



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 26, 2008

Chairman Don McLeroy  
State Board of Education  
1701 North Congress Avenue  
Austin, Texas 78701-1494

Dear Chairman McLeroy:

You recently asked for an opinion regarding the authority of the Commissioner of Education (the "Commissioner") to waive the limit on the number of open-enrollment charters that the State Board of Education (the "Board") may grant. Specifically you ask three questions:

1. Whether the Commissioner may grant a waiver to allow the Board to grant more than 215 open-enrollment charters?
2. Assuming the answer to the first question is "yes," whether an entity other than a school campus or district, such as the Board itself, may request such a waiver from the Commissioner?
3. Assuming the answer to the second question is "no," whether a school district may request such a waiver that would allow the Board to grant a charter for a school to operate outside of that district's geographic boundaries?

Please note that this response is not an official opinion of the Office of the Attorney General issued under section 402.042 of the Texas Government Code, nor is it an exhaustive memorandum of law; rather, it is an informal letter of legal advice offered for the purpose of general guidance.

Open-enrollment charter schools are authorized under subchapter D of chapter 12 of the Education Code. Section 12.101 provides that the Board may grant a charter on the application of an eligible entity for an open-enrollment charter school, but prohibits the Board from granting more than 215 of these charters. TEX. EDUC. CODE § 12.101(a)-(b) (Vernon 2006).

Section 7.056 of the Education Code provides that the Commissioner can waive requirements, restrictions, or prohibitions of the Education Code upon a school campus's or district's written request.<sup>1</sup> *Id.* § 7.056. A school campus or district seeking a waiver must submit a written application to the Commissioner not later than the 31<sup>st</sup> day before the campus or district intends to take action requiring the waiver. *Id.* § 7.056(b). The application must include: (1) a written plan approved by the board of trustees of the district that states the achievement objectives of the campus or district and the inhibition imposed on those objectives by the requirement, restriction, or prohibition; and (2) written comments from the campus- or district-level committee established under section 11.251 of the Education Code. *Id.*

You ask whether the Commissioner may grant a waiver under section 7.056 to allow the Board to grant more than 215 open-enrollment charters. As we noted above, the Commissioner's authority to issue a waiver is dependent on a school or school district requesting such a waiver and submitting an application which includes a plan outlining its achievement objectives and the inhibition imposed on those objectives by the requirement, restriction, or prohibition that is the subject of the waiver request. *See id.* § 7.056(a). For purposes of this analysis, we assume these prerequisites have been met.

The Commissioner's authority to grant a waiver is limited in that he or she may only waive those requirements, restrictions, and prohibitions that apply to the requesting school's or district's "achievement objectives." *See Miami Ind. Sch. Dist. v. Moses*, 989 S.W.2d 871, 876 (Tex. App.—Austin 1999, pet. denied). Furthermore, a waiver is valid only as long as the school or district fulfills those objectives and the school's or district's achievement levels do not decline. TEX. EDUC. CODE § 7.056(d). For purposes of section 7.056, we believe a court would find that "achievement objectives" means those objectives pertaining to educational achievement. *See House Research Organization, Bill Analysis, Tex. S.B. 1, 71<sup>st</sup> Leg., 6<sup>m</sup> C.S. (1990)* (Under the predecessor to section 7.056, a school campus or district "could apply . . . for a waiver of a state requirement or prohibition that inhibits *student achievement*." (emphasis added); *see also Miami Ind. Sch. Dist.*, 989 S.W.2d at 876 (analysis of sections 39.112 and 7.056 of the Education Code indicates their purpose is educational achievement).

The determination of whether a specific requirement, restriction, or prohibition applies to a school's or district's educational achievement objectives is, in general, a question of fact within the discretion of the Commissioner in the first instance subject to judicial review for abuse of discretion. *See id.* § 7.056(c); *see also Barrington v. Cokinos*, 338 S.W.2d 133, 142 (Tex. 1960) ("[W]here the law visits upon a governing body the duty to exercise its sound judgment and discretion, courts have no right to interfere so long as such body acts lawfully."); Tex. Att'y Gen. Op. No. GA-0522 (2007) at 4. Therefore, assuming the other requirements of section 7.056 are met, the Commissioner may waive the statutory limit on the number of open-enrollment charters the Board may grant if the Commissioner finds that the restriction applies to a school's or district's educational achievement objectives. *See Miami Ind. Sch. Dist.*, 989 S.W.2d at 876. We note that the

<sup>1</sup> Section 7.056(e)-(f) contains a list of non-waivable requirements, restrictions, and prohibitions, but none of them are at issue in this instance.

Commissioner's determination must be reasonable in that it is supported by facts. See Barrington, 338 S.W.2d at 142.

In your second question you ask whether an entity other than a school or district, such as the Board itself, may request a waiver from the Commissioner under section 7.056. If the language of a statute is not ambiguous, we must give effect to the plain meaning of its words unless doing so would lead to an absurd result. *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996). Section 7.056(a) states that "a school campus or district may apply to the commissioner for a waiver of a requirement, restriction, or prohibition imposed by this code or rule of the board or commissioner." Tex. Educ. Code § 7.056(a). We do not believe that this statute is ambiguous. By its plain language, the statute only permits a school campus<sup>2</sup> or district to apply for a waiver. Therefore, an entity other than a school campus or district may not request a waiver from the Commissioner under section 7.056.

Finally, you ask whether a school district may request a waiver that would allow the Board to grant a charter for a school that would operate outside of that district's geographic boundaries. In 2001, this office found that school districts may not operate schools outside the district's geographic boundaries. *See Tex. Att'y Gen. Op. No. JC-0332 (2001)*. However, the Legislature effectively overruled that opinion by enacting section 11.167 of the Education Code, which specifically permits a school district to operate a school outside of its geographic boundaries. TEX. EDUC. CODE § 11.167. You have not pointed us to, nor are we aware of, any other law or rule that would prohibit a school district from operating a school outside of the district's geographic boundaries. Therefore, a waiver is not necessary in such a situation.

Should you have any additional questions concerning this matter, or if I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Andrew Weber,  
Deputy Attorney General for Legal Counsel

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<sup>2</sup> Existing open-enrollment charter schools may request waivers under section 7.056. *See* TEX. EDUC. CODE § 12.104(a) ("An open-enrollment charter school has the powers granted to schools under this title.")