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**COMMITTEE ON
HOMELAND SECURITY & PUBLIC SAFETY
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October 21, 2013

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RQ-1158-CA

The Honorable Greg Abbott
Attorney General of the State of Texas
ATTN: Opinion Committee
PO Box 12548
Austin, TX 78711-2548

Re: Whether a school district may, pursuant to its general authority to authorize a person to carry a firearm on school property under Penal Code §46.03(a)(1), authorize an employee and/or a trustee to carry and use a concealed handgun at any meeting of a governmental entity (despite Penal Code §46.035(c)) and/or on the premises where a high school sporting event or interscholastic event is taking place on school property (despite Penal Code §46.035(b)(2)), and related questions.

Dear Attorney General Abbott:

Pursuant to the authority to issue advisory opinions granted to the Attorney General in §22 of Article IV of the Texas Constitution and §402.041, *et seq.* of the Texas Government Code, this letter is being submitted to request an opinion regarding certain provisions of the Texas Penal Code.

BACKGROUND

School districts across Texas use a variety of school safety measures for the protection of children, staff and visitors. When it comes to armed protection on school property, some larger districts staff an entire school district police department; some hire a school resource officer; and some contract with other local law enforcement on a part-time basis. Many school districts do not have any on-site armed protection and continue to rely solely on other local law enforcement to protect students just as any other citizen.

In recent years, some school districts, typically smaller rural districts, have used existing laws to create policies that allow their school boards to authorize, as allowed by Penal Code §46.03(a)(1), designated employees to carry a concealed handgun on school property pursuant to written regulations – discussed below as a Guardian Plan. The 83rd Texas Legislature, with the passage of HB 1009, created another option for school districts. HB 1009 specifically authorizes a school board to designate an employee to serve as a licensed "School Marshal" - discussed below as a School Marshal Plan.

While the Guardian Plan and the School Marshal Plan are similar, there are differences which may cause a school district to select one plan over the other. In fact, with the required training under the Marshal Plan not expected to be established until at least January 2014, the majority, if not all, of school districts that have adopted either plan are going with the Guardian Plan. Generally, the Guardian Plan gives the school board broader discretion in defining the plan through written regulations; whereas the School Marshal Plan has very specific requirements and constraints. The differences are discussed below.

Guardian Plan

Several school districts across the state have elected to authorize designated persons (typically an employee with other primary duties) to carry a firearm on school property in an effort to protect students, staff and others from armed intruders.¹ Such an authorization is typically included as a part of a school district's board policy and accompanying written regulations or administrative procedures. (A sample policy is attached as Exhibit A). Most school districts refer to this authorization as a "Guardian Plan" (originally coined by the first Texas school district to adopt such a plan – Harrold ISD). While some school districts adopted a Guardian Plan prior to 2013, the tragedy at Sandy Hook Elementary has resulted in these plans becoming more prevalent.

The legal authority for a Guardian Plan is primarily found in Penal Code §46.03(a)(1), in combination with a school board's general authority to manage and oversee public schools under Education Code §§ 11.151(b) and 11.1511(b)(15).

Penal Code §46.03(a)(1) states in pertinent part:

Sec. 46.03. PLACES WEAPONS PROHIBITED.

(a) A person commits an offense if the person intentionally, knowingly, or recklessly possesses or goes with a firearm, illegal knife, club, or prohibited weapon listed in Section 46.05(a):

- (1) on the physical premises of a school or educational institution, any grounds or building on which an activity sponsored by a school or educational institution is being conducted, or a passenger transportation vehicle of a school or educational institution, whether the school or educational institution is public or private, unless pursuant to written regulations or written authorization of the institution.

(Emphasis added).

¹ In Texas, there at least 10 school districts that have approved such authorization through the adoption of policies and procedures commonly referred to as a "Guardian Plan" – Cayuga ISD, Central Heights ISD, Ganado ISD, Harrold ISD, Huntington ISD, Louise ISD, Union Grove ISD, Westwood ISD, and Van ISD.

Texas Education Code §§ 11.151(b) and §11.1511(b)(15), state in pertinent part:

Sec. 11.151. IN GENERAL.

. . . . (b) The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.

Sec. 11.151. SPECIFIC POWERS AND DUTIES OF BOARD.

. . . . (b) The board shall:

. . . . (15) carry out other powers and duties as provided by this code or other law.

(Emphasis added.)

The requirements of a Guardian Plan are generally within the broad discretion of the school district as long as the requirements are included in "written regulations" as required by Penal Code §46.03(a)(1), and are in compliance with any other applicable laws. Typically, school districts adopt a broad policy allowing the board to authorize a Guardian(s) to carry a handgun on school property and to use it under limited defined emergency situations. (See Exhibit A) The school district will also typically have accompanying detailed procedures with other requirements and restrictions (e.g., concealed handgun license ("CHL") requirements, training, scope of authority). The procedures are typically kept confidential as part of the district's Emergency Operations Plan ("EOP"). See Tex. Educ. Code §37.108 (most of EOP is confidential). Thus, under Penal Code §46.03, a school district may through written regulations authorize the carrying of firearms on school property (e.g., a Guardian Plan).

