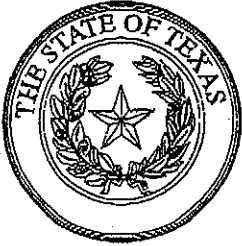


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MAY 18 2010

**OPINION COMMITTEE**

## State Board of Education

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Austin, Texas 78701-1494  
(512) 463-9007FILE # ML-46461-10  
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Commissioner of Education  
(512) 463-8985

May 11, 2010

**RQ-0887-GA**Honorable Greg Abbott  
Texas Attorney General  
Office of the Attorney General  
PO Box 12548  
Austin, TX 78711-2548**RE: Adoption and Distribution of State Textbooks**

Dear General Abbott:

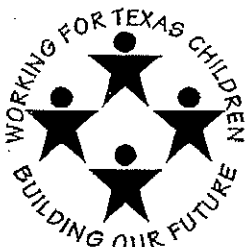
I am writing to seek your guidance regarding several changes made by the 2009 Texas Legislature to the procedures by which the state adopts textbooks for use in public schools and our school districts<sup>1</sup> distribute and account for those texts. As you know, Chapter 31 of the Texas Education Code provides for a state textbook adoption process based on the curriculum adopted by the State Board of Education ("Board"), and for local selection of specific textbooks by school districts. Note that under Section 31.002 of the Education Code, the term "textbook" can include a wide variety of electronic media used to convey the curriculum in addition to traditional paper textbooks.

House Bills 2488 and 4294<sup>2</sup>, as enacted in 2009, made significant changes to the textbook adoption and selection processes. House Bill 2488 created two additional categories of "open source textbooks". Section 31.0241 of the Education Code authorizes certain institutions of higher education to certify that a textbook developed by its faculty ("university open-source textbook") meets the requirements of the state curriculum for that subject and will prepare students for the next level course<sup>3</sup>. New Subchapter B-1 of Chapter 31 of the Education Code also authorizes the commissioner of education ("Commissioner") to purchase "state-developed open-source textbooks" through a competitive process. The content of state-developed open-source textbooks is owned or licensed to the state and can be

<sup>1</sup> Texas public schools are composed of school districts and charter schools authorized under Chapter 12 of the Texas Education Code. For simplicity, this letter will refer only to "school districts" but should be understood as applying to charter schools as well. My understanding is that school districts and charter schools participate in the state textbook program in exactly the same manner.

<sup>2</sup> Acts, 81st Leg., Reg. Sess., Ch's. 679 and 1407, respectively.

<sup>3</sup> Section 31.0241(b)(4) requires certification that a junior-level course will prepare a student for the subsequent senior-level course and that a senior-level course will prepare a student for college-level coursework without remediation.



modified by the Commissioner. Both types of open-source textbooks are available to school districts and charter schools at no cost<sup>4</sup>. State-developed open-source textbooks offer an opportunity for state payments that share savings in the cost of state-developed open-source textbooks<sup>5</sup>.

House Bill 4294 additionally authorized the adoption of a list of "electronic textbooks" and "instructional materials" by the Commissioner<sup>6</sup> that may be selected by a school district, again with the potential for sharing in cost savings with the state. That bill also created a requirement for each school district to certify that students are provided a combination of textbooks, electronic textbooks and instructional materials that cover the entire state curriculum for the subject<sup>7</sup>. Finally, the bill added a requirement that each school district purchase a "classroom set" of textbooks adopted by the Board for each subject<sup>8</sup>.

The Board has recently revised its administrative rules dealing with textbooks<sup>9</sup> and discovered a number of questions dealing with the interaction of the new requirements added by House Bills 2488 and 4294. My questions involve the implementation of those new statutes.

My first four questions deal with the term "classroom set" as it appears in Section 31.101(c-1) of the Education Code<sup>10</sup>.

