

**June 7, 2019**

**FINAL REPORT**

Ricardo Moreno, Board President  
Harlandale Independent School District  
102 Genevieve Street  
San Antonio, Texas 78214-2997

Reynaldo Madrigal, Superintendent  
Harlandale Independent School District  
102 Genevieve Street  
San Antonio, Texas 78214-2997

Dear Board of Trustees, and Superintendent Madrigal,

The enclosed final report presents the findings resulting from a Special Accreditation Investigation (SAI) conducted by the Texas Education Agency's (TEA) Special Investigations Unit (SIU), pursuant to the authority set forth under Texas Education Code (TEC) §39.057. The investigation was initiated based on allegations that Harlandale Independent School District (HISD) was not in compliance with the Governance of Independent School District, Nepotism, Contract Procurement, Conflict of Interest/Disclosure requirements under Tex. Educ. Code §§11.051, 11.151, 11.1511, 11.1512, 11.1513, 44.031, 44.0411, Tex. Gov't Code §§573.002, 573.041 and Tex. Local Gov't Code §176.003.

This final report addresses only those allegations described herein and investigated by the SIU to date. These findings do not address all allegations raised before, during or after our investigation. Additional investigative work may be conducted in the future to address any remaining allegations. Furthermore, other TEA divisions may be in the process of investigating HISD or issuing other investigative reports regarding the district.

The district and each person identified in this report as having violated a law, rule, or policy was afforded the opportunity to request an Informal Review of the preliminary report, which was sent to the school district on November 13, 2018, in accordance with Texas Education Code (Tex. Educ. Code) §39.058 and 19 Texas Administrative Code (Tex. Admin. Code) §157.1123.

The TEA received a written request for an Informal Review from HISD on December 21, 2018. TEA has considered the information provided by HISD in reaching its final findings. The attached final report is issued in accordance with Tex. Admin. Code §157.1123.

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If you have any questions, please contact me at (512) 936-5962.

Sincerely,



Jason Hewitt, Director  
Special Investigation Unit  
Monitors and Conservators

## **TEA Special Accreditation Investigation**

### **Final Investigative Report**

#### **Harlandale Independent School District**

The Texas Education Agency (TEA) received multiple complaints alleging that Harlandale Independent School District (HISD) is not in compliance with the laws relating to Governance of Independent School Districts, Tex. Educ. Code §§11.051, 11.151, 11.1511, 11.1512; Nepotism, Tex. Gov't Code §§573.002, 573.041, Tex. Educ. Code §11.1513, Harlandale ISD Board Policy DBE (Legal) 015904; Contract Procurement, Tex. Educ. Code §§44.031, 44.0411, Tex. Gov't. Code §2269.

In August 2017, TEA's Special Investigations Unit (SIU) contacted Harlandale ISD's (HISD) Superintendent and requested documentation and information in response to these allegations. In October 2017, HISD provided TEA with the requested documentation and information. Subsequently, in February 2018, SIU conducted an on-site visit at HISD. In May 2018, HISD provided additional documentation. The SIU investigation findings in this report are the result from the analysis of documents and interviews of HISD Board of Trustees, current and former HISD employees. The allegations and findings are described below resulting from the on-site inspections and extensive analysis of documents by SIU.

#### **Allegations**

- 1. Governance of Independent School District** In 2015, the Harlandale ISD Superintendent entered into four agreements and made payments to Terracon Consultants, Inc., without board approval, as required by CH (Local) X and Tex. Educ. Code. §11.1511.
- 2. Contract Procurement** Harlandale ISD has failed to follow proper procurement procedures as the bidding and selection processes were conducted improperly for the Gillette, Vestal and Carroll Bell Elementary Schools during fiscal year 2013-2014 and 2015-2016, in violation of Tex. Educ. Code §§44.031, 44.0411, Tex. Gov't. Code §2269.
- 3. Nepotism** Several family members of the Superintendent were hired to work in the district, in violation of Tex. Educ. Code §11.1513, Tex. Gov't Code §§573.002, 573.041, and Harlandale ISD Board Policy DBE (Legal) 015904.
- 4. Open Meeting Act** Board Members engaging in unlawful exchange of text messaging and discussing school business, in violation of Tex. Gov't Code §551.

