

IN RE: RQ-0430-GA	§	FOR CONSIDERATION BY
	§	
Whether the State Board of Education may	§	
adopt a rule prescribing general content	§	THE ATTORNEY GENERAL
requirements for public school textbooks,	§	
and whether the SBOE's authority over	§	
textbook adoption extends to ancillary	§	FOR THE STATE OF TEXAS
materials provided by publishers.	§	
Reconsideration of Attorney General	§	
Opinion DM-424 (1996)	§	

BRIEF OF TEXAS CITIZENS FOR SCIENCE

Texas Citizens for Science (TCS), an organization formed in Texas to defend the professionalism, accuracy, and integrity of science curriculum, instruction, and textbooks in Texas public schools, respectfully submits this brief in response to a request by the Attorney General's Opinion Committee regarding the above-referenced request to overrule Attorney General Opinion DM-424 (1996). After reviewing the original legislation (Senate Bill 1, 1995), the original AG opinion (DM-424, 1996), and the new request for an opinion (RQ-0430-GA, 2006), Texas Citizens for Science concludes that the Texas State Board of Education (SBOE) does not have the authority to create general textbook content requirements, that is, to regulate textbook or ancillary content beyond that explicitly allowed in the original 1995 legislation and 1996 AG opinion, specifically, conformation to the Texas Essential Knowledge and Skills (TEKS, the Texas public school instructional and textbook curriculum standards) and correction of factual errors, and *only* to these two content requirements.

In addition to the specific language of the statute itself, the history of the SBOE's treatment of textbook content prior to 1995, the legislative history of the law, and the history of textbook adoption in Texas subsequent to 1995 all make it clear that the 1996 AG opinion was correct. The SBOE engaged in massive textbook censorship prior to 1995 with consequences that were

bad for Texas and for the nation; this textbook censorship, with consequent distortion of curriculum and instruction, was engaged in for political, ideological, and religious reasons—that is, for non-educational reasons. The intent of the 1995 legislation was to remove *all* authority governing textbook adoption from the SBOE, but this was modified during legislative debate to just greatly weaken the SBOE’s control over this process. No changes to the applicable educational statutes have occurred since the original law was enacted by the Texas Legislature and subsequently interpreted by the Attorney General, so the relevant statutes remain unchanged. Finally, the contemporary request for a different interpretation and opinion has, as its presumed motive, a desire to return to the pre-1995 decades of complete SBOE control over textbook content so that censorship can be carried out as before, easily and secretly. For these reasons, among others that will be specifically discussed below, Texas Citizens for Science agrees that Attorney General Opinion DM-424 (1996) accurately and correctly analyzed this issue, and that the SBOE does not maintain authority over textbook content other than the statutorily-permitted TEKS requirements and correction of factual errors. Accordingly, TCS requests that the Attorney General issue an opinion reaffirming DM-424.

BACKGROUND AND SUMMARY

Prior to the revision of the Texas Education Code by Senate Bill 1 in 1995, the Texas SBOE deliberately and continuously engaged in massive textbook content censorship due to its power to prescribe general textbook content requirements and its authority to approve final textbook choices for purchase by the State of Texas for public school classroom use. The author of this brief was not an uninterested spectator of this abuse. As founder and president of the Texas Council for Science Education during 1980-1994, he vigorously observed, recorded, spoke, and wrote against the activities of the SBOE. An early example of this can be found at

<http://www.texscience.org/files/censorship-texas/>, “Censorship of Evolution in Texas,” published in 1982. During these fourteen years, the author witnessed censorship of biology, earth science, environmental science, history, social studies, government, economics, and health textbooks, and even the dictionary! Censorship took a variety of forms: usually textbook publishers made the required content modifications before or after textbooks were submitted, removing or changing items objectionable to the majority of Board members, such as birth control, evolution, or the history of the U.S. labor movement. But if a publisher unexpectedly refused to make the changes for some uncharacteristic reason, such as placing accuracy, integrity, or principle above profits, the book was simply rejected and not purchased. This is what happened to the dictionary; its publisher refused to remove the objectionable sexual words and definitions, and Texas continued to use the old editions adopted six years before whose bindings were now falling apart.

The SBOE derives its power to censor textbooks from a number of unique factors: (1) The authority to adopt textbooks in Texas is highly centralized—only the 15 members of the SBOE have total authority to decide which books to purchase; during approximately 1970-1988, the chairman of the SBOE in collaboration with his hand-picked Commissioner of Education would make all the decisions; (2) Texas is by far the largest adoption state—a state that chooses and buys all its school textbooks at one time each year—with a textbook purchase budget of \$300-500 million per year, second largest in the country, so publishers will do almost anything to get a Texas textbook contract; (3) Texas has a bizarre textbook adoption process, allowing private citizens to speak before the Board during public testimony, presenting positive or critical information about the textbooks, to attempt to persuade the Board members in their textbook choices; and (4) the fifteen SBOE members are elected, not appointed, so individuals who have an ideological or religious agenda and want to impose this on the Texas public education system

only have to win a low-profile election, and they can begin. This system is unique in the United States: no where else in the nation do so few individuals have so much control over public school textbook content. To win an extremely lucrative Texas textbook contract, publishers need only win the approval of eight Board members or, more commonly, not gain the enmity of more than seven members. Of course the textbooks must meet the TEKS requirements, but this is not difficult and is almost never the problem, since the TEKS are competently produced by TEA staff members, and the textbook publishers and authors know exactly what is expected of them and have plenty of time to complete their books.

Instead, problems occur when the texts contain content that some Board members object to (such as human and industrial responsibility for pollution, the topic of evolution, ages of geologic events in millions of years, the history of racism in the United States, the existence of homosexuality among humans, and the effectiveness of condoms for preventing pregnancy and sexually-transmitted diseases) or do not contain information that some Board members want included (such as the alleged scientific controversies about the mechanism of evolution, the alternative “scientific” explanation of intelligent design for the origin of species, a uniformly positive appraisal of American history and our treatment of other countries, condemnation of the gay “lifestyle,” and an abstinence-only approach to prevention of teenage pregnancy and STDs). When these problems occurred in the past, prior to 1995, the SBOE had authority over general textbook content requirements, and these problems were resolved secretly, out of the public eye, by “negotiations” with the publishers. Since 1995, however, without the power to write general textbook content requirements, these problems have had to be resolved in public sessions, with press attention and full public accountability. The resulting censorship received extensive press coverage and public attention, and was no doubt deeply embarrassing to the SBOE members

responsible. This explains the current attempt to reclaim the Board's old authority to write general textbook content requirements: with such authority, censorship is easier and can be carried out with almost no press and public oversight. SBOE Chair Geraldine Miller said that, if general textbook content authority was restored, the process “. . . would be easier for the publishers and easier for us.” Yes, easier *for* the SBOE but not easier *on* the school children of Texas.

