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Public Comments on Proposed New Commissioner's Rules: 19 TAC Chapter 102, Educational Programs, Subchapter JJ, Innovation District

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The Association of Texas Professional Educators (ATPE) is the preeminent educator association in Texas that, with a strong collaborative philosophy, speaks for classroom teachers, administrators, paraprofessionals, and teacher trainees. We work to create better opportunities for 5 million public schoolchildren. ATPE is a member-owned, member-governed professional association with more than 100,000 members, making it the leading educators' association in Texas and the largest independent association for public school educators in the nation. **ATPE appreciates the opportunity to offer the following comments on the proposed new rule 19 TAC Chapter 102, Subchapter JJ, Innovation District.**

ATPE comment on §102.1301. Definitions.

Please add definition for the term “requirement” as it applies to 12A.003(b) and 12A.004(a)(1).

The key provision in the Chapter 12A district of innovation (DOI) concept is the legislative authorization, provided in Texas Education Code (TEC) 12A.003(b)(2), for public school districts to exempt themselves from provisions of the TEC. The Legislature provided in TEC 12A.004 a list of specific TEC provisions from which a DOI may not exempt itself, but TEC 12A.004 does not state whether that list of non-exemptible TEC provisions is exhaustive. In other words, a question arises as to whether all other TEC provisions not listed in §12A.004 may be exempted by a DOI. Another unanswered question is whether there are TEC provisions that, by their nature, may not be exempted even if:

- (1) they are not in the list of non-exemptible provisions outlined in TEC 12A.004, and
- (2) a DOI does not clearly state in its innovation plan that it is not exempting itself from those provisions.

These are significant questions because of concerns whether immunity protections for school districts and their employees will apply to all DOI. TEC Chapter 22, Subchapter B provides immunity to school district employees, along with procedural requirements and limitations on monetary awards for potential plaintiffs. The DOI language in TEC 12A.004(a) does not specifically identify these Chapter 22 immunity protections as non-exemptible.

While it is unlikely that any district of innovation would *intentionally* exempt itself and its staff from these long-standing legislatively-provided protections, it is possible that a district could waive its immunity unintentionally by announcing that it is opting out of every statute to which it is legally entitled to an exemption under the new DOI law. At least one school district seeking DOI status board of trustees has already voted to adopt an innovation plan in which it merely provides a list of provisions from which the district is *not* exempting itself and states in its plan that it seeks to claim every exemption that is legally available to it. The district's list of non-exempted provisions includes only those TEC provisions listed in §12A.004 and the proposed commissioner's rules. Accordingly, unless a district is prohibited from exempting itself from Chapter 22 Subchapter B, a DOI could unintentionally waive these protections.

As noted, one school district, Spring Branch ISD (SBISD), has already taken the route of writing into its innovation plan a "negative list" of TEC provisions from which the district is not exempting itself; SBISD's list of non-exempted provisions does not include Chapter 22, Subchapter B. Further, SBISD has stated in its innovation plan that it seeks exemption from every provision that is legally available to a DOI, which implies that the district intends to exempt itself from anything not listed among non-exempted provisions of the TEC and the proposed commissioner rules in its innovation plan. It is reasonable to expect that other school districts will follow suit, as they may look to SBISD's early-adopted plan for insight and conclude that the easiest way to fulfill the obligations of becoming a DOI is merely to identify non-exempted provisions in one's innovation plan. However, as noted below, ATPE does not believe that this method is acceptable and believes that it violates the requirement of §12A.003(b)(2) for districts to specifically identify those provisions from which they are seeking exemptions.

Absent a clarification in rule or in law, the possibility that DOI might unwittingly waive the immunity protections otherwise afforded to them and their employees is ripe for litigation. Plaintiffs seeking to recover damages in lawsuits against a DOI or its employees will almost certainly argue that immunity has been waived by any district, such as SBISD, whose innovation plan provides for such blanket exemptions without specifying that the district does not intend to exempt itself from the immunity provisions.

Part of the ambiguity surrounding the actual impact of the DOI statute lies with understanding what constitutes a "requirement" that could potentially be waived by a DOI. This issue can be remedied in rule by defining the term "requirement" as that term is used in TEC 12A.003(b)(2) and 12A.004.