#### **TEA Response to General Comments in HISD Responses to Preliminary Report**

TEA acknowledges that both of Harlandale ISD's (hereinafter, "HISD") responses of December 21, 2018 and February 11, 2019, contain additional sections that do not correspond with the titles of sections within TEA's Preliminary SAI Report. TEA represents that HISD responses have been reviewed and considered in this Final Report. However, due to overlapping, repetitive and lengthy statements within the HISD's responses it was not feasible to incorporate the entirety of HISD's response, word for word, into this Final Report, in an effort to prevent confusion and duplicity.

The TEA acknowledges HISD's objection to the TEA Staff's findings; to the TEA Staff's discussion and

analysis; and to the proposed corrective measures and sanctions described in the Preliminary SAI Report. The TEA also acknowledges HISD's request for an in-person meeting with either the Commissioner or with a Commissioner-designated hearing officer at the TEA headquarters in Austin. The TEA additionally acknowledges HISD's request for an Informal Review to the Preliminary SAI Report, as set-forth in TEC. §39.057(b), Special Accreditation Investigation.

A. HISD Request for In-Person Meeting

It appears that HISD has misinterpreted the rule regarding who has the right to request an in-person meeting regarding an informal review. The right to request such meeting is set forth in Tex. Admin. Code §157.1134(a), which states: "The Texas Education Agency (TEA) representative may require the school district or open-enrollment charter school to meet at the TEA headquarters in Austin, Texas, or by telephone to discuss the findings and/or provide additional information for review." It is the TEA representative, rather than a school district, who may require such a meeting as deemed necessary. TEA has conducted an informal review." Pursuant to the rule, a school district does not have a right to request an in-person meeting with TEA. TEA does not require an in-person meeting with HISD prior to the issuance of this Final Report, thus no in-person meeting will be scheduled at this time.

B. HISD Request for Discovery

The TEA respectfully disagrees with the District's assertion that as a result of not receiving a response to a discovery request set forth in its November 29, 2018 letter, HISD's ability to adequately respond to the Preliminary SAI Report has been compromised. Upon review of Tex. Admin. Code §157.1123(c), HISD will find that in the informal review process, the "rules of civil procedure and evidence, including rules prohibiting ex parte communications, do not apply." That said, on January 23, 2018, the TEA provided copies of the text messages referenced in this report to HISD. Furthermore, during the investigation and during the phase of gathering and requesting documentation from HISD, numerous documents have been collected directly from HISD, which are easily obtainable by HISD counsel. As such, HISD was fully able to respond to the Preliminary SAI Report, as indicated by the December 21, 2018 sixty-five-page response with voluminous supporting attachments, as well as the subsequent February 11, 2019 response.

C. HISD Challenge to Commissioner of Education Delegation of Authority

HISD claims that the November 13, 2018, Preliminary SAI Report fails to provide evidence that the SAI was conducted within any parameters and constraints authorized by the Commissioner, if such investigation was in fact lawfully authorized. HISD also claims that the Commissioner is required to personally conduct HISD's informal review, under Tex. Educ. Code §39.058. TEA respectfully disagrees with both claims.

Pursuant to Tex. Educ. Code §7.055(b)(5), the Commissioner of Education has delegated to the Deputy Commissioner of Governance the full authority to conduct a Special Accreditation Investigation and to approve and to sign all documents related to a SAI Investigation, Preliminary and Final Reports. The Commissioner has also delegated full authority related to informal reviews. As legal counsel for HISD is aware, the Commissioner of Education may delegate ministerial and executive functions to agency staff and may employ division heads and any other employees and clerks to perform the duties of the agency. As such, both the investigative and informal review processes are in full compliance.

D. HISD Challenge to TEA Investigation Authority

Throughout HISD's response, HISD asserts that TEA has failed to specifically cite provisions relating to the Commissioners authority to investigate under Tex. Educ. Code §39.057, and specifically, that the Commissioner did not authorize an investigation to be conducted "as the commissioner otherwise determines necessary". HISD argues that due to a lack of authority to investigate, various findings by TEA must be dismissed and that SAI Findings not related to matters specifically designated by Commissioner's statutory authority in the Notice of SAI and Amended Notice of SAI violate the statutory limits of the Agency's power.

