

## **ATTORNEY GENERAL OPINION NO. 93-4**

To: Honorable Jerry L. Evans  
State Superintendent of Public Instruction  
**STATEHOUSE MAIL**

Per Request for Attorney General's Opinion

### **QUESTIONS PRESENTED**

1. Is a child entitled to attend an Idaho public school kindergarten when the child does not meet the Idaho school entry age but has completed a portion of kindergarten in another state and moves to Idaho?
2. If a child has completed kindergarten in another state or in a private kindergarten but is not six years old prior to August 16, may he or she be admitted into the first grade?
3. Is the first grade age requirement set forth in Idaho Code § 33-201 only applicable to those children who have not completed a kindergarten?

### **CONCLUSION**

1. A child who has attended part of the school year in a private or out-of-state kindergarten but is not five years of age prior to August 16, and who therefore does not meet the Idaho school entry age, may not attend kindergarten in Idaho public schools until "school age" is met.
2. If a child has completed a kindergarten program but is not six years old prior to August 16 that child may, but is not entitled to, enter the first grade. The school personnel will determine what is an appropriate placement of that child.
3. The first grade age requirement of six prior to August 16 applies only to those students who have not completed a kindergarten.

### **ANALYSIS**

#### **Question No. 1:**

Your first question asks whether a child is entitled to attend an Idaho public school kindergarten if the child has completed a portion of kindergarten in another state but is

not five years old prior to August 16, and thus does not meet Idaho's "school age" entrance requirement.

It is not uncommon for families with children to move into Idaho from other states during the school year. Many states have a later entry date for school age. Recent experiences of the Weiser School District illustrate typical age-related situations faced by school districts in Idaho.

In the first situation, a parent residing in the Weiser School District has a child whose fifth birthday falls only days after the August 15 cut-off date for entry into kindergarten in Idaho. Since Oregon has a later starting date for school age, the parent sends the child to school in Ontario, Oregon, for ten days. The parent then seeks to enroll the child in kindergarten in Weiser as a transfer student.

In the second situation, a family moving from Bend, Oregon, to Weiser in November has a child who completed a quarter of a year of kindergarten in Oregon but misses the Idaho school age date by a few days. The parents seek to enroll their child in kindergarten in Weiser as a transfer student.

Historically, the practice around the state has been not to allow the child in the first situation to enroll in an Idaho public school kindergarten since the child is not of school age and was sent to Oregon specifically to attempt to circumvent the Idaho statute. In the second situation, however, the practice has been to allow the student to transfer into an Idaho public kindergarten since the child did meet the school age requirements of the state where he or she was a resident even though the child, having moved to Idaho, did not meet Idaho's school age.

Prior to July 1, 1988, "school age" was defined as turning five prior to October 16. As Idaho Code § 33-201 reveals, the legislature, over the period of several years, changed the date by which a child must attain the age of five in order to be considered of "school age." The statute now requires children wishing to enroll in kindergarten to turn five prior to August 16:

The services of the public schools of this state are extended to any acceptable person of school age. "School age" is defined as including all persons resident of the state, between the ages of five (5) and twenty-one (21) years. For the purposes of this section, the age of five (5) years shall be attained when the fifth anniversary of birth occurs: before the beginning of the sixteenth day of September for the school year beginning in 1990; and before the beginning of the sixteenth day of August for any school year thereafter. For a resident child who does not attend a kindergarten, "school age" shall be the age of six (6) if this age has been reached: before the

beginning of the sixteenth day of October for the school year beginning in 1990; before the sixteenth day of September for the school year beginning in 1991; and before the sixteenth day of August for each school year thereafter.

(Emphasis added.)

The residency of a student is defined as the residence of the child's parent or guardian. Idaho Code § 33-1401(2). A nonresident student is defined as a student attending a school in a district other than the home district, or attending school in another state. Idaho Code § 33-1401(5). A student who moves with his or her family to Idaho becomes a resident student.

