

No. D-1-GN-18-005044

TEXAS AMERICAN FEDERATION	§	IN THE DISTRICT COURT OF
OF TEACHERS and TEXAS	§	
STATE TEACHERS ASSOCIATION	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
MIKE MORATH,	§	
COMMISSIONER OF EDUCATION,	§	
in his official capacity, and	§	
TEXAS EDUCATION AGENCY	§	
	§	
<i>Defendants.</i>	§	353rd JUDICIAL DISTRICT

**PLAINTIFFS’ SECOND AMENDED ORIGINAL PETITION
FOR DECLARATORY JUDGMENT**

TO THE HONORABLE COURT:

COME NOW plaintiffs, Texas American Federation of Teachers (Texas AFT) and Texas State Teachers Association (TSTA) and file this petition for declaratory judgment pursuant to the provisions of the Administrative Procedure Act, TEX. GOV’T CODE Section 2001.001 *et seq.* Texas AFT and TSTA seek a declaration that three of the Commissioner of Education’s recent administrative rules pertaining to the operation of charter schools in public school districts are invalid and illegal.

In 2017, the Texas Legislature passed Senate Bill 1882. This legislation provides that if a school district enters into a contract with a charter school operator to take over the operations of a campus deemed low-performing under the state’s accountability measures, the district may qualify to receive increased funding as well as relief from the academic accountability sanctions that

would otherwise be imposed. *See* TEC § § 11.174 and 42.2511. Given the significant benefits available, the legislature intended that there be strings attached to the arrangement, including protections for the school district employees and students on the campus and regulation of the performance contract between the district and the charter operator.

After SB 1882 was signed into law, the commissioner promulgated rules to implement the legislation in accordance with Subchapter B of Chapter 2001 of the Texas Government Code. *See* 19 TAC § § 97.1075 and 97.1079. The initial version of the rules went into effect on April 4, 2018. An amended version of the rules is scheduled to go into effect on September 1, 2019. The rules are attached and incorporated herein as Exhibit A. Contrary to the Education Code, the commissioner's rules challenged in this lawsuit invalidly limit the number and type of charter operators that must abide by the rules that were put in place to protect public school employees and students in SB 1882 charter schools, relax the requirements that the school district and charter operator need to satisfy before they can qualify for the benefits available under the law, and overstep the commissioner's authority.

I. DISCOVERY PLAN

1. Plaintiff intends for this suit to be conducted under Discovery Level 2, pursuant to TEX. R. CIV. P. 190.3.

II. JURISDICTION and VENUE

2. The subject matter in controversy is within the jurisdiction of the district court.

3. Venue is proper in Travis County, Texas under Tex. Gov't Code Section 2001.038.

Additionally, venue is proper in this court because the defendant Morath is an executive officer of a state agency and Texas Education Agency is a state agency.

4. The amount in controversy exceeds the minimum jurisdictional limits of this Court. Pursuant to Rule 47 of the Texas Rules of Civil Procedure, plaintiffs in good faith plead that at this juncture, they seek non-monetary relief available under the Texas Government Code.

III. PARTIES

5. Plaintiff Texas AFT is a statewide labor organization that represents employees of public school districts across Texas in matters related to their wages, hours, and terms and conditions of employment. Texas AFT has over 65,000 members in Texas and is affiliated with the American Federation of Teachers at the national level, as well as the AFL-CIO. As required of labor organizations representing public employees in Texas, Texas AFT does not claim the right to strike. Texas AFT has its principal place of business at 3000 S. IH-35, Suite 175, Austin, Texas, 78704-6536, in Travis County, Texas.

6. Plaintiff Texas State Teachers Association is (TSTA) is a state-wide, professional association whose members are employed by the public schools of this State, and is affiliated with the National Education Association. It exists to further the interests of public education by strengthening, promoting, and protecting the rights and privileges of employees of public education. To carry out its mission, TSTA has some 400 local affiliates throughout the state which are made up of members in various school districts and counties across the state. Participation of individual members of TSTA is not required with respect to the claims asserted or the relief requested herein. The interests of TSTA members in public school districts of this state will be affected by the regulations that have been adopted by defendants. The address of TSTA's principal place of business is 8716 N. Mopac Expressway, Austin, Texas 78759 in Travis County, Texas.

7. Defendant Mike Morath, Commissioner of Education, is, pursuant to Tex. Educ. Code Section 7.055, the educational leader of the state and the executive officer of the Texas Education Agency. He is charged with the responsibility of carrying out the duties imposed on this office by the Texas Legislature, including the adoption of rules. He may be served with process at the Texas Education Agency's office in Travis County, Texas at 1701 North Congress, Austin, Texas 78701.

