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ATTORNEY GENERAL OF TEXAS

April 14, 2022

The Honorable Paul Bettencourt  
Chair, Senate Committee on Local Government  
Texas State Senate  
Post Office Box 12068  
Austin, Texas 78711-2068

**Opinion No. KP-0403**

Re: Whether a school district may implement a policy making additional leave available to employees who are vaccinated for COVID-19 or medically exempt from the vaccination (RQ-0427-KP)

Dear Senator Bettencourt:

You ask whether a school district's leave policy constitutes a "vaccine passport" and whether it violates certain provisions of state and federal law or Executive Order GA-39.<sup>1</sup>

You tell us the governing body of the Houston Independent School District ("HISD") recently adopted a policy that would make available only to vaccinated employees, and those medically unable to be vaccinated, "additional, COVID-19-specific paid leave—above and beyond the regular sick leave included as an employee benefit." Request Letter at 1. You refer us to HISD's statement on the leave policy, which explains that the leave would consist of up to 10 days of paid leave for the 2021–2022 school year. *Id.*<sup>2</sup> To qualify, an employee would be required to submit proof of vaccination or medical exemption. HISD Plan at 14. Unvaccinated employees would be required to use their personal leave to isolate due to COVID-19. *Id.* You ask four questions related to this policy. Because your fourth question is dispositive as to your remaining inquiries, we address it first.

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<sup>1</sup>See Letter from Honorable Paul Bettencourt, Chair, Sen. Comm. on Loc. Gov't, to Honorable Ken Paxton, Tex. Att'y Gen. at 1–2 (Aug. 26, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0427KP.pdf> ("Request Letter").

<sup>2</sup>HISD 2021–2022 Back to School Plan, Ready Set Go, <https://www.houstonisd.org/readyssetgo> ("HISD Plan"), see also HISD Board of Education Meeting Agenda Packet (Aug. 19, 2021) at 8, [https://www.houstonisd.org/site/handlers/filedownload.ashx?moduleinstanceid=109240&dataid=338041&FileName=081921HMA\\_POST.pdf](https://www.houstonisd.org/site/handlers/filedownload.ashx?moduleinstanceid=109240&dataid=338041&FileName=081921HMA_POST.pdf) (noting that eligibility "is contingent upon demonstration that the absences are due to COVID-19 exposure, symptoms, infection, and related factors").

**I. By offering additional paid leave only to those employees showing proof of COVID-19 vaccination or a medical exemption, the HISD COVID-19 paid leave policy violates Executive Order GA-39.**

You ask whether HISD’s COVID-19 paid leave policy would violate Executive Order GA-39. Request Letter at 1–2. The Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020, and that declaration is ongoing.<sup>3</sup> Office of the Governor, Proclamation 41-3720, 45 Tex. Reg. 2094 (2020). The Legislature authorized the Governor, upon declaring a disaster, to “issue executive orders, proclamations, and regulations and amend or rescind them.” TEX. GOV’T CODE § 418.012. The Governor’s executive orders issued pursuant to his emergency powers under chapter 418 of the Government Code “have the force and effect of law.”<sup>4</sup> *Id.*

Relevant to your question, the Governor issued Executive Order GA-39 on August 25, 2021.<sup>5</sup> That order expressly prohibits state agencies and political subdivisions from requiring any documentation regarding a person’s COVID-19 vaccination status for entry or services:

State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an 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.

Office of the Governor, Executive Order GA-39 (2021) at 2.<sup>6</sup> Thus, under the order, a state agency or political subdivision may not adopt a policy conditioning the receipt of “any service” on an individual’s submission of COVID-19 vaccination information. The order does not exclude an employee from the term “individual,” nor does it limit “services” to those that would typically be provided to the public exclusively. *See* MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 114 (11th ed. 2004) (defining “benefit” to include a service provided by an employer in addition to wages or salary). Thus, a court could conclude that by offering a benefit of COVID-19 paid leave only to

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<sup>3</sup>*See* GOVERNOR OF THE STATE OF TEXAS, DISASTER PROCLAMATION (Mar. 13, 2020), [https://gov.texas.gov/uploads/files/press/DISASTER\\_covid19\\_disaster\\_proclamation\\_IMAGE\\_03-13-2020.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_covid19_disaster_proclamation_IMAGE_03-13-2020.pdf). The Governor renewed the disaster declaration most recently on March 23, 2022. *See* GOVERNOR OF THE STATE OF TEXAS, DISASTER PROCLAMATION (Mar. 23, 2022), [https://gov.texas.gov/uploads/files/press/DISASTER\\_renewing\\_covid19\\_disaster\\_proclamation\\_IMAGE\\_03-23-2022.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_renewing_covid19_disaster_proclamation_IMAGE_03-23-2022.pdf).

