STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

ATTORNEY GENERAL OPINION by THOMAS C. HORNE ATTORNEY GENERAL October 3, 2012	No. I12-003 (R12-014) Re: A School District's Ability to Provide a Preschool Program to Children Without Disabilities

To: Anthony W. Contente-Cuomo
Mangum, Wall, Stoops & Warden P.L.L.C.

Pursuant to Arizona Revised Statutes ("A.R.S.") § 15-253(B), this Opinion addresses a question from the Chinle Unified School District ("District") regarding the District's ability to provide a preschool program to children without disabilities without engaging a separate public, federally funded, or private child care provider. We issue this Opinion to provide guidance concerning this matter to all Arizona school districts.

Questions Presented

Does an Arizona school district have statutory authority to provide an educational preschool program to preschool children without disabilities without engaging a separate public, federally funded, or private child care provider?

Summary Answer

School districts are authorized to provide educational programs to preschool children without disabilities pursuant to federal or other grants or as part of a community school program that A.R.S. §§ 15-1141 and 15-1142 authorize. In providing such preschool programs, school districts are not required to engage a separate public, federally funded, or private child care provider unless a condition of a federal or other grant requires them to do so.

Background

The District has proposed participating as a subgrantee of the Arizona Department of Education in an Arizona Early Childhood Health and Development Board grant program, commonly known as "First Things First" ("ECHD"). The grant would give the District funding to directly provide educational services for all District preschool children meeting the grant program requirements. The grant program currently funds seventy school district preschools throughout Arizona. *See* Arizona Early Childhood Health and Development Board, *2011 Annual Report*, Pre-Kindergarten Expansion, at 15.

You have questioned whether school districts lack statutory authority to participate in such a program, other than a program for disabled students that A.R.S. § 15-771(A) authorizes or a program that A.R.S. § 15-1251 authorizes. Section 1251, which established the Early Childhood Block Grant ("ECBG") program, restricts the provision of preschool services funded under that program to services that a public, federally funded, or private child care provider other than the district itself provides. A.R.S. § 15-1251(C)(2). This Opinion revises your analysis and conclusion.

Many Arizona school districts currently maintain long-established educational preschool programs for children without disabilities without engaging a separate public, federally funded,

or private child care provider. The districts operate these programs primarily using funds from the following sources: (1) federal grants, such as those that the Head Start program provides; (2) grants and donations that ECDH and other programs provide; and (3) tuition payments made on behalf of the participating children.

Arizona Revised Statutes §§ 15-1141 through 15-1143 authorize school districts to provide educational programs to children as part of a community school program. In addition, A.R.S. § 15-207(B) provides that school districts may expend the federal grants that they receive in accordance with the grant's purposes. Further, A.R.S. § 15-341(A)(14) allows school district governing boards to accept gifts, grants, and devises and to spend the money for the donor's intended purpose.

We note that a distinction exists between educational services provided to preschool children and services that provide mere custodial care of children. The ECDH grant program that the District is considering involves providing educational services rather than custodial "day-care" services to preschool children.[1] This Opinion does not address any issues related to a school district providing custodial "day-care" services.

Analysis

A school district governing board's powers are limited to those that the Legislature has expressly or impliedly conferred upon it. *Tucson Unified Sch. Dist. No. 1 v. Tucson Educ. Ass'n*, 155 Ariz. 441, 442-43, 747 P.2d 602, 603-04 (App. 1987); Ariz. Att'y Gen. Op. I00-022. The statutes concerning the authority of school district governing boards focus on the districts' responsibility to educate children. Ariz. Att'y Gen. Op. I00-022; *see also Prescott Cmty. Hosp. Comm'n v. Prescott Sch. Dist. No. 1*, 57 Ariz. 492, 494, 1115 P.2d 160, 161 (1941) (stating that a

[1] *See* Ariz. Att'y Gen. Op. I81-014 (stating that the educational services school districts are authorized to provide include educational preschool programs but do not include the operation of custodial day-care facilities).

school district's purpose is to promote the education of the State's youth and that its granted powers are intended to meet that purpose).

I. School Districts Are Authorized to Directly Provide Educational Preschool Services to Children Without Disabilities

The statutes setting forth the general powers and duties of school district governing boards specifically state that school districts may provide educational preschool programs for children with disabilities. A.R.S. §§ 15-771(A), 15-821(B). The statutes do not expressly refer to providing educational preschool programs for children without disabilities. However, there are several statutes that impliedly confer authority to public schools to provide such preschool programs.