8. Defendant Texas Education Agency is the state agency created and charged with the responsibility of carrying out the education functions of the state, as delegated by the legislature. It may be served with process through the Commissioner of Education, 1701 North Congress, Austin, Texas 78701.

IV. ASSOCIATIONAL STANDING

9. Collectively, Texas AFT and TSTA have over 100,000 members. The combined membership of these two organizations easily exceeds the membership of any other organization representing public school employees in Texas. Texas AFT and TSTA are interested in enforcing and protecting the provisions of TEC Section 11.174(c) because its members work as teachers and public school employees throughout the state, including in school districts which choose to enter into SB 1882 charter arrangements. The commissioner places an invalid limitation on the types of charter operators that would be subject to the teacher protection provisions set forth in Section 11.174 (c), intrudes upon the prerogatives of local school districts to apply their own policies to SB 1882 charter contracts, and prohibits appeals under TEC Section 7.057 of his decisions regarding the charter operators' eligibility for charter contracts. The application, or threatened application, of the rules challenged herein interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of Texas AFT and TSTA members. Its

members are vitally interested in ensuring that their existing contract rights are not adversely affected by a SB 1882 charter contract, that they have a voice in the provisions to be included in the performance contract, that they receive the benefits and protections of local district policies and that the district and the charter operator satisfy the requirements spelled out in law and regulations that govern their relationship. Thousands of their members are aggrieved by the actions of the defendants and Texas AFT and TSTA bring this action on their behalf.

10. These organizations both have as one of their central purposes the protection of employment rights and benefits of their members. This action is germane to that purpose.

11. Texas AFT and TSTA members who are aggrieved by the actions of the defendants have standing to file this action on their own behalf.

12. Neither the claims asserted herein nor the relief requested requires the filing of individual petitions or the participation of individual members as parties in this action.

V. FACTS

Texas Education Code provisions.

13. Under the Texas Education Code, the State of Texas provides annual academic accountability ratings to its public school districts, charters and schools. When a school district or individual campus demonstrates problems achieving the required performance results, the Education Code provides the commissioner of education with the authority to order various levels of interventions and sanctions.

14. If a district or campus is rated “Improvement Required” due to low performance on one or more of the indices of performance, the commissioner intervenes. If a campus has an unacceptable performance rating for three consecutive school years after the campus is ordered to

submit a campus turnaround plan, the commissioner “shall order: 1) appointment of a board of managers to govern the school district as provided by Section 39A.202; or 2) closure of the campus.” TEC § 39A.111.

15. In 2017, Senate Bill 1882 was signed into law. The legislation creates a mechanism through which school districts with such campuses, by entering into a charter contract with an eligible entity, could potentially secure a reprieve from sanction options described in Paragraph 14, as well as obtain increased per-student funding from the state. To accomplish the objectives of the legislation, the legislature added two sections to the Texas Education Code, Sections 11.174 and 42.2511.

16. School districts have had the authority to have campus charters within their school districts since 1995. *See* TEC § § 12.051 – 12.065. The campus charter provisions in Subchapter C of Chapter 12 of the Education Code provide the legal backdrop for SB 1882 charters because, among other things, a district wishing to enter into this kind of arrangement must first grant the entity a charter under Subchapter C, Chapter 12. TEC § 11.174(a) and 19 TAC § 97.1075(d). Thus, all SB 1882 must operate under a Subchapter C campus charter.

17. Significantly, TEC Section 12.0522(d) in Subchapter C states: “Subchapter D [creating and governing open-enrollment charter schools] applies to a campus granted a district charter under this section as though the campus were granted a charter under Subchapter D, **and the campus is considered an open-enrollment charter school.**” (emphasis added).

18. TEC Section 11.174(a) specifies the entities which are eligible for a SB 1882 charter contract, including an existing Texas open-enrollment charter school or any of the other types of entities listed in TEC Section 12.101(a): an institute of higher learning, a non-profit organization,

or a governmental entity. *See* TEC § § 11.174(a) and 12.101(a)(1)-(4). After the district grants a campus charter to the eligible entity, and the district and the entity enter into a performance contract regarding the operation of the campus, the district submits the performance contract to TEA for the commissioner’s determination about whether the proposed partnership qualifies for the SB 1882 benefits.

19. The legislature placed a number of specific conditions upon school districts and eligible entities attempting to qualify for benefits under SB 1882. Two provisions in Section 11.174(c) address employees’ interests directly. One of the provisions states that “[b]efore entering into a contract [with the charter operator] as provided by this section, a school district must consult with campus personnel regarding the provisions to be included in the contract between the school district and the open-enrollment charter school.” Subsection (c) also provides that “[a]ll rights and protections afforded by current employment contracts or agreements may not be affected by the contract entered into between a school district and an open-enrollment charter school under this section.”