<sup>4</sup>Multiple lawsuits are currently pending in Texas state and federal courts that address the validity of certain gubernatorial executive orders related to the COVID-19 pandemic. *See, e.g., In re Abbott*, No. 21-0720 (Tex. filed Aug. 23, 2021). It is the policy of this office to refrain from issuing an Attorney General opinion on a question that we know to be the subject of pending litigation. *See* Tex. Att’y Gen. Op. Nos. KP-0382 (2021) at 2, GA-0502 (2007) at 3–4. We therefore assume without deciding the validity of Executive Order GA-39.

<sup>5</sup>*See* GOVERNOR OF THE STATE OF TEXAS, EXECUTIVE ORDER 39 (Aug. 25, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-39\\_prohibiting\\_vaccine\\_mandates\\_and\\_vaccine\\_passports\\_IMAGE\\_08-25-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-39_prohibiting_vaccine_mandates_and_vaccine_passports_IMAGE_08-25-2021.pdf).

<sup>6</sup>Executive Order GA-39 supersedes paragraph No. 2 of Executive Order GA-38, which similarly prohibited vaccine passports documenting COVID-19 vaccines administered under emergency use authorization. *See id.* at 3.

those employees showing proof of a vaccine or a medical exemption, the HISD paid leave policy violates Executive Order GA-39.

**II. Any standard documentation that certifies an individual's COVID-19 vaccination status constitutes a "vaccine passport" under section 161.0085 of the Health and Safety Code, but that provision currently prohibits a government entity from providing such document to a third party for a purpose other than health care.**

You also ask whether such a policy constitutes a "vaccine passport" under Senate Bill 968, recently passed by the Eighty-seventh Legislature. Request Letter at 1–2. Senate Bill 968, among other things, added section 161.0085 to the Health and Safety Code to prohibit vaccine passports. That section provides in relevant part:

(b) A government 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 or similar health information for a purpose other than health care.

(c) A business in this state may not require a customer to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery on entry to, to gain access to, or to receive service from the business. . . .

TEX. HEALTH & SAFETY CODE § 161.0085(b), (c). The provision does not define "vaccine passport." But the canon of statutory construction known as *noscitur a sociis*—"it is known by its associates"—instructs that "the meaning of a word or phrase, especially one in a list, should be known by the words immediately surrounding it." *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 61 (Tex. 2015) (citing *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 441 (Tex. 2011)). The statute prohibits "a vaccine passport, vaccine pass, or other standardized documentation to certify an individual's COVID-19 vaccination status." TEX. HEALTH & SAFETY CODE § 161.0085(b) (emphasis added). Accordingly, a vaccine passport as contemplated by section 161.0085(b) includes any standard documentation to certify an individual's COVID-19 vaccination status, including the documentation required under the HISD paid leave policy.

Subsection 161.0085(b) prohibits a governmental entity from issuing a vaccine passport in order to certify the individual's vaccination status to a third party and prohibits a governmental entity from otherwise publishing or sharing that documentation for a purpose other than health care. *Id.* Subsection 161.0085(b) does not address whether a governmental entity may require another party to submit a vaccine passport to itself. *See id.* To the extent that such documentation is provided by or from another governmental entity (in other words, not from HISD), then such governmental entity is also prohibited from providing the individual's COVID-19 immunization record to a third party, including HISD, for a purpose other than health care. Implementation of the HISD paid leave policy would be an employment matter, and documentation of an individual's

COVID-19 vaccination status in this instance would therefore not be for the purpose of health care of any individual.