ATPE recognizes that it is a well-founded legal principle that words used in statutory language are interpreted in a manner consistent with their common usage. The term "requirement" is commonly defined as "something obligatory or demanded" (Webster's New World Dictionary, 1974). Thus, under common legal principles it is *likely* that when litigation arises most of the immunity and procedural safeguards provided in Chapter 22, Subchapter B would be more accurately defined as "benefits" rather than "requirements." As "benefits," such statutes would not be exemptible by a DOI since they are not "requirements imposed by this code." However, a definition clarifying the term "requirement" would eliminate the likelihood that individual DOI will have to bear the heavy legal expenses of pursuing this logical but far from obvious argument in court after being sued.

The need for clarification of the definition of "requirements" for purposes of the DOI statute is highlighted by TEC 22.052: Administration of Medication by School District Employees or Volunteer Professionals; Immunity from Liability. This statute is included in Chapter 22, Subchapter B, and deals with immunity in certain circumstances. It is of particular significance to the question because, unlike many other immunity and procedural protections provided by the same subchapter, this particular statute grants immunity "...on the adoption of policies concerning the administration of medication." Therefore, it does in fact "impose a requirement" on a school district (adoption of policies) and provides immunity to

the district only after that requirement (the adoption of policies concerning the administration of medication) has been fulfilled.

A district that states in an innovation plan that it is seeking exemption from every provision not included in the statutory or commissioner's lists of non-exemptible provisions would have difficulty claiming that §22.052 still applies to it and its employees; since §22.052 does include a "requirement imposed by the code," it would seem to be susceptible to exemption, either intentionally or unintentionally, by a DOI.

In analyzing Chapter 12A with regard to its potential effect on immunity, ATPE also analyzed the effect of the Legislature's inclusion of "a state or federal requirement applicable to an open-enrollment charter school operating under Subchapter D, Chapter 12" in the list of non-exemptible TEC provisions. Section 12.1056, which is found in Chapter 12, Subchapter D, provides for Immunity from Liability and Suit. However, the statute also provides as follows:

"In matters related to operation of an open-enrollment charter school, an open-enrollment charter school or charter holder is immune from liability and suit to the same extent as a school district, and *the employees and volunteers of the open-enrollment charter school or charter holder are immune from liability and suit to the same extent as school district employees and volunteers*. A member of the governing body of an open-enrollment charter school or of a charter holder is immune from liability and suit to the same extent as a school district trustee." (Emphasis added.)

Because of the actual language used in §12.1056, which simply refers back to Chapter 22, Subchapter B, ATPE feels that it is unclear and uncertain that Chapter 22, Subchapter B is non-exemptible since "requirements" imposed on a charter school cannot be exempted by a DOI. Section 12.1056 does not state that charter school employees have immunity; it states that charter school employees have immunity to the same extent that school district employees have immunity. This begs the question of whether, pursuant to Chapter 12A, immunity can be exempted for school district employees. If it can, then that simply affects the actual meaning of §12.056. Again, it is not clear from reading the DOI statutes or the proposed commissioner's rules whether or not districts are able to exempt themselves from immunity provisions. By extension, it is unclear whether a district's immunity protections could be lost if a district board of trustees votes to be exempt from everything it legally can be exempt from in its innovation plan. ATPE believes this is an issue that *should* be made clear through the commissioner's rules. The alternative is the likelihood of costly litigation to clarify it.

Please include within this section of the rules a definition of "requirement" as it applies to sections 12A.003(b)(2) and 12A.004(a)(1). In defining "requirement" as a term of art, we ask that you differentiate a requirement under the TEC from a benefit conferred by the TEC, particularly as it applies to immunity from suit conferred by the code on district and charter school employees.

ATPE comment on §102.1305. Process Timeline. Subsection (c) - *Prior to the designation as an innovation district, a local innovation plan must be developed for the school district and shall meet the plan requirements as outlined in the TEC, §12A.003.*

The commissioner's rules serve through definition of terms and other clarifying statements to shape the innovation plan requirements with which a district must comply. Because these rules seek, and should

further seek, to define or clarify TEC, §12A.003, please add, “as described by these rules” after “... in the TEC, §12A.003” and before “.”.

ATPE comment on §102.1307. Adoption of Local Innovation Plan. Subsection (d) and Figure: 19 TAC §102.1307(d) - *The district shall notify the commissioner of approval of the plan along with a list of approved TEC exemptions by completing the agency form provided in the figure in this subsection.*

ATPE believes that 12A.003(b)(2) requires a district seeking to become a DOI to specifically identify which sections of the TEC from which it intends to exempt itself upon adoption of its plan. ATPE also asserts that the statute requires the district to identify how each requirement identified inhibits the innovation goals of its plan.