Commissioner of Education rules.

20. The commissioner’s rules state that its provisions governing performance contracts apply to open-enrollment charter schools and other entities eligible to serve as a charter partner pursuant to TEC Section 12.101(a), including non-profit organizations, institutes of higher learning, or governmental entities. TEA includes all those types of entities in its definition of “operating partner,” an umbrella term that is used throughout the rules:

(b) Definitions. For purposes of this division, the following words and terms have the following meaning, unless the context clearly indicates otherwise.

(1) Operating partner- Either a state-authorized open-enrollment charter school **or an eligible entity as defined by TEC, Section 12.101(a)....**

19 TAC § 97.1075(b)(1)(emphasis added).

The rule excluding non-profits and other eligible entities: 19 TAC Section 97.1075(d)(10).

21. The commissioner’s rules limit the teacher protection provisions in TEC Section 11.174(c) to open-enrollment charter schools, instead of applying the provisions to all the other types of entities eligible for charter contracts, such as non-profits and institutions of higher education. The rules provide:

(d) Performance contract. To contract to partner to operate under TEC, Section 11.174, the independent school district’s board of trustees must grant the **operating partner** a campus charter under TEC, Chapter 12, Subchapter C. The charter must include performance expectations memorialized in a performance contract, as required by TEC, Section 12.0531. This performance contract must include, at a minimum, the following provisions:

(10) an assurance that the district has consulted with campus personnel regarding the provisions included in the performance contract and that the rights and protections afforded by current employment contracts or agreements shall not be affected by this contract as required by TEC, Section 11.174(c), **unless the district is partnering with an entity described in TEC, § 11.174(a)(2)...**

19 TAC § 97.1075(d)(10) (emphasis added).

The rule regarding local school district policies: 19 TAC Section 97.1075(d)(6).

22. The commissioner’s rules include a provision limiting the extent to which a school district’s own policies apply to an SB 1882 charter operator. For other campus charters, the Education Code states that a campus “is exempt from the instructional and academic rules and policies of the board of trustees from which the campus is specifically exempted in the charter...” TEC Section 12.054(1), Subchapter C of Chapter 12. Thus, according to the Education Code, a district may choose not to apply its various local policies to charter contracts. If not specified, the default is that the policies apply.

23. The commissioner's rule for SB 1882 contracts is contrary to this statutory provision because it mandates that the performance contract exempt the charter from its local policies unless the district and charter operator specifically agree to apply them. The commissioner's rules provide that the performance contract contain:

(6) a contract term stating that the campus is exempt from laws and rules to the fullest extent allowed by TEC, Chapter 12, Subchapter C, and **is exempt from all district policies except for laws, rules, and policies that are specifically identified as applicable to the campus in the performance contract; ...**

19 TAC § 97.1075(d)(6)(emphasis added). The rule provides that the default is that local policies do **not** apply. As stated, this is contrary to TEC Section 12.054(1). Further, since the policies must be made a part of the performance contract that is then subject to the commissioner's review and approval before the SB 1882 benefits are made available, the commissioner has the authority to reject the application of local policies.

The rule limiting appeals.

24. In TEC Section 11.174(m), the legislature granted authority to the commissioner to administer Section 11.174, "including the requirements for an entity and the contract with the entity, including the standards required by an entity to receive approval under Subsection (a)(2) [governing the requirements of a performance contract]."

25. The commissioner's rules include a provision that prohibit an appeal of the approval or denial of the eligibility approval request under TEC Section 7.057. Section 7.057 is the statute that gives a party who is aggrieved by the actions or decisions of any school district board of trustees

the right to appeal to the commissioner, and then to Travis County District Court. The rules provide, in pertinent part:

(e) Decision finality. The approval or denial of the eligibility approval request is a final administrative decision by the commissioner and not subject to appeal under TEC, Section 7.057. 19 TAC § 97.1079(e). Section 11.174 does not grant the Commissioner the authority to restrict administrative and judicial appeals in this fashion.

