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Re: Request for Legal Opinion

RQ-0693-GA

Dear General Abbott:

The Texas Higher Education Coordinating Board ("Board" or "Coordinating Board") seeks your assistance in interpreting certain provisions of House Bill 3851, 80th Leg., R.S. (2007). The question we seek to resolve is whether the uniform high school grade point average that H.B. 3851 requires the Board to devise for university admissions must be adopted by Texas's independent school districts.

Background

H.B. 3851 amended Chapter 51, Subchapter U, of the Texas Education Code by requiring the Coordinating Board to establish a standard method for computing high school grade point averages, including providing for additional weight to be afforded for each honors course, advanced placement course, international baccalaureate course, or dual credit course completed by a student. Before the passage of H.B. 3851, the Legislature had assigned the power to adopt a uniform high school grade point average to the Commissioner of Education. Sections 28.0252(a) and (b) of the Education Code, granting this power to the Commissioner, were originally enacted in 2005 by the 79th Legislature. H.B. 3851 amended Section 28.0252(b) as well as Section 51.807 of the Education Code, which concerns the Board's rulemaking authority with regard to university admissions. It did not, however, amend Section 28.0252(a). That section states: "The Commissioner may develop a standard method of computing a student's high school grade point average that provides for additional weight to be given to each honors course, advanced placement course, international baccalaureate course, or dual credit course completed by a student." TEX. EDUC. CODE §28.0252(a).

Sections 1 and 2 of H.B. 3851, the provisions with which we primarily are concerned, provide:

SECTION 1. Section 28.0252(b), Education Code, is amended to read as follows:

(b) If the Commissioner develops a standard method under this section, a school district shall use the standard method to

compute a student's high school grade point average, except that to the extent of a conflict between that method and the method adopted under Section 51.807, [and] the student's grade point average computed in accordance with the method established under Section 51.807 [that manner] shall be used in determining the student's eligibility for university [automatic college] admission under Subchapter U, Chapter 51 [Section 51.803].

SECTION 2. Section 51.807, Education Code, is amended to read as follows:

Sec. 51.807. RULEMAKING. (a) To ensure a uniform standard for admissions under this subchapter, the [The] Texas Higher Education Coordinating Board shall adopt rules establishing a standard method for computing a student's high school grade point average. The method established under this subsection:

(1) must:

(A) be based on a four-point scale; and
(B) assign additional weight for each honors course, advanced placement course, international baccalaureate course, or dual credit course completed by the student as the board considers appropriate, taking into consideration the academic rigor of each course completed by the student; and

(2) may result in a student having a grade point average higher than 4.0 on a four-point scale as a result of the assignment of additional weight for one or more courses completed by a student under Subdivision (1)(B).

(b) The board may adopt other rules relating to the operation of admissions programs under this subchapter, including rules relating to the identification of eligible students [and the reporting requirements of Section 51.806].

(c) The standard method established under Subsection (a) for computing a student's high school grade point average applies to computing the grade point average of a student applying as a first-time freshman for admission to a general academic teaching institution beginning with admissions for the 2009 fall semester. This subsection expires January 1, 2010.

H.B. 3851, 80TH LEG., R.S. (2007) (Underscoring and strike-throughs as in original).

House Bill 3826, 80th Leg., R.S. (2007), may also have relevance in this matter. In what appears to be a related action by the Legislature to increase the rigor of the high school program for college bound students, H.B. 3826 requires students to take the "recommended or advanced" high school program for admission to the State's general academic teaching institutions. That bill, as did H.B. 3851, amended various sections of Chapter 51, Subchapter U of the Education Code. Thus, while imposing a requirement through H.B. 3826 that students take the recommended or advanced high school course program to be eligible for university admission, the Legislature, through H.B. 3851, appears to

have attempted to ensure that students' performance in those courses can be evaluated as uniformly as feasible through a standard method for computation of grade point averages. The principles undergirding the standardized methodology of computing uniform grade point averages appear to reinforce the "recommended or advanced" high school course requirements.

