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SENATOR PAUL BETTENCOURT

DISTRICT 7

August 26, 2021

VIA Email to: opinion.committee@oag.texas.gov
Office of the Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Houston Independent School District proposes discriminatory COVID-19 medical leave policy

Dear Attorney General Paxton,

This letter serves as a formal request for your opinion regarding the legality of a proposed policy adopted in recent days by Houston Independent School District (HISD).

Background

In recent weeks, HISD Superintendent Millard House II published a policy statement for the 2021-2022 School year, entitled, "ReadySetGo," which can be found online at [ReadySetGo \(houstonisd.org\)](http://ReadySetGo.houstonisd.org). Subsequently, on August 19, 2021, the HISD Board of Education, HISD's governing body, voted to approve and adopt this policy, pending approval by the Texas Education Agency (TEA). One of the policies proposed in this publication raises questions of legality.

Under the proposed policy at issue, HISD would make available *only to those HISD employees who are vaccinated with, or medically exempt from taking the COVID-19 vaccine*, an additional, COVID-19-specific paid leave — above and beyond the regular sick leave included as an employee benefit. This policy, on its face, would intentionally discriminate against employees based on their COVID-19 vaccine status by providing select employees an additional benefit for the same work.

The legal questions such a policy raises, include: (1) whether such a policy constitutes a "vaccine passport" under 87(R) SB 968; (2) whether employees' medical privacy rights, including, but not limited to those under HIPPA, would be violated by such a policy; and (3) whether the policy would violate Executive Order GA 39.

SB 968

On June 16, 2021, during the 87th Regular Legislative Session, the Governor signed into law, with immediate effect, SB 968, which prohibits COVID-19 "vaccine passports." SB 968 states, in relevant part (now codified as Health and Safety Code 161.0085), as follows:

(b) A governmental entity in this state may not issue a vaccine passport, vaccine pass, or other standardized documentation to certify an individual's COVID-19 vaccination status to a third party for a purpose other than health care or otherwise publish or share any individual's COVID-19 immunization record

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or similar health information for a purpose other than health care. (Emphasis added).

The plain language of SB 968 permits the use of COVID-19 vaccination documentation only for the "purpose [of] health care." HISD is not its employees' health care provider, and by requiring its employees to demonstrate or "share" an affirmative vaccination or exemption status (presumably with HISD's, human resources staff) for the purpose of *receiving an employment benefit*, HISD appears to propose a COVID-19 "vaccine passport" for its employees for "a purpose other than health care."

Employee Medical Privacy

At both the state and federal levels of government, Texans' medical privacy is generally protected under both the Health Insurance Portability and Accountability Act of 1996, commonly referred to as "HIPPA," and the Texas Medical Records Privacy Act (TMRPA). My concern is that HISD employees' rights under either these statutes, or their associated rules, may be violated by such a policy.

Executive Order GA-39

On August 25, 2021, Governor Greg Abbott issued Executive Order GA-39, which states, in part, "[n]o governmental entity can compel any individual to receive a COVID-19 vaccine"; and "[s]tate agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule or similar measure that requires and individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine." HISD, a political subdivision of the State of Texas, intends to require a COVID-19 vaccine as a condition of its employees receiving an additional employment benefit.

Request

For these reasons, and others, I believe the discriminatory vaccine leave policy under consideration by HISD and pending TEA approval is questionable in legality. I request that your office opine of the following questions: (1) Does the proposed HISD policy constitutes a "vaccine passport" under 87(R) SB 968? (2) Would HISD employees' medical privacy rights, including, but not limited to those under HIPPA/TMRPA, be violated by such a policy? (3) Would the policy violate Executive Order GA-39?

Given that the source of HISD funding includes property tax revenue, and other state and federal funds, the public has a clear interest in ensuring that the use of those funds comports with Texas law.

Thank you for your consideration of this request.

Sincerely,



Paul Bettencourt, Chairman
Senate Committee on Local Government