VI. CLAIMS

26. Plaintiffs incorporate by reference the preceding paragraphs as if repeated in full.

27. The commissioner's rule, 19 TAC 97.1075(d)(10), violates established law. It is contrary to TEC Section 12.0522(d), which specifically provides that a campus granted a district charter is deemed, as a matter of law, to be an open-enrollment charter school "as though the campus were granted a charter under Subchapter D." The commissioner's rule applies one set of SB 1882 requirements to open-enrollment charter schools and another to other types of entities, when TEC Section 12.0522(d) states that campus charters are to be considered open-enrollment charters. When Section 11.174(c) provides for employment protections to be addressed in a performance contract between a district and an "open-enrollment charter school," this requirement applies, as a matter of law, to a campus charter secured by other types of entities. Further, the non-application of the employment protections in Section 11.174(c) to the array of other entities that may qualify for SB 1882 contracts is contrary to other provisions in Section 11.174, as well as the legislative history and purpose of SB 1882 and HB 1842, and leads to an absurd result. The commissioner's rule interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of Texas AFT and TSTA members under this statute, namely, to be consulted regarding the provisions to be included in a SB 1882 performance contract between a charter

operator and a school district and to be guaranteed that their existing contractual rights are not adversely affected.

28. The commissioner's rule, 19 TAC Section 97.1075(d)(6), violates TEC Section 12.054(1), one of the campus charter provisions in Subchapter C, Chapter 12. A prerequisite for entering into a SB 1882 contract is for the school district to grant the eligible entity a campus charter, so the campus charter provisions in Subchapter C apply. *See* TEC § 11.174(a)(2) and 97.1075(d). Included in the provisions governing campus charters is a provision to the effect that local school district policies apply unless they are specifically exempted in the charter. TEC Section 12.054(1). Under the commissioner's rule challenged here, the commissioner requires that the SB 1882 performance contract include a provision that the campus is exempt from all local policies except those identified in the performance contract. Not only does this create an opt-in provision for local policies rather than the opt-out provision stated in Subchapter C, it also subjects the inclusion of any local policies to disapproval by the commissioner through the performance contract approval scheme. This rule interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of Texas AFT and TSTA members under Chapter 12, Subchapter C, who benefit from the employment rights and benefits in local school district policies. It is an invalid rule that illegally usurps the authority of local school districts to apply their own local policies to SB 1882 arrangements and illegally subjects the rights and benefits of plaintiff's members, as provided for in local district policies, to unwarranted control by the commissioner. Under TEC Section 7.003, "an educational function not specifically delegated to the agency...under this code is reserved to and shall be performed by school districts..." In adopting

19 TAC Section 97.1075(d)(6), the commissioner exceeded the bounds of his delegated authority by violating a provision in the Education Code.

29. The commissioner's rule, 19 TAC Section 97.1079(e) exceeds the commissioner's rule-making authority under TEC Section 11.174(m) and violates the plaintiffs' rights under TEC Section 7.057. The Commissioner's rule interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of Texas AFT and TSTA members under TEC Section 7.057, namely, the ability to contest charter operator contracts that violate their employment rights.

VII. SUIT FOR DECLARATORY RELIEF

30. Plaintiffs seek a declaratory judgment as to the validity of 19 TAC Sections 97.1075(d)(10), 97.1075(d)(6) and 97.1079(e), pursuant to Tex. Gov't Code Section 2001.038.

VIII. SOVEREIGN IMMUNITY DOES NOT BAR PLAINTIFF'S CLAIMS

31. Sovereign immunity does not bar plaintiffs' claims for declaratory and injunctive relief. Tex. Gov't Code Section 2001.038 waives sovereign immunity.

IX. RELIEF REQUESTED

WHEREFORE, PREMISES CONSIDERED, plaintiffs respectfully request that:

1. The defendants be cited to appear and answer.
2. That the Court declare and determine that 19 TAC Section 97.1075(d)(10) is an invalid and illegal rule that is null and void;
3. That the Court declare and determine that 19 TAC Section 97.1075(d)(6) is an invalid and illegal rule that is null and void;
4. That the Court declare and determine 19 TAC Section 97.1079(e) is an invalid and illegal rule that is null and void;

5. That the Court order appropriate injunctive relief; and
6. That plaintiffs be awarded all other relief to which the Court may find it entitled.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served to counsel of record herein _____ via first-class mail, X via eservice, _____ via email, _____ via certified mail, return receipt requested, _____ via facsimile on this the 23rd day of August, 2019, to wit:

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 /s/Martha P. Owen
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The Texas Education Agency (TEA) proposes amendments to §97.1075 and §97.1079, concerning contracting to partner to operate a district campus. The proposed amendment to §97.1075 would clarify which entities are subject to the requirements of Texas Education Code (TEC), §11.174(c). The proposed amendment to §97.1079 would correct a statutory reference and remove alternate authority for the commissioner to approve entity eligibility requests.

BACKGROUND INFORMATION AND JUSTIFICATION: The 85th Texas Legislature, Regular Session, 2017, implemented Senate Bill 1882, which authorizes school districts to enter into partnerships for certain entities to operate school district campuses.

