.Coanet.org>

Cognia Quality Early Learning Standards (QELS)
 1-888-413-3669
<https://www.cognia.org/services/accreditation-certification/>