

February 1, 1974

OPINION LETTER NO. 66
Answer by letter-Vodra

Honorable Sue S. Shear
Representative, District 76
%House Post Office, Capitol Building
Jefferson City, Missouri 65101



Dear Representative Shear:

This letter is in response to your request for a ruling on the following question:

"Missouri school law 163.017 states that 'average daily attendance' shall be obtained by dividing one half the total number of days attended by resident kindergarten pupils whose fifth birthday before the first of October after the first day of the school term, by the actual number of days that the school was in session not including legal school holidays and legally authorized teachers' meetings.

"Does this law unfairly discriminate against those children who, because of exceptional abilities, qualify for early admission to kindergarten, but are denied state aid because their fifth birthday's fall after October first?"

You have also furnished us with the factual situation giving rise to this request, set forth below:

A child has qualified for early admission to a University City school kindergarten. Because her birthday (fifth) falls on October 8, she does not qualify for state aid and the

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parents must pay \$602.00 tuition. Because she is a gifted child, the state is paying for only twelve of her thirteen years of schooling.

In our Opinion No. 394A, Moore, September 25, 1970, we ruled that a school district has the authority to admit a child to kindergarten even though the child will not reach his fifth birthday prior to the October first next following the start of school. However, under Section 163.017, RSMo Supp. 1971, the school district is not eligible for state aid for any such underage pupil. In order to pay for the schooling of the underage pupil, the district has imposed a tuition charge on the parents. You ask if this charge is illegal because it discriminates against gifted children in contravention of the equal protection clause of the United States Constitution.

The application of the equal protection clause to public education was recently considered at length by the United States Supreme Court in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 1295-1300, 36 L.Ed.2d 16 (1973), the so-called school finance case. Concerning this problem, the court concluded that education as such is not a constitutionally guaranteed right meriting special protection and actions by a state to assist public education are not to be criticized merely because the state might have gone further than it did. Rather, educational classifications related to spending levels are valid so long as they bear a rational relationship to a legitimate state purpose.

To evaluate properly the legality of the action you question, we first note that the tuition charge arose because the school district gave a special opportunity--early enrollment--to the child involved. If the parents had chosen to turn down the offer, the child could still have enrolled at age five and would have received the standard number of tuition-free years. The choice was up to the parents, and we believe that the program is consistent with the standards set out in Rodriguez.

As a matter of law, gifted students do not have a constitutional right to a different education than average pupils. The state or a school district may choose to establish a program for three or four-year-olds, and they may set up such a program for all students or for only those who need it most. However, to what extent a school district or the state chooses to expand on the minimum in such a fashion is a political, not a constitutional, decision. Rodriguez, supra.

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In Missouri, the state has provided free schools for all pupils between the ages of six and twenty and for all handicapped children between the ages of five and twenty; in addition, individual districts may offer free education to all pupils between five and six, and to handicapped children ages three and four, and the districts will receive aid from the state if they do so. Sections 160.051, 162.700, 162.975, and 163.017, V.A.M.S. The student you inquire about was not charged tuition because she was gifted, but merely because she was a nonhandicapped child who was only four on October first of the year she started kindergarten. The decision to provide free education only within certain ages is one which we believe the state is entitled to make.

It is, therefore, our view that the provisions of Section 163.017, RSMo Supp. 1971, limiting state aid for kindergarten students to those who are five years old on the October first next following the beginning of the school term are constitutional and do not improperly discriminate against gifted children.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enclosure: Op. No. 394A
9-25-70, Moore