Discussion

As a result of the passage of H.B. 3851, there are now two provisions in the Education Code dealing with the creation of uniform high school grade point averages. Section 28.0252(a) authorizes, but does not require, the Commissioner of Education to develop a method for computing such averages, giving additional weight in such computation for more rigorous course work. Section 51.807, as amended by H.B. 3851, requires the Coordinating Board to develop such a method for the purpose of university admissions under Chapter 51, Subchapter U. The method so developed must be based on a four-point scale and give additional weight to more rigorous courses.

A serious question has arisen, however, as to whether independent school districts are required to use this method, and, if they do not, what impact that has on their students' ability to gain admission to general academic teaching institutions.

Before the amendment of Section 28.0252(b) by H.B. 3851, that provision would have required school districts to use a standard method if and when such a method were developed by the Commissioner of Education, and the grade point average so computed would have been used to determine whether students were eligible for automatic college enrollment under Section 51.803 of the Education Code, popularly known as the "top ten percent law," which requires public universities to admit Texas high school graduates who graduate in the top ten percent of their classes. Section 51.807, as amended by H.B. 3851, requires the Board to develop a standard method, and requires the standard so developed to be used to determine the grade point averages of applicants for admission to Texas public universities not only under the top ten percent law but also under Subchapter U for all admissions.

Section 51.807, however, does not explicitly address whether school districts must use the method developed or what effects result if such method is not used.

The language of the amended version of Section 28.0252(b) appears to be ambiguous with respect to the question of the responsibility of school districts to adopt the standard developed by the Board. Two divergent interpretations of the statutory language have resulted.

The Texas Association of School Administrators ("TASA") has posited that the language of the amendment requires school districts to adopt the standard method developed by the Board "to the extent of a conflict" between that method and a method developed by the Commissioner of Education. If the Commissioner does not develop a method under Section 28.0252, in TASA's

view, "a conflict does not exist and thus school districts are not required to use the method adopted under Section 51.807 for university admissions."

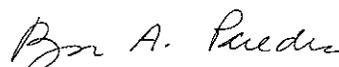
On the other hand, the Texas Education Agency ("TEA") has taken the view that H.B. 3851 does require the school districts to use the method developed by the Board. In its analysis of the bill, TEA wrote: "Currently the Commissioner of Education may opt to develop a standard method of computing students' GPA. If that method is established, districts are required to use it. This new law, however, requires that the method established by the THECB be used by ISDs in determining the top ten percent, and the optional top 25 percent, for the purpose of automatic admission eligibility." (Emphasis added.) (Copies of the TASA and TEA analyses are appended to this letter as Exhibits A and B, respectively.)

The Fiscal Note prepared by the Legislative Budget Board ("LBB") on H.B. 3851 appears to agree with TEA's interpretation of this issue. In its discussion of the impact of the bill on local government, the LBB stated, "Based on information collected by the Texas Education Agency through focus group meetings in December 2006, it appears that grade point average calculations vary widely from district to district. Given the complexity and variety of methods of calculating high school grade point average, it is assumed that school districts would likely incur some cost in conforming to an adopted methodology. Anticipated costs would include modification of local procedures and software."

In light of the apparent ambiguity of the provisions of H.B. 3851 and the different interpretations that have been presented on the question of whether the standard method of calculating grade point averages that the Texas Higher Education Coordinating Board is required by that act to develop must be followed by independent school districts, the Coordinating Board hereby requests, pursuant to Section 402.042 of the Government Code, that you issue an opinion on that question.¹ If possible, an expedited review would be appreciated due to time constraints in the legislation in issue.

Thank you very much for your assistance in this matter.

Sincerely,



Raymund A. Paredes

Enclosures

GC/pr

¹ It should be noted that the statutory provisions discussed in this request are a relatively small part of the subject of a far wider ranging lawsuit filed by a *pro se* plaintiff who is the father of two 14-year old boys. Alan Jordan, Parent of Charles Austin Jordan and Frederick Dallas Jordan v. Belton Independent School District, et al., Civil Action No. 08-CV-121. The question presented by this request for a legal opinion does not appear to be one that will be resolved in the referenced litigation.

Texas Association of School Administrators

Question Presented:

Whether §§28.0252 (b) and 51.807 of the Texas Education Code, as amended during the 80th Texas Legislature, apply to school districts if the commissioner of education has not developed a standard method of computing a student's high school grade point average.