1. Concerns have been raised about the impact of the term "classroom set" on elementary grade textbooks where students do not cycle through classes as is common in middle and high schools. I understand the Board's definition<sup>11</sup> to require most elementary schools to purchase complete sets of elementary textbooks adopted by the Board to satisfy the classroom set requirement. Please confirm that the Board has appropriately implemented this section of the Education Code.
2. Another question dealing with classroom sets is whether university open-source textbooks are eligible for local selection for that purpose<sup>12</sup>. Section 31.0241(b) of the Education Code requires the Board to "place an open source textbook for a secondary-

<sup>4</sup> Both university open-source textbooks and state-developed open-source textbooks are available without charge electronically pursuant to Section 31.002(1-a), although a charge may be required for an optional printed copy.

<sup>5</sup> A school district or charter may access a university open-source textbook free of charge. The commissioner determines a cost for state-adopted open-source textbooks. Pursuant to Section 31.073 of the Education Code, school districts may share in one-half of the cost savings attributable to purchasing a state-developed open-source textbook in lieu of a textbook adopted by the Board. See also the discussion at Question 8.

<sup>6</sup> Section 31.0231, Texas Education Code.

<sup>7</sup> Section 31.004, Texas Education Code.

<sup>8</sup> Section 31.101(c-1), Texas Education Code.

<sup>9</sup> The Board's textbook rules are at 19 Tex. Admin. Code Chapter 66.

<sup>10</sup> The Board received a letter from State Representative Dan Branch during its consideration of the rule involving "classroom sets", which is attached as Exhibit "A". In accordance with the letter, the requirement to purchase a classroom set is being implemented prospectively as textbooks for additional subjects are adopted.

<sup>11</sup> The definition recently adopted by the Board is at 19 Texas Admin. Code Section 66.104(s):

"A classroom set shall be defined as the total count of SBOE-adopted textbooks on the conforming or nonconforming list necessary to provide one copy to each student during the class period."

<sup>12</sup> Because both the commissioner's list of electronic textbooks and the state-purchased open-source textbooks are not adopted by the Board, we have assumed those textbooks are not eligible to be considered for classroom sets.

level course...on a conforming or nonconforming list"<sup>13</sup> if certain requirements are met. The Board believes that a university open-source textbook is ineligible for selection as a classroom set because such a textbook would not have been subject to the same review and consideration by the Board as all other textbooks adopted under Section 31.024<sup>14</sup>. The Board's rules provide for a thorough examination by subject matter experts and practicing teachers as to whether a textbook submitted for adoption covers all of the state curriculum or contains factual errors, leading to a public hearing and final adoption by the Board<sup>15</sup>. None of those safeguards would be in place for a textbook certified under Section 31.0241. The Board's rules accordingly exclude university-certified open-source textbooks from eligibility as a "classroom set"<sup>16</sup> because they are not subject to the same review and adoption process as all other textbooks adopted under Section 31.024. Please confirm that university open-source textbooks may not be selected by school districts to satisfy the classroom set requirement under Section 31.101(c-1).

3. Another question dealing with classroom sets is the relationship between the requirement to purchase such a set and the requirement to certify that students are provided textbooks, electronic textbooks or instructional materials covering the entire state curriculum. A textbook adopted by the Board could include a textbook on the nonconforming list, which would not provide coverage of the entire state curriculum. May a district or charter satisfy the requirement of Section 31.101(c-1) by purchasing a classroom set of materials adopted by the Board that does not cover the entire state curriculum, if it also provides students with other materials that make up any deficit in coverage to meet the standard of Section 31.004?
4. A final question dealing with classroom sets is the relationship between the required classroom set and the requirement in Section 26.006(c) of the Education Code to allow a student to take home a textbook:

(c) A student's parent is entitled to request that the school district or open-enrollment charter school the student attends allow the student to take home any textbook used by the student. Subject to the availability of a textbook, the district or school shall honor the request. A student who takes home a textbook must return the textbook to school at the beginning of the next school day if requested to do so by the student's teacher. In this subsection, "textbook" has the meaning assigned by Section 31.002.