An example of HISD's challenge is provided in the excerpt below, however, HISD appears to have referenced Tex. Educ. Code §37.057(a)(1-15) for Tex. Educ. Code §39.057(a)(1-15):

"The matters raised by Finding No. 3 were not included in items noticed for investigation under General Exhibits 2 and 3. SAI Findings not related to matters designated by the Commissioner's statutory authority violate the statutory limits of the Agency's power. This is especially so when relating to matters not statutorily designated for possible investigation in the first fifteen (15) subparts of Tex. Educ. Code §37.057(a)(1-15). Because they are not so designated here, these issues can only be investigated "as the commissioner otherwise determines necessary". Tex. Educ. Code §37.057(a)(16). There has been no such determination in this investigation."

TEA disagrees. Contrary to HISD assertions, TEA properly cited the statutory authority to conduct the investigation and the resulting findings flow directly from that authority. As HISD legal counsel is aware, the TEA Special Investigations Unit issued a Notice of Special Accreditation Investigation dated August 11, 2017, citing the authority to conduct the investigation under Tex. Educ. Code §39.057(15). On August 30, 2017, the TEA Special Investigations Unit issued an Amended Notice of Special Accreditation Investigation, again citing the authority to conduct the investigation under Tex. Educ. Code §39.057(15).

At the time of the issuance of the Notice of SAI on August 11, 2017, and the Amended Notice of SAI on August 30, 2017, Tex. Educ. Code 39.057(a)(15) was as follows: "The Commissioner may authorize special accreditation investigations to be conducted as the commissioner otherwise determines necessary." As such, both the Notice of SAI and Amended Notice of SAI as issued provided proper notice to HISD, based on the law that was in effect at issuance, regarding the authority of TEA to conduct the investigation, including the investigation of subsequent issues discovered during and flowing from the investigation as the commissioner otherwise determines necessary.

Research of the statutory history of Tex. Educ. Code §39.057 shows that it was amended on September 1, 2017, two days after the Amended Notice of SAI. This amendment shifted the provision that existed under Tex. Educ. Code 39.057(a)(15) to Tex. Educ. Code §39.057(a)(16). HISD's attempt to retroactively apply a statute is improper.

#### E. Findings and Recommendations

HISD claims an adoption of the Preliminary SAI Report as a Final Report would be arbitrary and capricious, and illegally affect and abridge the substantial rights of the District, its voters, and its Trustees. Findings in this Final Report reflect and consider the district's response to the Preliminary Report, if applicable, and any Findings which are amended or retracted have been updated in this Final Report accordingly. As such, these claims by HISD are unfounded.

F. Comments Related to Gillette Elementary Repairs

The district responded that the focus of the criticism appears to be on the apparent rising cost of the Gillette repairs. As the actual complaint was about this issue, TEA's investigation initially focused on the procurement process. However, the analysis of this issue by TEA later focused on Board Member interaction and overreach which demonstrates the lack of collaboration among the Board.

G. Comments Related to Vestal and Carroll Bell Elementary Schools

The district responded although matters to procurement at Vestal and Carroll Bell Elementary schools are listed as allegations in Item 2 of the Preliminary SAI Report, the Report alleges no facts whatsoever with respect to procurement issues relating to these two schools. As the actual complaint was about this issue, TEA's investigation initially focused on the procurement process. However, the analysis of this issue by TEA later focused on Board Member interaction and overreach which demonstrates the lack of collaboration among the Board.

**FINDINGS**

**Finding #1** The HISD Superintendent entered into four agreements and made payments to Terracon Consultants, Inc., without board approval, in violation of CH (Local) X and Tex. Educ. Code. §11.1511(c)(4).

**HISD's Response to Finding #1**

"TEA Finding No. 1 – Terracon Consultants, Inc. Facts Relevant to TEA Finding No. 1. At all times material to the Preliminary SAI Report, Terracon Consultants, Inc. ("Terracon") has been a professional engineering firm. Terracon has been licensed by the Texas Board of Professional Engineers since January 12, 2001 to offer professional engineering services within the State of Texas. (Firm # 3272). Harlandale ISD had used the services of Terracon Consultants, Inc. (Terracon) since January 2007 when Terracon was selected as a part of one of the multiple RFQ processes conducted by HISD. Terracon's services to HISD have been consistently found to be those of a highly-qualified provider of specialized professional engineering service offered and provided at a fair and reasonable price. Terracon's services have satisfactorily met District needs. HISD's prior experience with Terracon [See e.g., Exhibit Finding 1-A] has provided a context and history of performance from which the District can and has determined the satisfactory value of their qualifications and service.

