

TEXAS EDUCATION AGENCY

1701 North Congress Ave. ★ Austin, Texas 78701-1494 ★ 512/463-9734 ★ FAX: 512/463-9838 ★ http://www.tea.state.tx.us

Jim Nelson
Commissioner of Education

September 14, 2001

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Building
P.O. Box 12548
Austin, Texas 78711

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OPINION COMMITTEE

OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

FILE # ML-42157-01

I.D. # 42157

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RQ-0436-JC

Dear General Cornyn:

We are writing to seek your opinion regarding the respective duties of the State Board of Education ("Board"), Texas Education Agency ("TEA") and the Commissioner of Education ("Commissioner") with regard to assessments required under Section 39.023, Texas Education Code¹. We additionally request the assistance of your office with regard to a rule recently adopted by the Board.

Section 39.023 sets out the required assessments for the state public school accountability system. Subsection 39.023(b) requires the agency to "develop or adopt" the required assessment instruments². Subsection (i) provides that Section 39.023 is "subject to modification" by rules of the Board under Section 39.022, which directs the Board to "create and implement a statewide assessment program". A further legislative act³ directs the Commissioner to "make rules for the implementation" of Section 39.023 following a 1999 amendment to that section that significantly changed the grades and subjects assessed. Our questions involve the relationship of these three delegations of authority.

As you know, the Board is a fifteen-member elected body whose chair is appointed by the Governor⁴. The Commissioner is appointed by the Governor to a four-year term and acts as "executive officer" of the TEA and "executive secretary" of the Board⁵. Among the responsibilities of the Board and Commissioner are the assessment and accountability system for public schools created in Chapter 39 of the Texas Education Code. Because the Board does not have staff or an appropriation for administrative functions, TEA employees perform the necessary administrative and staff work for the Board. Prior to 1995, the Board, Commissioner

¹ All references to sections are to the Texas Education Code unless otherwise noted.

² Attached is a memo the agency received informally from Mr. John Twing of NCS, the company with whom the agency contracts for test development, regarding the concept of "test development" among professionals in the testing industry. Also attached is the glossary of The Standards for Educational and Psychological Testing (1999), prepared by the Joint Committee on Standards for Educational and Psychological Testing of the American Education Research Association and the National Council on Measurement in Education that deal with the term "test development" as used by the testing profession. These are labeled Exhibits "A" and "B", respectively.

³ Acts 1999, 76th Leg. Ch. 397, Section 9.

⁴ See Subchapter D, Chapter 7, Texas Education Code.

⁵ See Subchapter C, Chapter 7, Texas Education Code. The TEA is created in Subchapter B of Chapter 7. Duties or authority assigned to the TEA are exercised by the Commissioner in his role as executive officer. See also Section 7.002(a), which appears to define the "TEA" as including the Commissioner.

and TEA jointly comprised the Central Education Agency ("CEA"), which had a number of responsibilities within the testing and accountability systems. As part of a comprehensive revision of the Education Code in 1995, the Legislature abolished the Central Education Agency and delegated its duties to the three components⁶.

Since 1979, the Education Code has required a set of assessments of the state curriculum. When first enacted, the statute required the CEA to "adopt and administer" certain assessments⁷. Amendments in 1984 changed the wording to "Central Education Agency shall adopt" and separately required the Board to "administer the assessment instruments"⁸. In 1993 wording similar to the current Sections 39.022 and 39.023 was enacted⁹. In 1995, the CEA's duty to "adopt" assessments was transferred to the TEA¹⁰. Finally, the 1999 Legislature substantially revised the grades and subjects required to be assessed, and changed the duties of the TEA to the current wording of Section 39.023(b), "adopt or develop"¹¹. The TEA is currently in the process of developing new assessments to reflect that statutory change, as well as the new state curriculum adopted by the Board in 1997¹².

