



TEXAS EDUCATION AGENCY

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Felipe T. Alanis
Commissioner of Education

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OPINION COMMITTEE

RQ-0571-JC

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OFFICE OF THE ATTORNEY GENERAL
EXECUTIVE ADMINISTRATION

June 3, 2002

Honorable John Cornyn
Office of the Attorney General
Price Daniel Building
P.O. Box 12548
Austin, Texas 78711

2841

FILE # ML-42690-02

I.D. # 42690

Re: **Opinion JC-0492**

Dear General Cornyn:

This letter is to request withdrawal and clarification of your Opinion JC-0492, issued April 22, 2002. The request from my predecessor asked about the relationship between the authorization to utilize a "political subdivision aggregator" under Section 39.3545 of the Texas Utility Code and the minimum purchasing requirements under Chapter 44 of the Texas Education Code.

Section 39.3545 of the Utility Code authorizes a "person or political subdivision corporation" to register with the Public Utility Commission ("PUC") for purposes of negotiating the purchase of electricity. Our request focused on individuals or private corporations registering with the PUC and contracting with school districts in a manner that does not comply with the requirements of Subchapter B of Chapter 44 of the Education Code. We understand Opinion JC-0492 to generally require school districts to follow the requirements of that subchapter when purchasing electricity. We agree with that result.

Opinion JC-0492 focuses on the ability of a school district to participate in a "political subdivision corporation" created under Chapter 304 of the Local Government Code. The opinion concludes that a school district may not participate in such a corporation if it has electricity purchases in excess of \$25,000. The opinion is based on an understanding of a political subdivision corporation as a purchasing method that is not among those authorized under Section 44.031 of the Education Code. Our position is that joining a political subdivision corporation is an authorized action on the part of a school district, although one that does not excuse failure to comply with Chapter 44 of the Education Code.

We would ask you to reconsider the blanket prohibition regarding political subdivision corporations and determine whether a school district may participate in such a corporation, so long as the corporation itself complies with the requirements of Chapter 44 of the Education Code on behalf of the school district. A number of school districts in Texas have participated in political subdivision corporations based on the assumption that they could comply with those requirements through the corporation. Further, it is our understanding that at least some of the political subdivision corporations with school district participants in fact have been complying with the requirements of Chapter 44. The broad conclusion that they may not join political subdivision corporations at all could disrupt existing contracts in a manner harmful to those districts.

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Section 304.001 of the Texas Local Government Code authorizes "a county, municipality, hospital district, or any other political subdivision" (emphasis added) to join a political subdivision corporation. The phrasing utilized by the Legislature appears to be deliberately inclusive of all political subdivisions of the state. As we understand the opinion, a school district could participate in a political subdivision corporation if its aggregated electricity purchases were less than \$25,000¹. Given that some school districts could participate in a political subdivision corporation, we would suggest that the phrase "other political subdivisions" does include school districts, and that the legal focus should be on compliance with Chapter 44 of the Education Code rather than formation of or membership in the corporation itself.

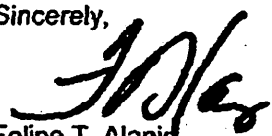
Section 44.031(a) lists a number of alternate methods for a school district to complete purchases greater than \$25,000. Section 44.0312 allows the board of trustees of the district to delegate a district's authority "to a designated person, representative, or committee", although the board may not delegate an action required to be taken by the board of trustees. The process set out in 44.031(b) requires "the district" to determine "to whom to award a contract". It would appear then that the board of trustees could delegate to a political subdivision corporation the selection of an electricity provider. Our assumption is that the political subdivision corporation as a delegee or agent of the district would have to follow the requirements of Section 44.031 on behalf of the district. There does not appear to be a role in Section 44.031 that is required to be taken by the board of trustees, but only "district" obligations that may be delegated by the terms of Section 44.0312².

Our basic conclusion is that Section 44.031 of the Education Code and Chapter 304 of the Local Government Code are not incompatible, and that both may be given full effect. The Local Government Code authorizes school district participation in political subdivision corporations. Chapter 44 of the Education Code requires minimum practices for electricity purchases in excess of \$25,000 and authorizes delegation of those functions. A construction that Section 44.0312 of the Education Code authorizes delegation to a political subdivision corporation gives effect to both statutes should be favored.

We would very much appreciate it if you would consider withdrawing JC-0492 in order to consider whether a school district may delegate to a political subdivision corporation its duties to comply with Section 44.031 of the Education Code with respect to electricity purchases in excess of \$25,000.

Thank you for your consideration of this request. Should you need any further information, please contact David Anderson, General Counsel, or Susan Hunter Smith, Senior Counsel, at (512) 463-9720.

Sincerely,



Felipe T. Alanis
Commissioner of Education

¹ Under Section 44.031(m) of the Education Code, some districts could be in the position of joining a political subdivision corporation for purposes of some campuses but not others.

² In contrast to the absence of actions required to be taken by a board of trustees under Section 44.031, compare Section 44.035, relating to "construction services". In that section the board itself is required "to determine which method" will be utilized to let a construction contract.