Background/Analysis:

During the 79th Texas Legislature (2005), §28.0252 was added to the Texas Education Code to provide the commissioner of education with the option of developing a standard method of computing a student's high school grade point average. If the commissioner were to develop a method, school districts are required to use the method to determine eligibility under the Top Ten Percent law. Subsection (b-1) of the statute provides that the standard method, if developed by the commissioner, would apply to students entering grade nine during or after the 2007-2008 school year. The commissioner of education has not developed a method.

During the 80th Texas Legislature (2007), HB 3851 (Morrison/Shapiro) amended §51.807 of the Texas Education Code to require the Texas Higher Education Coordinating Board to adopt a standard method of computing a high school grade point average that provides additional weight for each honors course, advanced placement course, international baccalaureate course, or dual credit course completed by each student. Significantly, the bill also amended §28.0252 (b) of the Texas Education Code by temporally establishing when the rules adopted under §51.807 are applicable to school districts. In short, the new amended §28.0252 (b) reads as follows:

(b) If the commissioner develops a standard method under this section, a school district shall use the standard method to compute a student's high school grade point average, **except to the extent of a conflict between that method and the method adopted under Section 51.807**, the student's grade point average computed **in accordance with the methods established under Section 51.807** shall be used in determining the student's eligibility for **university** admission under **Subchapter U, Chapter 51**. (emphasis added to highlight new language)

The new phrase – “except to the extent of a conflict between that method and the method adopted under Section 51.807” – is significant because it indicates when school districts must use the method adopted by the Texas Higher Education Coordinating Board. By inserting this clear and unambiguous phrase in §28.0252 (b), the Texas Legislature intended the adoption of a standard method by the commissioner of education *and* the existence of a conflict. If the commissioner of education does not adopt a method, a conflict does not exist and thus school districts are not required to use the method adopted under Section 51.807 for university admissions.

This line of reasoning parallels the same analysis employed by the Texas Legislative Budget Board in its fiscal note of the conference committee report of HB 3851, which was adopted by a vote of 142 yeas, 2 nays, 2 present-not-voting in the Texas House. The fiscal note provides in pertinent part: “If a standard method of calculation [sic] grade point average *were* adopted by the commissioner of education as authorized under Chapter 28, Education Code, the bill would provide for the method adopted under Chapter 51 to prevail for the purpose of determining the student's eligibility for university admission under Subchapter U, Chapter 51, Education Code.” (emphasis added)

ExH. "A"

Statute Amended or Added: Amends Sections 28.0252 (b), 51.807, 51.4032 and 51.808, Education Code

Summary: Gives authority to the Texas Higher Education Coordinating Board (THECB) for computing students' high school grade point averages (GPA's) in a certain manner for admissions to institutions of higher education.

Requires all general academic teaching institutions and health-related institutions to report to the THECB information regarding the composition of the institution's entering class, including a breakdown of high school GPA standing. The report must be published on each institution's website. Institutions must also report any plans, programs or policies developed to recruit and retain underrepresented student populations.

The law also requires each general academic teaching institution to adopt policies to encourage community college transfers. The policy must include outreach, recruitment strategies and may include incentives to retain and promote transfer students.

Change from current law: Currently the commissioner of education may opt to develop a standard method of computing students' GPA. If that method is established, districts are required to use it. The new law, however, requires that the method established by the THECB be used by ISDs in determining the top ten percent, and the optional top 25 percent, of the graduating class for the purpose of automatic admission eligibility.

Effective Date: Applies to first-time freshmen entering general academic teaching institutions beginning with the 2009 fall semester.

Action required for 2007-2008 School Year: The THECB will need to adopt rules for computing students' GPAs. In addition, general academic teaching institutions will need to adopt written admission policies to promote the admission of undergraduate transfer students to the institution.

Outstanding Issues: None

Does this bill create a new program? No

Rulemaking Authority? Yes, Texas Higher Education Coordinating Board

Does this apply to charters? Students graduating from charter schools will be subject to higher education admissions requirements under this section.

Does this bill contain a new reporting requirement for TEA/school districts? No