COMMONWEALTH of VIRGINIA

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The Honorable R. Steven Landes
Member, House of Delegates
Post Office Box 12
Verona, Virginia 24482

Dear Delegate Landes:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether early childhood teachers in private child care facilities must be licensed as teachers by the Virginia Department of Education. You also ask whether lottery funds that are distributed to localities may be used to help fund the Virginia Preschool Initiative.

Background

You relate that the state-funded Virginia Preschool Initiative (the "VPI"), which provides funds for at-risk children, is interested in engaging both public schools and private child care facilities. Funds from the program would be provided to support preschool services for at-risk children. The Virginia Department of Education ("VDOE") takes the position that preschool teachers paid with public funds must hold a baccalaureate degree and have a VDOE-approved teacher license (a "teacher license").

While preschool teachers in public preschools have teacher licenses, that is not necessarily true for preschool teachers in private child care facilities. Preschool teachers in private settings have a professional development system different from that of preschool teachers in public settings. Many private preschool teachers have a Child Development Associate credential, a Career Studies Certificate, or an Associate Degree, rather than a baccalaureate degree. Their credentials often are earned from Virginia community colleges with programs established to teach the specialized skills required for effectively teaching young children. You relate that these educational credentials do not qualify the holder for a teacher license.

Applicable Law and Discussion

A. Applicability of VDOE Licensure Requirements to Preschool Teachers in Private Child Care Facilities

The Virginia State Board of Education has not issued any regulations requiring licensure for teachers at private preschool facilities. However, § 22.1-299 of the *Code of Virginia* requires, in relevant

part, that all teachers paid from public funds must have teacher licenses, with the sole exception of substitute teachers hired to meet an emergency:

> No teacher shall be . . . paid from public funds unless such teacher holds a license or provisional license issued by the Board of Education . . . . In accordance with regulations prescribed by the Board, a person not meeting the requirements for a license or provisional license may be employed and paid from public funds by a school board temporarily as a substitute teacher to meet an emergency.[1]

A regulation duly promulgated by the State Board of Education defines a "teacher" as "a person who (i) is regularly employed full time as a teacher, visiting teacher/school social worker, guidance counselor, or librarian, and (ii) who holds a valid teaching license."[2] One of the requirements for being licensed as a teacher is to have a baccalaureate degree.[3]

Based on the foregoing, I conclude that, so long as they are paid solely from private funds, teachers in private child care facilities are not required to have a teacher license. However, if they are paid from public funds, the *Code of Virginia* requires that they have a teacher license. A baccalaureate degree is required in order to receive a teacher license. The credentials you have described as being typical of many private preschool teachers do not qualify as a baccalaureate degree.

B. Use of Lottery Funds to Help Fund the VPI

The VPI is a partially-state-funded, local-match VDOE program under which VDOE disburses payments "from the Lottery Proceeds Fund . . . to schools and community-based organizations to provide quality preschool programs for at-risk four-year-olds unserved by [the federal] Head Start program funding."[4] VPI funds appropriated by the General Assembly are "state funds."[5]

Article VIII, § 10 of the Constitution of Virginia allows the expenditure of public funds for "educational purposes," including in "nonsectarian private schools and institutions of learning."[6] It thus implicitly recognizes that nonsectarian private schools can perform an "educational purpose." This provision was found in the Constitution of 1971 as originally ratified. Approximately two decades later, the General Assembly in 1999 and 2000 proposed a constitutional amendment dealing with the Lottery and expenditure of Lottery Proceeds.[7] The voters ratified the amendment on November 7, 2000, and it became effective July 1, 2001.[8] It is now Article X, § 7-A of the Constitution of Virginia. In relevant part, it provides generally that "Lottery proceeds shall be appropriated from the [Lottery Proceeds] Fund to the Commonwealth's counties, cities, and towns, and the school divisions thereof, to be expended for

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[1] VA. CODE ANN. § 22.1-299 (Supp. 2015).

[2] 8 VA. ADMIN. CODE § 20-440-10.

[3] 8 VA. ADMIN. CODE § 20-22-40(A) ("Applicants for licensure must . . . [h]ave earned a baccalaureate degree . . . from a regionally accredited institution of higher education . . . .").

[4] 2015 Va. Acts ch. 665, Item 136(C)(14)(a)(1).

[5] *Id.*, Item 136(C)(14)(a)(2).