Before 1995, the SBOE chairman and TEA Commissioner would communicate with publishers before the textbook adoption process would begin. Most publishers knew what was expected, and they willingly engaged in self-censorship or pre-censorship of their own textbooks to ensure that there wouldn't be any problems. Some publishers, however, would submit books with “errors” that would be publicly criticized by individuals and organizations with extreme ideological and religious viewpoints. SBOE members would use this “public input” as justification to require that publishers make hundreds of changes before their textbooks could be adopted. Examples include diminishing evolution content in biology and earth science textbooks; removing information about homosexuality, condoms, self-exams, birth control, and other topics from health textbooks; changing history textbook content so it presented actions of the U.S. more favorably, such as our treatment of slaves, labor unions, and other countries; removing references to geologic ages in millions of years from history and science textbooks; and many other examples. Almost all publishers submitted to what was, in effect, state intimidation and legal extortion. The procedure was simple: textbooks would be adopted subject to completion of “necessary revisions” undertaken during “private meetings” with TEA staff members, so that the books would be in “compliance” with “Texas standards” and “free of errors.” In order to preserve the lucrative textbook contract almost in hand, publishers would agree to almost any

textbook revision during the clandestine post-adoption content “negotiations.” These textbooks were then often used throughout the country, much to the dismay of northern, northeastern, and western seaboard states, since publishers would literally write, edit, or “revise” their textbooks for the Texas market. Today, modern methods of textbook publishing have mitigated this circumstance, and separate regional editions can be manufactured more easily, but Texas editions are still used in most southern states, where conservative school districts know what to expect.

Often little thought is given to how curriculum and textbook censorship adversely affects the education of Texas public school students. As TCS laboriously pointed out over the decades and documented on the TCS website at <http://www.texscience.org/>, Texas students typically score in the bottom 10% of national achievement tests and Advanced Placement exams, in the same range as other southern U.S. states in which similar curriculum and textbook censorship is pervasive. In particular, the majority of Texas students graduate from high school with an incomplete and distorted understanding of modern biology, American history, modern economic systems, and personal health. This last topic is of most concern: due to censorship of condom prophylaxis, birth control, and information about sexuality, Texas teenagers have among the highest rates of unwanted pregnancy, illegitimate births, single mothers, sexually-transmitted diseases, and HIV infection in the United States, which means the highest among the industrialized countries of the world. Censorship of vital health information in the health education curriculum and textbooks by the SBOE is one of the major public health problems in Texas, but our politically-appointed state health commissioner refuses to do anything about it. During the 1994 health education textbook adoption, the process was so abused by the SBOE that the SBOE “requested” that publishers make hundreds of revisions in their texts that would have severely damaged their health content. One publisher refused to censor its textbook and

pulled it from consideration, informing the SBOE that the required revisions were “potentially injurious to the students of Texas,” and it was being asked to provide a product “that does not provide children with adequate instruction on life-threatening issues,” specifically those issues involving teenage sexuality: pregnancy, STD, and HIV prevention.

For another example, a teacher of life and earth sciences for both Texas high schools and undergraduates in Texas colleges and universities for 25 years estimates that over 90% of science students have either a faulty, incomplete, or no knowledge of modern evolution, and at least 60% are actively opposed to learning about it, for they believe in creationism that they have been taught in their home and Bible classes. Since evolution underlies all of modern biology, this means that the great majority of Texas students leave school with a very inadequate understanding of the science most important for their health and well-being. But this poor achievement is true for all technical, math, and science disciplines. Texas business leaders have long complained about the poor technical workforce we have in Texas—we don’t produce the knowledge workers among our young people that we will need to compete with the rest of the world in the 21st century. One of the major reasons (but not the only one, of course) for this state of affairs is the constant and unremitting pressure placed upon textbook authors, publishers, curriculum designers, and teachers by members of the SBOE to dumb down, distort, misrepresent, and censor educational content. The claims by some Board members that they want students to learn critical thinking are, frankly, just rhetoric, since the Board’s actions speak louder than their words. Students are just not going to learn the modern information they need to survive and succeed in the modern world if the state board and agency that regulates what information they receive doesn’t want them to have it. I have requested that SBOE members pass

a resolution asking school officials and teachers to teach science—particularly the topic of evolution—more accurately and completely, but this request was refused.

To deal with this amazing history of censorship and mandated ignorance, the complaints of business leaders, and the embarrassing national press coverage, the authors of Senate Bill 1 in 1995 sought to limit the SBOE’s authority over textbook adoption. The goal was to loosen the SBOE’s counterproductive stranglehold on textbook content and choice, and give that authority to local school districts, as is the case with most states in this country (non-adoption states greatly outnumber adoption states in the U.S.). The initial draft of SB1 gave the SBOE no role in textbook adoption, but since Texas has always provided textbooks to school districts at state expense (paid for from a multi-billion dollar general education fund which the SBOE controls independently of the state legislature), it was thought necessary by legislators to have the SBOE retain minor control over textbook selection, and the ultimate criteria were explicitly specified. Potential textbooks would be reviewed by SBOE committees, and acceptable books would be placed on “conforming” and “nonconforming” lists, or rejected, based on their completeness and accuracy. Only textbooks placed on the two lists could be chosen by a school district, but in practice, books placed on the nonconforming list are rarely chosen, for additional state requirements place an almost insurmountable burden on a district if they dare to choose books from the nonconforming list. The SBOE was further constrained on the criteria they could use to adopt books: (1) physical specifications, such as a rugged binding, (2) conformance to TEKS curriculum standards, and (3) factual accuracy (books must be revised or be rejected if they contain “factual errors”). Thus, the SBOE’s authority to adopt textbooks in 1995 went from virtually unlimited statutory control over any topic or content item—based on nothing more than the political, ideological, and religious opinions, beliefs, or biases of at least eight individual

members—to a much more limited role. This, in theory, gave much more control to local school districts to choose textbooks from a conforming list that may contain several different publishers’ texts, and the potential for embarrassing, damaging state-level censorship was reduced.

