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1701 North Congress Avenue
Austin, Texas 78701-1494
(512) 463-9007

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FILE # ML-44547-06

I.D. # 44547

January 6, 2006

RQ-0430-GA

Honorable Greg Abbott
Texas Attorney General
PO Box 12548
Austin, TX 78711-2548

Attn: Opinions Committee

Re: Request for Opinion

Dear General Abbott:

Enclosed is an opinion request from Mrs. Terri Leo, a member of the Texas State Board of Education, regarding the process by which our Board adopts textbooks for use in the public schools. I am requesting your opinion on the questions presented in her request.

Thank you very much for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Geraldine Tincy Miller".

Geraldine "Tincy" Miller, Chair
State Board of Education

Enclosure

Dear Attorney General Abbott:

We request reconsideration of Texas Attorney General Opinion No. DM-424, regarding State Board of Education (SBOE) authority to adopt a rule requiring textbooks to meet general textbook content standards as a condition of SBOE approval, and regarding SBOE authority with respect to ancillaries provided by publishers at no additional cost to school districts that adopt their textbooks. Opinion No. DM-424 held that the SBOE lacks authority to impose such general textbook content standards, and that SBOE authority to approve or reject textbooks does not extend to consideration of said ancillaries. We suggest that Opinion No. DM-424 misread the Texas Education Code (TEC) and misinterpreted legislative intent; that SBOE establishment of general textbook content standards is lawful under current statute and serves a legitimate state interest; and that including ancillaries as part of the official submission in the state textbook approval process is the sole reasonable construction of the TEC that serves an important state interest.

General Textbook Content Standards

General textbook content standards complement the state curriculum. The Texas Essential Knowledge and Skills (TEKS) tell publishers what textbooks *should* include. General textbook content standards tell publishers what textbooks *should not* include – e.g., no sensational violence, no blatantly offensive language or illustrations, no group stereotyping. General textbook content standards are a democratic check and balance by Texas' elected State Board of Education on editors and authors, monitoring accountability on concerns that the TEKS by their nature cannot address. General textbook content standards existed in old TAC Chapter 67 under the pre-1995 Texas Education Code (TEC). As originally filed in the 74th legislature, SB-1 stripped the SBOE of all power over textbook selection. But the final version of the new TEC preserved and reaffirmed SBOE authority in this area, including the power to enact general textbook content standards. Together new TEC Sections 31.023, 31.024, and 28.002 (c) and (h) address this point.

§ 31.023. TEXTBOOK LISTS. (a) For each subject and grade level, the State Board of Education shall adopt two lists of textbooks. The conforming list includes each textbook submitted for the subject and grade level that meets applicable physical specifications adopted by the State Board of Education and contains material covering each element of the essential knowledge and skills of the subject and grade level as determined by the State Board of Education under Section 28.002 and adopted under Section 31.024. The nonconforming list includes each textbook submitted for the subject and grade level that:

- (1) meets applicable physical specifications adopted by the State Board of Education;
- (2) contains material covering at least half, but not all, of the elements of the essential knowledge and skills of the subject and grade level; and
- (3) is adopted under Section 31.024.

(b) Each textbook on a conforming or nonconforming list must be free from factual errors.

§ 31.024. ADOPTION BY STATE BOARD OF EDUCATION. (a) By majority vote, the State Board of Education shall:

- (1) place each submitted textbook on a conforming or nonconforming list; or
- (2) reject a textbook submitted for placement on a conforming or nonconforming list.

§ 28.002

(c) The State Board of Education, with the direct participation of educators, parents, business and industry representatives, and employers shall by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks under Chapter 31

(h) The State Board of Education and each school district shall foster the continuation of the tradition of teaching United States and Texas history and the free enterprise system in regular subject matter and in reading courses and in the adoption of textbooks. A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage.

TEC Sections 31.023, 31.024, and 28.002(c) grant the SBOE final authority to define the TEKS and to judge textbook conformity to them. This SBOE power is the same as under the pre-1995 TEC with the old Essential Elements. The old TEC specified a single state-approved textbook list, while the current law provides for conforming and nonconforming lists. But dual lists do not lessen SBOE authority over textbooks, since for competitive reasons publishers will revise their books as the SBOE determines, to win placement on the conforming list. The new TEC devised the nonconforming list chiefly to permit approval of Saxon math texts, whose rejection under the old rules had caused an outcry. Yet even Saxon did not sell well as a nonconforming series in the 1999 Texas math adoption, confirming SBOE importance as gatekeeper to the conforming list. Legislative intent of actual current law is clear when contrasted with the first draft of SB-1 in 1995, which gave the SBOE no role in textbook approval.

