December 20, 2019

The Honorable Mike Morath
Commissioner of Education
Texas Education Agency
William B. Travis Building
1701 N. Congress Avenue
Austin, Texas 78701

RE: Proposed rule changes to 19 Texas Administrative Code Sections 100.1010 and 100.1033

Dear Commissioner Morath:

On behalf of the education organizations listed at the end of this letter, we submit these comments on the proposed rule changes to 19 Texas Administrative Code Sections 100.1010 (Performance Frameworks) and 100.1033 (Charter Amendment).

The proposed change to Section 100.1010 alters the framework for measuring the performance of an open-enrollment charter school, and the proposed change to Section 100.1033, among other modifications, provides for the framework's use in considering charter amendments.

Based on academic, financial, and operational criteria, the proposed rule divides charter schools into three tiers (high-performing, average performance, and watch list status). These tiers would be used for TEA's levels of oversight and for TEA determinations of eligibility for expansion amendments (an amendment that permits a charter school to increase its maximum allowable enrollment, extend the grade levels it serves, change its geographic boundaries, or add a campus or site), in addition to the requirements in Education Code Sections 12.1141 and 12.115 that TEA use the framework for decisions on renewal, nonrenewal, and revocation of charters.

We note that although there is clear statutory basis to use the framework for nonrenewal and revocation of charters, statute neither contemplates nor provides authority to the Commissioner to reward certain charter schools with the ability to self-replicate across the state via nearly automatic expansion amendments using the Education Code Section 12.1181 framework. Instead, Section 12.101(b-4) has clearly prescribed parameters for "high-performing" new campus expansions. This proposed-rule framework does not follow the same statutory standards yet tries to reach nearly the same result.

Under the proposed framework, charter schools that attain scores at or above 60 percent on the framework overall and on both the academic and financial frameworks would qualify for expansion amendments, with "approval subject to the commissioner's discretionary consideration." The expansion amendments of charter schools that attain scores at or above 80 percent on the framework overall and on both the academic and financial frameworks, however, apparently are not "subject to the commissioner's discretionary consideration."

We understand the need for TEA, with a small staff overseeing hundreds of charter schools and with a paltry two-month window for amendment review, to manage its workload by limiting which charter schools can be considered for expansion amendments, and we understand why charters with the lowest performance ratings should not be considered for expansion.

We urge TEA, however, to reconsider the proposed framework rule's nearly automatic expansion eligibility for "high-performing" charter schools and the weakening of TEA's existing framework indicators. Although the proposal purports to emphasize academic achievement, it actually waters down the academic framework indicators by apparently excluding consideration of the performance of each individual campus and diminishing consideration of the performance of English language learners. The proposal also deemphasizes operational framework indicators for special populations and bilingual education/English as a second language populations and removes consideration of program requirements for career and technical education populations.

The proposed rules together provide more leeway for the proliferation and expansion of certain open-enrollment charter schools without due consideration of their impact on the best interests of all Texas public school students. We address these and other concerns below.

Proposed Rules Could Lead to Dramatic State Budget Growth and Impose Large Costs on School Districts to Students' Detriment

We question TEA's response on the Texas Register's "Fiscal Impact," "Cost Increase to Regulated Persons," and "Government Growth Impact" statements for both amendments. Although TEA acknowledges that the rulemakings would "expand the existing regulation," TEA indicated the amendment imposes "no additional costs to state or local government" (Fiscal Impact), "does not impose a cost on … a local government" (Regulated Persons), and "would not require an increase … in future legislative appropriations to the agency" (Government Growth).

Specifically, allowing a charter school chain almost carte blanche to expand its operations will result in large additional costs to state government and will require a substantial increase in state general revenue in future legislative appropriations to TEA to disburse to the expanded charter schools. The state would never allow a contractor essentially to write itself a blank check from the state treasury.