Despite the new post-1995 limited role, the process nevertheless continued to allow the opportunity for unscrupulous Board members to censor textbooks based on their power to (1) adopt and interpret the specific TEKS requirements and (2) to determine what is or is not a “factual error” that necessitates forced textbook content revision or rejection. In fact, attempts by the SBOE to censor textbooks is today as bad as it has always been, only now the Board member’s acts are subject to much greater public exposure. The intense degree of public and press attention paid to censorship of textbook content sometimes makes it less likely that members will vote to support the lowest prejudices of socially conservative and religious textbook critics. For example, in 2003 only four members voted to censor biology texts—by inserting bogus and misleading material about evolution and the origin of life that would have gravely damaged those sections that discussed these topics—despite an extremely expensive and intense effort by both state and national creationist organizations to accomplish this goal. Prior to 1995, this censorship would have occurred, since the possession of general textbook content authority would have provided SBOE members several ways to force the publishers to revise the texts in scientifically-inaccurate ways without public or press oversight. In fact, TCS believes that this 2003 loss by the religious and social conservatives on the SBOE is the primary reason there is now a new attempt to win back general textbook authority. If they regained the general textbook content authority by a new AG opinion, the biology textbooks would be among the first to suffer in 2009.

On the other hand, the SBOE voted in 2002 to reject an environmental textbook because the publisher refused to change a section that placed the blame for certain types of pollution on businesses, which the SBOE decided was a “factual error.” The health education textbooks were adopted in highly-censored form in 2004 by overwhelming majority vote of the SBOE. In this case, despite the epidemic of teenage pregnancies and STDs in our state, and the fact that over 60% of high school students are sexually active, the SBOE adopted health books that promoted abstinence-only sex education and completely omitted information about condoms and sexual activity vital to the health and well-being of Texas students, especially female students and their families. So the SBOE has shown its willingness in recent years to continue censoring textbooks, even with less authority than they had prior to 1995. If the SBOE is allowed to adopt a rule prescribing general textbook content requirements or standards, as one member requests, then textbook censorship will simply be accelerated, with corresponding accelerated damage to Texas public education.

Texas Citizens for Science has always advocated either removing all textbook selection power from the SBOE or, if the beneficial program of error correction is to be retained, to mandate that content specialists, such as university professors, have ultimate authority to decide what is or is not a factual error, as the best way to solve this decades-old problem. Another solution that worked well for several years under a former governor was the appointment of SBOE members rather than their partisan election, but Texas citizens in their wisdom voted to return to the old system of elected SBOE members. In hindsight, this really was a wise decision, since the current governor could appoint fifteen SBOE members who would vote to censor and distort evolution content in biology textbooks rather than the five elected members we have now. At least the Commissioner of Education is now appointed by the governor rather than by the Board (actually,

hand-picked by the SBOE Chairman and then confirmed by majority Board vote), so there exists the possibility for some independent oversight of textbook adoption processes. But this remedy works only in theory, not in practice when the governor and SBOE share political, ideological, and religious philosophies, as they do today.

There is quite a record of attempts to change the TEC to permit textbook censorship by allowing the SBOE to write general textbook content standards and, in fact, implementing a few specific ones at the same time. The 2005 Texas Legislature saw two bills, House Bills 220 and 2534, submitted to accomplish this task (for details, please see "House Bills 220 and 2534 Will Return Texas to Its Dark Ages" at <http://www.texscience.org/files/censorship-tx-hb.htm>). HB 220, for example, would have amended the TEC to create the following rule:

“The State Board of Education shall by rule adopt guidelines that define general textbook content standards under this subchapter, including standards related to curriculum requirements under Section 28.002. The board shall reject any textbook that does not comply with the textbook content standards adopted under this subsection.”

Advocates for this legislation included SBOE member Terri Leo, as recorded in the following news article (<http://www.dfw.com/mld/dfw/news/legislature/11466091.htm>):

State board member Terri Leo, a social conservative Republican from Houston, said the legislation would simply restore to the state board its authority over textbooks.

"Without SBOE authority to establish general textbook content standards, books with viewpoint discrimination, bias, a negative portrayal of the free enterprise system and U.S. citizenship and extremely objectionable or inappropriate content can be and have been approved," Leo said.

Ms. Leo's statements are disingenuous. The "viewpoint discrimination" and "bias" she refers to are the information about evolution in biology textbooks. Her contention that textbooks that contain a "negative portrayal of the free enterprise system and U.S. citizenship" have been approved is nonsense. The "extremely objectionable or inappropriate content" she mentions are

the few references to gay people in some textbooks, or perhaps information about evolution or dates in the millions of years, which she herself would find “extremely objectionable.”

These bills did not pass and were not even seriously considered by Texas House members, who had more important items to deal with. The failure to pass these bills in 2005 led directly to the Leo Opinion Request RQ-0434-GA in 2006. As the Texas Attorney General explains at <http://www.oag.state.tx.us/opinopen/opinhome.shtml>:

Unless or until an opinion is modified or overruled by statute, judicial decision, or subsequent Attorney General Opinion, an Attorney General Opinion is presumed to correctly state the law. Accordingly, although an Attorney General Opinion is advisory, it carries the weight and force of law unless or until it is modified or overruled.

Thus, if the DM-424 (1996) opinion is reversed, Terri Leo and other anti-science, pro-censorship advocates will have accomplished by a legal tactic what they could not accomplish by legislative action with press and public scrutiny. This is another reason why DM-424 should be reaffirmed: there is no legislative will to change the law as it now stands. When given the opportunity to change the TEC to give the SBOE general textbooks content authority, the legislature refrained.