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<sup>13</sup> Section 31.023 of the Education Code provides for a "conforming list" of textbooks that cover all the elements of the state curriculum and a "nonconforming list" whose textbooks cover at least one-half of those elements.

<sup>14</sup> Of course, a university could choose to submit a textbook through the formal Board adoption process in addition to certifying under Section 31.0241.

<sup>15</sup> See generally 19 Tex. Admin. Code Chapter 66, Subchapter B (available at <http://ritter.tea.state.tx.us/rules/tac/chapter066/index.html>). Rules for textbook review panels are at Sections 66.30 through 66.45. Sections 66.54 and 66.57 provide for samples to be made available to the public for review prior to consideration by the Board. Sections 66.60 through 66.66 deal with the formal adoption process.

<sup>16</sup> See, 19 Tex. Admin. Code Section 66.67(k).

First, please confirm that Subsection 26.006(c) entitles a student to take a textbook home at the request of a parent if a copy of the textbook is "available". Several Board members have received complaints that school districts do not allow students to do so and I would appreciate a confirmation of that requirement from your office. Second, does Section 26.006(c) entitle a student to take home a textbook that is part of the "classroom set"?

The process of rule adoption also raised several questions about university open-source textbooks. Section 31.0241(b) of the Education Code provides that the board "shall place" a university open-source textbook on the appropriate list if the textbook meets four criteria in section 31.0241(b). Subsections 31.0241(b)(3) and (4) require the university to certify the textbook "for accuracy" and determine the extent to which the textbook covers the state curriculum. Under Section 31.023, the Board would normally determine whether a textbook is "free of factual errors" and the extent to which it covers the state curriculum.

5. The Board's rule establishes a process to "confirm" that a university open-source textbook covers the state curriculum and to notify the university of any shortcomings. The statute is unclear as to whether the Board would have the authority to decline to place a university open-source textbook on the conforming or nonconforming list of textbooks if the university disagreed with the Board as to whether the textbook covered the curriculum or contained factual errors. Please provide guidance as to the extent to which the Board may independently exercise discretion to place a university open-source textbook on a state adoption list.

Subchapter D of Chapter 31 of the Education Code imposes certain duties on a "publisher or manufacturer" of textbooks and authorizes the Board to impose sanctions for violation of that section. The Board has adopted rules that provide for a review of the content of a university-submitted open-source textbook and applying the duties of publishers to a university submitting an open-source textbook<sup>17</sup>.

6. The Board's rule imposes the duties of a "publisher"<sup>18</sup> on a university certifying an open-source textbook under Section 31.0241 of the Education Code. The status of "publisher" raises a question as to whether penalties that the Board may otherwise assess against a publisher may be imposed on a university. Please clarify whether the Board has the authority to impose a fine or other sanction under its rules generally relating to a publisher against a university that certifies an open-source textbook.

I would also appreciate your guidance as to university open-source textbooks and textbook credits under Section 31.1011 of the Education Code. That section provides for a "credit" which may be used to purchase additional textbooks, instructional materials or technological equipment. Subsection 31.1011(a) provides for a credit equal to one-half of the difference between the cost of a textbook and the maximum cost established by the Board under Section

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<sup>17</sup> See, 19 Tex. Admin. Code Section 66.67(g) and (i), respectively.

<sup>18</sup> See, Section 31.151 and Subchapter A, Chapter 66, 19 Tex. Admin. Code. Note that the Board's rule [at Section 66.67(i)] exempts universities from a subset of penalties based on a percentage of sales due to university open-source textbooks being provided at no charge.

31.025 of the Education Code. University open-source textbooks are required to be available at no cost and thus it is unclear as to whether they are "purchased" or otherwise eligible for a textbook credit.

7. If a school district selects a university open-source textbook in lieu of another textbook purchased at state expense, is the district entitled to a credit under Section 31.1011 of the Education Code?

My final question deals with the ownership of technology purchased with state textbook funds. Section 31.102 provides that "[e]ach textbook purchased as provided by this chapter is the property of the state."

