

State Board of Education

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April 7, 2008

The Honorable Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

ENTERED
RQ-0694-GA

FILE # ML-45615-08

I.D. # 45615

Re: **Request for Opinion Regarding Waiver Authority**

Dear General Abbott:

I am writing to ask for your opinion regarding the authority of the commissioner of education to waive the limit in Section 12.101(b), Texas Education Code, on the maximum number of open-enrollment charters that may be granted by the State Board of Education ("the Board").

Section 7.056 of the Texas Education Code authorizes the commissioner to grant a waiver of "a requirement, restriction, or prohibition imposed by this code or rule of the board or commissioner."¹ Subsection (e) prohibits a school district or campus from receiving a waiver from certain provisions of the Education Code². Subchapter D of Chapter 12 of the Education Code authorizes the Board to grant open-enrollment charters to certain "eligible entities."³ Subsection 12.101(b) provides that the Board "may not grant a total of more than 215 charters for an open-enrollment charter school." Chapter 12 of the Education Code is not listed among the provisions of the Education Code that may not be waived⁴.

¹ The reference to "board" means the State Board of Education. See Section 5.001, Texas Education Code.

² Subsection 7.056(f) allows additional provisions of the Education Code to be waived for certain districts.

³ Section 12.101(a), Texas Education Code authorizes open-enrollment charters to be granted to public or private institutions of higher education in Texas, non-profit corporations or "governmental entities".

⁴ While not relevant to this request, certain provisions of Chapter 12 may constitute requirements or prohibitions that fall within the ambit of more general limitations on waivers under Subsections 7.056(e)(1) (prohibition on criminal conduct) or (e)(2) (requirement imposed by federal law).

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The Board has adopted an annual application cycle for the approval of open-enrollment charters. A request for application is issued by the board each summer. Required applicant conferences are held through the fall, and applications are due to the agency by the end of the following February. Applications are reviewed for completeness and scored by an external review panel. Those scoring above a predetermined level are interviewed by a subcommittee of the Board, followed by an award made by the entire Board in September, allowing the new charter to open the following fall. The current application cycle has had 104 attendees at the applicant conferences for a maximum of four charters that may be granted under the Section 12.101(b) limit. The Board believes strongly in the positive effects of the state's charter program and expects to have significantly more qualified applicants than can be granted within the existing 215 charter school limit.

My first question is whether the commissioner of education grant a waiver to allow the Board to grant more than 215 open-enrollment charters.

Should your answer to my first question be "yes", other provisions of Section 7.056 become relevant. Subsection (a) provides that a "school campus or district" may apply for a waiver⁵. Subsection (d) limits the period of a waiver to three years. Subsection (b) requires "a written plan approved by the board of trustees of the district that states the achievement objectives of the campus or district" and "written comments from the campus or district-level committee" as part of the waiver application.

My second question is whether an entity other than a school district—specifically the State Board of Education--request a waiver of the limit on the number of charter schools under Section 12.101 of the Education Code.

Should your determination be that only a school district may request a waiver under Section 7.056, my third question is whether a school district request a waiver that would allow the granting of a charter school to operate outside of that district's geographic boundaries.

⁵ The "school campus or district" phrasing is repeated through subsections (b), (c) and (d) dealing with the process of applying for, granting and renewing a waiver. The agency has allowed charter schools to apply for waivers in the same manner as school districts pursuant to Section 12.104(a), Texas Education Code ("open-enrollment charter school has the power granted to schools under this title"). We assume that the questions asked in terms of school districts in this request will also apply to charter schools.

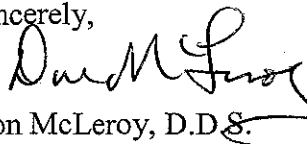
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Thank you for your consideration of this request. Should you require any additional information, please feel free to contact me or David Anderson, TEA General Counsel, at (512) 463-9720.

Sincerely,

A handwritten signature in cursive script, appearing to read "Don McLeroy".

Don McLeroy, D.D.S.
Chair, Texas State Board of Education

Cc: Robert Scott, Commissioner of Education