

# TEXAS EDUCATION AGENCY

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

Felipe T. Alanis  
Commissioner of Education

September 10, 2002

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

Dear General Cornyn:

This letter is to request an opinion from your office regarding the relative authority of the State Board of Education ("Board") and the Commissioner of Education ("Commissioner") with regard to the Academic Excellence Indicators ("AEIs") established under Section 39.051 of the Texas Education Code<sup>1</sup> and the evaluation of school districts, campuses and open-enrollment charter schools under Subchapter D of Chapter 39 of the Education Code.

Texas public schools operate under an "accountability system" established in Chapter 39 of the Education Code<sup>2</sup>. Section 39.051(a) provides:

(a) The State Board of Education shall adopt a set of indicators of the quality of learning on a campus. The State Board of Education biennially shall review the indicators for the consideration of appropriate revisions.

Section 39.072(a) requires the Board to "adopt rules to evaluate the performance of school districts and to assign to each district a performance rating". Subsection (b) provides that the AEIs adopted in Section 39.051(b)(1) through (7), as well as compliance with special education requirements "shall be the main consideration of the agency in the rating of the district"<sup>3</sup>.

Section 39.073(a) reads as follows:

(a) The agency shall annually review the performance of each district and campus on the indicators adopted under Sections 39.051(b)(1) through (7) and determine if a change in the accreditation status of the district is warranted. The

<sup>1</sup> All section and chapter references are to the Texas Education Code unless otherwise noted. Note that Section 39.051 was amended by three bills passed by the Texas Legislature during its 2001 legislative session, resulting in three versions of subsection (b). Acts, 77<sup>th</sup> Leg. Sess., chs. 8, 725 and 834. Resolving differences among those legislative acts may be necessary to answer some of the questions posed in this request.

<sup>2</sup> Subchapter B of Chapter 39 requires uniform state assessments, Subchapter C creates "performance indicators" to measure academic achievement, and Subchapter D provides for accreditation of school districts and open-enrollment charter schools.

<sup>3</sup> The agency is authorized in Subsection 39.072(b) to use "additional criteria in the rules". It is not entirely clear whether the rules referred to are Board rules under Subsection (a), the additional AEIs indicators adopted by the Board under 39.051(b) (10), Commissioner definitions of performance under 39.051(d) or 39.053(a), or commissioner rules in the Accountability Manual under 39.073(a).

RECEIVED  
SEP 16 2002  
OPINION COMMITTEE

RQ-0607-JC

FILE # ML-42788-02  
I.D. # 42788

RECEIVED  
SEP 12 2002  
OPEN RECORDS DIVISION

commissioner may determine how all indicators adopted under Section 39.051(b) may be used to determine accountability ratings and to select districts and campuses for acknowledgment<sup>4</sup>.

Subsection 39.051(b) creates a number<sup>5</sup> of statutorily-required AElS and requires that the performance of school districts and campuses be compared to state standards and “disaggregated with respect to race, ethnicity, sex<sup>6</sup> and socioeconomic status”.

Subsection 39.051(d) requires the Commissioner to “annually define exemplary, recognized and unacceptable performance for each academic excellence indicator under Subsections (b)(1) through (6)” and (b)(7). That subsection also prohibits the commissioner from considering certain students as “dropouts” in defining the performance standards under Subsections (b)(2) and (3)<sup>7</sup>. Subsection 39.051(e) requires school districts to “cooperate with the agency<sup>8</sup> in determining whether a student is a dropout under this section”.

AEIs are the basis of school district and campus “report cards” and “performance reports” required under Sections 39.052 and 39.053. They also form the basis for accreditation review under Subchapter D of Chapter 39. Section 39.052(a) requires the agency to “prepare and distribute...a report card for each campus” that includes the AEIs “adopted under Section 39.051(b)(1) through (9)”. Subsection 39.053(a) requires an annual district report “describing the educational performance of the district and of each campus in the district that includes uniform student performance and descriptive information as determined under rules adopted by the commissioner”<sup>9</sup>. Subsection 39.053(b) requires AEIs information in the annual reports to “be provided by the agency”<sup>10</sup>.

---

<sup>4</sup> Note that Section 39.072 refers to rating school districts while Section 39.073 refers to districts and campuses.