The Idaho Legislature used the word "shall" in setting forth the "school age" required for admission to kindergarten and first grade. Usually "shall" is mandatory, not directory. Mandatory statutes are usually imperative, and directory statutes are permissive. Sutherland Stat. Const. § 57.01 (5th Ed.). When a statute is not ambiguous, "it is the duty of the court to follow the law as written, and if it is socially or otherwise unsound, the power to correct is legislative, not judicial." Anstine v. Hawkins, 92 Idaho 561, 563, 447 P.2d 677, 679 (1968). As stated in Morrison v. Chicago Board of Education, 544 N.E.2d 1099 (Ill. App. 1 Dist. 1989):

Statutes must be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statute, and absent some clear legislative intent to the contrary, terms are to be given their ordinary and commonly understood meaning. The language used in a statute is the primary source for determining legislative intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted.

*Id.* at 1102.

The legislative history in amending Idaho Code § 33-210 reveals that the House and Senate Education Committees listened to testimony both for and against the moving of the entrance school age to August. The legislature heard testimony regarding the percent of children at-risk with birthdays between August 15 and October 15. House Education Committee, February 8, 1988, Mr. Yankey. One person did testify to the House Education Committee that he felt transfer students from out of state would have more access to the schools than Idaho students. House Education Committee, February 1, 1988, J.B. Johnston. There is, however, no record of any discussion of allowing out-of-state kindergarten students, who do not meet Idaho's school age for kindergarten, to transfer into Idaho's schools.

While the legislature also heard testimony suggesting that school districts might be able to test children who fall below the school age to determine their readiness for school, it did not make any provisions for such testing. In fact, there was concern for the school districts if they were made responsible for determining who was to be excepted from the age requirements and thus accepted into school. Senate Education Committee, February 17, 1988, Senator Twiggs.

Thus, the legislative history indicates that the Idaho Legislature, in amending Idaho Code § 33-210, made no provision for case-by-case evaluations of children who have completed a portion of kindergarten at the time they move into Idaho but who do not otherwise meet Idaho's "school age" entry requirements.

Other states have also wrestled with this issue. In Morrison, *supra*, an Illinois appellate court reviewed the Illinois statute regarding school age. The statute provides that children must be five by "September 1 of the year of the 19881989 school term . . . ." Daniel Morrison turned five on September 4, 1988. In reviewing the issue of school age, the court stated:

The general purpose of the statute is to impose an age limit on students eligible to attend public schools. The legislature, in the debates involving this provision, stated that the imposition of an earlier cut-off date was due to studies that have shown that the older a child is upon entering kindergarten, the more successful the schooling experience.

In evaluating the statute in light of its general purpose, it is clear that the legislature intended to impose a strict age limitation on students eligible for kindergarten . . . .

544 N.E.2d at 1102-03 (citation omitted). As a result, Daniel Morrison was not admitted to school in 1988-89.

The state of Pennsylvania, in O'Leary v. Wisecup, 364 A.2d 770 (1976), reviewed a case in which a five-year-old child began kindergarten in one school district and then, mid-year, moved to another school district with a different age requirement. The child was not allowed to enroll in kindergarten in the second district since he did not meet the age requirement for that district. The child's parents brought an action for preliminary injunction, claiming he should be allowed to transfer to the second kindergarten from the first kindergarten, even though he did not meet the age requirements of the second kindergarten. The Commonwealth Court of Pennsylvania found that when a statutory entitlement exists, "that eligibility is also subject to the protection of the Fourteenth Amendment and may 'not be limited in any way that works an invidious discrimination or

constitutes a denial of due process." 364 A.2d at 773 (citation omitted). The court concluded that the student had not acquired a property right to continue his education in the second school district and that his constitutional rights were not violated. The court also held that a public education is not a fundamental right and that classification by age does not constitute a suspect classification. *See also Goldsmith v. Lower Moreland School District*, 461 A.2d 1341 (Pa. Cmwlth. 1983) (child under the age of six does not have a constitutionally protected property interest in admission into kindergarten); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975) (Idaho Supreme Court refused to classify the right to education as a fundamental right).

