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OPINION COMMITTEE

State Board of Education

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ID. # 47743

RQ-0026-KP



June 8, 2015

The Honorable Ken Paxton
Texas Attorney General
Attn: Jennie Hoelscher, Chair, Opinion Committee
P.O. Box 12548
Austin, TX 78711

Re: The authority of the State Board of Education to promulgate rules governing the process used by school districts and charters regarding instructional materials

Dear General Paxton:

I write to seek your guidance related to the authority of the State Board of Education (the Board) to promulgate rules governing the process used by school districts and charters (collectively referred to as "public schools" hereafter) regarding the adoption and use of instructional materials.¹ These instructional materials may be used by the public schools to certify to the Board and Commissioner of Education that the public school has instructional materials that cover all elements of the Texas Essential Knowledge and Skills (TEKS) for the required curriculum. TEX. EDUC. CODE § 31.004. The Board has long had considerable authority over the approval and adoption of instructional materials used by the public school children of Texas. See Tex. Att'y Gen. Op. GA-0823 (2010). Chapter 31 of the Education Code governs the adoption of instructional materials generally. The legislature has made extensive amendments to chapter 31 over the years, modifying the duties and authority of the Board, public schools, and publishers related to the adoption, use, and purchase of instructional materials, which are discussed in more detail in the general background section below. See Act of June 27, 2011, 82nd Leg., 1st C.S., ch. 6, 2011 Tex. Gen. Laws 5368 (S.B. 6); Act of May 29, 2009, 81st Leg., R.S., ch. 679, 2009 Tex. Gen. Laws 1508 (H.B. 2488); Act of May 29, 2009, 81st Leg., R.S., ch. 1407, 2009 Tex. Gen. Laws 4392 (H.B. 4294); Act of May 21, 2007, 80th Leg., R.S., ch. 445, 2007 Tex. Gen. Laws 790 (H.B. 188)

The chapter has numerous provisions that govern the review and adoption of instructional materials by the Board. Section 31.023 of the Education Code requires the Board to adopt a list of instructional materials (Board's approved list) that meet certain specifications. TEX. EDUC. CODE §§ 31.023, 31.024. That section specifically requires that the Board ensure its adopted instructional materials cover a certain percentage of elements of the TEKS. TEX. EDUC. CODE § 31.023. Chapter 31 also contains numerous other provisions for additional adoptions of materials beyond those on the Board's approved list. TEX. EDUC. CODE §§ 31.0231, 31.0241, 31.0242, 31.028, 31.029, 31.031, 31.035, 31.073.

I seek to identify the extent of the Board's rulemaking authority to ensure that, at the local level, appropriate process and safeguards exist with regard to the adoption and use of instructional materials by a public school. I specifically seek clarification of the following questions:

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¹ Instructional materials are defined in TEX. EDUC. CODE § 31.002 to include a variety of media used to convey the Texas Essential Knowledge and Skills (TEKS).

1. May the Board by rule require public schools to follow a process in the local adoption of instructional materials that allows for public input and participation during the local review and adoption process? Does the Board's authority extend to all local adoptions of instructional materials regardless of whether the materials are purchased from the Board's list of adopted instructional materials?
2. May the Board by rule require public schools to adopt procedures ensuring prior local approval of changes in content made by a publisher to instructional materials that are not purchased from the Board's approved list?
3. May the Board by rule require public schools to specify which TEKS are covered by each locally-adopted instructional material and make this information publically available? Further, may the Board impose a requirement on public schools to identify which passage(s) in each of those instructional materials cover(s) which specific elements of the TEKS?
4. May the Board by rule establish an administrative penalty for a publisher who fails to correct a factual error identified by a public school contained in an instructional material that was not on the Board's approved list?
5. May the Board by rule require public schools to develop conflicts of interest policies and require public schools and publishers to keep contact registers between school officials and publishers? Does the Board's authority extend to local adoptions of instructional materials regardless of whether the materials are purchased from the Board's approved list?
6. May the Board by rule require a public school to adopt only instructional materials that provide an end-of-section review exercise, an end-of-chapter activity, a unit test, or its electronic equivalent, documenting TEKS coverage in the student version when purchasing instructional materials that are not on the Board's approved list?
7. May the Board by rule require a public school to ensure that all locally-adopted instructional materials that are not on the Board's approved list comply with Texas Education Code section 28.002(h)? In the alternative, does section 28.002(h) impose a mandate on public schools to ensure that locally-adopted instructional materials meet that requirement?