ARGUMENT

I. NEW OR RESTORED GENERAL TEXTBOOK ADOPTION STANDARDS WILL ONLY PERMIT ADDITIONAL CENSORSHIP BY THE STATE BOARD OF EDUCATION

The request RQ-0430-GA (January 6, 2006; hereafter the “Leo Request”) from Geraldine Miller, Chair of the SBOE, and Terri Leo, Member of the SBOE, asks the Texas Attorney General to reconsider Opinion DM-424 (1996), suggesting that it misread the Texas Education Code (TEC) and misinterpreted legislative intent, that SBOE establishment of general textbook content requirements or standards should be considered lawful under current statute and serves a legitimate state interest, and that including ancillaries as part of the official state textbook

approval process is the correct interpretation of the TEC. The Leo Request claims that Opinion DM-424 is “erroneous on its face and should be **REVERSED**.” The present brief disagrees with these suggestions, instead concluding that the original 1996 AG opinion was correct and should be reaffirmed.

The Leo Request alleges that the TEKS “tell publishers what textbooks **should** include,” while “general textbook content standards tell publishers what textbooks **should not** include.” The Leo Request gives examples of such standards: “no sensational violence, no blatantly offensive language or illustrations, no group stereotyping.” These examples are disingenuous, since they are seemingly innocuous, but would be actually be used by the SBOE to (1) force publishers to remove “sensational” descriptions of corporate and police violence against labor union workers, white citizen violence against slaves, and U.S. military violence against other nations; (2) force publishers to remove “offensive” illustrations of breast self-exams and human genitalia in health books, photos of developing vertebrate embryos and evolving moths in biology books, and fossil history charts with time-lines in millions of years from earth science books; and (3) force publishers to remove “stereotyping” pictures from textbooks of a woman carrying a briefcase, which the SBOE said undermined traditional values, and positive references to Islam, which they called propaganda. In short, *any* and *every* general content standard would be used by the SBOE to censor textbooks in unfair and biased ways, for *every one* of the above censorship examples is one that SBOE members actually accomplished or tried to accomplish in recent years past as an expression of members’ political or religious ideologies, not for legitimate educational reasons.

Here’s another example of a Leo Request-alleged “should not” general textbook content standard used for decades by the SBOE to censor biology textbooks of the topic of evolution:

§ 1.3 Textbooks that treat the theory of evolution should identify it as only one of several explanations of the origins of humankind and avoid limiting young people in their search for meanings of their human existence.

(1) Textbooks presented for adoption which treat the subject of evolution substantively in explaining the historical origins of humankind shall be edited, if necessary, to clarify that the treatment is theoretical rather than factually verifiable. Furthermore, each textbook must carry a statement on an introductory page that any material on evolution included in the book is clearly presented as theory rather than fact.

(2) Textbooks presented for adoption which do not treat evolution substantively as an instructional topic but make reference to evolution, indirectly or by implication, must be modified, if necessary, to ensure that the reference is clearly to a theory and not a verified fact. These books will not need to carry a statement on the introductory page.

(3) The presentation of the theory of evolution should be done in a manner which is not detrimental to other theories of origin.

The infamous anti-evolution Section 1.3 of the 1960s-1980s is actually very much a traditional SBOE “should” textbook content standard, and a perfect example of the type of content requirement that Terri Leo and some other Board members would immediately vote to implement as textbook standards if given permission by a new AG opinion that reverses the 1996 opinion. Returning this anti-science textbook censorship requirement would be difficult to pass and more difficult to enforce today, since it would immediately be litigated and thrown out by the courts, but it is the education-damaging type of textbook content standard that radical social conservatives motivated by religious ideologies will implement or attempt to implement to use to intimidate publishers, teachers, and school administrators to keep them from teaching evolution. All topics and disciplines will be subject to this kind of intimidation, not just evolution, if the Leo Request is granted. Frankly, past SBOE history up to the present year suggests that, if allowed to write general textbook content standards, every one will be used for ideological and religious censorship, not for legitimate educational purposes.

II. THE TEXAS EDUCATION CODE IDENTIFIES SPECIFIC TEXTBOOK ADOPTION CRITERIA BUT DOES NOT GRANT GENERAL AUTHORITY FOR ADDITIONAL TEXTBOOK CONTENT STANDARDS

Although the original SB1 stripped the SBOE of all power over textbook selection, intending to leave textbook adoption to the individual school districts as is usual in this country, the Leo Request points out that three sections of the final statute—§ 31.023, § 31.024, and § 28.002—preserve some SBOE authority in this area. This is true to some extent, but the entire argument rests on the amount of authority—the degree of specificity or generality—allowed to the Board over textbook adoption. The Leo Request states that the final version of SB1 “preserved and reaffirmed SBOE authority in this area, including the power to enact general textbook content requirements.” This is surely an incorrect interpretation of the statute. The three cited sections of the legislation are very specific about textbook criteria and content: § 31.023 (a) mandates that the textbooks meet applicable physical standards and conform to the TEKS; § 31.023 (b) requires that textbooks be free from factual errors; § 28.002 (c) specifies how the TEKS are to be identified (explicitly *not* solely by the SBOE, but with the “direct participation” of several other parties); and § 28.002 (h) states that the SBOE and school districts shall continue to foster the teaching of U.S. and Texas history and the free enterprise system. *Nowhere* in any of these sections of the statute is the SBOE explicitly granted general textbook content authority of any type or degree.

The Leo Request, using convoluted reasoning, tries to argue that the statute gives them general textbook content authority, but it is simply not there. If the Texas Legislature wished to grant the SBOE such authority, it would have specified that in the statute. In particular, the Leo Request argues that because the SBOE and individual school districts are given shared *specific*

authority over *three itemized* standards (U.S. history, Texas history, and the free enterprise system) for regular subject matter, reading courses, and textbook adoption in § 28.002 (h), then this allows one to conclude that the legislature intended to give the SBOE *general* authority over *all textbook* standards. This extremely tendentious argument simply cannot be sustained by logic and plain language, and is obviously fallacious due to significant category differences. By itemizing and specifying the granted authorities, the legislature clearly intended the SBOE to have demarcated and limited authority.

