



TEXAS EDUCATION AGENCY

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October 8, 2007

OPINION COMMITTEE

RQ-0634-GA

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

Re: Opinion Request Regarding Effect of Texas Education Code § 21.060 Upon State Board of Educator Certification Rule 19 TAC § 249.16

Dear General Abbott:

As a part of the comprehensive review by State Board for Educator Certification (SBEC) and its Texas Education Agency (TEA) administrative staff of the disciplinary rules for certified Texas educators, TEA staff proposed an amendment to 19 Texas Administrative Code (TAC) § 249.16, a rule relating to the certification eligibility of persons with criminal convictions pursuant to the Texas Occupations Code. After meeting with stakeholders, and considering the concerns they expressed about whether the new Texas Education Code (TEC) § 21.060, enacted by Senate Bill 9, effective June 15, 2007,¹ might preempt this proposed rule, SBEC and TEA agreed to seek your opinion as to whether the proposed rule is a legitimate exercise of agency rule making authority.

Section 249.16, both in its current form² and in the proposed amendment,³ establish the guidelines authorized by Occupations Code § 53.025 regarding what crimes will be considered to be related to the education profession so that conviction of such a crime will authorize SBEC to revoke or suspend the person's certification pursuant to Occupations Code § 53.021. TEC § 21.060 makes no reference to the Occupations Code, but states that SBEC:

"may (emphasis added) suspend or revoke the certificate or permit held by a person under this subchapter, impose other sanctions against the person, or refuse to issue a certificate or permit to a person under this subchapter if the person has been convicted of a felony or misdemeanor offense relating to the duties and responsibilities of the education profession, *including*: (emphasis added) ..." [followed by a list of some, but not all, of the same offenses that are in the current form of § 249.16]

Some of the stakeholders have suggested that the legislature has established through TEC § 21.060 the exclusive list of crimes or offenses that are considered to be directly related to the education profession. TEA staff, on the other hand reads § 21.060 as establishing an independent basis for sanctions against a certified educator that does not preempt or create a conflict with proposed SBEC Rule § 249.16 or the Occupations Code. Both the current form of § 249.16 and the proposed amendment include all of the offenses listed in TEC § 21.060, but each adds several additional types of offenses that are also considered by SBEC to relate directly to the education profession.

¹ Senate Bill 9, 80th Texas Legislature, Section 5; <http://www.sos.state.tx.us/statdoc/bills/sb/SB9.pdf>, pages 3-4.

² See Appendix A

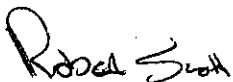
³ See Appendix B

Therefore, we are asking your opinion whether TEC § 21.060 expressly preempts SBEC from applying or amending Rule § 249.16 to define the offenses it deems to be directly related to the education profession pursuant to Occupations Code § 53.025, in such a way that adds other offenses to those enumerated in § 21.060. In that connection, we request your opinion whether, in referring to SBEC's authority under this statute, the use of the word "may" rather than "shall" makes the application of this statute by SBEC discretionary,⁴ and whether the use of the word "including" creates any presumption that offenses not listed must not be deemed by SBEC rule to be offenses relating to the duties and responsibilities of the education profession.⁵

Some stakeholders have also suggested that the legislative history of the provision of Senate Bill 9 enacting the new TEC § 21.060 indicates a legislative intent to narrow the list of offenses deemed to be directly related to the education profession. As passed, § 21.060 is essentially the same as current Rule § 249.16, except that only five of the seven offenses listed in the current rule are included in § 21.060. As originally introduced,⁶ § 21.060 provided that SBEC could sanction educators based on a deferred adjudication, as well as a conviction, of any of the same seven offenses listed in Rule § 249.16. The fact that the original title of § 21.060 contained a reference to deferred adjudication indicates the focus of the proposed statute. During consideration by the Senate Education Committee of which deferred adjudication crimes should be included in § 21.060, the last two offenses listed in the introduced version were omitted, but the deferred adjudication provision remained in the final version passed by the Senate.⁷ In the House, however, the deferred adjudication provision was strongly opposed and eventually removed, while the list of five offenses from the final Senate version was not amended. The House's final draft of § 21.060 was accepted by the Conference Committee. Given that the focus of legislative debate was on the deferred adjudication provision, TEA staff does not interpret the legislative history of § 21.060 as evidencing an intent to narrow the list of offenses expressly deemed to be related to the education profession, especially given the lack of any reference to SBEC Rule § 249.16 or the Occupations Code. As a result, even though we view the nonexclusive language of the statute as clear and unambiguous, we also request that you consider whether the legislative history of TEC § 21.060 affects your interpretation of its asserted effect upon SBEC's rule-making authority.

Thank you for your attention to this request. Should you need any additional information, please contact David Anderson, General Counsel, at 463-9720.

Sincerely,



Robert Scott
Commissioner of Education (Acting)

⁴ Texas Government Code § 311.016(1).

⁵ Texas Government Code § 311.005(13).