8. We understand the term "textbook" to include textbooks adopted by the Board under Subchapter B of Chapter 31, as well as electronic textbooks and state-purchased open source textbooks adopted or purchased by the Commissioner under Section 31.0231 and Subchapter B-1. Section 31.1011 provides for "textbook credits" to school districts that select textbooks offered at a price less than the maximum cost established by the Board under Section 31.025<sup>19</sup>. School districts share one-half of the cost savings with the state and are allowed to order additional textbooks, supplemental textbooks, instructional materials or "technological equipment"<sup>20</sup>. We have assumed that these additional textbooks and instructional materials become state property by virtue of Section 31.102<sup>21</sup>.

The definition of "textbook" in Section 31.102 does not appear to include "technological equipment" as defined at Subsection (4). However, state textbook funds may be used to purchase technological equipment<sup>22</sup>. Please provide us guidance as to whether technological equipment purchased under Section 31.1011 is the property of the state or the local school district.

Thank you for your consideration of this request.

Sincerely,



Gail Lowe, Chair  
State Board of Education

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<sup>19</sup> Section 31.073 additionally provides credits in the same manner for selection of a state-developed open source textbook instead of a textbook with an additional cost to the state. Section 31.073(b) provides for the credits generated under that section to be used in the same manner as credits under Section 31.1011.

<sup>20</sup> See, Section 31.1011(c).

<sup>21</sup> The term "textbook" as defined in Section 31.002 includes electronic textbooks, open-source textbooks and instructional materials.

<sup>22</sup> See, Section 31.021(f), providing that the "state textbook fund may be used to purchase technological equipment..."



STATE OF TEXAS  
HOUSE OF REPRESENTATIVES

December 14, 2009

DANIEL H. BRANCH  
MEMBER

The Honorable Gail Lowe  
11 Chris Avenue  
Lampasas, TX 76550

Dear Chairman Lowe:

It has come to my attention that the State Board of Education is currently considering rules for the textbook-related legislation passed during the 81st legislative session. As the author of HB 4294, I was asked to clarify my position on the classroom set requirement.

As enrolled, HB 4294 includes a provision requiring the purchase of a classroom set of materials for both the required and enrichment curricula. Some districts have inquired whether districts must now buy classroom sets for subjects that already have textbooks adopted and purchased.

To be clear, it is my intent that the classroom set requirement be implemented as new textbook adoptions become available and are funded. It would be unfair to school districts that have already purchased textbooks for previous or current adoptions, or have elected not to purchase a textbook for an enrichment subject, to expend local funds to satisfy a retroactive implementation of new legislation. The classroom set requirement is meant to ensure that districts provide State Board approved materials in the classroom before purchasing supplemental instructional materials with state funds.

Please note that the textbook definition in the Education Code, Section 31.002, includes an "electronic textbook." Per statute, districts and charters are allowed to purchase electronic textbooks that have been adopted by the State Board to satisfy the classroom set requirement.

The number of textbooks or e-textbooks that make up a classroom set was purposely left undefined. Moreover, to stipulate a predetermined number for a classroom set seems to run counter to our intent of allowing flexibility for school districts in this area; letting them decide the format and number of State Board-approved textbooks that make up a classroom set.

Thank you for your work in helping to ensure the quality of public education in Texas. Please let me know if I can be of further assistance.

Best wishes.

Sincerely,

Dan Branch

cc: Hon. Lawrence A. Allen, Jr.  
Hon. Terri Leo  
Hon. Rick Agosto  
Hon. Mary Helen Berlanga  
Hon. David Bradley  
Hon. Barbara Cargill  
Hon. Bob Craig  
Hon. Cynthia Noland Dunbar

Hon. Patricia Hardy  
Hon. Mavis B. Knight  
Hon. Don McLeroy  
Hon. Ken Mercer  
Hon. Geraldine "Tincy" Miller  
Hon. Rene Nuñez  
Robert Scott, Commissioner of Education

DALLAS, HIGHLAND PARK, UNIVERSITY PARK - DISTRICT 108

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