Equally without logic is a second Leo Request's argument that since the completed 1995 legislation granted the SBOE final authority to define the TEKS and to judge textbook conformity to them (both true), and that because the SBOE had essentially the same powers *before* 1995 when the TEC gave the SBOE authority over the Essential Elements, the pre-1995 equivalent to the TEKS (also true), and that prior to 1995 the SBOE had general textbook content authority (again true), then it is reasonable to conclude that the legislature intended the SBOE to once again have the same general content authority *after* 1995. Once again, the conclusion does not follow from the premises, because the argument is fallacious. In its carefully spelled-out authorities granted to the SBOE in 1995, the legislature didn't just fail to mention the grant of general textbook content authority, it deliberately refrained from giving the SBOE that power. The legislation started from a point of giving the SBOE *no* authority over textbook content and selection, and then added a few limited and specified powers during debate. It is reasonable to assume that if the legislature wanted the SBOE to have the ultimate power of general control over textbook content, it would have granted that power, but it did not.

Attorney General Opinion DM-424 (1996) explicitly stated this. The TEC contains "Limitation on Authority" language that expressly limits the SBOE's authority, forcing the AG

to strictly construe the new statute's grants of power to the Board. The 1996 Opinion makes note of the fact that § 31.003 gives the State Board of Education the power to adopt rules "for the adoption, requisition, distribution, care, use, and disposal of textbooks," without specifying them, but then explicitly and deliberately specifies rules for textbook *content* in § 31.023, indicating that this is an area which the legislature wishes to restrict the SBOE's otherwise broader authority over textbook selection rules. The 1996 Opinion states:

When given rule-making authority, a state agency generally may adopt only such rules as are authorized by and consistent with its statutory authority. An agency rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions.

The revised TEC, in other words, contains both specific provisions regarding textbook selection *and* a general intent to reduce and limit the SBOE's authority. This mandates an opinion that general textbook content requirements are *not* authorized by or consistent with relevant statutory provisions.

A third Leo Request argument is that current TEC Section 28.002 (h) refers in part to "adoption of textbooks" by both the SBOE and school districts in fulfillment of a "primary purpose," and this fact refutes Opinion DM-424's finding that subsection (h) "does not confer any additional power to the board with respect to textbook adoption," such as establishing general textbook content standards, because its language is largely identical to former Section 21.101 (d), whose "primary purpose" language was to "give school districts some guidance in formulating their local curriculum plans." Once again, the Leo Request's interpretation is wrong and the original 1996 opinion was correct: there is no license here to conclude that the Board was granted or allowed to keep its old general textbook content authority. The new language of Section 28.002 (h) certainly does add both the "State Board of Education" and "adoption of textbooks" to the requirement to "foster" the teaching of U.S. and Texas history and the free

enterprise system, but *that's all it does*. It does *not* specify or grant *general* textbook content authority to the SBOE, so the 1996 AG Opinion is certainly correct that this new language “does not confer any additional power to the board with respect to textbook adoption,” that is, any power *in addition* to that explicitly specified and granted. The fact that the SBOE had such general authority prior to the 1995 TEC revision is irrelevant when evaluating the language of this section; if the legislature had wanted to grant additional powers to the SBOE under the new section, it would have done so. Because it did not, there is no logical reason to assume that such powers were granted.

The fourth and final Leo Request argument—the most important one—is as incorrect and illogical as the first three. The 1996 AG Opinion noted that “it has been argued that the license to adopt general textbook content requirements or standards can be found in TEC section 31.022 (1995),” which provides, in part:

(b) The board shall adopt rules to provide for a full and complete investigation of textbooks for each subject in the foundation curriculum at least every six years...

(c) The board shall adopt rules to provide for a full and complete investigation of textbooks for each subject in the enrichment curriculum on a cycle the board considers appropriate.

The 1996 Opinion continued by stating that it did “not believe section 31.022 gives the board authority to adopt the proposed content guidelines as part of their ‘full and complete investigation’ of textbooks.” Instead, the Opinion stated that the SBOE’s investigation is limited to consideration of the criteria for textbook adoption set out in section 31.023: physical specifications, TEKS elements, and factual errors.

Against this, the Leo Request quoted Opinion DM-424 (1996) to the effect that, “[n]o such broad authority over textbook adoption or specific control over content is found in the new

Education Code” because “[w]hen the legislature amends a statute and omits language of the former statute in its amended version, the legislature is presumed to have intended to change the law.” But, the Leo Request argues:

In fact, however, new TEC Section 31.022 (b) and (c) *does not omit* the old language. It twice *reiterates* [the old language of Section 12.24 (a)] (“The board shall adopt rules to provide for a full and complete investigation of textbooks ...”). Thus, the statement in DM-242 that “[w]e do not believe section 31.022 gives the board authority to adopt the proposed content guidelines as part of their ‘full and complete investigation’ of textbooks” is counterfactual.

It defies logic to conclude, as Opinion No. DM-424 concludes, that the old TEC **permitted** the SBOE to establish general textbook content standards even though old Section 21.101(d) **mentioned neither** the SBOE **nor** textbook adoptions, while the new TEC **prohibits** the SBOE from establishing general textbook content standards even though new Section 28.002(h) **mentions both** the SBOE **and** textbook adoptions. It denies reason to contend, as Opinion No. DM-424 contends, that the same language which in old TEC section 12.24(a) **supported** the SBOE’s instituting general textbook content standards, now **strips** the SBOE of that power when **repeated** in new TEC Section 31.022 (b) and (c). The legislature either carried over or strengthened the language of the old TEC in the new TEC on these points. It intended no change in statute. The SBOE retains power under the current TEC to establish general textbook content standards. Opinion No. DM-424 is erroneous on its face and should be **REVERSED**.

The breathless and histrionic style of Opinion Request RQ-0430-GA, with its many bold-faced and all-caps words, is identical to the literature produced by the Educational Research Analysts organization, founded by Mel and Norma Gabler over 40 years ago. This organization has in the past provided SBOE Member Terri Leo with literature, handouts, and pre-written motions to use to influence SBOE textbook selection, such as for the biology adoption in 2003 and health education adoption in 2004. Educational Research Analysts (ERA) does not hide its mission; its website (<http://www.textbookreviews.org/>) prominently displays it: “We are a conservative Christian organization that reviews public school textbooks submitted for adoption in Texas. **Our reviews have national relevance because** Texas state-adopts textbooks and buys

so many that publishers write them to Texas standards and sell them across the country.” The ERA’s first “subject area of concern” is “Scientific weaknesses in evolutionary theories.” The Leo Request is presumably a product of ERA, submitted to the Attorney General over the signatures of Terri Leo and SBOE Chair Geraldine Miller, perhaps without the latter’s knowledge of its source. If so, that would explain the Leo Request’s illogic and disingenuousness, both common attributes of all ERA literature.

