Texas Education Agency

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Michael Williams
Commissioner

December 21, 2015

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

Re: The application of Section 39.112 of the Education Code to a Board of Managers in place prior to the 2015 amendments to that section and to board of managers placed subsequently

Dear General Paxton:

I write to obtain your guidance regarding amendments to section 39.112 of the Education Code enacted by the 84th Legislature. The 84th Legislature enacted two bills that amended section 39.112 of the Education Code: House Bill 3106 and House Bill 1842. I seek to resolve two issues. First, which provisions of section 39.112 of the Education Code govern the period of appointment and removal of a board of managers currently in place in Beaumont Independent School District[1] law in effect prior to June 19, 2015; the provisions of House Bill 3106; the provisions of House Bill 1842; or some interpretation of the various provisions of HB 1842 and HB 3106? Second, for future placement of a board of managers, may the provisions regarding terms of board of managers from HB 1842 and HB 3106 be harmonized, and if not, in determining latest in date of enactment what rules apply under section 311.025 of the Government Code when two bills both satisfy all the statutory tests for last in enactment?

In considering the above questions, the agency turned to rules of statutory construction. However, several issues presenting themselves need your guidance:

1) Does the Code Construction Act (CCA)[2] apply to interpreting provisions of Titles 1 and 2 of the Education Code? If the CCA does not apply to Titles 1 and 2 of the Education Code, how should the Commissioner of Education resolve which provisions of section 39.112 of the Education Code apply to the term of the Beaumont board of managers and future placement of boards of managers?
2) If the CCA applies, would the savings provision in section 311.031 of the CCA apply to the Beaumont board of trustees and necessitate the application of prior law to the term of the Beaumont board of managers?
3) If the CCA and its savings provision applies, does the legislative intent of HB 3106 overcome application of the savings provision? If so, does the respective lettering of new subsections in section 39.112 of the Education Code and/or the senate committee debate indicate the requisite legislative intent to apply either or both HB 3106 and HB 1842 to the Beaumont board of managers? In that event, may the bills be harmonized or are they irreconcilable?

[1] I appointed the Beaumont I.S.D. board of managers in May 2014.
[2] Chapter 311, Government Code.

4) If the CCA applies and the bills are irreconcilable, how does section 311.025 of the Government Code operate when the bills in question bear the same dates of enactment, signing by the last presiding officer, signing by the governor, and becoming law by operation of law?

Law Prior to June 19, 2015

Prior to June 19, 2015, section 39.112 of the Education Code provided that:

> (e) At the direction of the commissioner ***but not later than the second anniversary of the date the board of managers of a district was appointed,*** the board of managers shall order an election of members of the district board of trustees. The election must be held on a uniform election date on which an election of district trustees may be held under Section 41.001, Election Code, which is at least 180 days after the date the election was ordered. On qualification of members for office, the board of trustees assumes all of the powers and duties assigned to a board of trustees by law, rule, or regulation.

Tex. Educ. Code § 39.112(e), Added by Acts 1995, 74th Leg., ch. 260, Sec. 1, eff. May 30, 1995. Amended by: Acts 2009, 81st Leg., R.S., Ch. 895 (H.B. 3), Sec. 59, eff. June 19, 2009 (emphasis added).

2015 Amendments to Section 39.112 of the Education Code

The 84th Texas Legislature adopted amendments to section 39.112 of the Education Code in two separate bills without direct reference to one another. House Bill 3106 amended subsection (e) and added subsection (f) of section 39.112 and House Bill 1842 adopted new subsections (d-1), (d-12), and (g) and amended subsection (e).

House Bill 1842

House Bill 1842 amended section 39.112(e) of the Education Code to provide that:

(1) the commissioner must announce within two years of appointment when the appointment of the board of managers will expire; and
(2) the commissioner must replace the board of managers with elected board of trustees members on a one-third basis over three years.

Thus, the amendments to subsection (e) adopted in HB 1842 remove any limitation on the term of appointment of a board of managers and impose a de facto minimum of a three-year term of appointment for a board of managers assuming the commissioner of education announces immediately that he intends to begin the phase-out process for the board of managers in the next year. HB 1842 did not contain a subsection (f), but rather, amended subsection (e) and added a new subsection (g); HB 3106 contained a new subsection (f), as explained below.