The minimum school age entry requirement of Idaho Code § 33201 is mandatory ("shall"). In addition, school districts' boards of trustees also have the duty "to exclude from school, children not of school age." Idaho Code § 33-512(5). It is, therefore, our opinion that the legislature intended that all children--even those who have completed a portion of kindergarten prior to moving into Idaho during the school year--must meet the "school age" requirement of turning five prior to the sixteenth day of August in order to be allowed to enroll in an Idaho public school kindergarten.

#### **Question No. 2:**

The next question to be addressed deals with those children who are five prior to the sixteenth day of August, have not yet turned six, and have already attended a kindergarten consisting of at least 450 hours of instruction in a school year.

The Weiser School District has also experienced this situation. A family with twin daughters moved from California around the first of December and asked that their daughters be admitted into the first grade. The girls had successfully completed kindergarten and the first quarter of the first grade in California where the entrance date for "school age" is later than that of Idaho. The girls were of "school age" as defined by Idaho Code § 33-201--they turned five prior to the sixteenth day of August--but had they started school in Idaho, they would have been placed in kindergarten.

Idaho Code § 33-201 provides both the date by which a child must attain the age of five to enter into kindergarten and the date by which a child must attain the age of six to enter into the first grade if that child has not attended a kindergarten. However, the statute does not expressly address the situation where a child has attended a private or out-of-state kindergarten for the required 450 hours, but has not reached the "school age" requirement in Idaho to enter into the first grade.

It is well established that a child who meets the definition of "school age" is entitled to attend the public schools in Idaho. Idaho Code § 33-201. However, a child

who has attended a private or out-of-state kindergarten for the required 450 hours is not automatically entitled to enter into the first grade in an Idaho public school.

Once a child is of legal age to be admitted to school, it is up to school officials to determine the appropriate placement of the child. The courts will not intervene in areas where school personnel have discretion, and have the expertise to determine the appropriate placement. As stated in Morrison, *supra*:

[I]t is well established that where the legislature has empowered a school board to perform certain functions, the courts will not interfere with the exercise of such powers nor substitute their discretion for that of the school board unless the board's action is palpably arbitrary, unreasonable, or capricious.

544 N.E.2d at 1101.

In this case, school officials would determine whether first grade or kindergarten is the appropriate placement for the girls and would no doubt take into consideration the fact that the girls had completed an entire year of kindergarten and part of the first grade in California.

### **Question No. 3:**

The final fact pattern to be discussed in this opinion deals with those children who have not attended a kindergarten in Idaho, or elsewhere, for at least 450 instructional hours in a school year.

Idaho Code § 33-201 specifically states: "For a resident child who does not attend a kindergarten . . . 'school age' shall be the age of six . . . ." (Emphasis added.) Thus, if a child does not attend a kindergarten, then he or she must turn six prior to the sixteenth day of August to be enrolled in the first grade. If this requirement cannot be met, the child should be placed in kindergarten. However, once the child is properly enrolled, it is within the discretion of the school officials thereafter to change that placement if it is in the child's best interest.

## **AUTHORITIES CONSIDERED**

- 1. Idaho Code:**
  - § 33-201.
  - § 33-210.
  - § 33-512(5).
  - § 33-1401.

**2. Idaho Cases:**

Anstine v. Hawkins, 92 Idaho 561, 447 P.2d 677 (1968).

Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975).

**3. Other Cases:**

O'Leary v. Wisecup, 364 A.2d 770 (1976).

Goldsmith v. Lower Moreland School District, 461 A. 2d 1341 (Pa. Cmwlt. 1983).

Morrison v. Chicago Board of Education, 544 N.E.2d 1099 (Ill. App. 1 Dist. 1989).

**4. Other Authorities:**

Sutherland, Statutory Construction § 57. 01 (5th Ed.).

DATED this 1st day of April, 1993.

LARRY ECHOHAWK  
Attorney General

**Analysis by:**

ELAINE EBERHARTER-MAKI  
Deputy Attorney General