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The Honorable Greg Abbott
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RQ-0716-GA

FILE # ML-45705-08
I.D. # 45705

Re: Substitute for Opinion Request - RQ-0693-GA

Dear General Abbott:

Please accept this opinion request as a substitute to the opinion request submitted on March 28, 2008.

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 questions we seek to resolve are as follows:

QUESTIONS PRESENTED:

1. Whether Sections 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 as allowed in Section 28.0252 (a).
2. Notwithstanding the requirement of Texas Education Code, Section 51.807(c), that the standard method for computing a student's high school grade point average apply to a student applying as a first-time freshman for admission to a general academic teaching institution beginning with the 2009 fall semester, must the method adopted by the Texas Higher Education Coordinating Board ("Board") provide a transition period so as not to adversely affect students currently in high school who did not have notice of the method or a reasonable opportunity to plan their high school academic choices based on the method?
3. Even if the answer to the second question is negative, and the Board is not required to provide for such a transition period in its standard method, does the Board have the discretionary authority to include such transition provisions in its method?

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4. If the Board adopts a standard method in conformance with Section 51.807(c) that adversely affects students currently in high school who did not have notice of the method or a reasonable opportunity to plan their high school academic choices based on the method, would such a method violate the Texas Constitution, Article 1, Section 16, which prohibits a retroactive law?

5. To the extent that a standard method adopted by the Board under Section 21.807 conflicts with a standard method adopted by the Commissioner of Education of the Texas Education Agency ("Commissioner of Education") under Section 28.0252, do Subsections 28.0252(b) and (b-1) mean that the Board's standard method controls over the commissioner's standard method, but that the Board's method only applies to students who enter grade nine in high school in the 2007-2008 school year or thereafter?

BACKGROUND:

In 2005, the Texas Legislature enacted Texas Education Code, Section 28.0252, which authorizes, but does not require, the Commissioner of Education to develop a standard method of computing a student's high school grade point average. If the Commissioner of Education were to develop such a standard method, school districts would be required to use that method, but it would only apply to students entering grade nine during or after the 2007-2008 school year.

In 2007, the Texas Legislature enacted Texas Education Code, Section 51.807 (H.B. 3851) requiring the Board to establish a standard method for computing a student's high school grade point average, 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. 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. 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).

The method adopted by the Board applies to students applying for first-time admission to a general academic teaching institution for the 2009 fall semester. Thus, any method adopted by the Board apparently would apply to students currently in grade eleven of high school, but only to the computation of grade point averages for those students who actually apply for first-time admission in the fall semester of 2009.

Nothing in Section 51.807 directly states that the method developed and adopted by the Board must be used by school districts to compute the grade point averages of all students, such as students who do not pursue post-secondary education, or pursue post-secondary education at any institution that does not fall within the statutory definition of "general academic teaching institution."

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].

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(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).

DISCUSSION:

The legislation enacting Section 51.807 amended Section 28.0252(b), to provide that, to the extent of any conflict between a standard method adopted by the Commissioner of Education and a standard method adopted by the Board, the method adopted by the Board controls for the purpose of determining a student's eligibility for university admission to a general academic teaching institution under the Texas Education Code, Section 51, Subchapter U. Subchapter U does not apply to students who attend a community or junior college, who attend a private college or university in Texas, who attend a post-secondary technical or vocational training program, who do not pursue post-secondary education at all, or who attend a college or university in another state or country. Thus, it is clear that the method adopted by the Board would not completely replace any method adopted by the Commissioner of Education, but would only control to the extent of a conflict with regard to admission at a specific class to Texas institutions of higher education.

Further, if the Commissioner of Education does not exercise his discretion to adopt a standard method under Section 28.0252, it appears clear that any method adopted by the Board would not replace any local policies and procedures adopted by the boards of trustees of school districts. Section 51.807 applies to admission to a general academic teaching institution, does not give the Board enforcement authority over Texas school districts, and does not require the method adopted by the Board to be used generally by school districts to compute students' grade point averages. Section 28.0252 authorizes the Commissioner of Education to adopt a method that school districts would be required to use, and makes clear that any method adopted by the Board would take precedence over the Commissioner of Education's method, but only for purposes of admission to a specific class of institutions of higher education.

To further complicate the analysis, the provision that makes clear that the Board's standard method would take precedence over any standard method adopted by the Commissioner of Education for admission to a specific class of institutions of higher education is in Section 28.0252(b). Subsection 28.0252(b-1) states that "Subsection (b) applies only to students entering grade nine during or after the 2007-2008 school year."

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Thus, it appears that Section 28.0252 provides that any method adopted by the Board would take precedence over a method adopted by the Commissioner of Education with respect to admission to a specific class of Texas institutions of higher education, but only beginning with students who typically will not be in grade twelve in high school until the 2010-2011 school year, and who typically will not be applying for admission to the universities subject to Subchapter U until the fall semester of 2011.

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.

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.

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 10 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.

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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. Several public education stakeholders have 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 their 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.) (A copy of the TEA analysis is appended to this letter as Exhibit A.)

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."

With this complicated statutory background, the Board is concerned that any method it adopts in accordance with the statutory requirement of Section 51.807 not adversely affect current high school students who have not had any notice of the method and who have not had a reasonable opportunity to plan their high school academic choices based on the method. As the Board has worked in recent months to develop a standard method, it has received substantial helpful comments and suggestions from Texas school districts and organizations representing various aspects of public elementary and secondary education. Based on this input, it appears likely that any method adopted by the Board will significantly change the current method of computing students' grade point averages in many school districts and will change class rankings for

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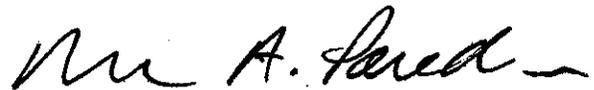
many, potentially thousands, of current high school students, including those guaranteed admission under the "Top 10 Percent" provisions of Subchapter U. If the Board attempts to make any such method effective for students applying for first-time admission in the 2009 fall semester, it will affect thousands of students who currently are in their junior year of high school and who will be entering their senior year of high school by the time the method is in effect. To the extent that the method "rewards or penalizes" students for course selection decisions made in their freshman, sophomore or junior years before the effective date of the Board's method, we are very concerned that it will result in legal challenges from adversely affected students and parents. For example, such a method could be challenged as being a retroactive law in violation of the Texas Constitution, Article 1, Section 16.

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 the questions presented in this letter.¹ If possible, an expedited review would be appreciated due to time constraints in the legislation at issue.

One reasonable option to resolve these complicated issues of statutory construction and avoid adversely affecting current high school students who have not had notice of the Board's method and a reasonable opportunity to plan their high school academic course selections on the method, and also hopefully to avoid any related litigation, would be to give effect to Section 28.0252(b) and (b-1), so that any Board method would only apply to students who enter grade nine in high school in the 2007-2008 school year or thereafter.

Thank you very much for your assistance in this matter.

Sincerely,



Raymund A. Paredes

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 questions presented by this request for a legal opinion do not appear to be ones that will be resolved in the referenced litigation.

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