Arizona Revised Statutes § 15-207(B) provides that school districts may expend federal monies that the State Board of Education apportions to them for the purposes and in the manner that the federal grants set forth. Further, A.R.S. § 15-341(A)(14) allows school district governing boards to accept other gifts, grants, and devises and to expend the funds for the donor's intended purpose. We conclude that it is permissible for a school district to provide educational services to preschool children as part of the conditions of a federal grant or of a grant provided under Section 15-341(A)(14).

In addition, A.R.S. §§ 15-1141 through 15-1143 permit school districts to operate community school programs, which A.R.S. § 15-1141(3) defines as follows:

> [T]he involvement of people in the development of an educationally oriented community. The community school serves the purposes of academic and skill development for all citizens, furnishes supervised recreational and avocational instruction, supplies remedial and supplemental education, furnishes meeting places for community groups and provides facilities for the dissemination of a variety of community related services . . . .

This definition encompasses a school district's provision of an educational preschool program. An educational preschool program encourages the "development of an educationally oriented community" and serves the purpose of "academic and skill development" for children. Further, such a program "supplies . . . supplemental education" for children. A.R.S. § 15-1141(3).

This Office previously reached the same conclusion in Ariz. Att'y Gen. Op. I81-014. The second of three questions that the Opinion addressed was whether a school district has authority to operate an educational preschool facility itself. We concluded that these sources of authority, including the predecessor statutes to A.R.S. §§ 15-1141 through 15-1143, authorize school districts to provide educational services to preschool children pursuant to grants or as a part of a community school program.[2]

Further recognition that a school district may provide educational preschool services itself is found in an administrative rule of the State Board of Education. The rule provides a licensing methodology for issuing early childhood teaching certificates to persons engaged in programs for children birth through age eight provided both by "local education agencies" as well as by their "subgrantees and contracted providers . . ." A.A.C. R7-2-608.

II. Early Childhood Block Grant Funds Can Be Used to Provide Educational Services to Preschool Children

In the past, school districts used the ECBG program pursuant to A.R.S. § 15-1251 to provide educational services to preschool children. The statutory authorization for this program restricts a school district's use of ECBG funding to preschool services provided "only from a public, federally funded, or private child care provider." A.R.S. § 15-1251(C)(2).

[2] The conclusion in Ariz. Att'y Gen. Op. I81-014 that school districts are authorized to provide educational services to preschool children has been cited in several opinions addressing school district authority. *See* Ariz. Att'y Gen. Op. I98-007, I99-021 and I02-003.

As a consequence, if a school district decides to conduct a preschool program with ECBG funds, a condition of the funding is that the district cannot directly conduct the program. The use of the funds is specifically restricted to a school district that retains a public, federally funded, or private child care provider to provide services on its behalf.

We note, however, that in fiscal year 2010, the Legislature froze ECBG funding due to budget constraints and subsequently deappropriated it. *See* 2010 Ariz. Sess. Laws, 7th Spec. Sess. ch. 1 § 135. Arizona's budget for fiscal year 2011 provided no funding for the ECBG program, which terminated the program for the 2010-2011 school year. The program did not receive any funding for the 2011-2012 or 2012-2013 school years either. As a consequence, while the ECBG enabling statute remains in effect, the grant program has been suspended since fiscal year 2010 due to lack of appropriated funds and it therefore is not currently a potential source of educational preschool funding.[3]

III. Arizona Early Childhood Development and Health Board ("First Things First") Funds

The ECDH issues grants that are a significant source of funding for educational preschool programs for school districts as well as the private sector. The grants are funded by a dedicated tax levied on tobacco products. A.R.S. §§ 42-3371, 42-3372. Revenues from that tax are deposited directly into the Early Childhood Development and Health Fund established by the voter initiative that created the agency. A.R.S. §§ 8-1181, 42-3371, 42-3372.

The statutory requirements for ECDH's grant program are set forth in A.R.S. § 8-1171. There are no requirements in the ECDH statute limiting the use of its funds for educational preschool programs for disabled children, nor are there restrictions prohibiting a school district from directly providing preschool services. Because A.R.S. § 15-341(A)(14) allows school

[3] Your opinion to the District assumes that the unfunded ECBG grant program is "the primary source of funding for the First Things First Program."

district governing boards to accept gifts, grants, and devises and to expend the money for the donor's intended purpose, we see no statutory restriction on a school district spending ECDH grant funds on district-conducted educational preschool programs in accordance with the terms the grant sets forth.

Conclusion

School districts are authorized to provide educational programs to preschool children without disabilities pursuant to federal or other grants or as part of a community school program that A.R.S. §§ 15-1141 and 15-1142 authorize. In providing such preschool programs, school districts are not required to engage a separate public, federally funded, or private child care provider unless a condition of a federal or other grant requires them to do so.

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