General Background

Chapter 31 of the Texas Education Code covers the topic of instructional materials. In general terms, it imposes duties on the Board to review and adopt instructional materials that meet the statutory requirements. This has been the subject of many decisions. See Tex. Att'y Gen. Op. GA-0823 (2010); Tex. Att'y Gen. Op. GA-0456 (2006); Tex. Att'y Gen. Op. GA-0444 (2006); Tex. Att'y Gen. Op. DM-465 (1998); TEX. Att'y Gen. Op. DM-424 (1996). The chapter also imposes requirements on public schools with respect to coverage of the TEKS, use of the instructional materials allotment (IMA), and local operations with respect to instructional materials. TEX. EDUC. CODE § 31.004 et seq.

As noted above, this chapter has been revisited periodically and major policy shifts have occurred over the years. See Act of June 27, 2011, 82nd Leg., 1st C.S., ch. 6 (S.B. 6), 2011 Tex. Gen. Laws 5368; Act of May 29, 2009, 81st Leg., R.S., ch. 679, 2009 Tex. Gen. Laws 1508, (H.B. 2488); Act of May 29, 2009, 81st Leg., R.S., ch. 1407, 2009 Tex. Gen. Laws 4392 (H.B. 4294); Act of May 21, 2007, 80th Leg., R.S. ch. 445, 2007

Tex. Gen. Laws 791 (H.B. 188). Most recently, in 2011, the Legislature enacted Senate Bill 6, which made numerous revisions to the instructional materials provisions in the Code. Act of June 27, 2011, 82nd Leg., 1st C.S., ch. 6, 2011 Tex. Gen. Laws 5368 (attached).

Prior to SB 6, the Board approved a conforming (covering 100% of the TEKS) and a non-conforming (covering at least 50% of the TEKS) list of reviewed textbook.

Act of May 27, 1995, 74th Leg., R.S., ch. 260 § 1, 1995 Tex. Gen. Laws 2207, 2337 (amended 2011) (current version at TEX EDUC. CODE § 31.023(a)) Public schools were required to select textbooks in the foundation subjects from the Board's conforming and non-conforming lists. Act of May 27, 1995, 74th Leg. R.S., ch. 260 § 1, 1995 Tex. Gen. Laws 2207, 2338 (amended 2011) (current version at TEX. EDUC. CODE § 31.101(a). For enrichment subjects, a district could receive 70% of the cost of the textbook if they chose a textbook not appearing on either the conforming or non-conforming list. Id. SB 6 removed the conforming and non-conforming lists, and required that each instructional material approved by Board cover at least 50% of the elements of the TEKS, and fulfilled other requirements. TEX. EDUC. CODE § 31.023(a). Furthermore, SB 6 provided public schools an instructional materials allotment (IMA) and authorized public schools to purchase instructional materials that were not approved by the State Board of Education without penalty regardless whether the instructional materials covered foundation or enrichment curriculum. TEX. EDUC. CODE § 31.0211(c)(1)(B). Notably, each school district and charter school must still certify annually that it has the instructional materials necessary to cover the TEKS of the required curriculum prior to spending IMA funds on other items. TEX. EDUC. CODE § 31.004.

Throughout the changes over the years, a constant is the Board's general rulemaking authority in Chapter 31. This provision reads:

The State Board of Education may adopt rules, consistent with this chapter, for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

TEX. EDUC. CODE § 31.003. This provision has seen only one change since its codification in 1995, which was to replace the word "textbook" with "instructional materials." Act of May 27, 1995, 74th Leg., R.S., ch. 260 § 1, 1995 Tex. Gen. Laws 2207, 2336 (amended 2011) (current version at Tex. Educ. Code § 31.003). The provision requires that the rules be "consistent with this chapter" and governs the "adoption, requisition, distribution, care, use, and disposal of instructional materials." TEX. EDUC. CODE § 31.003. By its express terms, the statute provides rulemaking authority to the Board over certain aspects of instructional materials. The phrase "instructional materials" in section 31.003 does not distinguish between the instructional materials purchased from the Board's approved list or those purchased by a public school outside of the Board's approved list. Nor is the phrase textually limited to certain entities, but appears to govern all entities that implement the adoption, requisition, and use of instructional materials including the Board, public schools, and publishers.