House Bill 3106

House Bill 3106 added a new subsection (f) to section 39.112 of the Education Code to provide that the commissioner could, under certain conditions, extend the period of appointment of a board of managers for a period of two additional years beyond the period specified in 39.112(e), as it existed prior to June 19, 2015. HB 3106 also added the phrase "[e]xcept as otherwise provided by Subsection (f)" in the introduction of (the otherwise unamended) subsection (e).

In short, prior law required an election for a board of trustees to replace the board of managers to be called within two years of the placement of the board of managers. HB 3106 authorized an additional two-year extension of that two-year requirement. HB 1842 removed the time limit

entirely for replacement of the board of managers, but required at least a three-year phase out to remove the board of managers. Seemingly, HB 3106 and HB 1842 are irreconcilable with regard to the limit on the period of an appointment of a board of managers.

Does the Code Construction Act (CCA) apply to amendments and revisions to Title 2 of the Education Code?

The CCA was enacted in 1967,[3] and section 311.002 states that the chapter expressly applies to:

> (1) each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program;
>
> (2) each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature;
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> (3) each repeal of a statute by a code;
>
> (4) each rule adopted under a code.

In 1963, the legislature directed the Texas Legislative Council to "plan and execute a permanent statutory revision program for the systematic and continual study of the statutes of this state and for formal revisions on a topical or code basis to clarify, simplify and make generally more accessible, understandable and usable the statutory law of Texas."[4] While Title 3 of the Texas Education Code was expressly adopted as part of the Legislative Council's non-substantive revision program[5] and appears to be subject to the CCA pursuant to section 311.002(1),[6] other parts of the Education Code resulted from a project of the Governor's Committee on Public School Education. According to page one of the Texas Legislative Council's *Revisor's Report: Proposed Title 3 of the Texas Education Code* submitted to the legislature in 1971, the Council "provided research, drafting, and technical assistance for three code projects which are not directly connected with the Council's revision program but which recognize the Council's plans and specifications for statutory revision", and notes that the Governor's Committee on Public School Education's Education Code project was one of the three.

Does the CCA apply to Titles 1 and 2 of the Education Code pursuant to section 311.002(1) even though they were enacted outside of the Texas Legislative Council's statutory revision program?[7] If section 311.002(1) of the CCA does not apply the Act to Titles 1 and 2 of the Education Code, does section 311.002(2) make the Act applicable to amendments, repeals, revisions, and reenactments of Titles 1 and 2 of the Education Code?[8]

Is the term of appointment of a board of managers governed by the saving provisions of CCA?

Section 311.031 of the CCA provides that:

> Sec. 311.031. SAVING PROVISIONS. (a) Except as provided by Subsection (b), the reenactment, revision, amendment, or repeal of a statute does not affect:
>
> (1) the prior operation of the statute or any prior action taken under it;

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[3] The CCA, which was formerly found at V.A.C.S Art. 5429b-2, was codified in Chapter 311, Government Code in 1985.
[4] Acts 58th Leg., R.S., ch. 448 (V.A.C.S. Art. 5429b-1).
[5] Acts 62nd Leg., R.S., p. 3072, ch. 1024 (H.B. 1657).
[6] The express terms of the adoption of Title 3 also stated that the CCA formerly found at V.A.C.S Art. 5429b-2 applied to Title 3. Acts 62nd Leg., R.S., p. 3363, ch. 1024, Sec. 46, eff. Sept. 1, 1971. (H.B. 1657)
[7] There is a 1972 Attorney General Opinion, Tex. Op. Att'y Gen. M-1129 (1972), which applies the former Code Construction Act to the Texas Education Code, but the opinion concerns a provision in Title 3 of the Education Code and does not specifically address Titles 1 and 2.
[8] Please note that Titles 1 and 2 of the Education Code were reenacted in 1995 by Acts 74th Leg., R.S., ch. 260, eff. May 30, 1995 (S.B. 1).

(2) any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under it;

(3) any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute before its amendment or repeal; or

(4) any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment; and the investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the statute had not been repealed or amended.

(b) If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

Tex. Gov't Code § 311.031. Under the saving provisions, do any of the enumerated concepts apply to the Beaumont board of trustees or the Beaumont board of managers such that prior law would continue to apply to the term of the Beaumont board of managers?