TEC, §11.174(c), specifies that before a district enters into a contract with an open-enrollment charter school as provided in TEC, §11.174(a)(1), it must first consult with campus personnel regarding the provisions to be included in the contract. The statute also specifies that all rights and protections by current employment contracts or agreements may not be affected by the contract with an open-enrollment charter school.

The proposed amendment to §97.1075(d)(10) would clarify that these provisions apply only to open-enrollment charter schools, which are described in TEC, §11.174(a)(1), and do not apply to entities that are described in TEC, §11.174(a)(2), and subject to 19 TAC §97.1079.

TEC, §11.174(a)(2), specifies that the commissioner must approve entities that are described in TEC, §11.174(a)(2), and TEC, §11.174(m), grants the commissioner rulemaking authority, including standards required for an entity to receive approval under TEC, §11.174(a)(2). Section 97.1079 sets forth the requirements for such entities to be approved. Section 97.1079(e) allows the commissioner to approve an entity that did not otherwise meet the requirements set forth in §97.1079 if the commissioner determined that the approval of the entity eligibility request would improve student outcomes. After examining the initial round of eligibility determination requests, the commissioner has determined that the requirements adopted to evaluate the eligibility of such entities are sufficient and that the authority in §97.1079(e) to approve entities that would not otherwise meet the eligibility requirements is not necessary. Therefore, the proposed amendment to §97.1079(e) would remove this language.

In addition, a statutory reference in §97.1079(d)(8)(C) would be corrected.

FISCAL IMPACT: Joe Siedlecki, deputy commissioner for improvements, innovations, and charters, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

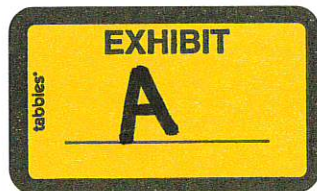
SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would limit an existing regulation by removing the commissioner's existing authority to approve entity eligibility requests.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency;



would not create a new regulation; would not expand or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Siedlecki has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be clarifying which entities must comply with TEC, §11.174(c), correcting a statutory reference, and removing an unnecessary provision. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins May 31, 2019, and ends July 1, 2019. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on May 31, 2019. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/Proposed_Commissioner_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §11.174(a), which authorizes a school district to enter into a partnership to operate a school district campus under certain conditions; TEC, §11.174(c), which requires that before a district enters into a contract with an open-enrollment charter school as provided in TEC, §11.174(a)(1), it must first consult with campus personnel regarding the provisions to be included in the contract, and that all rights and protections by current employment contracts or agreement may not be affected by the contract with an open-enrollment charter school; TEC, §11.174(e), which requires the commissioner to continue to evaluate campus performance and assign overall and domain ratings for a campus operated under a partnership; TEC, §11.174(f), which prohibits the imposition of certain interventions and sanctions based on accountability performance for the first two school years for which a school district partnership operates on the campus; TEC, §11.174(g), which extends the intervention exemption to a subsequent or renewed partnership only upon approval from the commissioner; and TEC, §11.174(m), which authorizes the commissioner to adopt rules to implement TEC, §11.174.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §11.174(a), (c), (e)-(g), and (m).

<rule>

§97.1075. Contracting to Partner to Operate a Campus under Texas Education Code, §11.174.

- (a) **Applicability.** This section applies only to an independent school district that intends to contract to partner to operate a campus and receive benefits under Texas Education Code (TEC), §11.174 and §42.2511.
- (b) **Definitions.** For purposes of this division, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise.
 - (1) **Operating partner**--Either a state-authorized open-enrollment charter school or an eligible entity as defined by TEC, §12.101(a).
 - (2) **Open-enrollment charter holder**--This term has the meaning assigned in TEC, §12.1012(1).
 - (3) **Governing body of a charter holder**--This term has the meaning assigned in TEC, §12.1012(2).
 - (4) **Governing body of a charter school**--This term has the meaning assigned in TEC, §12.1012(3).

