

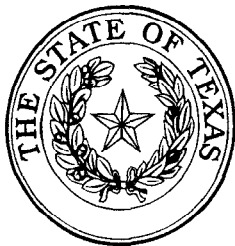
State Board of Education

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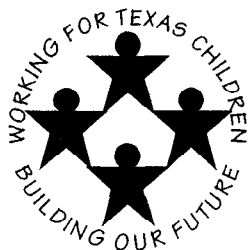
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January 27, 2006

FILE # ML-44583-06
I.D. # 44583

RQ-0437-GA

Honorable Greg Abbott
Texas Attorney General
PO Box 12548
Austin, TX 78711-2548

Re: Funding for State Textbooks

Dear General Abbott:

I am writing to seek your opinion regarding several issues related to the funding and provision of state textbooks. The State Board of Education has both constitutional and statutory duties to provide free textbooks for the schoolchildren of Texas.

As you know, the State Board of Education ("Board")¹ is required to invest the assets of the Permanent School Fund² ("PSF") under the provisions of Article VII, Section 5 of the Texas Constitution. The Board sets a percentage of the average value of the PSF prior to each regular legislative session, which becomes the principle part of the Available School Fund ("ASF")³. The ASF is required to "be applied annually to the support of the public free schools"⁴. The ASF is currently appropriated for the purchase of state-adopted textbooks, with the remainder distributed to school districts on a "per capita" student basis⁵.

¹ Article VII, Section 8 of the Texas Constitution requires the Legislature to "provide by law for a State Board of Education".

² The Texas Constitution establishes a "Perpetual School Fund" at Article VII, Section 2 and a "Permanent School Fund" at Article VII, Section 5. We understand those references to be the same fund, consisting of both real estate managed by the General Land Office under Article VII, Section 4 (which uses the term "Public Free School Fund") and the proceeds from the sale of real estate invested by the Board. See, Texas Attorney General's Opinion DM-316 (1995).

³ The ASF also includes one-fourth of the state motor fuels taxes as dedicated by Article VIII, Section 7-a of the Texas Constitution. See, also Section 43.001, Texas Education Code, as amended by Acts 2003, 78th Leg., Ch. 328.

⁴ Article VII, Section 5(c), Texas Constitution.

⁵ See, Section 43.001(c), Texas Education Code defining "scholastic population" for purpose of the required annual distribution of the ASF.

Article VII, Section 3(b)⁶ of the Texas Constitution provides as follows:

It shall be the duty of the State Board of Education to set aside a sufficient amount of available funds to provide free text books for the use of children attending the public free schools of this State.

Your office ruled in 1975 that the authority of the Board to “set aside” funds for textbooks is limited to the amount appropriated by the Legislature⁷.

In addition to its constitutional role of setting aside funds for textbooks, the Board adopts a statewide curriculum for the public schools and acts on a regular cycle to adopt textbooks which meet the elements of the curriculum⁸. The Board is required to revise textbooks on a six-year cycle, allowing for a review of the curriculum prior to issuing a “proclamation” inviting publishers to submit textbooks for review and adoption⁹. A proclamation must be issued at least 24 months prior to adoption of the textbooks¹⁰. Thus “Proclamation 2002” was issued in that year, leading to the adoption of textbooks in certain subjects in November of 2004. Note that at the time the proclamation is issued and even when textbooks are adopted in an even-numbered year, the Legislature will not yet have met and passed a budget for the purchase of those books. The Texas Education Agency submits a legislative appropriation request prior to each legislative session asking for funding for textbooks that are expected to be adopted and purchased.

My questions deal with the textbook and appropriations process in light of the requirements of Article VII, Section 3 of the Texas Constitution.

1. I would ask you to advise the Board as to the legal effect of its action to set aside funds. This issue does not appear to have been addressed in Opinion H-507. If the Board in its discretion determines that a certain amount is “sufficient...to provide free textbooks”, and acts to set aside that amount pursuant to its authority under Article VII, Section 3(b) of the Texas Constitution, may the Legislature appropriate those funds for any other purpose?

I would ask you to consider this question in light of the requirement of Article VII, Section 5(c) that the ASF be “applied annually” to support public education. If the amount the Board sets aside exceeds the amount appropriated for textbooks, does the excess remain unspent and would that potentially violate the directive to apply the ASF on an annual basis?

⁶ Prior to a 1999 amendment, Subsection 3(b) required funds to be set aside from “said tax”, referring to the state property tax previously dedicated to the ASF. Our understanding is that the ASF continued to be the source of appropriations for textbooks after the abolition of the state property tax in 1982 by the adoption of Article VIII, Section 1-e of the Texas Constitution.

⁷ Texas Attorney General’s Opinion O-507 (1975). Statutory provisions regarding the “setting aside” process similar to those discussed in the opinion can be found at Section 31.021, Education Code.

⁸ The curriculum is required under Section 28.002, Texas Education Code. The textbook adoption process is set out at length in Chapter 31 of the Education Code and Board rules at 19 Tx. Admin. Code Chapter 66.

⁹ Section 31.022, Texas Education Code.

¹⁰ Id.

2. Should you determine that the Board may only set aside the amount appropriated by the Legislature, I would ask you to consider whether the Texas Constitution sets minimum standards for the amount to be appropriated. The constitutional directive certainly requires "free textbooks" to be made available. What, if any, limits are there on the Legislature's discretion to determine the amount appropriated for textbooks? In particular, does the Texas Constitution require that state-funded textbooks be available for some or all of the subjects in the state curriculum¹¹?

Thank you for your consideration of this request. Some of these questions may also involve issues currently under consideration as part of pending RQ-0397-GA, submitted by Commissioner Patterson at the Texas General Land Office. I would ask that you consider the requests together to better advise both the Board and the General Land Office. Should you have any questions, please feel free to contact me or David Anderson, General Counsel, Texas Education Agency at (512) 463-9720.

Sincerely



Geraldine "Tincy" Miller, Chair
State Board of Education

¹¹ The state curriculum is divided into a "foundation curriculum" of English Language Arts, mathematics, science and social studies, and an "enrichment curriculum" of other subjects. See, Texas Education Code Section 28.002. The foundation curriculum subjects are the basis for the state tests required under Section 39.023 of the Education Code, which in turn are the basis of the state accountability system (Sections 39.072 and 39.073). Students are generally required to pass certain foundation curriculum subjects to be promoted at grades 3, 5 and 8 (Section 28.0211) and for high school graduation (Sections 28.025 and 39.025).