TEC Section 28.002(h) states, "A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage." This, as Opinion No. DM-424 notes, directly quotes old TEC Section 21.101(d). Yet that opinion finds "that subsection (h) ... does not confer any additional power to the board with respect to textbook adoption" – such as establishing general textbook content standards – because "[i]t appears that the intent of the 'primary purpose' language in section 21.101(d) was to give school districts some guidance in formulating local curriculum plans," and because "[t]he former subsection made no reference to textbook adoption." These are remarkable constructions, since the preceding sentence in Section 28.002(h) *does refer to textbook adoptions*, and makes this "primary purpose" a joint duty of local districts *and the SBOE*.

Opinion No. DM-424 also reads old TEC Section 12.24(a) ("The State Board of Education shall adopt rules to provide for a full and complete investigation of all books") to mean that the old law empowered the SBOE to establish general textbook content standards. But, Opinion No. DM-424 adds, "[n]o such broad authority over textbook adoption or specific control over content is found in the new Education Code" because "[w]hen the legislature amends a statute and omits language of the former statute in its amended version, the legislature is presumed to have intended to change the law." In fact, however, new TEC Section 31.022 (b) and (c) *does not omit* the old language. It twice *reiterates* it ("The board shall adopt rules to provide for a full and complete investigation of textbooks"). Thus the statement in Opinion No. DM-424 that "[w]e do not believe that section 31.022 gives the board authority to adopt the proposed content guidelines as part of their 'full and complete investigation' of textbooks" is counterfactual.

It defies logic to conclude, as Opinion No. DM-424 concludes, that the old TEC **permitted** the SBOE to establish general textbook content standards even though old Section 21.101(d) **mentioned neither** the SBOE **nor** textbook adoptions, while the new TEC **prohibits** the SBOE from establishing general textbook content standards even though new Section 28.002(h) **mentions both** the SBOE **and** textbook adoptions. It denies reason to contend, as Opinion No. DM-424 contends, that the same language which in old TEC section 12.24(a) **supported** the SBOE's instituting general textbook content standards, now **strips** the SBOE of that power when **repeated** in new TEC Section 31.022 (b) and (c). The legislature either carried over or strengthened the language of the old TEC in the new TEC on these points. It intended no change in statute. The SBOE retains power under the current TEC to establish general textbook content standards. Opinion No. DM-424 is erroneous on its face and should be **REVERSED**.

Ancillaries

Ancillaries are supplements that publishers provide at no extra cost to school districts that adopt their textbooks. In response to several questions regarding SBOE authority with respect to ancillaries, Opinion No. DM-424 found that (1) ancillaries fall outside the intended legislative definition of "textbooks" in the TEC; (2) under the law, publishers determine which materials constitute the official submission for state review; and (3) the SBOE cannot consider the contents of unsubmitted ancillaries in deciding whether to approve or reject submitted textbooks. Reasons for these findings were that (1) TEC Section 31.151(a)(3) refers to ancillaries separately from textbooks; (2) TEC Chapter 31, which provides for textbook adoption and purchasing, does not mention ancillaries; (3) publishers' right to determine which are submitted materials implies the right to decide which are unsubmitted ancillaries; and (4) ancillaries are provided "free of charge" to school districts, and thus are distinct from the "state funded textbooks" which the SBOE approves.

The foregoing inferences are untenable extrapolations of fact and statute. Ancillaries are not actually "free of charge." Their cost is factored into the textbook price. Ancillaries are thus financially inseparable from "state funded textbooks" which the SBOE approves or rejects. TEC Section 31.023(b) does require all approved textbooks to be free from factual errors. Error-free ancillaries serve the same important state interest as error-free textbooks. It is clearly legislative intent that ancillaries be as free from factual errors as other instructional materials. The state cannot ascertain ancillaries' freedom from factual errors unless they undergo the same scrutiny as the rest of the submission. TEC Chapter 31 therefore includes ancillaries as part of the submission without enumerating them, and publishers cannot withhold ancillaries from the state review process. We conclude that ancillaries must submit to the same state approval procedures as textbooks, and must likewise conform to the same SBOE general textbook content standards.

Sincerely,

Terri Leo
State Board of Education, District 6