<sup>5</sup> The three 2001 amendments created different lists of mandatory AEIs, ten in two of the bills and eleven in a third. The wording of several indicators is also different among the three bills.

<sup>6</sup> One version substitutes “gender” for “sex”. Acts, 77<sup>th</sup> Leg. Sess., ch. 725.

<sup>7</sup> This provision precludes the commissioner from considering as dropouts students who have been expelled, found to have engaged in delinquent conduct, or are convicted of an offense under the Texas Penal Code. Subsection 39.073(f) contains additional restrictions on students in juvenile detention and correctional facilities for purposes of calculating a number of dropouts.

<sup>8</sup> “Agency” means the Texas Education Agency per Section 5.001(1) of the Texas Education Code. Section 7.055 names the Commissioner as “executive officer of the agency”. For purposes of this request, we believe there is no meaningful distinction between the Commissioner and the agency. Prior to 1995, a Central Education Agency (“CEA”) existed, composed of the Board, Commissioner and the Texas Education Agency. The 1995 revision of the Education Code abolished the CEA and transferred its duties to the TEA. “[A] reference in law to the Central Education Agency means the Texas Education Agency.” Acts 1995, 74<sup>th</sup> Leg. Sess., ch. 260, Section 80.

<sup>9</sup> The agency collects information at regular intervals from school districts through the Public Education Information Management System (“PEIMS”) as authorized under Section 42.006. To the extent the mandatory AEIs indicators are currently defined beyond the statutory language, the definitions in PEIMS and in the agency Student Attendance Accounting Handbook, are applied in the process of assigning district and campus ratings through the Commissioner’s Accountability Manual. The agency accountability manual can be accessed at (<http://www.tea.state.tx.us/perfreport/account/>). This webpage has a menu box allowing the viewer to select ratings information by year. The accountability manual is part of the information available beginning with the 1996 ratings. Accountability manuals have been published by the Commissioner since 1994.

The PEIMS data standards and the agency Student Attendance Accounting Handbook contain many of the technical definitions of AEIs indicators as currently applied in the process of assigning district/charter/ campus ratings. The data standards and attendance handbook are accessible at (<http://www.tea.state.tx.us/peims/>). This webpage has a menu that includes the PEIMS Data Standards and the Student Attendance Accounting Handbook, both of which are available online back to 1996-97.

Both the Student Attendance Accounting Handbook and the Accountability Manual are adopted by reference as Commissioner’s rules at 19 Texas Administrative Code Sections 129.1023 and 1025 and Chapter 97, respectively.

<sup>10</sup> Subsection 39.073(e) additionally requires the agency to consider special education compliance and the progress of students who previously failed state-required assessments “[i]n determining a district’s accreditation rating”.

Current administrative rules involving accreditation are found in Chapter 97 of Title 19, Texas Administrative Code<sup>11</sup>. Subchapter A contains Board rules, while Subchapters AA, BB, CC, and DD contain rules adopted by the Commissioner<sup>12</sup>.

The State Board of Education has had several discussions concerning the current agency definition of "dropout" in light of changes made by the 2001 Legislature to add a "completion rate" in Section 39.051(b)<sup>13</sup>. A number of questions have arisen regarding the authority of the Board over the AEIs indicators and the effect of that authority on the commissioner's role in determining a school district or campus' accountability rating, as well as on the annual report required by Section 39.182. The Board adopted a resolution regarding dropout rates at its November, 2001 meeting<sup>14</sup> and several Board members desire to set particular criteria for computing dropout rates.

My questions are as follows:

**Question 1.** Does the Board's authority under the provisions of Section 39.051 that direct it to "adopt" indicators and biennially "review the indicators for the consideration of appropriate revisions" authorize Board rules for the methodology used for those indicators, particularly to measure dropout rates?

#### Discussion

Indicators similar to those in current Section 39.051 were first required by Section 21.7531, as enacted in the 1989 Legislative session and amended in 1990<sup>15</sup>. That statute required the Board to "adopt a set of indicators of the quality of learning on a campus and other performance standards." Six indicators were required by statute to be included in the AEIs measures. The Board was required to appoint an advisory committee "to make recommendations to the board for the initial set of performance indicators"<sup>16</sup>, which were submitted to the Legislative Education Board<sup>17</sup> for review and comment prior to adoption by the Board. The initial set of indicators was required to be adopted "not later than January 1, 1991"<sup>18</sup>.