- (5) Contract to partner to operate a campus--This term means the partner must operate the campus in accordance with subsection (c) of this section under a performance contract as outlined in subsection (d) of this section.
 - (6) Campus--This term has the meaning assigned in §97.1051(3) of this title (relating to Definitions).
- (c) Conferred authority. In order to qualify as operating a district campus under TEC, §11.174, the district must confer, at a minimum, the following enhanced authorities to the operating partner.
- (1) Staffing authorities.
 - (A) The operating partner must have authority to employ and manage the campus chief operating officer, including initial and final non-delegable authority to hire, supervise, manage, assign, evaluate, develop, advance, compensate, continue employment, and establish any other terms of employment.
 - (B) The operating partner must have authority over the employees of the operating partner, including initial and final non-delegable authority for the operating partner to employ and/or manage all of the operating partner's own administrators, educators, contractors, or other staff. Such authority includes the authority to hire, supervise, manage, assign, evaluate, develop, advance, compensate, continue employment, and establish any other terms of employment.
 - (C) The operating partner must have authority over the assignment of all district employees to the campus, including initial and final authority to approve the assignment of all district employees or contractors to the campus, as well as initial and final authority to supervise, manage, and rescind the assignment of any district employee or district contractor from the campus.
 - (D) The operating partner must directly manage the instructional staff described in subparagraphs (B) and (C) of this paragraph who provide services to at least a majority of the students.
 - (2) Other authorities. The operating partner must have:
 - (A) initial and final authority to approve all curriculum decisions beyond the minimum requirements outlined in §74.2 of this title (relating to Description of a Required Elementary Curriculum) or §74.3 of this title (relating to Description of a Required Secondary Curriculum), lesson plans, instructional strategies, and instructional materials, as defined in TEC, §31.002(1), to be used at that campus;
 - (B) initial and final authority over educational programs for specific, identified student groups, such as gifted and talented students, students of limited English proficiency, students at risk of dropping out of school, special education students, and other statutorily defined populations;
 - (C) initial and final authority to set the school calendar and the daily schedule, which may differ from those in other district campuses;
 - (D) initial and final authority to approve all assessments that are not required by the state of Texas; and
 - (E) initial and final authority to adopt and implement the campus budget. The governing body of the operating partner shall approve the campus budget in a meeting held under the Texas Open Meetings Act, Texas Government Code, Chapter 551. Notwithstanding such budget authority, the operating partner's expenditures must comply with applicable restrictions on the use of state and federal funds.
- (d) Performance contract. To contract to partner to operate under TEC, §11.174, the independent school district's board of trustees must grant the operating partner a campus charter under TEC, Chapter 12, Subchapter C. The charter must include performance expectations memorialized in a performance contract, as required by TEC, §12.0531. This performance contract must include, at a minimum, the following provisions:

- (1) a description of enhanced authorities as outlined in subsection (c) of this section;
- (2) academic performance expectations and goals, which shall include, but are not limited to:
 - (A) for campuses that are paired for accountability purposes, specific annual targets for improved student academic performance;
 - (B) for campuses issued an accountability rating under TEC, §39.054, a specific annual target for the overall campus academic rating and a specific target for student growth based on the School Progress Domain; and
 - (C) specific consequences in the event that the operating party does not meet the annual academic performance expectations and goals described in the performance contract;
- (3) annual financial performance expectations and goals, which shall include, but are not limited to:
 - (A) the completion of an annual financial report of the operating partner meeting the expectations outlined in §109.23 of this title (relating to School District Independent Audits and Agreed-Upon Procedures);
 - (B) receipt of an unqualified audit opinion, in connection with the annual financial report required in subparagraph (A) of this paragraph; and
 - (C) specific consequences in the event that the operating partner does not meet the annual financial performance expectations and goals described in the performance contract;
- (4) a description of the campus enrollment and expulsion policies that must comply with TEC, §11.174(i);
- (5) a contract term of up to ten years as required by TEC, §12.0531, with a provision(s) specifying:
 - (A) a requirement for a public hearing at least 30 days prior to any district action to terminate the contract for an operating partner that successfully met the performance expectations and goals described in the performance contract; and
 - (B) a requirement for a public hearing at least 30 days prior to any district action to extend the contract for an operating partner that failed to meet the performance expectations and goals described in the performance contract;
- (6) a contract term stating that the campus is exempt from laws and rules to the fullest extent allowed by TEC, Chapter 12, Subchapter C, and is exempt from all district policies except for laws, rules, and policies that are specifically identified as applicable to the campus in the performance contract;
- (7) service-level agreements that describe and allocate shared resources and services the district provides to the operating partner, which may include:
 - (A) facility use and related matters;
 - (B) transportation;
 - (C) specific education program services, such as providing special education services; and
 - (D) access to other resources and services as agreed between the parties;
- (8) a per pupil allocation from the district to the operator that provides a student-level allocation of local, state, and federal funds received by the district;
- (9) a description of the educational plan for the campus;
- (10) an assurance that the district has consulted with campus personnel regarding the provisions included in the performance contract and that the rights and protections afforded by current employment contracts or agreements shall not be affected by this contract as required by TEC, §11.174(c), unless the district is partnering with an entity described in TEC, §11.174(a)(2); and