Does legislative intent trump the saving provisions?

The saving provision generally applies unless legislative intent indicates that the statute was intended to apply prospectively without saving prior law. *Quick v. City of Austin*, 7 S.W.3d 109, 130 (Tex. 1998) ("Given this general policy and the broad applicability of the Code Construction Act, we will presume that the general savings clause applies unless a contrary legislative intent is shown by clear expression or necessary implication.") Tex. Op. Att'y Gen. GA-0590 (2008).

While the application of HB 3106 to the Beaumont board of managers is not addressed in the text of the bill, the legislative history demonstrates that members of the Senate committee and the Senate sponsor of the legislation directly discussed the application of this provision to Beaumont ISD. *See* http://tlcsenate.granicus.com/MediaPlayer.php?view_id=30&clip_id=10191 (Senate Education Committee, Part I at 35:00, 42:28-1:19)

Do these discussions evidence legislative intent that requires application of HB 3106 to the Beaumont board of managers? Does that legislative intent overcome the operation of the saving provisions so that changes enacted by HB 3106 must apply prospectively to the Beaumont board of managers notwithstanding the saving provision?

As indicated above, HB 1842 also amended section 39.112 of the Education Code. Interestingly, HB 1842 revised subsection (e), and added a new subsection (g) but deliberately skipped adding a new subsection (f). HB 3106 made subsection (e) subject to a new subsection (f) added in that bill. Does this lettering of the new subsections in the two bills demonstrate that HB 3106 was contemplated in the passage of HB 1842? And if it is resolved that the legislative intent was that HB 3106 applies to the Beaumont board of managers, does the respective lettering of the new subsections suggest HB 1842 was also intended to apply to Beaumont? If so, which rules control to either (1) harmonize the two bills or (2) determine which is last enacted and thus supersedes?

Last Enactment?

In addition to assisting in resolving the Beaumont board of managers' questions, determining how to apply the last enactment provisions of section 311.025 of the CCA is important in resolving whether HB 3106 or HB 1842 applies to terms of future board of managers.

Sec. 311.025. IRRECONCILABLE STATUTES AND AMENDMENTS.

(a) Except as provided by Section 311.031(d), if statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment prevails.

(b) Except as provided by Section 311.031(d), if amendments to the same statute are enacted at the same session of the legislature, one amendment without reference to another, the amendments shall be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment prevails.

(c) In determining whether amendments are irreconcilable, text that is reenacted because of the requirement of Article III, Section 36, of the Texas Constitution is not considered to be irreconcilable with additions or omissions in the same text made by another amendment. Unless clearly indicated to the contrary, an amendment that reenacts text in compliance with that constitutional requirement does not indicate legislative intent that the reenacted text prevail over changes in the same text made by another amendment, regardless of the relative dates of enactment.

(d) In this section, the date of enactment is the date on which the last legislative vote is taken on the bill enacting the statute.

(e) If the journals or other legislative records fail to disclose which of two or more bills in conflict is latest in date of enactment, the date of enactment of the respective bills is considered to be, in order of priority:

(1) the date on which the last presiding officer signed the bill;

(2) the date on which the governor signed the bill; or

(3) the date on which the bill became law by operation of law.

Tex. Gov't Code § 311.025 (emphasis added).

HB 1842 and HB 3106 were both adopted by record vote on May 31, 2015, each bill was finally signed in the House and Senate on June 1, 2015, each bill was signed by the Governor on June 19, 2015, and each bill became effective immediately on June 19, 2015.

The provisions of section 311.025 of the CCA speak to a "date" of enactment. Each of the four enumerated tests fail to resolve the last date of enactment. In such a case, what rule applies to determine which provision prevails?

Of note, for HB 3106 the record vote for the house is recorded on page 5857 of the house journal and the senate vote is recorded on page 3607 of the senate journal. For HB 1842 the record vote for the house is recorded on page 5916 of the house journal and the senate vote is recorded on page 3624 of the senate journal. With respect to the time, the page numbers indicated that in both houses, HB 1842 was voted on last, though both bills were voted on the date.

Your guidance in this matter would be greatly appreciated. If you have any further questions, please contact Von Byer, General Counsel at (512) 463-9720.

Sincerely,

Michael Williams
Commissioner of Education

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