The Board's rulemaking authority requires that the rules be "consistent with this chapter," which would, therefore, require a court to consider the provisions and objectives of the chapter as a whole in determining the extent of the Board's authority over the local adoption of instructional materials. TEX. EDUC. CODE § 31.003; see TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011) ("We construe statutes as a whole rather than their isolated provisions.") The chapter authorizes public schools to use instructional materials allotment funds to purchase materials on or off the Board's approved list. TEX. EDUC. CODE § 31.0211(c)(1)(b). The chapter contains a specific subchapter governing the local public school selection and purchase process for instructional materials. TEX. EDUC. CODE §§ 31.101-31.106. It imposes

a duty on the public school to certify coverage of the TEKS. TEX. EDUC. CODE § 31.004(a). Chapter 31 creates an offense for interference with the chapter's provisions regarding purchasing of instructional materials. TEX. EDUC. CODE §§ 31.152-31.153. It imposes performance parameters on publishers and provides regulatory authority to the Board to enforce those provisions. TEX. EDUC. CODE § 31.151. It follows then that the Board's authority to adopt rules would extend to both the Board's own duties imposed by various provisions of chapter 31, as well as to the local adoption, requisition, distribution, care, use and disposal of instructional materials, regardless whether they are purchased from the Board's approved list.

With the greater flexibility public schools are afforded in purchasing instructional materials, quality control and public input to the instructional materials process may suffer. While the statute has been amended with respect to what public schools may purchase, the statutory delegation of rulemaking authority to the Board has remained intact and takes on new importance in the context of other changes within chapter 31. To ensure that Texas public students have access to high-quality instructional materials, the Board needs to resolve the extent of its authority to promulgate rules governing the process used by public schools regarding adoption of instructional materials used by Texas public school students.

Question One: May the Board by rule require public schools to follow a process in the local adoption of instructional materials that allows for public input and participation during the local review and adoption process? Does the Board's authority extend to all local adoptions of instructional materials regardless of whether the materials are purchased from the Board's list of adopted instructional materials?

As discussed above, section 31.003 of the Texas Education Code provides the Board with a broad grant of authority to promulgate rules regarding the adoption and use of instructional materials. The text of the statute does not distinguish between instructional materials on the Board's approved list or authorized elsewhere in the chapter, including through a local selection process. Subchapter C of Chapter 31 of the Texas Education Code contains provisions that set out requirements for the local selection and requisition of instructional materials; therefore, a Board rule that augments those provisions with additional procedural requirements to ensure input in the local adoption process would be a lawful exercise of the Board's authority to adopt rules consistent with this chapter. TEX. EDUC. CODE §§ 31.003, 31.101-31.106.

In fact, since 2001, the Board by rule has required public schools to adopt a local process for the selection of instructional materials. See 19 TEX. ADMIN. CODE § 66.104. The Board amended rules in 2012, after the passage of SB 6, and retained the requirement that a public school adopt a local process even though statute no longer required the purchase of foundation curriculum materials from the Board's approved list. This rule has not been challenged in court, nor expressly superseded by legislative enactment.

Given the Board's broad rulemaking authority over the adoption of instructional materials, it would appear consistent with the Board's authority to provide a more prescriptive local process that ensures public input and participation in the local selection of instructional materials, regardless of whether those instructional materials are purchased from the Board's approved list.

Question Two: May the Board by rule require public schools to adopt procedures ensuring prior local approval of changes in content made by a publisher to instructional materials that are not purchased from the Board's approved list?

When the Board adopts an instructional material, the publisher cannot make changes to the state-adopted instructional material without the approval of the Board. 19 TEX. ADMIN. CODE §§ 66.10(g), 66.75. As discussed above, a plain reading of the Board's rule-making authority over the adoption and use of

instructional materials contains no express limitation. Because chapter 31 of the Texas Education Code contains provisions setting out certain requirements for local adoption process, as well as imposing duties upon publishers, the adoption of a Board rule setting out a requirement that a publisher adhere to the same requirement at the local level as mandated by the Board for prior approval of changes to instructional materials, would be “consistent with this chapter.” TEX. EDUC. CODE §§ 31.003, 31.023, 31.151.

It would appear consistent with the Board’s rule-making authority to require public schools to ensure that the school grant approval to a publisher before the publisher may change content of instructional materials purchased by a public school that were not on the Board’s approved list. This would ensure the same protection for locally-adopted instructional materials outside the Board’s approved list as materials on the Board’s approved list. Furthermore, a public school is required, with one minor exception, to annually certify that its instructional materials cover the TEKS. TEX. EDUC. CODE § 31.004(a). If a publisher could amend their texts without approval at any time, the certification would be valid for only the day the certification was issued.

