



# THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

**WILL WILSON**  
ATTORNEY GENERAL

April 6, 1959

Dr. J. W. Edgar  
Commissioner of Education  
Texas Education Agency  
Austin, Texas

Opinion No. WW-591

Re: Constitutionality of  
Section 1, Subsection (4)a,  
Article 9922-13, Vernon's  
Civil Statutes, as amended,  
relating to allotment of  
exceptional children teach-  
er units.

Dear Dr. Edgar:

We have received your request relating to the consti-  
tutionality of Section 1, Subsection (4)a of Article 9922-13,  
Vernon's Civil Statutes, as amended, when considered in the  
light of Subsection (4)b of the same Article. Subsection (4)a  
is as follows:

"a. It is the purpose of this allotment  
of exceptional children teacher units to  
provide competent educational services for  
the exceptional children in Texas between  
and including the ages of six (6) and seven-  
teen (17), for whom the regular school facili-  
ties are inadequate or are not available.

"In interpreting and carrying out the pro-  
visions of this Act, the words 'exceptional  
children' wherever used, will be construed  
to mean physically handicapped children and  
mentally retarded children; the words 'physi-  
cally handicapped children' wherever used,  
will be construed to include any child of  
educable mind whose body functions or members  
are so impaired that he cannot be safely or  
adequately educated in the regular classes of  
the public schools, without the provision of  
special services; and the words 'mentally  
retarded children' wherever used, will be con-  
strued to include any child whose mental condi-  
tion is such that he cannot be adequately edu-

cated in the regular classes of the public schools, without the provision of special services. The term 'special services' may be interpreted to mean transportation; special teaching in the public school curriculum; corrective teaching, such as lip reading, speech correction, sight conservation and corrective health habits; and the provision of special seats, books and teaching supplies, and equipment required for the instruction of exceptional children." (Emphasis added.)

Subsection (4)b of such Article reads as follows:

"(4)b. In any school district where the parents of the required number of any type of exceptional children, or types which may be taught together, petition the Board of Education of that district for a special class, it shall be the duty of such Board to request the State Commissioner of Education to cooperate in the establishment of such class or classes. The State Commissioner of Education shall allot to such district such number of exceptional children teacher units to operate special or convalescent classes for exceptional children within said district pursuant to rules and regulations adopted by the State Board of Education. Provided that districts not eligible for a full exceptional children teacher unit may enter, by vote of their respective Boards of Trustees, into one cooperative agreement to provide exceptional children teacher units, such units to be approved by the County School Superintendent. The teacher for an exceptional children teacher unit shall be employed by the Board of Trustees of the district in which the class is to be taught, and such unit shall be administered solely and exclusively by the Superintendent of such district. The State Commissioner of Education, upon certification of such agreement by the County School Superintendent, shall allot to each district party to such agreement a fractional part of an exceptional children teacher unit, provided that the sum of

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such units so allotted shall not be greater than the number of units for which said district would be eligible provided no cooperative agreement existed." (Emphasis added.)

Section 1 of Article VII of the Constitution of Texas reads as follows:

"Section 1. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

The Constitution of Texas provides, in other sections, for the general maintenance, financing and operation of public free schools and institutions of higher learning.

The constitutional question raised by your request, in our opinion, concerns Section (4)a when considered in the light of Section (4)b, relating to whether the Legislature is prohibited from imposing a duty upon the Board of Education of a school district "to cooperate (with the Texas Education Agency) in the establishment of such class or classes" for the teaching of exceptional children, in Texas.

The Constitution requires a system of public free schools to be maintained, and it is clear that the Legislature is vested with broad discretion insofar as providing the details of how such is to be accomplished.

Mumme v. Marrs, 120 Tex. 383, 40 S.W.2d 31, is a landmark case concerning the nature of legislative control over education in this State:

" . . .

"The history of educational legislation in this state shows that the provisions of article 7, the educational article of the Constitution, have never been regarded as limitations by implication on the general power of the Legislature to pass laws upon the subject of education. This

article discloses a well-considered purpose on the part of those who framed it to bring about the establishment and maintenance of a comprehensive system of public education, consisting of a general public free school system and a system of higher education. . . .