In contrast, subsection 161.0085(c), concerning vaccine passports in the context of businesses, clearly prohibits requiring the submission of vaccine passports:

A business in this state may not require a customer to provide any documentation certifying the customer's COVID-19 vaccination or post-transmission recovery on entry to, to gain access to, or to receive service from the business. . . .

*Id.* § 161.0085(c). Chapter 161 does not define “business” for purposes of subsection 161.0085(c). Courts construing an undefined word generally apply the word’s common, ordinary meaning, looking to “a wide variety of sources, including dictionary definitions.” *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). The term “business” is commonly understood to refer to a “commercial and mercantile activity customarily engaged in as a means of livelihood.” WEBSTER’S THIRD NEW INT’L DICTIONARY 302 (2002).

Thus, a court would likely conclude that subsection 161.0085(b) does not allow HISD to issue or share a vaccine passport, vaccine pass or other standardized documentation for purposes of its COVID-19 paid leave policy, nor does it allow another government entity to issue any such documentation to HISD for purposes of such paid leave policy. Subject to the foregoing, subsection 161.0085(b) does not speak to whether a government entity may require submission of any documentation certifying COVID-19 vaccination or post-transmission recovery (as opposed to the clear restriction under subsection 161.0085(c) on a business from requiring such documentation).

### **III. HISD is not a “covered entity” under HIPAA, and thus the restrictions under HIPAA on disclosure of protected health information do not apply.**

Next you ask whether HISD’s policy would violate employees’ medical privacy rights under other law, such as the federal Health Insurance Portability and Accountability Act (“HIPAA”) or the Texas Medical Records Privacy Act. Request Letter at 1–2.

Congress enacted HIPAA to increase the portability of health insurance and to reduce health care costs by simplifying administrative procedures. *See generally* Health Ins. Portability & Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (codified as amended at 42 U.S.C. §§ 1320d to 1320d–9 (2006)). Congress also authorized the secretary of the U.S. Department of Health and Human Services to promulgate rules governing the disclosure of confidential medical records. *See generally* 45 C.F.R. pts. 160 & 164. The resulting HIPAA Privacy Rule addresses “the use and disclosure of individuals’ health information . . . as well as

standards for individuals' privacy rights to understand and control how their health information is used."<sup>7</sup> *See generally id.* pts. 160 & 164.<sup>8</sup>

Relevant to your question, the HIPAA Privacy Rule applies only to "covered entities," which HIPAA regulations define as a health plan, health care provider, or health care clearinghouse, and their business associates. *See id.* §§ 160.103 (defining "covered entity" and "business associates"), .102(a)–(b) (specifying HIPAA's applicability only to those entities).<sup>9</sup> You tell us that "HISD is not its employees' health care provider," and we presume that HISD is likewise not a health plan or a health care clearinghouse. Request Letter at 2. Thus, a court would likely conclude that because HISD is not a "covered entity" under HIPAA, the school district's COVID-19 leave policy would not violate an employee's HIPAA privacy rights with respect to HISD.

That said, the term "health information" under the Privacy Rule includes "any information . . . that: (1) [i]s created or received by a . . . school . . . ; and (2) [r]elates to the past, present, or future physical or mental health or condition of an individual [or] the provision of health care to an individual . . . ." *Id.* § 160.103. Any such health information that is individually identifiable and that is transmitted or maintained in any form constitutes "protected health information" under HIPAA. *Id.* Thus, to the extent a school receives an individual's COVID-19 vaccination status, that information would likely be characterized as protected health information under HIPAA.

#### **IV. While HISD must comply with the Texas Medical Records Privacy Act ("TMRPA"), HISD's COVID-19 paid-leave policy does not, on its face, violate an employee's medical privacy rights under TMRPA.**

The Texas Medical Records Privacy Act ("TMRPA") is the state counterpart to HIPAA, governing the use and disclosure of protected health information and working in tandem with HIPAA to protect the privacy of medical records. *See generally* TEX. HEALTH & SAFETY CODE §§ 181.001–.207; *see also id.* §§ 181.001 (adopting HIPAA definitions for terms TMRPA does not otherwise define, which includes "protected health information"), 181.004 (requiring covered entities to comply with both laws, to the extent applicable). The TMRPA defines "covered entities" more broadly than HIPAA, encompassing "any person" who assembles, collects, analyzes, uses, evaluates, stores, or transmits protected health information or who comes into possession of it, and expressly including a "school." *Id.* § 181.001(b)(2). Under this expanded

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<sup>7</sup>U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, SUMMARY OF THE HIPAA PRIVACY RULE, at 1, <https://www.hhs.gov/sites/default/files/privacysummary.pdf>.