For the engagements apparently at issue in TEA Finding No. 1 (the specific engagements have not been identified), Terracon was identified as a vendor on an eligible list of vendors which were selected after an RFQ process conducted in accordance with District Board Policy CH (Local). On June 17, 2013. The HISD Board of Trustees approved

Terracon, among other vendors, for stand-by Geotechnical Engineering and Construction Materials testing in accordance with Request for Qualifications (RFQ) 130548. As can be seen from the agenda item recommendation, Terracon was placed upon a list of respondents ". . . to comprise a standby panel from which District staff may choose."

There were six payments to Terracon during the 2014-15 school year totaling \$60,925. The amounts paid were well within the budgeted authority for such expenditures. Board adoption of a budget constitutes the appropriation authority for expenditures of District funds for the purposes set forth in such adopted budget. See, Tex. Educ. Code §44.006.

Similarly, at page 13 of the Preliminary SAI Report, TEA Staff alleges that the Superintendent exceeded his authority with respect to the alleged approval of four “agreements.” Those Agreements are attached hereto as Exhibit Finding 1-H through K. They are each for materials testing. The District identified four Purchase Orders for these Terracon services that correspond to the four contracts. Each of the Purchase Orders was identified as being responsive to Bid No. 101015. As explained by the Superintendent during the investigative phase, the four PO’s should have been identified to Bid No. 130548. The delegation of general authority with respect to the designation of a consultant off of the approved list was Board-authorized on June 13, 2014. It is hardly surprising that Terracon was designated by HISD Staff as the consulting engineer. On January 23, 2012, Terracon had been designated by a unanimous Board of Trustees’ vote to serve “. . . as the consultant of record for the inspection of construction materials testing and special services for Harlandale and McCollum High Schools Band Hall and Field House Project for Bond 2009 . . .” The Terracon engagement was within the HISD budget for facilities for the 2014-15 fiscal year. The four contracts and corresponding POs constituted the extent of the District’s authorization to Terracon. The checks were for payments actually made during the 2014-15 fiscal year.

B Legal Analysis of TEA Finding No. 1 As is indicated in the June 17, 2013 Agenda Item, District staff was expressly delegated the authority to engage one or more of the consulting engineering firms on the Board approved list. There were funds available for such purchases. The Board’s action delegating the authority is expressly authorized by law in the provisions of Tex. Educ. Code §§44.0312(a); 11.202(d)15 and Tex. Govt Code §2269.053.

The HISD Board, as advised by its own legal counsel, authorized the Superintendent to approve the Terracon PO’s and contracts. At Finding #1 (page 4) and again at pages 5-6 of the Preliminary SAI Report, TEA Staff alleges, albeit curiously without reference to the specific provisions involved, that the Superintendent violated his authority under District Policy CH (Local) by making purchases on behalf of the District ostensibly without required prior Board approval. District Policy CH (Local) provides as follows: The Board delegates to the Superintendent or designee the authority to make budgeted purchases for goods or services. However, any single, budgeted purchase of goods or services that costs \$25,000 or more, regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place. In no event shall the Superintendent enter into contracts with attorneys, architects, auditors, or fiscal agents without prior Board approval.

As discussed above, there was a record of approvals for these transactions. The delegation of such authority is expressly authorized by law Tex. Educ. Code §§11.1512 (c)(4) and 11.201(d)(15), Tex. Govt Code §2269.053(a), by HISD Policy CH (Local) and in this case by specific action taken on June 17, 2013, authorizing HISD Staff to select and contract with identified vendors for engineering services. TEA Staff may not substitute its interpretation of HISD Board Policy CH (Local) for that of the Board which clearly expressed its intent to delegate, unless the Board’s interpretation of its own policy was arbitrary. It was not. A “reviewing tribunal is restricted to that record, save any extraordinary circumstances and it may not re-weigh the evidence, find facts or substitute its judgment for that of the original tribunal.” *Ysleta Independent School District v. Meno*, 933 S.W.2d 748, 751 (Tex. Civ. App. – Austin 1996 writ denied). A local board is "best suited to be the interpreter of its own policies and the Commissioner of Education

will not substitute his judgment for that of the District unless that decision was arbitrary, capricious or unlawful,” *San Antonio Teacher's Council v. San Antonio ISD*, TEA Docket No. 270-R2-689 (Comm'r Ed. 1991); *Poole v. Karnak ISD*, TEA Docket No. 045-R10-1203 (Comm'r Ed. 2005).