A difference of opinion has arisen regarding the authority, if any, of the Board with respect to the agency's duty to "develop or adopt" the assessments under Section 39.023(b) or the Commissioner's duty to "make rules for the implementation" of Section 39.023 following the 1999 amendments. The Board has recently considered several proposed rule amendments offered under the authority of Sections 39.022 and 39.023(i) that may conflict with the TEA and Commissioner's authority regarding the assessments. We have attached legal positions received from agency counsel and two private attorneys that were submitted to the Board during its September 6-7, 2001 meeting¹³, as well as letters received from legislators involved in the 1995 amendment to Subsection 39.023(b)¹⁴.

On September 7, 2001, the Board adopted an amendment to its current assessment rule found at Section 101.3(b), Title 19, Texas Administrative Code that provides as follows:

"No assessment shall provide a choice of answers of which all but one are very easily identified as false or impossible."

In the opinion of the agency counsel, this provision exceeds the Board's rulemaking authority under Section 39.022 by attempting to control the development of assessments under Subsection 39.023(b). Because the agency performs administrative functions for the Board, the requisite certification by agency counsel required by Section 2001.033(a)(3) of the Texas Government Code is lacking. As part of your general determination of the respective duties of

⁶ Acts 1995, 74th Leg., ch. 260, Section 1. In addition to the specific delegations in statute, Section 80 of that act provided that "a reference in law to the Central Education Agency means the Texas Education Agency".

⁷ Section 16.176, Texas Education Code as amended by Acts, 1979, 66th Leg., ch. 602, Section 9.

⁸ Section 21.551, Texas Education Code as amended by Acts 1984, 68th Leg., 2nd C.S. ch 28.

⁹ Sections 35.022 and 35.023, Texas Education Code, as added by Acts 1993, 73rd Leg., ch 347, Section 7.01.

¹⁰ Sections 39.022 and 39.023 as added by Acts 1995, 74th Leg., ch. 260, Section 1.

¹¹ Acts, 1999, 76th Leg., Ch. 397, Section 3. Section 9 of that act provides for that the commissioner "shall adopt rules for the implementation of Section 39.023, Education Code, as amended by this Act."

¹² The Board establishes a statewide curriculum under Section 28.002 consisting of the essential knowledge and skills ("TEKS") in each grade and subject. The assessments required under Section 39.023(b) must test the TEKS in the grades and subjects required by the statute.

¹³ Exhibits "C", "D" and "E".

¹⁴ The letter from Lt. Governor Ratliff and Representative Sadler (Exhibit "F") was directed to the Board at its July, 2001 meeting. A similar letter from then-Senator Ratliff to Commissioner Moses (Exhibit "G") was received in 1997 and is also attached.

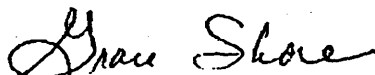
the Board, Commissioner and TEA in this opinion request, we are asking for guidance from your office directly to the Board with respect to authority for this particular amendment.

Our questions are as follows:

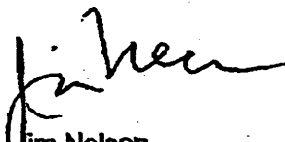
1. Do the provisions of Section 39.022 or 39.023(i) authorize the Board to adopt a rule controlling the adoption or development of the state assessments required under Section 39.023(b)?
2. Do the provisions of Section 39.022 or 39.023(i) authorize the Board to adopt a rule controlling the Commissioner's implementation of Section 39.023 following its 1999 amendment?
3. To the extent your answers to questions 1 or 2 are "yes", please advise us of the extent of the Board's authority with regard to the assessments required by Section 39.023. May the Board restrict the form or construction of test questions? May the Board determine the manner or process by which the agency constructs assessments?
4. May the Board adopt the amendment to 19 Texas Administrative Code Section 101.3(b) as set out in this letter?
5. If your determination is that the Board may not make rules for all aspects of the test development process, please advise us as to what rules, if any, are required by the implementing provision from the 1999 amendments to Section 39.023¹⁵.

Thank you for your consideration of this request.

Sincerely,



Grace Shore
Chair, State Board of Education



Jim Nelson
Commissioner of Education

Enclosures

¹⁵ Acts, 1999, 76th Leg., Ch. 397, Section 9.