The 1993 Legislative session made extensive changes to provisions relating to public school accreditation and accountability, and reorganized the Education Code to compile accountability statutes in Chapter 35<sup>19</sup>. Section 35.041 was amended to provide for the Board to adopt indicators "on the advice of the Legislative Education Board"<sup>20</sup>. The statutorily-required

<sup>11</sup> Chapter 97 contains both Board rules (Subchapter A) and Commissioner's rules (Subchapters AA, BB, CC and DD). Title 19 rules can generally be distinguished as Commissioner's rules by a four-digit section number (e.g., 19 TAC Section 97.1001), or as Board Rules by a shorter section number (e.g., 19 TAC Section 97.1).

<sup>12</sup> The rules may be accessed on the agency's website at (<http://www.tea.state.tx.us/rules/tac/chapter097/index.html>).

<sup>13</sup> Acts 2001, 77<sup>th</sup> Leg. Sess., chs. 725 and 834, amending subsections (b)(3) and (b)(2), respectively.

<sup>14</sup> A copy of the Board's resolution is attached as Exhibit "A".

<sup>15</sup> Acts, 71<sup>st</sup> Leg., ch. 813 and Acts, 71<sup>st</sup> Leg., 6<sup>th</sup> C.S., ch. 1.

<sup>16</sup> Acts, 71<sup>st</sup> Leg., ch. 813, Section 2.30(a)(1).

<sup>17</sup> The Legislative Education Board ("LEB") existed under the authority of Chapter 327 of the Texas Government Code, consisting of ten members of the Texas Legislature, including the Lieutenant Governor and Speaker of the House. The LEB was abolished in 1993. Acts 1993, 73<sup>rd</sup> Leg., ch. 520, Section 25.

<sup>18</sup> Acts, 71<sup>st</sup> Leg., ch. 813, Section 2.30(b). The same deadline was repeated in the 1990 amendment. Acts 71<sup>st</sup> Leg., 6<sup>th</sup> C.S., Section 2.28.

<sup>19</sup> Note that following the 1993 Legislative session, two chapter 35s existed in the Education Code.

<sup>20</sup> Note that the same session repealed the organic statute for the LEB. Acts 1993, 73<sup>rd</sup> Leg. Sess. Ch 520, Section 25. Subsection 25(a) provided that "Any reference in a law not amended by this Act to the Legislative Education Board means the Legislative Budget Board". Further complicating the relationship between the Board and Legislature with regard to the AEIs, a third bill amended Section 21.7531 without referencing its repeal, substituting the "advice" of an "academic excellence indicators advisory committee" and the standing legislative committees with jurisdiction over public education for that of the LEB. The same provision required the "Education Economic Policy Center" to "biennially review the indicators adopted under this section and recommend changes in those indicators to the State Board of Education and the standing committees of the Senate and House of

indicators were also amended and expanded from six in number to eight. The directive to "biennially review the indicators for the consideration of appropriate revisions" remained unchanged<sup>21</sup>. The 1993 amendments also added specific duties for the Commissioner to "establish" a "state standard" for each AEl under Subsection 35.041(c). Subsection 35.041(b)(8) was adopted at this time, adding to the statutory indicators "any other indicator the State Board of Education adopts".

In 1995, the Education Code was revised, with former Section 35.041 becoming Section 39.051<sup>22</sup>. The requirement for indicators to be adopted "on the advice of" the LEB was dropped and the statutory indicators again revised. The Board's ability to add to the statutory indicators was repealed in 2001<sup>23</sup>.

Subsections 39.051(a) has not been amended since 1995. The list of statutory indicators in subsection (b) was not substantively amended in the 1997 session; but was amended by multiple bills in the 1999<sup>24</sup> and 2001<sup>25</sup> legislative sessions. Attached as Exhibits "B" through "G" are copies of Board minutes showing the adoptions of AEl indicators in 1990, 1992, 1994, 1996, 1998 and 2000. Beginning with its 1994 adoption, the Board's action was limited to adopting additional indicators beyond the statutorily-mandated ones<sup>26</sup>.

