



TEXAS EDUCATION AGENCY

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Jim Nelson
Commissioner of Education

December 22, 2000

The Honorable John Cornyn
Attorney General of Texas
Price Daniel Building
P.O. Box 12548
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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION
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FILE # ML-41810-00
I.D. # 41810

Re: Applicability of Nepotism and Conflict-of-Interest Laws to Governing Boards of Open-Enrollment Charter Schools

Dear General Cornyn:

This letter is to request your opinion regarding the applicability of Chapter 573 of the Government Code and Chapter 171 of the Local Government Code to the members of the governing boards of open-enrollment charter schools.

Chapter 573 of the Government Code makes it an offense involving official misconduct for a "public official" to appoint, confirm the appointment of, or vote to appoint or confirm the appointment of a relative to a position directly or indirectly compensated from public funds or fees of office. See TEX. GOVT. CODE § 573.041. "Public official" is defined therein to include:

(A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state; [or]

(B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state.

Id. § 573.001(3).

Chapter 171 of the Local Government Code requires a "local public official" to file an affidavit disclosing a substantial interest in a business entity or in real property that is the subject of a vote or decision by a governmental entity, and to abstain from further participation in the matter involving that business entity or real property. See TEX. LOC. GOVT. CODE § 171.004. "Local public official" is defined therein as "a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature." *Id.* § 171.001(1).

Both chapters are expressly applicable to the members of boards of trustees of school districts, but a question arises as to whether members of governing boards of open-enrollment charter schools are likewise "public officials" or "local public officials" as defined in these chapters. Under Subchapter D of Chapter 12 of the Education Code, charter schools share some of the attributes of school districts and are subject to some of the same restrictions, but are exempted from others.

The Legislature has authorized the granting of charters to four types of sponsoring entities, see TEX. EDUC. CODE § 12.101(a), and the vast majority of the charters that the State Board of Education has granted pursuant to this authority have been to nonprofit corporations exempt from tax under Internal Revenue Code section 501(c)(3). A nonprofit corporation receiving a charter may create a separate board for the governance of the charter school, or may utilize its existing governing board. In either case, these board members, unlike school district trustees, are selected and removed according to the corporate by-laws or in the manner described in the entity's charter application, not elected as provided in Chapter 11 of the Education Code. And unlike school district boards, these boards do not have the power to levy and collect taxes or to exercise the right of eminent domain. See *id.* §§ 11.152, 11.155.

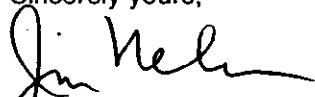
However, like school district trustees, these charter school board members are responsible for implementing the state's system of public education, *id.* § 11.002, receive public funds from the available school fund for the education of the children in attendance, *id.* § 12.106, are accountable to the State for the educational results obtained through the use of those funds and for compliance with established financial accounting practices in their expenditure of funds, *id.* § 12.104(b)(2)(K), must conduct open meetings and respond to open records requests as required of governmental bodies, *id.* § 12.105(b), and enjoy the degree of immunity from liability given to school board members, *id.* § 12.105(c).

The statutory intent in Education Code Chapter 12, Subchapter D regarding nepotism and conflict-of-interest restrictions is not entirely clear. Section 12.103 says that a charter school is subject to "federal and state laws and rules governing public schools." However, very few laws are directed at "schools" *per se*; rather, most laws governing school operations apply, as Government Code chapter 573 and Local Government Code chapter 171 do, to "school districts." It is possible that the Legislature intended such laws to be made applicable to open-enrollment charters through section 12.103. On the other hand, in reading Chapter 12 one could conclude that the Legislature was conscious of, and intended, the distinction between "schools" and "school districts." Section 12.012(a), describing home-rule school district charters, contains a comparable provision to that in section 12.103, but specifically says that a home-rule school district is subject to "federal and state laws and rules governing school districts." Furthermore, when in 1999 the Legislature decided to clarify the applicability of the Open Meetings Act and the Public Information Act to open-enrollment charters, it did so in an unambiguous way, recognizing that those statutes impose obligations on "school districts": "Any requirement in [chapters 551 or 552 of the Government Code] relating to a school district, school board, or school children applies to an open-enrollment charter school and to children attending an open-enrollment school." *Id.* § 12.105(b). The Legislature made no comparable change to section 12.103.

In summary, then, my question is: Are the members of a governing board of a sponsoring entity of an open-enrollment charter school (and the members of the governing board of the charter school, if such a separate board exists) "public officials" subject to Chapter 573 of the Government Code and Chapter 171 of the Local Government Code?

Thank you for your consideration of this request. Should you have any questions, please feel free to call David Anderson, General Counsel, at 463-9720.

Sincerely yours,



Jim Nelson
Commissioner of Education