Question Three: May the Board by rule require public schools to specify which TEKS are covered by each locally-adopted instructional material and make this information publically available? Further, may the Board impose a requirement on public schools to identify which passage(s) in each of those instructional materials cover(s) which specific elements of the TEKS?

Section 31.004 imposes a requirement on public schools to annually certify to the State Board of Education and the Commissioner of Education that the public school provides instructional materials to cover all elements of the TEKS for the required curriculum. TEX. EDUC. CODE §§ 31.004, 28.002. Public schools may consider a variety of materials, including materials not on the Board’s approved list, but must prioritize their instructional materials allotment expenditure on materials required to certify coverage of the TEKS. TEX. EDUC. CODE § 31.0211(c), (d).

Public schools are provided information regarding coverage of the TEKS for instructional materials approved by the Board. See 19 TEX. ADMIN. CODE § 66.51(7) requiring publishers to submit correlations of TEKS coverage by the submitted instructional material. 19 TEX. ADMIN. CODE § 66.36 requires instructional materials review panels to review materials for coverage of essential knowledge and skills. 19 TEX. ADMIN. CODE §§ 66.63 requires the Commissioner of Education to submit recommendations to the Board for approval or rejection of an instructional material. The agency makes available which TEKS are not covered by an adopted instructional material.² While a public school is required to certify that its instructional materials cover the TEKS, there is no provision in statute that requires a public school to identify where in the instructional materials each of the TEKS is covered. Consequently, there is no way for the Board, the Commissioner, or a member of the public to verify that public school’s certification is valid.

The statute specifically requires a public school’s certification (and dictates what materials may be used to certify) TEKS coverage. TEX. EDUC. CODE § 31.004. The certification currently lacks a method of verification. Therefore, the Board’s promulgation of a rule to specify how a public school must certify TEKS coverage to the Board and Commissioner would be consistent with this chapter. The Board suggests that a court should find that it is within the Board’s authority to require a public school to publically identify specific citations to its instructional materials clearly identifying where the TEKS are covered within the public schools’ instructional materials for the purpose of verification of coverage. Furthermore, the Board’s

² Information regarding TEKS not covered by adopted instructional materials may be reviewed by searching the links labeled as “Proclamation 2015 TEKS Not Addressed Report” at the following site:
http://tea.texas.gov/Curriculum_and_Instructional_Programs/Instructional_Materials/Review_and_Adoption_Process/Proclamation_2015/

authority over the adoption and use of instructional materials should also permit the Board to prescribe certain minimums in TEKS coverage that an instructional material must cover when the instructional material is not purchased off the Board's approved list.

Question Four: May the Board by rule establish an administrative penalty for a publisher who fails to correct a factual error identified by a public school contained in an instructional material that was not on the Board's approved list?

Section 31.151(b) authorizes the Board to assess an administrative penalty against a publisher which fails to correct a factual error identified by the Board. TEX. EDUC. CODE § 31.151(b). Board Rule 66.10 implements that provision. 19 TEX. ADMIN. CODE § 66.10(d). However, this rule applies only when the Board has issued a proclamation for the purchase of Board-approved instructional materials. The current version of the rule does not apply when a public school purchases an instructional material that was not adopted by the Board. Section 31.151(a)(4), however, requires that a publisher guarantee that each instructional material "sold in this state"—without limitation to materials on the Board's approved list—be free from factual error. TEX. EDUC. CODE § 31.151(a)(4). This subsection, and chapter 31 as a whole, gives the Board authority over publishers who wish to sell instructional materials within the state. It is, therefore, plainly consistent with the Board's authority to impose an administrative penalty on a publisher that does not correct a factual error in instructional materials sold in this state whether purchased from the Board's approved list or not. The Board seeks clarification whether it has the authority to establish an administrative penalty upon a publisher that fails to correct a factual error identified by a public school if the instructional material was not approved by the Board.

Question Five: May the Board by rule require public schools to develop conflicts of interest policies and require public schools and publishers to keep contact registers between school officials and publishers? Does the Board's authority extend to local adoptions of instructional materials regardless of whether the materials are purchased from the Board's approved list?

Chapter 31 of the Education Code contains provisions that address conflicts of interest in the procurement process for instructional materials. TEX. EDUC. CODE §§ 31.152, .153. The Board has adopted rules including additional safeguards in the instructional materials procurement process, which include ethics and conflicts of interest training for instructional materials advisory board members. 19 TEX. ADMIN. CODE §§ 66.30-.45. Additionally, the Texas Education Agency maintains a register of contacts with publishers and their representatives and Board members and agency staff. 19 TEX. ADMIN. CODE § 66.4.