The Leo Request argument quoted above would have some validity if the disputed language of pre-1995 Sections 21.101 (d) and 12.24 (a) and post-1995 Sections 28.002 (h) and 31.022 (b) and (c) actually referred to the relevant point of dispute, that is, if they were the source of the SBOE’s authority to write general textbook content standards and to select or reject textbooks based on those standards. *But they are not.* As demonstrated earlier, new Section 28.002 (h) does *not* specify or grant *general* textbook content authority to the SBOE, but only very limited, specific, and joint authority to foster the teaching of U.S. and Texas history and the free enterprise system. The new TEC at Section 28.002 (h) does indeed mention both the SBOE and textbook adoptions, as claimed in the Leo Request, but not in the context it claims, that of establishing general textbook content standards. Contrary to the Leo Request, the DM-424 conclusion that the old TEC permitted the SBOE to establish general textbook content standards had nothing to do with old Section 21.101(d), so its successor with suggestive language, new Section 28.002 (h), is irrelevant in establishing such authority.

The refutation of the Leo Request argument about Sections 12.24 (a) and 31.022 (b) and (c) is similar. As the Leo Request claims, the Opinion DM-424 did indeed state that pre-1995 TEC Section 12.24 gave the SBOE “broad powers” and “great discretion” to consider “textbook

content” in their evaluation and selection of textbooks. But Section 12.24 (b) is also extremely relevant. These two sections in the old TEC read as follows:

Sec. 12.24. SELECTION AND ADOPTION.

(a) The State Board of Education shall adopt rules to provide for a full and complete investigation of all books and accompanying bids and for an opportunity for members of the public to comment in regard to textbook content or in support of or against any textbook presented.

(b) The books selected and adopted shall be those which in the opinion of the board are most acceptable for use in the schools. Quality, mechanical construction, paper, print, price, authorship, literary merit, and other relevant matters shall be given such weight in making the decisions as the board may deem advisable.

Note that the important phrase repeated in Sections 31.022 (b) and (c), “The board shall adopt rules to provide for a full and complete investigation of textbooks,” is originally (in almost identical wording) in Subsection 12.24 (a), as the Leo Request so emphatically emphasizes to make its argument. However, Subsection 12.24 (a) deals with the rules of the *mechanics* of the textbook adoption procedure, *not* for rules governing textbook *content*. The textbook content rules are in Subsection 12.24 (b), particularly the rule that the “books selected and adopted shall be those which in the opinion of the board are most acceptable for use in the schools,” and that the criteria to make this selection include “other relevant matters,” which TCS agrees could be interpreted to include textbook content, even though it is not explicitly specified. Here, in the pre-1995 TEC Subsection 12.24 (b), the SBOE is indeed given authority to select textbooks based on its “opinion” of a textbook’s content.

But Subsection 12.24 (b) is *missing* from the 1995 TEC at Section 31.022 and at every other section, and this is no accident. The Leo Request’s argument, that Opinion DM-424 “denies reason to contend, . . . that the same language which in old TEC section 12.24(a)

supported the SBOE’s instituting general textbook content standards, now **strips** the SBOE of that power when **repeated** in new TEC Section 31.022 (b) and (c)” is manifestly false, because the old TEC language that supported SBOE general textbook content authority was in Subsection 12.24 (b), *not* Subsection 12.24 (a) as Leo claims, while the repeated language in new TEC Section 31.022 is from Subsection 12.24 (a), which has no bearing on general textbook content standards at all. So Opinion DM-424 was correctly reasoned. The absence of Subsection 12.24 (b) from the 1995 TEC makes the intention of the legislature clear: removal of any and all rules that gave the SBOE any control over textbook content other than conformation to the TEKS and factual accuracy, exactly as Opinion DM-424 reasonably argued. It is clear that the Leo Request, for whatever reason, confused or conflated the two subsections, which are in reality quite distinct, and this revelation completely nullifies the Leo Request argument.

But wait . . . there’s more! Strangely enough, the true statutory source of the SBOE’s pre-1995 power to select, adopt, reject, and censor textbooks was completely overlooked by the Assistant Attorneys General when they researched and wrote the DM-424 opinion in 1996. Here is the specific source of the SBOE’s power in the old TEC:

CHAPTER 31. TEXTBOOKS
SUBCHAPTER B. STATE ADOPTION, PURCHASE, ACQUISITION,
AND CUSTODY
§ 12.13. ADOPTION BY STATE BOARD OF EDUCATION.

By majority vote, the State Board of Education may remove books from a list submitted by a subject area committee

Only an organization intimately familiar with the entire public and private process and history of textbook adoption in Texas, such as the TCS, would understand what this rule means, and the AG office in 1996 did not. Prior to 1995, the SBOE had the power to remove any book from a list of textbooks selected by the subject area committee for adoption, for whatever reason a

majority of the Board wished. Since the SBOE Chairman always controlled a majority of the Board, that single person, usually in consultation with his hand-picked Commissioner of Education, could reject or censor any textbook he wanted. Many textbooks were censored.

As explained earlier, the process was simple: After textbooks were submitted to the SBOE for adoption by publishers, a state textbook committee for every discipline chose all the books from the submitted list that met the Essential Elements. These books were subjected to a public hearing, in which the controversial ones (biology, history, social studies, health, environmental science, earth science, etc.) were attacked by ideological and religious extremists. This allowed the conservative SBOE members and their staff to identify what controversial material the textbooks contained (evolution, history of American racism or socialism, gender equality, birth control and prophylaxis, explanations of health hazards from industrial pollution, dates in millions of years, etc.). These textbooks then received *preliminary adoption* subject to the condition that they would be “revised” by the publishers during secret staff negotiations *after* committee selection but before *final* adoption by the SBOE and TEA. If publishers refused to “revise” (i.e. censor) their textbooks, the books would be rejected by majority vote, and they knew it. Few to no publishers stood up to this censorship, which would have cost them millions of dollars in lost contracts. After revisions were agreed to, the textbooks received official adoption by the TEA, multi-million dollar contracts were signed, and the textbooks were purchased and distributed to unwitting Texas students. TCS has always characterized this process as legal extortion, since the SBOE could force publishers to change their textbook content for non-educational reasons, to simply coincide with the majority’s personal ideological and religious biases.