Finally, at page 7 of the Preliminary SAI Report, TEA Staff cited an inquiry made by the District's Auditor as the basis for concern about the lack of Board approval. As can be seen from the attached letter recently provided by the District's external auditor, Mr. Rene E. Gonzalez, the CPA's concerns from 2015 have been resolved in favor of the District. The contracts cited by Mr. Gonzalez in resolving his concerns are attached hereto. Each of the attached four contracts are for materials engineering, testing and inspection services which are subject to Tex. Govt Code §2269.058(a). As such, the provisions of Tex. Govt Code §2269.058(b) direct the procurement of such services through Tex. Govt Code §2254.0004, the Professional Services Procurement Act. Each of the contracts can in turn be linked through their purchase order numbers to HISD Request for Qualifications (RFQ) 130548 under which the Board approved the vendor list and delegated Board authority to staff to select vendors from the list.

For all of the foregoing reasons, the total payments to Terracon Consultants during the 2014- 15 school year were fully authorized, properly procured, within the HISD budget, and within expressly delegated executive authority for said purposes.”

### **TEA'S Informal Review of Finding #1**

TEA is perplexed as to why HISD is elaborating on the selection of Terracon Consulting by HISD as a qualified vendor pursuant to Tex. Gov't Code §2254, there is no finding regarding this issue. What the district fails to ascertain, however, is although HISD may have a group of qualified vendors, which included Terracon, the qualification step does not abrogate the Board of Trustees duty in approving professional services contracts and contracts above \$15,000. In this case, the Board neither approved any of the contracts for professional services with Terracon, nor did they approve any of the invoices/purchase orders related to the contracts.

The process under Tex. Gov't Code §2254 requires that only after a vendor of professional services is qualified, that negotiation for cost of services begins and contracts are entered only after there is an agreement on that cost. Approval of a qualified vendor by the Board does not give delegation to the Superintendent to approve a professional services contract. The Superintendent is specifically prohibited from entering into a professional service contract and requires Board approval. CH(Local) X.

HISD's additional argument that because of the contract, purchase orders and subsequent payments were “within the budget” and therefore could be approved by the Superintendent is also illogical and directly contradicts their own procurement rules at the time of the contracts and payments.

CH (Local) X, (version prior to 09/2015) states that the HISD delegates to the Superintendent or designee the authority to make budgeted purchases for goods or services. However; any single, budgeted purchase of goods or services that costs \$15,000 or more, regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place.

CH(Local) X, (current as of 09/2015) states that the HISD Board delegates to the Superintendent authority to make budgeted purchases states that the HISD delegates to the Superintendent or designee the authority to make budgeted purchases for goods or services. However; any single, budgeted purchase of goods or services that costs \$25,000 or more,



regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place. *See* HISD Exhibit 11

TASB School Board Guide to Purchasing, page 3, states “Based on this provision, if the Superintendent purchases goods or services at a cost below the dollar amount set by the board, the superintendent would not need to seek board approval of the contract as long as the goods or services are provided for in the adopted budget.” *See*, HISD Exhibit 6.

Review of the contracts show that one contract is above \$15,000 alone, and all the contracts and purchase orders are well above \$15,000 within a one-year time frame, when combined, in 2014. These facts required the Superintendent to secure Board approval, regardless of method of procurement.

As such, the Superintendent overreached his authority when he contracted and then approved payments to Terracon beyond his delegated authority. There are no evidentiary documents or board minutes that show the Board delegated to the Superintendent the authority to enter into professional services contracts or to enter into contracts for services which are over the allowed threshold of \$15,000 without Board approval.

The Agency is not persuaded to change the substance of its findings based on the response provided by Harlandale ISD. TEA determines that Finding One stands.

**Finding #2** The HISD Board of Trustees failed to monitor district finances to ensure that the Superintendent properly maintained the district’s financial procedures and records, in violation of Tex. Educ. Code §§11.1511(b)(9), 11.1511(b)(15).

#### **HISD’s Response to Finding #2**

“Other than the facts related to Terracon discussed above, the facts relating to Jasmine Engineering and the elementary school issues discussed below, the Preliminary SAI Report completely fails to provide Harlandale ISD any notice of any other matters under review concerning Board financial oversight. We do understand and will directly address issues related to the acquisition of engineering services by the Board of Trustees. There is simply no hint of any other issue surrounding putative financial oversight requirements in either of the two Notice Letters or in the Preliminary SAI Report to which a response can be written. This Response and the District’s Letter of November 29, 2018 [General Exhibit 1] raise procedural and due process issues with respect to the lack of required notice and the requirement of a Commissioner’s authorization for review. The District stands by these objections.