- (11) a description of the consequence(s) in the instance that either the district or the operating partner breaches the contract. The contract may not be contingent on any rating issued by the TEA to the campus prior to the operation of the campus by the operating partner.
- (e) Contract notification to the TEA. In order to qualify as an eligible partnership under TEC, §11.174, notification of contracts related to TEC, §11.174(a)(1), must meet the deadlines published by the TEA staff.
- (f) Contract amendments. Eligible partnerships under TEC, §11.174, must notify the TEA of amendments to performance contracts related to TEC, §11.174(a)(1) and (2).
- (g) Monitoring. The commissioner of education shall continue to evaluate and assign overall and domain performance ratings under TEC, §39.054, to the campus. In order to qualify for ongoing benefits, subsequent to initial eligibility validation or approval, the eligible partnership campus must comply with all information requests or monitoring visits deemed necessary by the TEA staff to monitor the ongoing eligibility of the partnership.
- (h) Continued eligibility. To receive benefits under TEC, §11.174(f) and (g) and §42.2511, the district must continuously meet the requirements in subsections (c)-(g) of this section.
- (i) Decision finality. A decision of the commissioner made under this section is a final administrative decision and is not subject to appeal under TEC, §7.057.

§97.1079. Determination Processes and Criteria for Eligible Entity Approval under Texas Education Code, §11.174.

- (a) Applicability. This section applies only to independent school districts that intend to contract to partner to operate a campus and receive benefits under Texas Education Code (TEC), §11.174(a)(2).
- (b) Definitions. For purposes of this division, the following words and terms shall have the following meaning, unless the context clearly indicates otherwise.
 - (1) Eligible entity--This term has the meaning assigned in TEC, §12.101(a).
 - (2) Campus--This term has the meaning assigned in §97.1051(3) of this title (relating to Definitions).
 - (3) Applicant--This term refers to an independent school district seeking approval to receive benefits for an eligible entity to contract to partner to operate a campus.
 - (4) Proposed operating partner--This term refers to the eligible entity seeking approval in coordination with an independent school district to contract to partner to operate a campus.
- (c) Institutions of higher education. This subsection applies to entities meeting the definition of an institution of higher education as described in TEC, §61.003.
 - (1) For applicants seeking eligibility approval of an institution of higher education, which has been granted a charter in accordance with TEC, Chapter 12, Subchapter E, as the proposed operating partner, the commissioner of education will treat the institution of higher education as an open-enrollment charter school under TEC, §11.174(a)(1).
 - (2) The commissioner may approve an eligibility approval request under this section if the commissioner determines that the approval of the eligibility approval request will improve student outcomes at the campus.
- (d) Private or independent institutions of higher education that are not described in subsection (c) of this section, non-profits, and governmental entities. This subsection applies to entities meeting the definitions described in TEC, §12.101(a)(2), (3), and (4).
 - (1) Prior to each eligibility approval cycle, the commissioner shall approve an eligibility approval request form for submission by applicants seeking eligibility approval as specified in TEC, §11.174. The eligibility approval request form may contain, but is not limited to, any of the following:
 - (A) the timeline for eligibility approval;

- (B) scoring criteria and procedures for use by the review panel selected under paragraph (4) of this subsection; and
 - (C) eligibility approval criteria, including the minimum score necessary for approval.
- (2) The Texas Education Agency (TEA) shall review eligibility approval requests submitted under this section. If the TEA determines that an eligibility approval request is not complete and/or the applicant does not meet the eligibility criteria in TEC, §11.174, the TEA shall notify the applicant and allow ten business days for the applicant to submit any missing or explanatory documents.
- (A) If, after giving the applicant the opportunity to provide supplementary documents, the TEA determines that the eligibility approval request remains incomplete and/or the eligibility requirements of TEC, §11.174, have not been met, the eligibility approval request will be denied.
 - (B) If the documents are not timely submitted, the TEA shall remove the eligibility approval request without further processing. The TEA shall establish procedures and schedules for returning eligibility approval requests without further processing.
 - (C) Failure of the TEA to identify any deficiency or notify an applicant thereof does not constitute a waiver of the requirement and does not bind the commissioner.
 - (D) A decision made by the TEA to deny, remove, or return an eligibility approval request is a final administrative decision of the TEA and may not be appealed under TEC, §7.057.
- (3) Upon written notice to the TEA, an applicant may withdraw an eligibility approval request.
- (4) Applicants with complete eligibility approval requests shall be reviewed by an external eligibility approval request review panel selected by the commissioner. The panel shall review eligibility approval requests in accordance with the procedures and criteria established in the eligibility approval request form. Review panel members shall not discuss eligibility approval requests with anyone except TEA staff. Review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from any person or organization with an interest in the results of an eligibility approval request review. Members of the review panel shall disclose to the TEA immediately the discovery of any past or present relationship with an applicant, including any current or prospective employee, agent, officer, or director of the eligible entity, an affiliated entity, or other party with an interest in the approval of the eligibility approval request.
- (5) No recommendation, ranking, or other type of endorsement by a member or members of the review panel is binding on the commissioner.
- (6) All parts of the district's eligibility approval request are releasable to the public under the Texas Public Information Act, Texas Government Code, Chapter 552, and will be posted to the TEA website. Therefore, the following must be excluded or redacted from an eligibility approval request:
- (A) personal email addresses;
 - (B) proprietary material;
 - (C) copyrighted material;
 - (D) documents that could violate the Family Educational Rights and Privacy Act (FERPA) by identifying potential students of the partnership school, including, but not limited to, sign-in lists at public meetings about the school, photographs of existing students if the school is currently operating or photographs of prospective students, and/or letters of support from potential charter school parents and/or students; and
 - (E) any other information or documentation that cannot be released in accordance with Texas Government Code, Chapter 552.
- (7) TEA staff may interview applicants whose eligibility approval requests received the minimum score established in the eligibility approval request form, may specify individuals required to