Several Board members believe that the language of Section 39.051(a) authorizes the Board to prescribe the methodology for computing each statutory AEl indicator. For example, the Board could determine which students are "dropouts", thereby resolving questions as to students who complete a GED high school equivalency program, are incarcerated, or otherwise do not graduate. On the other hand, the Texas Legislature has consistently revised the statutory indicators, in the past required legislative comment through the LEB, and the statute calls for a "biennial" review that would be consistent with interpreting Section 39.051(a) as prescribing a recommendation to each legislative session for revision of the statutory AEl. The history of the report required under Section 39.182 may also be relevant because of its definition of a performance measure identical to one of the AEl.

**Question 2.** After the 2001 amendments to Section 39.051, may the Board add additional indicators to the statutorily-required ones? If the Board may not do so, what is the status of any additional indicators adopted in the past?

### **Discussion**

Three separate bills passed the Texas Legislature in 2001 amending Subsection 39.051(b). The first bill to pass deleted Subsection 39.051(b)(10), which authorized the Board to add to the

---

Representatives with primary jurisdiction over the public school system." Acts 1993, 73<sup>rd</sup> Leg. Sess. ch. 347, Section 7.12, amending Subsections 21.7531(a) and (e).

<sup>21</sup> Acts, 73<sup>rd</sup> Leg., ch. 347.

<sup>22</sup> Acts, 74<sup>th</sup> Leg. ch. 260.

<sup>23</sup> Acts, 2001, 77<sup>th</sup> Leg. ch. 8. See also footnote 1 regarding the relationship of the three 2001 amendments.

<sup>24</sup> Acts, 1999, 76<sup>th</sup> Leg. chs. 396, 397 and 1422.

<sup>25</sup> Acts, 2001, 77<sup>th</sup> Leg. chs. 8, 725 and 834.

<sup>26</sup> It is unclear whether the 1990 and 1992 adoptions constituted more than the statutory indicators plus additional statutory definitions of students classified as "dropouts" under Section 11.205 as in effect during those years. That provision required the CEA to "develop a program to reduce the rate of students leaving the public school system before completing high school" and instructed the agency to "develop a system for school districts to collect data on student dropouts" and report to the Legislature. A statutory definition of "dropout" was found in Subsection (e). Beginning with the 1995 Legislative session, Section 11.205 became part of Section 39.182(a)(5) ("Comprehensive Biennial Report"), requiring the CEA to report to the Legislature "a statement of the dropout rate of students in grade levels 7 through 12". In 1995, the duties of the CEA were transferred to the Texas Education Agency. That agency requirement remains as current subsection 39.182((a)(7)and (8). See footnote 7 above.

statutory AEIs indicators "any other indicator"<sup>27</sup>. Two subsequent bills<sup>28</sup> set out but did not amend Subsection (b)(10). By virtue of Section 311.025(c), Texas Government Code, the agency has understood that section to be repealed. If you agree with that conclusion, please provide us counsel as to the legal status of indicators adopted prior to the effective date of the repeal<sup>29</sup>.

**Question 3. Must the commissioner follow a Board-adopted definition of an individual AEIs when determining a district or campus rating under Sections 39.072(b) and 39.073(a) or for purposes of the annual report required under Section 39.182?**

#### **Discussion**

Subchapter D provides for "accreditation" of school districts and open enrollment charter schools. The Board has been authorized at least since 1984 to provide for accreditation of school districts. The same advisory committee that recommended the initial AEIs indicators for adoption in 1990 was required to "develop the criteria for evaluating the performance of school districts and rating the districts for accreditation purposes"<sup>30</sup>. At that time, the Central Education Agency provided campus ratings under Section 21.754<sup>31</sup>.

The 1993 compilation of accountability statutes created Section 35.062, which preserved the Board's rulemaking authority under Subsection (a) but added a Subsection (b) requiring that the "academic excellence indicators shall be the main consideration of the Central Education Agency in the rating of the district under this section." Subsection (c) calling for CEA rating of campuses remained unchanged. Current Section 39.073 ("Determining Accreditation Status") was also added in 1993 as Section 35.063. Subsection (a) required the Central Education Agency to "annually review the performance of each district and campus" based on the selected AEIs indicators.