Here are facts about state general revenue legislative appropriations for charter schools:

- Charter schools have been one of the largest growth areas for general revenue in the state budget in recent years.
- In a five-year span, from Fiscal Year 2014 to Fiscal Year 2019, the state general revenue appropriations to charter schools almost doubled to about $3 billion. Charter schools, comprising about 6 percent of the state's students, were consuming about one-sixth of the state's general revenue for the Foundation School Program in Fiscal Year 2019.[1]

The following figure shows, from fiscal years 2012 to 2021, charter school state aid, the percentage of total state aid, charter school average daily attendance, and the percentage of total ADA made up by charter schools

Year	State Aid (in Millions)	Average Daily Attendance (ADA)	Percentage of Total ADA
2012	$1,172.1	139,049	3.0%
2013	$1,327.1	161,846	3.4%
2014	$1,561.3	183,228	3.8%
2015	$1,793.2	207,003	4.3%
2016	$2,030.9	226,771	4.6%
2017	$2,256.4	250,592	5.0%
2018	$2,550.8	271,781	5.4%
2019*	$2,922.2	301,882	6.0%
2020*	$3,315.5	336,325	6.6%
2021*	$3,608.0	363,511	7.0%

*Projected

- Starting with Fiscal Year 2020, HB 3 gave charter schools a "Small and Midsize Allotment," now costing $313.7 million or more than $1,000 per charter student.
    - The purpose of the Small and Midsize Allotment is to account for economies of scale. Unlike school districts, whose Small and Midsize Allotment is on a sliding scale and is capped at 5,000 students, there is no sliding scale or enrollment cap for this allotment for charter schools.
    - A charter chain with more than 46,000 students can draw $48.8 million from this allotment (more than $1,000 per student), while a school district with 4,150 students draws little more than $700,000 (about $177 per student).
- A student in a charter school is funded at a higher level of Foundation School Program operations funding (the funds to run schools and pay teachers) than the same student in all but the smallest school districts.[2] The incremental funding advantage of student attendance in a charter school is explicitly calculated by the agency as the additional revenue for an SB 1882 partnership at https://txpartnerships.org/tools/. That additional funding is inescapably an increase in the state cost of the Foundation School Program over what the same student would have cost in his or her home school district.

[1] See Legislative Budget Board, Texas Education Agency, Summary of Recommendations, Appendix G, Chart 1, at http://www.lbb.state.tx.us/Documents/SFC_Summary_Recs/86R/Agency_703.pdf (page 48).

[2] Because school districts educate much higher percentages of students with special needs such as students with disabilities, offer robust career and technical education options, and provide student services such as transportation, and thus draw more special education, career and technical education, and transportation dollars than charter schools that do not educate or offer such services, a school district may have higher average funding on a per student basis. But a student in a charter school draws a higher amount to start with than does the same student in one of the school districts serving the vast majority of the state's students.

- Even with higher levels of funding for the same student, charter schools pay teachers less on average than school districts and have higher administrative costs.[3]

This proposal has the potential to escalate the dramatic rise in costs to the state for charter schools. Unless the proposed rules are intended to reduce charter schools by the same number as the expansions they create, they cannot be revenue neutral to the state and to state general revenue appropriations.

This proposal also imposes costs on local governments. When a student leaves a school district for a charter school, many fixed costs remain, with less funding, resulting in higher costs per student.

Giving certain charter schools the unfettered ability to locate and expand wherever they please will impose large and drastic costs on school districts and their taxpayers. This will necessarily result in loss of jobs and in loss of services to children in school districts. And allowing unfettered duplication of services, buildings, and programs most certainly will result in duplication, waste, and inefficiency across the state.

We suggest the Commissioner instead amend 19 TAC Section 100.1033 to:

- Thoughtfully regulate where charter schools can expand (for example, not next to public schools offering the same grade levels and not within the boundaries of high-performing school districts)
- Study whether there is duplication of services and programs (perhaps requiring such informational detail in a needs assessment on TEA's charter amendment forms, such as asking whether a community has recently chosen to pass a bond and build new campuses or expand programs in a school district proposed to be included in an expansion)
- Consider proximity to existing school district campuses or charter schools that are not fully enrolled (please note this would require charter schools to provide specific information about the location of the proposed charter campus, including the zip code or neighborhood of the proposed new charter campus and the number of existing campuses within a three-mile and five-mile radius of the proposed location, and the enrollment and grade levels at these existing charter and district campuses so that the Commissioner can consider these factors; this specificity also would help school districts anticipate and plan for future changes to enrollment at campuses).

Additionally, we suggest the Commissioner amend 19 TAC Section 100.1033 to require consideration of potential costs to school districts, including stranded costs for school operations; stranded costs for schools recently built using bond or other funds; increased costs associated with serving special student populations, including special education students; and impact on recapture payments.

[3] See 2018 TEA Snapshot, at https://rptsvr1.tea.texas.gov/perfreport/snapshot/2018/state.html.