Soon, it was common for publishers to pre-censor or self-censor their textbooks, since they knew what to expect and didn't want to undergo the experience; this led to a tremendous dumbing-down of textbook quality during the 1960s-1980s, which was recognized by teachers and education researchers and publicly commented upon in books and articles. For example, one famous article in *Science* documents the gradual minimizing of and equivocation about the topic of evolution in biology textbooks during this period; many educators believe that Texas biology textbook censorship was probably the primary reason for this phenomenon. Writing a textbook for the lowest-common denominator, so that it is unobjectionable to anyone, no matter how biased or bigoted, removes all relevant and interesting content from textbooks that deal with controversial subjects, and textbook quality deteriorated. The censorship has mitigated somewhat in recent years due to responses by concerned citizens and organizations that oppose this process, but censorship still continues. For example, the health education textbooks adopted in 2004 in Texas were self-censored by the publishers (they were abstinence-only, with prophylaxis, birth control, relevant sexual behaviors such as monogamy, etc. totally removed), and when threatened with further controversial textual revisions demanded by Terri Leo, they capitulated some more, although this time the censorship process was public. It is important to emphasize that Section 12.13 permitted the SBOE to censor or reject *any* textbook for *any* reason whatsoever, whether for educationally-sound reasons or simply due to personal bias based on political, ideological, and religious beliefs. It is not known how many books were censored in this fashion, but over the decades it must have reached the hundreds.

Senate Bill 1 tried to end this nefarious practice in 1995, since the embarrassment, poor education results, and toll on student accomplishment were taking a toll on Texas and Texans, not to mention the rest of the country. We note in today's paper that a Texas public official stated

yesterday that Texas students' SAT scores are 47th in the nation. The author pointed this out to the SBOE in 1983 and several times in subsequent years, but obviously little has been done to correct this poor status. Removal of section 12.13 from the original bill was a major step in the complete revision of the Texas Education Code. Removal of Section 12.13 from the TEC is the best evidence that the 1995 legislators intended to remove general textbook content authority from the SBOE, since this was the specific rule that gave the SBOE its far-reaching powers to censor. Opinion DM-424 did not point this out in 1996, but we do now in this brief.

As described previously, the original legislation not only stripped the SBOE of its powers to censor textbooks, but also intended to turn over all authority for textbook adoption to the school districts. Here's the relevant passage:

CHAPTER 31. TEXTBOOKS
SUBCHAPTER A. GENERAL PROVISIONS
§ 31.013. SELECTION AND PURCHASE OF TEXTBOOKS.

(a) The board of trustees of each school district and the governing body of each state-granted charter school shall select and purchase or provide for the purchase of textbooks for district or school students, as applicable.

Admittedly, this rule was not in the final bill, because a majority of legislators voted to allow the SBOE to retain some minor textbook content authority. But the granted authority was extremely limited, specific, and itemized. No general textbook content authority was granted, and none was implied. The ultimately-passed rules read as follows:

§ 31.023. TEXTBOOK LISTS.

(a) For each subject and grade level, the State Board of Education shall adopt two lists of textbooks. The conforming list includes each textbook submitted for the subject and grade level that meets applicable physical specifications adopted by the State Board of Education and contains material covering each element of the essential knowledge and skills [the nonconforming list is described]

(b) Each textbook on a conforming or nonconforming list must be free from factual errors.

These two subsections are the only two rules that give explicit powers to the SBOE concerning textbook content. There is no ambiguity here: no other content rule or authority is granted or implied in the TEC specifically concerning textbooks. It is reasonable to expect to find such rules if the 1995 legislature wished to give the SBOE additional powers or authority over this topic by amending SB1, but there are none.

Subsection 31.023 (a) is relevant. The TEKS are professionally produced by a body of discipline experts for each subject area, and the TEKS knowledge requirements are carefully stated to be as unambiguous and free of interpretative difficulties as possible, since they must be used by students, teachers, textbook authors and publishers, curriculum developers, exam writers, school officials, TEA officials, and SBOE members—quite a diverse array of individuals. By the time the SBOE receives the submitted textbooks, they already conform to the TEKS (or if not, they soon will be if their publishers want them to be purchased, so they are willingly revised; a TEA review committee examines each submitted textbook to make sure it conforms to the TEKS). So there is usually little room for censorship here. The censorship would have to occur during the TEKS writing sessions by professional educators, and this is rare. The Board's power here is limited: simply to vote to accept books that conform to the TEKS. The SBOE can't force publishers to change textbook content except to conform to the TEKS, and the Board's power to do that is it can reject a book whose publishers refuse to make the necessary revisions. In practice, this is extremely rare, and has not been controversial or subject to ideological or religious bias (except in the case of the health texts, whose TEKS had been weakened of information vital to young adults, and the health education texts adopted demonstrably did not meet the TEKS as written, but these facts were ignored by the SBOE).

Subsection 31.023 (b) is even more relevant. Legislators intended to limit the Board's power to correct only *factual* errors, and several spoke to that effect during and after floor debate. It is obvious that the term "factual errors" was specified explicitly to make it clear that the intention was to allow the SBOE to revise this type of error and no other type. The Legislature could have used the term "errors" or "errors as determined by the SBOE," in either case allowing the SBOE greater leeway in determining what specific content could be changed, including content that the Board simply objected to out of political, ideological, or religious bias. But the rule was written explicitly to limit the Board's authority to *factual* errors only. The Legislature did this precisely to restrict the SBOE's well-known penchant for textbook censorship. It was explained earlier that even the adjectival restriction has not stopped the Board from censoring textbooks out of ideological and religious bias, since the members are allowed to determine for themselves what is or is not a "factual error" without relying on professional advice, even if that determination flies in the face of scientific knowledge or common sense (the classic example of this now is that the SBOE rejected an environmental science textbook in 2002 because it determined that its content about industries causing pollution that is bad for humans is a factual error; the publisher later sued the SBOE and some individual members). In hindsight, the Legislature in SB1 should have specified "factual errors as determined by competent professionals" or "factual errors as determined by discipline experts," but legislators probably never expected that the term "factual error" would be abused in this way.