However, a typical requirement within the written regulations is that a Guardian must have a current CHL. In turn, Penal Code §46.035 lists various locations where a CHL is prohibited from carrying a handgun, including a sporting or interscholastic event, and a school board meeting, as follows:

(b) A license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of Subchapter H, Chapter 411, Government Code, regardless of whether the handgun is concealed, on or about the license holder's person:

. . . . (2) on the premises where a high school, collegiate, or professional sporting event or interscholastic event is taking place, unless the license holder is a participant in the event and a handgun is used in the event;

. . . . (c) A license holder commits an offense if the license holder intentionally, knowingly, or recklessly carries a handgun under the authority of Subchapter H, Chapter 411, Government Code, regardless of whether the handgun is concealed, at any meeting of a governmental entity.

(Emphasis added.)

Thus, the potential conflict between these two provisions raises the issue of whether a school board's authorization under a Guardian Plan overrides the apparent prohibition for a CHL to carry at a school board meeting and/or at a school sporting or interscholastic event on school property.

School Marshal Plan

HB 1009, the "Protection of Texas Children Act," was signed into law effective June 14, 2013. The new law specifically creates an additional category of certified peace officer called a "School Marshal" who may carry a concealed handgun on school property, and it authorizes school boards to designate a school employee as a "school marshal" - commonly referred to as a School Marshal Plan.

The School Marshal Plan under HB 1009 has specific requirements and constraints – one of which is that the person must be an employee. The employee must also:

- Be licensed under the TCLEOSE² school marshal training program as set forth in Occupations Code §17021. 260 (which does not currently exist, but will be added to the Occupations Code no later than January 1, 2014);
- Obtain a CHL issued under Chapter 411 of the Government Code;
- Complete 80 hours of instruction designed to:
 - o Emphasize strategies for preventing school shootings and for securing the safety of potential victims of school shootings;
 - o Educate a trainee about legal issues relating to the duties of peace officers and the use of force or deadly force in the protection of others;
 - o Introduce the trainee to effective law enforcement strategies and techniques;
 - o Improve the trainee's proficiency with a handgun; and
 - o Enable the trainee to respond to an emergency situation requiring deadly force, such as a situation involving an active shooter; and
- Pass a psychological examination administered by TCLEOSE.

² Beginning January 1, 2014, with the passage of SB 686 in the 83rd Legislative Session, TCLEOSE will be renamed "Texas Commission on Law Enforcement" ("TCLE").

If an employee meets these requirements and voluntarily agrees to serve, the board of trustees of a school district may appoint that person as a School Marshal. Other requirements or restrictions include:

- The board may appoint not more than one School Marshal per 400 students in average daily attendance per campus (and that School Marshal may serve only at that designated campus);
- Once selected, the School Marshal may carry a concealed handgun on the premises of a school, except if the primary duty of the School Marshal involves direct contact with students, in which case, the Marshal may only possess a handgun in a locked and secured safe “within the marshal’s immediate reach;”
- The handgun carried on or within the immediate reach of the School Marshal must be loaded with “frangible ammunition designed to disintegrate on impact;”
- A School Marshal may only use the handgun when “circumstances would justify the use of deadly force” under Penal Code §§ 9.32 and 9.33; and
- A School Marshal’s license expires on the marshal’s first birthday two years after the Marshal was first licensed, and then it must be renewed every two years, by:
 - o Completing combined TCLEOSE approved classroom and simulation training not to exceed 16 hours;
 - o Demonstrating appropriate knowledge on an examination designed and administered by TCLEOSE;
 - o Demonstrating handgun proficiency to the satisfaction of commission staff; and
 - o Demonstrating psychological fitness through a TCLEOSE administered exam.

Because of these stringent requirements, many school districts are expected to choose (or continue with) a Guardian Plan instead of a School Marshal Plan. Under a Guardian Plan, the school district has greater flexibility and may define its own “written regulations.” One significant difference is that a School Marshall must be an employee. As a result, some districts that wish to designate a school board member(s) as a Guardian are bypassing the option of a School Marshal Plan and opting for the Guardian Plan.³

³ The bill analysis for HB 1009 seems to clarify that a School Marshal Plan is *not the only means* by which district employees can possess handguns for the protection of students: The “Background and Purpose” section of the bill analysis states:

It has been observed that a few schools have adopted policies that allow teachers who are concealed handgun license holders to carry a firearm in school buildings and on school grounds. In an effort to provide an *additional option* for protecting students, faculty, and other staff in Texas schools, H.B. 1009 seeks to authorize a school district...to appoint school marshals...