We also suggest the Commissioner carefully reevaluate the rulemakings' impact on costs to local governments and on local recapture increases as well as impacts on increases to the state budget, as required by Government Code Chapter 2001 (Administrative Procedure Act).

At a Minimum, a Charter Holder Should Meet All Charter Requirements and Applicable Laws Before Being Granted the Ability to Expand

The existing rule provides that the Commissioner may approve an amendment only if the charter holder meets "all applicable requirements" and only if the commissioner determines that the amendment "is in the best interest of the students enrolled in the charter school."

We suggest that "all applicable requirements" should include that the charter holder uphold and abide by each provision of the charter as well as other applicable requirements before it applies for an expansion amendment. For example, before granting an expansion amendment, the Commissioner should consider whether the charter holder has achieved the representations and goals included in its initial charter application, including the demographics of students enrolled (including percentage of economically disadvantaged, special education, African American, Hispanic, and students with a disciplinary history); special programming; and transportation.

Footnote 1 on page 1 of the framework overview states that if a charter school does not receive an operational or financial rating, its academic framework score will equal its overall framework score. We are curious why a charter school that seeks an expansion amendment should not have all three ratings. An expansion should not be automatically allowed absent an agency evaluation of why a charter cannot be evaluated financially or operationally.

We note that the proposed framework deemphasizes operational ratings, lowering it from 15 percent to 10 percent of the total score for overall performance. Financial ratings are lowered as well, from 25 percent to 20 percent of the total score for overall performance. Academic performance will constitute 70 percent instead of 60 percent of the overall score.

A charter is in the nature of a license or permit to operate a charter school, subject to applicable laws.[4] Expansion amendments are not rights, nor should the law set them up as such, which is why sorting amendments into an "automatic grant" pile via a performance framework is problematic. Frameworks and the mathematical calculation of scores can change from year to year, and pressures to reformulate them to advantage an expansion will no doubt grow if expansions are tied to fungible and malleable frameworks. But legal requirements to run a charter school and properly educate children are fairly constant and should be a first threshold measure of whether a charter school has met minimum requirements for expansion.

For example, 501(c)(3) status is a basic statutory requirement under Education Code Section 12.101. Under the framework, however, failure to maintain such status is simply one of

[4] Honors Academy v. Texas Education Agency, Texas Supreme Court (2018).

fourteen indicators on a part of the framework that only counts for 10 percent of the overall score, and it does not by itself – but should – preclude expansion. Failing an operational safeguard, such as failing to handle assessment materials properly or to handle student records properly, also should preclude consideration of an expansion amendment. To deemphasize academic accountability safeguards when substantially raising stakes on academic accountability targets could invite noncompliance with the former to benefit the latter.

Similarly, not meeting operational indicators of program requirements for special populations and for bilingual education/English as a second language populations is a huge red flag that should preclude an expansion amendment, yet these are only a few factors of many in the averaging of an overall framework score that can deem a charter school "high-performing."

Additionally, not having the principal or all teachers at the charter school hold a baccalaureate degree or meet the statutory exception is a basic legal requirement for a charter school[5] and should disqualify an expansion amendment applicant. Instead, this law counts for less than 1 percent of the total framework score, and a charter school that does not comply could still be labeled "high-performing." Charter school teachers other than special education and bilingual education teachers are not required to hold state certification. Thus, in a state focusing on increasing teacher quality, it is alarming that a charter school could qualify for an expansion amendment without even having degreed teachers for Texas children as required by law. We suggest as well that a charter school meet legal requirements for special education and bilingual education teachers prior to asking for an expansion amendment.

Proposed Rules and Expansion Amendments Should Be in the Best Interest of All Texas Public School Students

In 19 TAC Section 100.1033(b)(4), the "Best interest of students" are addressed:

> (4) Best interest of students. The commissioner may approve an amendment only if the charter holder meets all applicable requirements, and only if the commissioner determines that the amendment is in the best interest of the students enrolled in the charter school. The commissioner may consider the performance of all charters operated by the same charter holder in the decision to finally grant or deny an amendment.

Other Subdivisions in Subsection (b) use either "best interest of the students enrolled in the charter school" or "best interest of the students of Texas." We suggest amending the "best interest" language throughout Subsection (b) to "the best interest of the students of Texas." The mission of the public education system of this state is to ensure that all Texas children have access to a quality education.[6] For an amendment, statute does not limit the ability of the commissioner to consider only students of the charter school. Rather, under the

[5] Education Code Section 12.129 (Minimum Qualifications for Principals and Teachers).