attend the interview, and may require the submission of additional information and documentation prior or subsequent to an interview.

- (8) The commissioner will consider criteria that include the following when determining whether to approve an applicant.
- (A) The criteria described in this subparagraph apply to all campuses. Each applicant must demonstrate:
- (i) evidence of a high-quality district charter authorizing process as required by TEC, §12.058, which may include the following:
 - (I) the district's adoption and implementation of an authorizing policy;
 - (II) the district's adoption and implementation of a local campus charter application, including the evaluation of:
 - (-a-) the qualifications, backgrounds, and histories of individuals and entities who will be involved in the governance, management, and educational leadership of the proposed operating partner; and
 - (-b-) any operating and academic performance history of the proposed operator; and
 - (III) the district's adoption and implementation of codified procedures for monitoring and reviewing in-district charters;
 - (ii) evidence that the applicant and proposed operating partner meet the requirements to contract to partner to operate, as outlined in §97.1075 of this title (relating to Contracting to Partner to Operate a Campus under Texas Education Code, §11.174); and
 - (iii) an assurance that the governing body of the operating partner shall remain independent of the independent school district. This may include the following:
 - (I) an assurance that the governing body of the operating partner is not and shall not be comprised of any members of the independent school district's board of trustees, the superintendent, or staff responsible for granting the contract to partner to operate or overseeing the performance contract;
 - (II) an assurance that the majority of the governing body of the operating partner is not and shall not be comprised of district staff;
 - (III) an assurance that no member of the governing body of the operating partner will be related within the first degree of affinity or consanguinity with any members of the independent school district's board of trustees, the superintendent, or staff responsible for granting the charter or contract to partner to operate or overseeing the performance contract;
 - (IV) an assurance that all members of the governing body of the operating partner have passed and will continually pass the district's conflict of interest checks; and
 - (V) an assurance that the district has not appointed a majority of the members of the governing board of the operating partner; and
 - (iv) an assurance that the operating partner has the staff capacity, including at least one full-time equivalent employee, necessary to oversee the operation of the campus.

- (B) The criteria described in this subparagraph apply to a campus whose last preliminary or final overall performance rating was unacceptable. In addition to the criteria described in subparagraph (A) of this paragraph, the commissioner will consider the following:
- (i) evidence that the proposed operating partner has the capacity to operate the campus, including the following:
 - (I) an education plan;
 - (II) the capacity of the operating partner's board and leadership team; and
 - (III) if applicable, the operating partner's previous history operating campuses; and
 - (ii) evidence or an assurance that the operating partner has or will have dedicated staff capacity to operate or oversee the operation of a campus.
- (C) Notwithstanding this subsection, the commissioner will treat a campus granted a charter under TEC, Chapter 12, Subchapter C, as an open-enrollment charter school under TEC, §11.174(a)(1) [~~§17.174(a)(1)~~], if the Subchapter C charter was granted by a high-quality district authorizer. A high-quality district authorizer is a district that has successfully completed a state-approved professional development program in high-quality authorizing and has operated at least four Subchapter C campuses that are eligible for benefits under TEC, §11.174, in the prior year with at least 75% of those campuses performing at or above an agency-identified threshold for each campus's School Progress Domain.
- (e) Decision finality. ~~[Notwithstanding any other provisions, the commissioner may approve an eligibility approval request under this section if the commissioner determines that the approval of the eligibility approval request will improve student outcomes at the campus.]~~ The approval or denial of the eligibility approval request is a final administrative decision by the commissioner and not subject to appeal under TEC, §7.057.