QUESTIONS PRESENTED

1. Does a school district's written authorization allowing either an employee or trustee who has a CHL to carry and use a concealed handgun on school property pursuant to Penal Code §46.03(a)(1) (Guardian Plan) override the prohibition against a concealed handgun license holder from carrying a handgun at "any meeting of a governmental entity" under Penal Code §46.035(c)?
2. Does a school district's written authorization allowing either an employee or trustee who has a CHL to carry and use a concealed handgun on school property pursuant to Penal Code §46.03(a)(1) (Guardian Plan) override the prohibition against a concealed handgun license holder from carrying a handgun "on the premises where a high school, . . . sporting event or interscholastic event is taking place" on school property under Penal Code §46.035(b)(2)?
3. Would serving as a Guardian under a school district's Guardian Plan fall within the scope of official duties of a school board trustee under Texas Education Code §11.1511(b)(15)?
4. If the answer to question nos. 1 and/or 2 above is "No," may a school district simultaneously appoint one employee to serve as a School Marshal under HB 1009 (to ensure an armed presence at school board meetings and sporting events), and appoint another person to serve as a Guardian under a Guardian Plan (to allow flexibility in its armed presence in other locations)?

DISCUSSION:
QUESTIONS 1 AND 2

Question nos. 1 and 2 are treated together since they are similar in nature and involve the same two statutes. The crux of the issue is whether a school board's written authorization to carry under a Guardian Plan (to either an employee or a trustee with a CHL) may include carrying at a school board meeting or at a school sporting or interscholastic event on school property despite the apparent prohibitions for a CHL to carry in those locations under Penal Code §46.035.

DISCUSSION: QUESTION 3

3. Would serving as a "Guardian" under a school district's "Guardian Plan" fall within the scope of official duties of a school board trustee under Texas Education Code §11.1511(b)(15)?

One potential issue for a school district that authorizes a school board member to serve as a Guardian is whether or not such an authorization would fall within the scope of official duties for the board member. This is important for purposes of potential liability as well as liability insurance coverage in the event a trustee authorized as a Guardian is ever required to take action. Obviously, if carrying a concealed handgun is not authorized by law, and therefore beyond the scope of a trustee's official duties, a school district would likely not grant such authority since any action by that board member as a Guardian would almost assuredly not be covered under the school district's liability insurance policy. The question appears to be whether or not the school

board's authorization itself, or the general statutory authority given to trustees, would support the conclusion that serving as a Guardian is within the official duties of a school district trustee.

The Attorney General considered a similar, but not determinative, issue in Attorney General Opinion Number GA-1008 (June 10, 2013). In GA-1008, the Texas Medical Board adopted a resolution allowing their investigators to carry concealed handguns while on duty. One of the issues raised in this opinion was whether or not the board would be protected under sovereign immunity if it adopted the resolution.

Even though a medical board investigator's typical duties did not require carrying a weapon, the Attorney General determined that if the board adopted the resolution for their employee investigators to carry concealed handguns, the resolution would not waive immunity because the investigator would be acting within the scope of his or her employment if so authorized. See *Lopez v. Trevino*, 2 S.W.3d 472, 474 (Tex. App-San Antonio 1999 - pet. dism'd w.o.j.) (holding that the establishment of general policy is a legislative function) (Emphasis added). Based upon the rationale in GA-1008, it appears that any school board trustee who is authorized to serve as a Guardian would be acting within the scope of his official duties as long he acts within the authorization provided by the board of trustees.

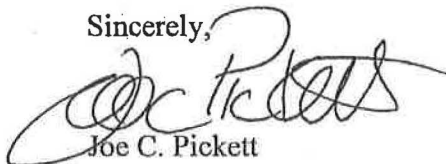
DISCUSSION: QUESTION 4

4. May a school district simultaneously appoint one person to serve as a School Marshal under HB 1009 and another person to serve as a Guardian under a Guardian Plan?

In the event a Guardian is unable to carry a concealed handgun at a school board meeting or sporting or interscholastic event on school property, a school district may wish to authorize both a School Marshal (who may carry at a school board meeting and/or sporting event as a certified peace officer) and a Guardian (for other circumstances). The legislative history of HB 1009 makes it clear that a School Marshal Plan is simply another option, and no part of HB 1009 appears to prohibit using both methods. As such, it appears that school district could simultaneously adopt a School Marshal Plan and a Guardian Plan to allow more comprehensive armed protection.

Thank you for your time and consideration with regard to this matter. If you need any additional information, please do not hesitate to contact me.

Sincerely,



Joe C. Pickett

Chairman

House Committee on Homeland Security and Public Safety

Cc: The Honorable Jason Villalba
The Honorable Travis Clardy