[6] Education Code Section 4.001 (Public Education Mission and Objectives).

Education Code, the commissioner is designated "the educational leader of the state" and has the duty to "adopt an annual budget for operating the Foundation School Program" which must be "in accordance with legislative appropriations."[7] This underscores the need for the Commissioner to weigh the best interest of all students, especially for conditional approvals, relocations, and expansion amendments (including expedited expansions) that impact the Foundation School Program.

The Commissioner also should consider the best interests of all students because of the potential harm to millions of Texas children. "School choice" should not mean a charter school choosing its own students, particularly in a high-stakes performance-equals-expansion environment. Any attempt to choose or deny students should preclude consideration of an expansion amendment. Selective advertising, paying to recruit students from certain neighborhoods or groups, "counseling out" certain kinds of students before admission or enrollment, or disciplining certain kinds of students as incentives to leave would not necessarily impact "the students enrolled in the charter school." These activities deeply impact the rejected students who are not recruited, not admitted, or not retained. These activities also impact the nearby school district students who wonder why they have downsized programs once the "tuition free" charter school opens next door. The proposed rules raise the stakes on incentives to game the system by recruiting and retaining high-performing students and then reaping a financial expansion-amendment reward for educating such students.

A charter expansion necessarily impacts the students at an affected school district, particularly if the demographics of the charter school and the school district are drastically different and the school district will be left with fixed costs and fewer resources to educate a larger pool of students whose education requires more resources to reach the same educational outcomes required of all students.

To further clarify whether an expansion amendment is in the best interest of all students in Texas, we suggest that Section 100.1033 should require analysis of the following factors:

- Is the percentage of the charter school's special education enrollment near the state average of 9.1 percent and are its campuses near the average of neighboring school district campuses from which each charter campus draws? For example, the Commissioner could require that a charter school, before asking for an expansion, be serving at least 80 percent of the state average (at least 7.82 percent special education enrollment).
- Is the percentage of English language learners at each charter school campus similar to the neighboring school district campuses from which it draws?
- What is the attrition rate of students before graduation, and what is the achievement of those students who have left?

Charter schools on average serve drastically lower percentages of special education students than school districts, and many serve fewer English language learners than the neighboring school district campuses from which they draw students. This is particularly true of students

[7] Education Code Section 7.055 (Commissioner of Education Powers and Duties).

who have the highest needs. The Education Code mandates that charter schools be "open-enrollment" and even names them that. We should ensure the state not reward an "open-enrollment charter school" if it does not truly serve all students.

We propose that the Commissioner consider these factors and demographics before granting any expansion amendment. For example, if a charter school serves few special education students, it should not qualify for expansion. Underserving is undeserving.

TEA Should Not Water Down Accountability by Removing A-F Accountability for Campuses

If the Commissioner uses one individual A-F school district campus rating to replace an entire school district's elected school board, surely the Commissioner should use individual A-F charter school campus ratings when considering charter performance and expansions.

The current academic framework indicators use A-F ratings for "campus status," and a charter school gets the highest score if all campuses received A or B ratings. The proposed rule changes this to a numerical scoring, presumably so that the scores of all the campuses can be combined together for an aggregate score, with the highest score if all the campuses "received ratings that were at or above 80." If campuses are to be aggregated, it largely duplicates the first academic indicator, which is "Overall A-F score" for the charter school (which includes all campuses), and we oppose watering down the scoring and moving from individual campus ratings. Also, numerical averaging could lead to gaming the system through the creative creation of small high-performing campuses to bring up the numerical average of "all" campuses. Small high-performing campuses (or small populations of students at tested grades) could thus mask poorer-performing large campuses and still look like an "80" campus average.

If TEA's intent was not to numerically aggregate campuses, then we would suggest clarifying that this is not the intent by changing "all" (which means "the whole number or sum of" and expresses an aggregate) to "each of" (which refers to "every one of two or more persons or things," separately considered) in each instance to ensure continued individual campus focus. For example, change "Earn 10 points if all the charter school's campuses received ratings that were at or above 80" to "Earn 10 points if each of the charter school's campuses received ratings that were at or above 80." Of course, it would be simplest and most parallel to school district accountability to keep the existing A-F campus ratings language intact.

On a different issue, proposed 19 TAC Section 100.1033(b)(12) and (13) change which ratings are used for new school designations and high-quality campus designations. Under the proposal, these charter schools must have received the highest or second highest rating "in two of the last four ratings" rather than current rule's "for three of the last five years." We suggest looking instead at the three most recent consecutive years of ratings. School districts do not get to pick preferred years in the accountability system.