<sup>8</sup>The term "health information" under the Privacy Rule includes "any information . . . that: (1) [i]s created or received by a . . . school . . . ; and (2) [r]elates to the past, present, or future physical or mental health or condition of an individual [or] the provision of health care to an individual . . . ." 45 C.F.R. § 160.103. Any such health information that is individually identifiable and that is transmitted or maintained in any form constitutes "protected health information" under HIPAA. *Id.* Thus, to the extent a school receives an individual's COVID-19 vaccination status, that information would likely be characterized as protected health information under HIPAA.

<sup>9</sup>The law specifies that a "government agency, with respect to determining eligibility for . . . a government health plan that provides public benefits and is administered by another government agency, or [is] collecting protected health information for such purposes" is not a "business associate." 45 C.F.R. § 160.103.

definition, HISD would likely be a “covered entity” under TMRPA if it received COVID-19 vaccination status information from an employee.<sup>10</sup> As such, HISD would be obligated to comply with TMRPA.

TMRPA generally prohibits covered entities from using protected health information for marketing purposes or from disclosing it electronically to any person without the person’s authorization. *Id.* §§ 181.152(a), .154(b). Under TMRPA, a covered entity may not reidentify or attempt to reidentify an individual without obtaining the necessary authorization. *Id.* § 181.151. TMRPA also prohibits covered entities from selling protected health information. *Id.* § 181.153(a). Covered entities must notify any “individual for whom the covered entity creates or receives protected health information” if the information is subject to electronic disclosure. *Id.* § 181.154(a). Other requirements TMRPA imposes on covered entities include (1) training employees regarding state and federal law on protected health information; and (2) providing electronic access when a person requests his or her own health records.<sup>11</sup> *See id.* §§ 181.101, .102. The facts you provide do not indicate whether HISD’s use or handling of protected health information from an employee under the COVID-19 leave policy would violate TMRPA.

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<sup>10</sup>*But see* TEX. HEALTH & SAFETY CODE § 181.055(2) (providing that TMRPA “does not apply to . . . any covered entity or other person, insofar as the entity or person is acting in connection with an employee benefit plan”). Whether the COVID-19 paid leave at issue is part of an “employee benefit plan” is a fact question we do not determine. *See* Tex. Att’y Gen. Op. No. KP-0231 (2019) at 1 (refraining from opining on fact questions).

<sup>11</sup>*But see* TEX. HEALTH & SAFETY CODE § 181.051 (exempting certain entities, including “an employer,” from the TMRPA except as to subchapter D); *id.* §§ 181.151–.154 (comprising subchapter D).

**S U M M A R Y**

A court would likely conclude that, by offering additional paid leave only to those employees showing proof of COVID-19 vaccination or a medical exemption, the Houston Independent School District's COVID-19 paid leave policy violates Executive Order GA-39.

Any standard documentation that certifies an individual's COVID-19 vaccination status constitutes a "vaccine passport" under subsection 161.0085(b) of the Health and Safety Code. Subsection 161.0085(b) does not permit a government entity to issue nor share standard documentation that certifies an individual's COVID-19 vaccination status for any purpose other than for health care. Sharing information for an employment matter (or any other non-health care related purpose) would not be permitted under this statute. As written, subsection 161.0085(c) clearly prohibits a business from requiring submission of such documentation from a customer. The statute is silent as to whether a governmental entity may, or may not, require submission of such information.

HISD is not a covered entity under the federal Health Insurance Portability and Accountability Act; however, a person's vaccination status likely falls within the definition of "protected health information" under this federal statute.

HISD is a covered entity under the Texas Medical Records and Privacy Act and must comply with its provisions. Any information related to the vaccination status of an employee would be covered as "protected health information" under the TMRPA (as the statute adopts the federal definition) and treated accordingly.

Very truly yours,



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