

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by TERRY GODDARD ATTORNEY GENERAL September 13, 2004	No. I04-009 (R04-022) Re: Child Care Licensing Exemption for Preschool Special Education Programs
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To: Thomas W. Pickrell, Esq.
General Counsel
Mesa Unified School District

Pursuant to Arizona Revised Statutes (“A.R.S.”) § 15-253(B), you submitted for review an opinion that you prepared for Mesa Unified School District. This Office concurs with your opinion that A.R.S. § 36-884, as amended effective August 25, 2004, exempts school facilities that operate a state and Federal mandated program of special education services exclusively for preschool children with qualifying disabilities under state and Federal law from the child care licensing requirements contained in A.R.S. § Title 36, Chapter 7.1 (A.R.S. §§ 36-881 through - 897.12). We issue this Opinion to provide guidance to other school districts concerning this subject. *See* Ariz. Att’y Gen. Op. I98-006 at 2 n.2 (review may be granted when facts have “broad statewide applicability”).

Question Presented

You have asked whether an amendment to A.R.S. § 36-884 that became effective on August 25, 2004 exempts public school facilities from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1, where a school district operates a mandatory program of special education services exclusively for preschool children with qualifying disabilities.

Summary Answer

As a result of the amendment to A.R.S. § 36-884, school facilities that operate a mandatory program of special education services exclusively for preschool children with qualifying disabilities under State and Federal law are exempt from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1.

Background

Preschool Programs for Children With Disabilities

Federal and state law requires states to provide special needs preschools. *See* 20 U.S.C. § 1400 (the Individuals With Disabilities Education Act or “IDEA”); 34 C.F.R. § 300.552; A.R.S. § 15-764. The State requires public school districts to “make available an educational program for preschool children with disabilities who reside in the school district and who are not already receiving services that have been provided through the department of education.” A.R.S. § 15-771. A preschool child is defined as “a child who is at least three years of age but who has not reached the age required for kindergarten,” but also may include “otherwise eligible children who are within ninety days of their third birthday” if it is determined to be in their best interest. A.R.S. § 15-771(G). To be eligible for these educational programs, a preschool child must have one or more of the following disabilities (defined at A.R.S. § 15-761):

1. Hearing impairment
2. Visual impairment
3. Preschool moderate delay
4. Preschool severe delay
5. Preschool speech/language delay

A.R.S. § 15-771(A)(1) - (5). Special education and related services for preschool age children with qualifying disabilities are a part of early childhood special education (“ECSE”) and are commonly referred to as special needs preschools.

Child Care Program Licensing Requirements

The Arizona Department of Health Services (“ADHS” or “the Department”) regulates child care facilities. *See* A.R.S. §§ 36-881(5). In order to operate, child care facilities must be licensed by ADHS. A.R.S. § 36-882(A). A “child care facility” is defined as “any facility in which child care is regularly provided for compensation for five or more children not related to the proprietor.” A.R.S. § 36-881(3). “Child care” is statutorily defined as “the care, supervision and guidance of a child or children, unaccompanied by a parent, guardian or custodian, on a regular basis, for periods of less than twenty-four hours per day, in a place other than the child’s or the children’s own home or homes.” A.R.S. § 36-881(2).

A public school is generally exempt from child care licensing requirements. A.R.S. § 36-884(3). A public school is not exempt, however, if child care is provided outside the “school’s regular hours” or “for children who are not regularly enrolled in kindergarten programs or grades one through twelve.” *Id.* Prior to the recent amendment to A.R.S. § 36-884, the Department determined that special needs preschools were subject to state child care licensing laws, and it had

been licensing such preschools in various public school districts throughout the State since 1996.

History of the Public School Exemption

Prior to 1994, A.R.S. § 36-884 exempted public schools from the child care license requirement. The statute read: “This article does not apply to the care given to children by or in . . . [a] unit of the public school system.”

In 1994, the Legislature amended and narrowed the scope of the public-school exemption:

36-884. Exemptions

[T]his article shall not apply to the care given to children by or in:

. . . .

3. A unit of the public school system. If a public school provides child care other than during the school’s regular hours or for children who are not regularly enrolled in kindergarten programs or grades one through twelve, that portion of the school that provides daycare is subject to standards of care prescribed pursuant to section 36-883.04.

1994 Ariz. Sess. Laws, 9th Spec. Sess., ch. 5, § 3. The purpose of this amendment was to create a single regulatory system that provided standards of care for public and private child care facilities.

1994 Ariz. Sess. Laws, 9th Spec. Sess., ch. 5, § 5. The Department interpreted this amendment to require all child care programs provided by public schools, including special needs preschools, to be licensed, regardless of whether the program was mandated by law or was offered exclusively to preschool children with qualifying disabilities. As a result of this interpretation, school districts requested legislation that would clarify that mandatory special education programs provided to preschool children with qualifying disabilities were exempt from A.R.S. § 36-882 licensing requirements.

In 2004, the Legislature amended A.R.S. § 36-884 to address preschool programs for children with disabilities:

36-884. Exemptions.

This article does not apply to the care given to children by or in:

.....