ATPE believes the following changes are needed in the proposed rules:

(1) The commissioner’s rules should specify that a district developing an innovation plan is required to affirmatively list each statutory provision from which it intends to exempt itself, and is also required to state how compliance with those statutory provisions would otherwise specifically inhibit the district’s ability to meet the goals of its innovation plan.

(2) The commissioner’s proposed check-off form in figure 19 TAC §102.1307(d) is inadequate to meet the requirements of Chapter 12A, provide due notice of the district’s plans, or promote a thoughtful consideration of a district’s actions in exempting itself from legislative expectations in the TEC.

(3) In addition to the above requirements, the commissioner should also maintain an exhaustive list of TEC provisions from which a district may not exempt itself as required by TEC 12A.004(b)(1). Such a list will serve to provide notice to districts and other interested parties.

ATPE comment on §102.1309. Prohibited Exemptions. With regard to non-statutory exemptions that are listed under the following TEA rationale, *TEC, §12A.004(a)(1) establishes a floor for exemptions for a district seeking to be a district of innovation. Several provisions of the TEC are inapplicable to an open-enrollment charter school, not because the legislature has intentionally limited the requirement, but because the inherent nature of an open-enrollment charter school makes application of the provision nonsensical. The legislature clearly intended a floor to apply to the exemptions; consequently, districts may not seek an exemption from certain statutory provisions that lack a charter analog. As such, a district seeking to be a district of innovation may not seek an exemption from:*

- *TEC Chapter 13, since open-enrollment charters have no exclusive boundaries vis-à-vis other charter schools; nor are open-enrollment charters as a group required to cover all geographic boundaries of the state;*
- *TEC §§37.011, 37.012, and 37.013, because a district must allow an open-enrollment charter school student to be served at a Juvenile Justice Alternative Education program;*
- *TEC Chapters 41 and 42, because open-enrollment charters have no taxing capacity, and HB 1842 contained no textual indication or legislative intent demonstrating that the legislature intended to alter current funding mechanisms for districts of innovation;*
- *TEC §§44.0011, 44.002, 44.003, 44.004, 44.0041, 44.005, 44.0051, 44.006, 44.007, 44.0071, 44.008, 44.009, 44.011, 44.0312, 44.032, 44.051, 44.052, 44.053, and 44.054;*
- *TEC §§45.003, 45.0031, 45.005, 45.105, 45.106, 45.202, 45.203; and*
- *TEC Chapter 46, since open-enrollment charters have no taxing capacity for interest and sinking purposes and, therefore, have no access to facility assistance.*

While we agree that there are sections of the TEC that are not specifically listed in Chapter 12A that are nonetheless non-exemptible, we disagree with the agency's conclusion that "the legislature clearly intended ... [that] districts may not seek an exemption from certain statutory provisions that lack a charter analog." First, there is no legislative intent that such an assumption by the Legislature existed. Second, and more importantly, assuming that the Legislature clearly intended such a conclusion would make TEC §12A.004(a)(2), the very next subsection after the one the alleged assumption springs from, meaningless and unnecessary as TEC Chapter 11, Subchapters A, C, D, and E and TEC §§ 11.1511(b)(5) and (14) and 11.162 lack a charter analog and yet have been specifically listed in the statute as non-exemptible. Such a reading breaks the fundamental rule of statutory construction that every part of a statute be read such that it has meaning.

It is instead far more likely that the Legislature intended TEC §12A.004(a) to be read as it was written. In other words, we believe the Legislature intended that any "requirement" that applies to an open-enrollment charter school, or one imposed by federal law (a list of requirements that may change over time), may not be exempted by a DOI. The fact that the Legislature in its very next breath included a separate non-exemptible item that is not applicable to open-enrollment charter schools shows that the Legislature clearly understood such provisions existed and was capable of adding them to the list of non-exemptible items where it saw fit to do so. Lawmakers' addition of TEC Chapters 28 and 39 to the list of specifically non-exemptible items despite also being required of open-enrollment charter schools can be read to have meaning. The reason is because should a future Legislature choose to amend the open-enrollment charter school statute in such a way that charters would no longer be required to comply with TEC chapters 28 and 39, these chapters would still be non-exemptible for a DOI, due to their having been separately and specifically listed as non-exemptible provisions in the DOI chapter.