Chapter 31 explicitly creates an offense for school personnel who accept a commission or rebate on instructional materials and creates an offense for a violation of law regarding purchasing or distribution of free instructional materials. Therefore, enacting rules requiring public schools school to adopt a policy expressly prohibiting conflicts of interest would be "consistent with this chapter," and within the Board's authority. TEX. EDUC. CODE § 31.003, 31.152, 31.153.

Question Six: May the Board by rule require a public school to adopt only instructional materials that provide an end-of-section review exercise, an end-of-chapter activity, a unit test, or its electronic equivalent, documenting TEKS coverage in the student version when purchasing instructional materials that are not on the Board's approved list?

Sections 31.023 and 31.024 of the Education Code impose on the Board standards for adopting instructional materials. Section 31.023(a), in pertinent part, stipulates certain mandatory TEKS coverage "in the student

version of the instructional material, as well as in the teacher version of the instructional material” TEX. EDUC. CODE § 31.023. That section evidences the Legislature’s clear intent that the student version must, without fail, cover the required elements of the TEKS. This is so because only what is tested assuredly gets taught. This is the basis for the Board’s four rules that each require documentation of TEKS coverage. Rule 66.27 provides that TEKS must be covered “at least once in the student text narrative or its electronic equivalent and once in either an end-of-section review exercise, an end-of-chapter activity, or a unit test or their electronic equivalents.” 19 TEX. ADMIN. CODE § 66.27(c). Board Rule 66.36 mandates TEKS coverage be reviewed by state instructional material review panel members. 19 Tex. Admin. Code § 66.36(a)(1). Board Rule 66.51(7) mandates that a publisher provide correlations of the student version of instructional materials submitted for state adoption with the TEKS required by each proclamation issued by the Board. 19 TEX. ADMIN. CODE § 66.51(7). Finally, Rule 66.63 requires the Commissioner of Education to issue a report providing evaluations of instructional materials prepared by instructional panel review members, and requires that to qualify for adoption each material must cover at least 50% of the required TEKS in both the student text narrative and in the end-of-section review exercise, an end-of-chapter activity, or a unit test, or their electronic equivalents. 19 TEX. ADMIN. CODE § 66.63(a)(1).

Additionally, various Attorneys General have issued opinions addressing the Board’s authority over the adoption of instructional materials. Some of those opinions have noted limitations in the Board’s authority over the content of instructional materials. See Tex. Op. Att’y Gen. GA-0456 (2006); Tex. Op. Att’y Gen. DM-424 (1996). The question presented here falls squarely within the bounds of the Board’s authority, because the question is solely whether the Board may impose the requirement that instructional materials not on the Board’s approved list contain review items at the end of sections or chapters or unit tests that may be used by the student, teacher or school to determine mastery of TEKS. The question is not whether the Board may mandate which of the TEKS are to be covered for a particular chapter or unit, but merely whether the Board may require that a publisher provide a review exercise for those covered activities, as it requires of its own adopted instructional materials. In so doing, the Board would be within its permissible rulemaking authority under section 31.003 to govern procedural aspects of the use of locally-adopted instructional materials.

Question Seven: May the Board by rule require a public school to ensure that all locally-adopted instructional materials that are not on the Board’s approved list comply with Texas Education Code section 28.002(h)? In the alternative, does section 28.002(h) impose a mandate on public schools to ensure that locally-adopted instructional materials meet that requirement?

Texas Education Code section 28.002(h) requires the State Board of Education and public schools in the adoption of instructional materials to foster patriotism, democratic values, and free enterprise. Section 28.002(h) imposes a duty on the Board and public schools with respect to the adoption of instructional materials. Section 28.002(i) authorizes the Board to adopt rules regarding the subchapter that includes Section 28.002(h). Read in conjunction with the broad rulemaking authority regarding the adoption and use of instructional materials, the Board’s authority should authorize Board rules requiring public schools to ensure that all locally-adopted instructional materials not approved by the Board comply with Texas Education Code section 28.002(h). In the alternative, does section 28.002(h) impose a mandate on public schools to ensure that its locally-adopted instructional materials meet the requirement?

If you have questions, please feel free to contact me at (512) 463-9007.

Sincerely,

Barbara C. Cargill

Barbara Cargill
Chair, State Board of Education