The 1995 Code revision substituted "agency" for "Central Education Agency" throughout Sections 39.072 and 39.073<sup>32</sup>. Neither Section 39.072 nor 39.073 was amended in 1997. The 1999 Legislative session amended Section 39.072 in conformance with amendments to the statutory AEIs and Section 39.073 to add subsection (e) requiring the agency to "consider the district's current special education compliance status" when it determines a district's accreditation rating:<sup>33</sup>

The 2001 legislative session amended Subsection 39.073(a) to provide that "the commissioner may determine how all indicators adopted under Section 39.051(b) may be used to determine accountability ratings"<sup>34</sup>; added a requirement in Subsection (e) to require the agency to consider the "progress of students who have failed to perform satisfactorily" on the required

---

<sup>27</sup> Acts, 2001, 77<sup>th</sup> Leg. ch. 8.

<sup>28</sup> Acts, 2001, 77<sup>th</sup> Leg., chs. 725 and 834.

<sup>29</sup> The agency believes all of the additional indicators adopted by the Board have been statutorily incorporated in the "Gold Performance rating Program" created in Section 39.0721.

<sup>30</sup> Acts 1989, 71<sup>st</sup> Leg., ch. 813, amending Section 21.753. The "Central Education Agency" consisted of the Board, Commissioner and agency, per Section 11.01 as it existed prior to the 1995 Code revision.

<sup>31</sup> Acts 1990 6<sup>th</sup> C.S., ch. 1. See also footnote 7 above regarding the Central Education Agency. The 1995 Code revision provided that "a reference in law to the Central Education Agency means the Texas Education Agency." Acts 1995, 74<sup>th</sup> Leg. Sess., ch. 260, Section 80.

<sup>32</sup> See footnote 7 above.

<sup>33</sup> Acts 1999, 76<sup>th</sup> Leg. Sess., chs. 396 and 1417.

<sup>34</sup> Acts 2001, 77<sup>th</sup> Leg. Sess. ch. 1504

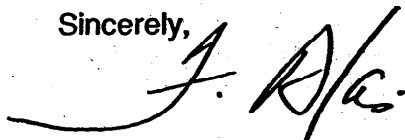
state assessments<sup>35</sup>; and added Subsection (f) limiting the definition of a "dropout" under Section 39.051(b).

Section 39.182 requires of the agency a "Comprehensive Annual Report" that includes a calculation of dropout and completion rates<sup>36</sup>.

Should your opinion be that the Board may define the methodology for computing the statutory AEs indicators under Section 39.051(b), a determination will also be needed as to whether that methodology is binding upon the commissioner in assigning accountability ratings to school districts, campuses and open-enrollment charters under Subchapter D, as well as for the annual report required under Section 39.182. In addition to any authority by virtue of Section 39.051(b), the Board has been granted rulemaking authority in Section 39.072(a) "to evaluate the performance of school districts and to assign to each district a performance rating" since the inception of the accountability system. Arguing against a conclusion of Board authority is the subsequent enactment of Section 39.073, particularly the 2001 amendment to subsection (a). Subchapter D also appears to grant specific authority to either the agency or commissioner at Subsections 39.072(b) and (c)<sup>37</sup>. Section 39.182 has since at least 1990 required an agency report of one of the AEs indicators and appears to envision an agency definition.

Thank you for your consideration of this request. Should you need any additional information, please contact David Anderson, General Counsel, at 463-9720.

Sincerely,



Felipe Alanis  
Commissioner of Education

DA:lmw

Enclosures

<sup>35</sup> Acts 2001, 77<sup>th</sup> Leg. Sess. Ch. 725. A related amendment was made in the same bill to Section 39.051, adding subsection (g) requiring the commissioner to "adopt accountability measures" to assess the progress of students who do not pass the required state assessments.

<sup>36</sup> At Subsections (a)(7) and (8). See the discussion of this section and its predecessor at footnote 26 above.

<sup>37</sup> Several recent additions to Subchapter D may also be relevant. Section 39.0721 establishes a "Gold Performance Rating Program" developed by the commissioner "[i]n addition to" the ratings established under Section 39.072. Acts 2001, 77<sup>th</sup> Leg. Sess. Ch. 834. Section 39.0731 as added in 2001 requires the commissioner to "develop an alternative accreditation pilot program" for certain students that "must include an analysis of student performance and improvement on indicators determined by the commissioner under Section 39.073(a)". Acts 2001, 77<sup>th</sup> Leg. Sess. ch. 1504.