While we do not agree with the logic behind the charter analog rationale, there are provisions of the TEC that are not specifically listed and are yet not exemptible because they either serve to impose a "requirement" only on TEA or on some other entity that is not a school district. Similarly, there are statutes that confer a benefit on a district but do not impose any "requirement" in relation to the benefit conferred, and thus they would not be exemptible. Such provisions are outside the language of §12A.003(b)(2) that requires districts to identify "requirements imposed by this code" from which it seeks exemption. As such, any provision of the TEC that does not impose a "requirement" on a district is outside the statutory definition of an exemptible requirement.

ATPE comment on §102.1309. Prohibited Exemptions. Subsection (b)(3) - *In addition to the prohibited exemptions specified in subsection (a) of this section, an innovation district may not be exempted from: (3) any other requirement from which the district of innovation cannot be exempted, as determined by the commissioner of education.*

As explained above, ATPE believes that it is in the interest of all parties for the immunity protections and procedural safeguards provided to school districts and school district employees in Chapter 22, Subchapter B of the TEC to be prohibited from exemption by rule to ensure that a DOI does not unintentionally waive these protections or find itself required to expend its resources arguing through litigation that it has not waived these protections. Adding this to the list of non-exemptible provisions would serve the public good by clarifying that these protections extend to DOI, regardless of the way that a DOI board of trustees identified their exemptions.

By the same token, ATPE believes that many important provisions of the TEC serve vital public policy interests and should not be exemptible. Just as the commissioner has recognized the need to expand the list of non-exemptible provisions by referencing statutes dealing with school finance, for example, ATPE urges the commissioner to consider making non-exemptible those statutes dealing with the teacher

pipeline and educator quality (TEC Chapter 21 and 22), as well as school safety (TEC Chapter 37) and parents' rights (TEC Chapter 26). Unlike charter schools that operate as alternatives to traditional public schools, school districts are the primary option for the enrollment of all Texas children and serve the important constitutional function of providing every child with access to a free public education. Parents, taxpayers, voters, and communities need assurances that the primary provider of a free public education in their districts will uphold the school laws of the state of Texas.

ATPE requests the Commissioner set forth by rule that a DOI may not be exempted from TEC, Chapter 22 Subchapter B Civil Immunity.

As explained above, to thwart possible litigation against DOI and DOI employees which would result in monetary damages, the clearest way to insure the civil immunity protections and procedures apply to DOI is for the commissioner, in these rules, to set forth that a DOI may not exempt itself from TEC, Chapter 22, Subchapter B Civil Immunity. Along with clarifying whether a DOI must list all the provisions they are exempting themselves from in their innovation plan, the commissioner's rules would hopefully set a clear course for DOI to follow that would not allow for the possibility that a DOI would unintentionally exempt itself from the civil immunity protections and procedures provided by the Texas Legislature. These commissioner rules would state in black and white that the civil immunity protections and procedures of Chapter 22 Subchapter B apply to DOI and would deter plaintiffs' lawsuits without the need for costly litigation to determine the definition of "requirement" as it applies to DOI and civil immunity protections and procedures.

ATPE comments on §102.1313. Amendment, Rescission, or Renewal. *A district innovation plan may be amended, rescinded, or renewed if the action is approved by a majority vote of the district-level committee established under the Texas Education Code (TEC), §11.251, or a comparable committee if the district is exempt from that section, and a two-thirds majority vote of the board of trustees.*

Please include within **TAC §102.1301 - Definitions** a definition of "comparable" as it relates to the requirement that an amendment, rescission, or renewal of a DOI plan be approved by the district-level committee established under the TEC, §11.251, or a comparable committee. The rules should make clear that a committee cannot be comparable to a committee established under TEC, §11.251, if the committee does not have the same general composition.

Please clarify that as part of the DOI enacting statute, TEC, §12A.007 is not exemptible either in whole or in part. The preceding should go without saying as both several principals of statutory construction and common logic lead to this conclusion. However, as there has already been at least one district's innovation plan that has included an attempted exemption from part of TEC, §12A.007 by seeking blanket exemption authority, ATPE believes that specific rule language covering this point is in order. Further, ATPE believes the commissioner's rules should provide that a DOI is prohibited from exempting itself from *any* provision in Chapter 12A Districts of Innovation.

Thank you again for your consideration of our comments on the proposed commissioner's rules with regard to innovation districts. For additional information, contact the ATPE Governmental Relations department at government@atpe.org or (512) 467-0071.