



**THE ATTORNEY GENERAL
OF TEXAS**

July 10, 1989

**JIM MATTON
ATTORNEY GENERAL**

Honorable Bob McFarland
Chairman
Criminal Justice Committee
Texas State Senate
P. O. Box 2068
Austin, Texas 78711

LO-89-55

Dear Senator McFarland:

You ask whether the Brookwood Community School is a "public school" within the meaning of section 109.33(a) of the Alcoholic Beverage Code, which provides in part that a commissioners court may enact ordinances applicable in unincorporated parts of the county "prohibiting the sale of alcoholic beverages by a dealer whose place of business is within 300 feet of a church, public school, or public hospital" (emphasis added).

You state in your request that the Brookwood Community School is a nonprofit corporation established for the benefit of functionally disabled individuals, that it is funded primarily from charitable donations from foundations and corporations, and that it is not funded by federal, state, or local government.

"Public school" is not defined in section 109.33 or elsewhere in the Alcoholic Beverage Code. In the absence of a contrary indication from the legislature, words used in a statute are to be assigned their ordinary meanings. Webster's Ninth New Collegiate Dictionary (1983), defines "public school" as either a kind of endowed secondary school in Great Britain -- which definition obviously is not applicable here -- or "a free tax-supported school controlled by a local governmental authority."

The provisions of the Education Code support the reading of "public school" as one which is tax-supported. Section 1.03 provides in part that the purpose of the Education Code is to harmonize existing law related to the "public school system," and section 1.04 provides that the code "shall apply to all educational institutions supported either wholly or in part by state tax funds unless specifically excluded." See also Attorney General Opinion M-749 (1970) (University of Houston, which "was established

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as a state-owned institution [and] is supported by state tax funds" is a public school within the meaning of former Penal Code article 666-25a, now section 109.33, Alcoholic Beverage Code) and other authority cited there, particularly former article 2922-1.02(a)(2), V.T.C.S., now section 31.001(12), Title 110B, defining, "public school" for purposes of the provisions for the Teacher Retirement System as "an educational institution or organization in this state that is entitled by law to be supported in whole or in part by state, county, school district, or other municipal corporation funds."

Since, on the facts you present, the Brookwood Community School is not government funded, we conclude that the legislature would not have intended that it fall within the meaning of "public school" as used in section 109.33(a) of the Alcoholic Beverage Code.

You suggest that constitutional equal protection principles compel a reading of "public school" in section 109.33(a) so as to include the Brookwood Community School. You argue that functionally disabled individuals, such as those the school serves, constitute a class for which there is no "rational basis" for the legislature to have excluded from the protection afforded by section 109.33, which was clearly intended, as you say, "to protect impressionable students from [exposure to] the activities taking place" at a business selling alcoholic beverages. You say that Brookwood students "need such protection to an even greater extent because of their specific disabilities."

Nevertheless, we do not think a court, if presented with the question, would find that the legislature had no rational basis for including public schools but not non-public schools, such as the Brookwood Community School, among the institutions for which protection could be afforded under section 109.33. Speaking of the degree of scrutiny a court would give an equal protection claim that there was no rational basis for a classification made by a state statute, the plurality opinion in Clements v. Fashing, 457 U.S. 957, 963 (1982) stated that unless a statute burdens a suspect class or a fundamental right, thus triggering a heightened degree of scrutiny over and above a "rational basis" test, classifications made by a statute "are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them."

In upholding an Oklahoma statute which imposed certain regulations on opticians but exempted sellers of ready-to-wear glasses, Justice Douglas of the Supreme Court wrote:

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The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. State of Texas*, 310 U.S. 141. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538.

Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

Similarly, in speaking of "under-inclusive" regulatory classifications -- ones which allegedly single out particular areas for regulation while excluding other areas also arguably in need of such regulation -- One authority notes that such classifications "are usually upheld." Rotunda, Nowak, and Young, Treatise on Constitutional Law: Substance and Procedure, § 18.2, at 321 (1986).

We think that a court would find that the legislature legitimately would be particularly concerned with the welfare of public school students as compared with those in other institutions. We also believe that it would find a rational basis for the legislature's providing, in section 109.33, for regulation of dealers in alcoholic beverages in close proximity to public schools while not having done so with respect to other schools.

Very truly yours,



Rick Gilpin, Chairman
Opinion Committee

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RG/SW/WW/mc

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