We now return to Opinion DM-424 (1996), which concluded that:

No such broad authority over textbook adoption or specific control over content is found in the new Education Code. When the legislature amends a statute and omits language of the former statute in its amended version, the legislature is presumed to have intended to change the law. [References cited.] In great contrast to its former authority, the board's powers are now expressly limited, and powers not assigned to the board are reserved to local school

districts.

It is clear from the arguments in the present brief, that refute the arguments in the Leo Opinion Request RQ-0430-GA, that the above conclusions of the 1996 Attorney General Opinion are correct: No broad authority over textbook adoption or general control over content is found in the TEC, and it was not the intent of the 1995 Texas Legislature in SB1 to give them or preserve for them that authority. Limited, specific, and itemized SBOE authority *is* found in SB1 and TEC, but this obviously does not permit an interpretation that unlimited and general authority is thereby granted. The inescapable conclusion is that the 1996 Opinion should be reaffirmed. This would not merely be consistent with the law, but would have the additional benefit of making it more difficult for the SBOE to censor textbooks easily and secretly as they have in the past, since they must now do it publicly with at least the pretense of correcting “factual” errors.

The results have been beneficial for Texas students and teachers. For example, the biology textbooks adopted in 2003 are the best that this state has purchased since at least the 1950s, for the topics of evolution and origin of life in them remained uncensored, despite a tremendous and expensive effort to accomplish such censorship using the current rules (conformance to TEKS and no factual errors), which national- and state-based creationists mistakenly thought would be sufficient. As stated previously, TCS believes that the 2006 Leo Request’s major purpose is an attempt to reverse the 2003 failure of her creationist colleagues—i.e., to reverse the 2003 biology textbook success of citizens and scientists—and allow the SBOE to write general textbook content requirements that would make it difficult for biology textbooks in the future (2009, when next up for adoption) to maintain scientific accuracy and integrity. In particular, if general textbook content rules are allowed by an AG opinion that reverses the 1996 opinion, some members of the SBOE will attempt to adopt a rule that requires biology textbooks to contain a

disclaimer statement that distorts the topic of evolution or a rule that allows alternate pseudoscientific explanations for the origin of species to be included. Other possible rules will make it more difficult to teach history, social studies, government, and economics accurately. The possibilities for censorship are endless if the current SBOE is given license to write its own general textbook content standards. Opinion DM-424 should be reaffirmed.

ANCILLARY MATERIALS

Ancillaries are supplements that publishers provide free to school districts that adopt their textbooks, although it is true that the cost of *some* ancillaries can be factored into the (extremely high) cost of textbooks, so publishers aren't losing any money. The provision of ancillaries is sometimes used as a marketing tool that may or may not be useful to adopting school districts. Other ancillaries are more than a marketing tool, but are vital. Ancillaries that provide teachers and students with consumable class and home worksheets are invaluable, as are laboratory manuals for laboratory-based science classes, but these consumable ancillaries are not free; the school district must purchase them each year. Other ancillaries are indeed free but end up sitting unused in boxes or on classroom bookcases. There are so many different types of ancillaries that it is unreasonable to expect the SBOE and TEA to deal with all of them.

Opinion DM-424 (1996) concluded that ancillaries, if submitted by the publisher for adoption consideration, can and should be reviewed by the textbook adoption process and selected or rejected by the SBOE along with the textbook they accompany. If not submitted, such review is not compelled. Opinion DM-424 further concluded that, since under the new TEC districts are free to use local funds to purchase whatever textbooks they choose, “[n]othing in the

code prohibits districts from accepting books free of charge,” and they should be allowed to do so without SBOE approval. The TCS agrees with this conclusion.

The argument of the Leo Request that since the cost of *some* ancillaries is factored into the cost of *some* textbooks, then *all* ancillaries must be submitted to the state textbook review process, is illogical. Ancillaries provided free, whether their cost is factored into the textbooks or not, should not be subject to review by the state. This would also be an undue burden on the state as well as publishers if their ancillaries change yearly (textbooks are adopted on a six-year cycle). Ancillaries that the school districts pay for from their own funds would obviously not have to undergo review. It seems reasonable, however, that if the ancillaries are not free, and the state is expected to pay for them from state-approved general textbook funds, then they must undergo the textbook selection process.

The Leo Request maintains that error-free ancillaries serve the same important state interest as error-free textbooks. Likewise, it can be maintained, censored ancillaries *disserve* the same important state interest as censored textbooks. If the purpose of the Leo Request is to find bogus “factual errors” in ancillaries as the SBOE has done with textbooks and forcing publishers to change them, then including ancillaries with textbooks under the state textbook review and adoption process must be carefully considered. Indeed, the presence of information about contraception and prophylaxis in health education ancillaries was a major topic during the health textbook adoption in 2004. The abstinence-only advocates kept insisting that school districts could use ancillaries to educate their students about these two topics if they wanted. After an inquiry, it was determined that no such ancillaries actually existed, and the suggestion that they did was a ploy to get the censored health texts adopted in their current defective state, which is what ultimately happened, contrary to the wishes of those who wished students to be informed.

The Leo Request concludes “that all ancillaries must submit to the same state approval procedures as textbooks, and must likewise conform to the same SBOE general textbook content standards.” There are no *general* textbook content standards, but two *specific* standards, so this part of the Leo Request conclusion must be correctly interpreted. It seems reasonable to conclude, as the present brief does, that if ancillaries are to be paid for with state funds and distributed free to districts, they must be submitted by publishers, undergo the state selection process, and meet the two specific standards, i.e. conformance to the TEKS and be free of factual errors. However, if they are to be provided to school districts by publishers free of charge, whether their cost is factored into the textbook price or not, or if paid for by the school districts from their own funds, then they do not have to be selected by school districts without state approval. This is essentially the conclusion of the 1996 Attorney General Opinion DM-424.

CONCLUSION

For all the reasons and arguments set forth above, the Attorney General should issue an opinion affirming DM-424.

Respectfully Submitted on March 24, 2006,

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