" . . .

" . . . the Constitution has been liberally construed with reference to the creation of institutions of higher education, and the same liberal rules should apply in determining the power of the Legislature with reference to the public school system. We cannot readily suppose that those who framed the Constitution would have left the Legislature with plenary power to create and maintain a system of higher education, and at the same time have intentionally so drawn the instrument that the legislative hands would be tied when changed condition rendered it desirable or necessary to give aid to the public school system in the manner outlined in the law before us.

" . . .

" . . . in ascertaining the power which the Legislature may constitutionally exercise with reference to the school system, we are not to limit or restrict that power, including the power to assign revenue derived from sources other than those specifically named, to the school fund, unless we find in the Constitution itself a specific limitation or one which arises by necessary implication from the language used. . . . (Emphasis by the Court.)

"Under our Constitution, public education is a division or department of the government, the affairs of which are administered by public officers, and in the conduct of which the Legislature has all legislative power not denied it by the Constitution. . . .

"Under the Constitution, our public schools are essentially state schools, and authority to control their operation, except as otherwise provided, is included among the power conferred upon the Legislature. *Webb County v. School*

Trustees, 95 Tex. 132, 135, 65 S.W. 878; Constitution, art. 7. . . .

" . . . Since the Legislature has the mandatory duty to make suitable provision for the support and maintenance of an efficient system of public free schools, and has the power to pass any law relative thereto, not prohibited by the Constitution, it necessarily follows that it has a choice in the selection of methods by which the object of the organic law may be effectuated. The Legislature alone is to judge what means are necessary and appropriate for a purpose which the Constitution makes legitimate. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen.

. . . .

" . . .

"The word 'suitable' used in connection with the word 'provision' in this section of the Constitution, is an elastic term, depending upon the necessities of changing times or conditions, and clearly leaves to the Legislature the right to determine what is suitable, and its determination will not be reviewed by the courts if the act has a real relation to the subject and object of the Constitution. . . ."

In our opinion, the Constitution of Texas does not prohibit the Legislature from providing that exceptional children, as defined by Section (4)a, shall be taught or trained, to the extent that they may be, by the free public schools of this State. We are not concerned with whether such determination is in accordance with accepted educational policies. We do not imply that it is not in accord. Our limited inquiry here is only if it is prohibited.

It is true that the Legislature may not divert or require the diversion of a public fund created for educational purposes to other than educational purposes. (See Love v. City of Dallas, 40 S.W.2d 20). This does not imply that the Legislature is prohibited from establishing provisions for

courses for children who cannot compete, for physical or mental reasons, with the students in the regular normal curriculum; nor is it implied that the Legislature is prohibited from making provision for such children in their home community, even though an Eleemosynary Institution is maintained by the State for children who may reside in an area which does not have such services available. It is within the provision of the Legislature to determine the entrance requirements of Eleemosynary Institutions. (See Attorney General's Opinion WW-~~575~~ [1959]). In our opinion, the Legislature is not prohibited from providing for these services by the local school districts. We call your attention to an Attorney General's Opinion, dated June 4, 1917, addressed to Honorable W. F. Doughty, concerning the Act, which provided for the establishment and maintenance of free kindergartens upon petitions of parents or guardians:

"In our opinion the language used in this Act is mandatory and that upon a filing of a proper petition executed by the required number of parents or guardians the Trustees of every district in the State, when so petitioned, may be required to institute the free kindergarten so prescribed in the Act. We are also of the opinion that this Act applies to all districts, whether they be common school districts or independent districts created under any of the various modes authorized by law for their creation."

In our opinion Section 1, Subsection (4)a, of Article 9922-13 of Vernon's Civil Statutes, as amended, is constitutional, when considered in the light of Subsection (4)b.

#### SUMMARY


Section 1, Subsection (4)a of Article 9922-13 of Vernons's Civil Statutes, as amended, is constitutional insofar as it requires a local school district, upon proper petition, to provide the enumerated

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services for exceptional children,  
as defined by Subsection (4)a.

Yours very truly,

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APPROVED:

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