Disruptive Relocation Amendments Should Be Considered Expansion Amendments

The proposed rule on relocation amendments states:
(6) Relocation amendment. An amendment to relocate an existing campus or site [~~with the same administration and staff while still serving the same students and grade levels~~] is not an expansion amendment subject to paragraphs (9)(A) and (10)(D) of this subsection. An amendment to relocate solely permits a charter holder to relocate an existing campus or site to an alternate address while serving the same students and grade levels without a significant disruption to the delivery of the educational services. The alternate address <u>of</u> [~~in~~] the relocation [~~request~~] shall not be in excess of 25 miles from the existing campus address.

The proposed changes to 19 TAC Sec. 100.1033(b)(6) create an exception to the expansion amendment for something that is very much like an expansion amendment. Non-expansion amendments can be proposed at any time and are under fewer parameters, so this distinction is important. We argue that it is per se not a "relocation" of an existing campus or site to not include the same staff and administration, as under the proposed rule. This is a significantly disruptive change to students. Also, we urge limiting relocation amendments to relocating a charter campus or site a few miles, not more than 10 miles, from the existing charter campus. Especially for a charter school that does not offer transportation, relocation of a site or campus almost 25 miles away is a significantly disruptive change to students attending that campus or site and thus such an amendment is not a mere "relocation." Such an amendment should fall into the "expansion amendment" category.

Other Suggestions for Changes to Proposed Rules

The proposed rules in 19 TAC Section 100.1033(b)(5) remove the need for a written resolution for conditional approval:
(5) Conditional approval. The commissioner may grant the amendment without condition, or may require compliance with such conditions and/or requirements as may be in the best interest of the students enrolled in the charter school. [~~An amendment receiving conditional approval shall not be effective until a written resolution accepting all conditions and/or requirements, adopted by the governing body of the charter holder and signed by the members voting in favor, is filed with the TEA division responsible for charter schools.~~]

We suggest that the rule reflect that, when TEA grants an amendment with conditions or requirements, TEA post the list of the conditions or requirements on its charter amendments website so there is a clear public record for all parents and citizens. The presence of a written, signed agreement, however, would better inform the public and protect the agency.

Summary

We normally would not comment on proposed rules that do not directly affect school districts. Except that these rules do affect all schools and all children.

The proposed rules could allow greater expansions of charter schools, with some charter schools receiving nearly unfettered authority for expansions. This could have a tremendous

financial impact on the Foundation School Program, school districts, students, and taxpayers. We urge review during the expansion amendment process of duplication and proximity to other campuses.

We have an accountability system and A-F campus ratings that are used to intervene in and sanction school districts. Moving away from A-F campus ratings for charter schools could result in a watered-down and gameable system that could create large financial rewards for charter schools that can expand.

The rules should include safeguards to ensure that a charter school that seeks to expand also complies with each provision of its charter and with each applicable law. For example, noncompliance with 501(c)(3) status or noncompliance with the statute requiring principals and teachers to have a baccalaureate degree should be bars to expansion and not be overlooked as a small portion of an overall framework score. Compliance with operational safeguards, such as properly handling assessment materials and student records and complying with program requirements for special populations, are even more important as stakes are raised.

These proposed rules could create the potential to skew charter schools' incentives to underserve students whom they perceive as having more challenges or more expense, especially students with disabilities. Strong safeguards must be put in place to prevent this result, such as ensuring that charter school campuses are not underserving special student populations relative to their nearby school district campuses. Charter school amendments should be based on the best interest of all Texas school children rather than the "best interest of the students enrolled in the charter school."

The state would never allow a transportation contractor, for example, to abide by the rules of its choosing, locate roads where it pleases, and serve only the most profitable communities. We urge TEA to do no less for children.

Thank you for the opportunity to comment on these rules. We ask that the agency refine the rules to provide that high-quality charter schools, at a minimum, abide by each provision of their charters and applicable laws, serve all students with true open enrollment, and have the same individual campus accountability as school districts.

The following organizations endorse the comments included in this letter:

Texas Association of School Boards

TASA
TEXAS ASSOCIATION OF
SCHOOL ADMINISTRATORS

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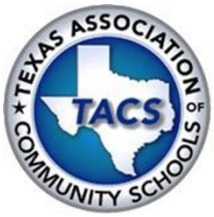

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