[6] VA. CONST. art. VIII, § 10

[7] *See* 1999 Va. Acts chs. 933 & 934; 2000 Va. Acts chs. 622, 713, 1015, 1017.

[8] VA. CONST. art. VIII, § 10, http://law.lis.virginia.gov/constitution/article10/section7-A/ (detailing the date of ratification and date amendment became effective).

the purposes of public education."[9] A similar requirement is contained in § 58.1-4022(D) of the *Code*, which states, in relevant part,

> In addition to such other funds as may be appropriated, 100 percent of the lottery revenues transferred to the Lottery Proceeds Fund shall be appropriated entirely and solely for the purpose of public education in the Commonwealth unless otherwise redirected pursuant to Article X, Section 7-A of the Constitution of Virginia. The additional appropriation of lottery revenues to local school divisions for public education purposes consistent with this provision shall be used for operating, capital outlay, or debt service expenses, as determined by the appropriation act.[10]

The precise question thus presented is whether the General Assembly's appropriations to the VPI are for "public education," since lottery proceeds may be used only for that purpose, barring any redirection made pursuant to Article X, § 7-A of the Constitution.

In answering this question, it is first critical to note that at the time the General Assembly recommended Article X, § 7-A to the voters, it was aware of the existing language in Article VIII, § 10 recognizing that nonsectarian private schools may perform "educational purposes" that may permissibly be supported by public funds. This fact alone strongly supports a conclusion that the VPI is "public education," even when the education is occasionally provided in the setting of private preschool facilities.

Further support for this conclusion is that the VPI is overseen and administered by VDOE. VDOE is a state agency, and its entire existence pertains to public education.[11] Finally, the 2015 Appropriation Act[12] contains Item No. 136 for "Distribution of Lottery Funds," which provides an appropriation to the VPI, and Item No. 136(C)(14)(a)(1), which governs disbursement of "Virginia Preschool Initiative Payments" from the Lottery Fund "to schools and community-based organizations to provide quality preschool programs for at-risk four-year-olds unserved by [federal] Head Start funding." Thus, the General Assembly's Appropriation Act has determined the VPI to be a form of public education, and an act of the General Assembly is presumed to be constitutional.[13]

For those reasons, I conclude that funding the VPI with the Lottery Proceeds Fund is legally permissible because it is a form of public education.

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[9] VA. CONST. art. X, § 7-A.

[10] VA. CODE ANN. § 58.1-4022(D) (Supp. 2015).

[11] VDOE also has a publication entitled "Overview of Virginia's Foundation Blocks for Early Learning." In relevant part, it states, "The value of early education is imperative to the future academic success and the growth of children's intellectual development . . . . The purpose of this document is to provide early childhood educators a set of minimum standards in literacy, mathematics, science, history and social science, health and physical development, personal and social development, music, and the visual arts, with indicators of success for entering kindergarten that are derived from scientifically-based research. The standards reflect a consensus of children's conceptual learning, acquisition of basic knowledge, and participation in meaningful and relevant learning experiences. The standards are aligned with 'Virginia's Kindergarten Standards of Learning (SOL) and Virginia's Phonological Awareness Literacy Screening (PALS).'"

[12] 2015 Va. Acts. ch. 665.

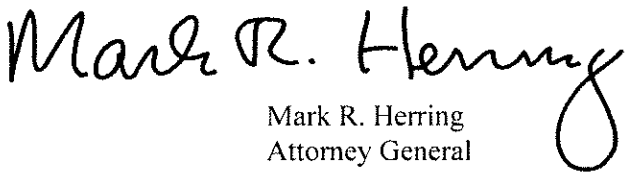
[13] Terry v. Mazur, 234 Va. 442, 449 (1987) ("[A]n act of the General Assembly is presumed to be constitutional, and every reasonable doubt must be resolved in favor of the act's constitutionality" (citing Almond v. Gilmer, 188 Va. 822, 834 (1949))).

Conclusion

For the reasons stated, it is my opinion that teachers in private preschools must have teacher licenses in order to be paid with public funds, which include the Lottery Proceeds Fund. It is my further opinion that the Lottery Proceeds Fund legally may be used to fund the VPI in all nonsectarian preschools, subject only to such restrictions and requirements as may apply to public funding of preschools.

With kindest regards, I am

Sincerely yours,



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