⁶ Senate Bill 9, 80th Texas Legislature, Section 5, as introduced;
<http://www.legis.state.tx.us/tlodocs/80R/billtext/pdf/SB00009I.pdf>, pages 2-3.

⁷ Senate Bill 9, 80th Texas Legislature, Section 5, as engrossed and passed by Senate:
<http://www.capitol.state.tx.us/tlodocs/80R/billtext/pdf/SB00009E.pdf>, pages 3-4.

Appendix A
Current Version of 19 TAC § 249.16

§249.16. Eligibility of Persons with Criminal Convictions for a Certificate under Articles 6252-13c and 6252-13d, Revised Civil Statutes.

- (a) Pursuant to Articles 6252-13c and 6252-13d, Revised Civil Statutes, and Subchapter C, Chapter 22, Education Code, the board may suspend or revoke an existing valid certificate, deny an applicant a certificate, or bar a person from being assessed or examined for a certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the education profession.
- (b) Subsection (a) of this section applies to a crime that: indicates a threat to the health, safety, or welfare of a student, parent of a student, fellow employee, or professional colleague; interferes with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicates impaired ability or misrepresentation of qualifications to perform the functions of an educator. Crimes considered to relate directly to the duties and responsibilities of the education profession include:
- (1) the crime involves moral turpitude;
 - (2) the crime involves any form of sexual or physical abuse of a minor or student or other illegal conduct with a minor or student;
 - (3) the facts underlying the crime would support a felony conviction for possession, transfer, sale, distribution, or conspiracy to possess, transfer, sell, or distribute any controlled substance defined in Chapter 481, Health and Safety Code;
 - (4) the crime involves school property or funds;
 - (5) the crime involves any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;
 - (6) the crime occurs wholly or in part on school property or at a school-sponsored activity; or
 - (7) two or more crimes are committed within any 12-month period that involve public intoxication, operating a motor vehicle while under the influence of alcohol, or disorderly conduct.
- (c) Pursuant to Article 6252-13d, Revised Civil Statutes, the executive director shall notify the applicant or certificate holder in writing of the agency's intent to seek disciplinary action, including denial or revocation, and the reasons for the proposed action. The applicant or certificate holder shall have the opportunity to be heard according to the procedures set forth in this chapter.

Appendix B

Proposed Amendment to 19 TAC § 249.16

§249.16. Eligibility of Persons with Criminal Convictions for a Certificate under Texas Occupations Code, Chapter 53 [Articles 6252-13c and 6252-13d, Revised Civil Statutes].

- (a) Pursuant to the Texas Occupations Code, Chapter 53 [~~Articles 6252-13c and 6252-13d, Revised Civil Statutes~~], and the Texas Education Code (TEC), Chapter 22, Subchapter C, [~~Chapter 22, Education Code~~] the State Board for Educator Certification [~~board~~] may suspend or revoke an existing valid certificate, deny an applicant a certificate, or bar a person from being assessed or examined for a certificate because of a person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of the education profession.
- (b) Subsection (a) of this section applies to a crime that ~~indicates~~ indicates a threat to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague; interferes with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicates impaired ability or misrepresentation of qualifications to perform the functions of an educator. Crimes considered to relate directly to the duties and responsibilities of the education profession include, but are not limited to:
- (1) crimes involving ~~the crime involves~~ moral turpitude;
 - (2) crimes involving ~~the crime involves~~ any form of sexual or physical abuse or neglect of a student or minor ~~or student~~ or other illegal conduct with a student or minor ~~or student~~;
 - (3) crimes involving any ~~the facts underlying the crime would support a felony conviction for~~ possession, transfer, sale, distribution, or conspiracy to possess, transfer, sell, or distribute any controlled substance defined in the Texas Health and Safety Code, Chapter 481 [~~Health and Safety Code~~];
 - (4) crimes involving ~~the crime involves~~ school property or funds;
 - (5) crimes involving ~~the crime involves~~ any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;
 - (6) crimes occurring ~~the crime occurs~~ wholly or in part on school property or at a school-sponsored activity; or
 - (7) felonies involving driving while intoxicated (DWI) or driving under the influence (DUI) of drugs or alcohol.
 - ~~(7) — two or more crimes are committed within any 12-month period that involve public intoxication, operating a motor vehicle while under the influence of alcohol, or disorderly conduct.~~
- (c) Pursuant to the Texas Occupations Code, Chapter 53, [~~Article 6252-13d, Revised Civil Statutes~~] the Texas Education Agency (TEA) staff [~~executive director~~] shall notify the applicant or certificate holder in writing of the TEA staff's [~~agency's~~] intent to seek disciplinary action, including denial or revocation, and the reasons for the proposed action. The applicant or certificate holder shall have the opportunity to be heard according to the procedures set forth in this chapter.
- (d) The grounds for revoking or suspending a certificate provided by this section and the Texas Occupations Code, Chapter 53, are cumulative of the other grounds and remedies provided by the TEC, § 21.060, and this chapter.