3. A unit of the public school system, INCLUDING SPECIALIZED PROFESSIONAL SERVICES PROVIDED BY SCHOOL DISTRICTS FOR THE SOLE PURPOSE OF MEETING MANDATED REQUIREMENTS TO ADDRESS THE PHYSICAL AND MENTAL IMPAIRMENTS PRESCRIBED IN SECTION 15-771. If a public school provides child care other than during the school's regular hours or for children who are not regularly enrolled in kindergarten programs or grades one through twelve, that portion of the school that provides child care is subject to standards of care prescribed pursuant to section 36-883.04.

2004 Ariz. Sess. Laws, 2d Reg. Sess., ch. 23, § 1 (emphasis added). This amendment became effective August 25, 2004.

Analysis

The primary goal of statutory construction is to ascertain and give effect to the Legislature's intent. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). A statute's language is the best indicator of that intent. *Hosp. Corp. of Northwest, Inc. v. Ariz. Dep't of Health Servs.*, 195 Ariz. 383, 384, 988 P.2d 168, 169 (App. 1999). Also relevant are the statute's context, history, subject matter, effects and purpose. *Blum v. State*, 171 Ariz. 201, 205, 829 P.2d 1247, 1251 (App. 1992).

On its face, the amendment to A.R.S. § 36-884 is clear. It exempts from ADHS's licensing requirements preschool programs for children with disabilities provided by public school districts for the sole purpose of meeting the requirements of A.R.S. § 15-771. The legislative history of the amendment supports this interpretation.

The amendment to A.R.S. § 36-884 was part of House Bill 2031. As originally proposed, the amendment read:

3. A unit of the public school system, INCLUDING PRESCHOOL PROGRAMS FOR DISABLED STUDENTS AND AFTER SCHOOL TUTORING PROGRAMS.

After its first reading, the bill was assigned to the House of Representatives Committee on Health.

That Committee amended the bill to read:

3. A unit of the public school system, INCLUDING SPECIALIZED PROFESSIONAL SERVICES PROVIDED BY SCHOOL DISTRICTS FOR THE SOLE PURPOSE OF MEETING MANDATED REQUIREMENTS TO ADDRESS THE PHYSICAL AND MENTAL IMPAIRMENTS PRESCRIBED IN SECTION 15-771.

The amendment to HB 2031 was adopted unanimously and was enacted without any change. As set forth in House summaries for HB 2031, the amendment's purpose was to clarify that the exemption only included programs provided by school districts for the sole purpose of meeting mandated requirements of providing preschool programs for children with disabilities. Ariz. H.R. Comm. On Health, HB 2031 Summary, 46th Leg., 2d Reg. Sess. (Summaries dated January 22, 2004; February 3, 2004; and March 31, 2004).

Your opinion addresses only special needs preschools that exclusively serve special needs children who are qualified under A.R.S. § 15-771(A). Not all special needs preschools, however, are restricted to children with qualifying disabilities. Some programs include children who do not have qualifying disabilities. They do so in an effort to meet the federal requirement, set forth at 34 C.F.R. § 300.550, that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are nondisabled," as well as the state requirement, set forth at A.A.C. R7-2-401(G), that special education services be delivered in "the least restrictive environment as

identified by IDEA and regulations, and state statutes and state board of education rules.” Ordinarily, the parents of such children pay a fee for them to attend the program.

While the Legislature has amended the exemption that A.R.S. § 36-884(3) to exempt special needs preschools from the licensing requirements, the last sentence has remained unchanged. The result is that special needs preschools that include nondisabled children may be subject to child care regulation, depending on the number of nondisabled children enrolled and whether the district receives compensation.

Because nondisabled preschool children lack a qualifying disability, they are not eligible for and do not receive ECSE services— “professional services provided by school districts for the sole purpose of meeting mandated requirements to address the physical and mental impairments prescribed in section 15-771.” A.R.S. § 36-884(3). The new statutory exemption therefore does not include these children. Because the children are also not regularly enrolled in kindergarten or grades one through twelve, services provided to them are “child care” and thus are subject to the licensing requirement.

ADHS only has authority to license a child care program, however, if child care is being provided for five or more children for compensation. A.R.S. §§ 36-881(3), -882(A). If an otherwise exemption-qualified ECSE special needs preschool program enrolls nondisabled children without receiving compensation in addition to its federal and state ECSE funding, the program remains exempt. Likewise, if an otherwise exemption-qualified ESCE special needs preschool program provides services to four or fewer nondisabled children for compensation, the program remains exempt. If, however, an otherwise qualified ECSE special needs preschool program provides

services to five or more nondisabled children for compensation, the exemption becomes unavailable and the program must be licensed by ADHS.

Conclusion

The amendment to A.R.S. § 36-884(3) expressly exempts public school facilities from the child care licensing requirements of A.R.S. § Title 36, Chapter 7.1 where a school district operates a mandatory program of special education services exclusively for preschool children with qualifying disabilities. In addition, where nondisabled children are brought into a special needs preschool program meeting the requirements of A.R.S. §§ 36-884(3) and 15-771 at no charge to their parents or other funding in addition to the program's ESCE state and federal funding, or where four or fewer nondisabled children are brought into an otherwise exemption-qualified special needs preschool program and additional compensation is received by the program, that program is exempt from ADHS child care licensing requirements. Finally, when an otherwise exemption-qualified special needs preschool program provides services to five or more nondisabled children for compensation, that program requires a child care license from ADHS.

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