Notwithstanding the lack of specifics, a few observations must be made with respect to the alleged lack of Board oversight. The Board properly delegated authority to the Superintendent and Administrative Staff of the District. Under express provisions of Texas Law, to wit: TEX. EDUC. CODE §§ 44.0312(a); 11.202(d)15, and TEX. GOV’T. CODE § 2269.053 a school board may delegate authority to make purchasing decisions. Harlandale ISD District Policy CH (Local) requires, in relevant part: However, any single, budgeted purchase of goods or services that costs \$25,000 or more, regardless of whether the goods or services are competitively purchased, require Board approval before a transaction may take place. In no event shall the Superintendent enter into contracts with attorneys, architects, auditors, or fiscal agents without prior Board approval. [See, General Exhibit 11, District Policy CH (Local)]. The Board’s action taken on June 17, 2013 authorizing HISD Staff to select and contract with identified vendors for engineering services [See, Exhibit Finding 1-C] meets all of the conditions imposed by Texas law and by Local Policy. Terracon Consulting was on the Board-approved vendor list. The Board met its obligations

to approve specifically identified professional vendors of engineering services and approved staff selection from this list for specific projects. There is no lack of financial oversight shown by the selection of vendors from this list. With respect to the selection of the other engineering firms at issue in the Preliminary SAI Report, we will provide evidence of specific Board action with respect to the selection of such services. There is no demonstrable lack of oversight in the attached documentation.”

### **TEA’S Informal Review of Finding #2**

HISD received the Notice of SAI dated August 11, 2017, Amended Notice of SAI dated August 14, 2017, and Extended Notice of SAI dated August 30, 2017, that pursuant to Tex. Educ. Code §11.051, “an independent school district is governed by a board of trustees who, as a body corporate, shall: oversee the management of the district; and ensure that the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations.” HISD was properly noticed that part of the scope of TEA’s investigation on this case directly concerned HISD governance. The law authorizing TEA to conduct the investigation concerning the governance of HISD includes not only contracting and procurement, but a general review of HISD financial records. HISD’s assertion that TEA is limited or prohibited from investigating potential violations or subject matter discovered while investigating governance issues is illogical. TEA has the authority to thoroughly investigate any issues relating to HISD governance and act on newly discovered issues.

Additionally, HISD received notice regarding the applicability of Tex. Educ. Code 11.1511(b)(15) which requires the board to carry out other powers and duties as provided by this code or other law. As such, Tex. Educ. Code, §44, concerning Fiscal Management, directly relates back to the board’s requirement to oversee the management of the district pursuant to Tex. Educ Code §11.051, and clearly addresses the expectation of the financial oversight by the Board of Trustees and is part of the investigatory scope. For example, Tex. Educ. Code §44.007, Accounting System, Report (a) A standard school fiscal accounting system must be adopted and installed by the board of trustees of each school district. The accounting system must conform with generally accepted accounting principles. (c) A record must be kept of all revenues realized and of all expenditures made during the fiscal year for which a budget is adopted. A report of the revenues and expenditures for the preceding fiscal year shall be filed with the agency on or before the date set by the State Board of Education. (d) The State Board of Education shall require each district, as part of the report required by this section, to include management, cost accounting, and financial information in a format prescribed by the board and in a manner sufficient to enable the board to monitor the funding process and determine educational system costs by district, campus, and program.

As a whole, TEA’s analysis of the facts of the case indicate the Board of Trustees failed to monitor district finances to ensure that the Superintendent properly maintained the district’s financial procedures and records.

The Agency is not persuaded to change the substance of its findings based on the response provided by Harlandale ISD. Based on the totality of the record, TEA determines that Finding Two stands.

**Finding #3** The HISD Board of Trustees acted individually on behalf of the board, exceeded the scope of their authority, and failed to collaborate with the district’s administration, in violation of Tex. Educ. Code §§11.051(a-1), 11.1512(a), (b)(3), and (b)(5).

### HISD's Response to Finding #3

TEA Finding No. 3 – Trustees Acting Individually.

Facts Relevant to TEA Finding No. 3.

The Preliminary SAI Report does not yield much information concerning what “evidence” TEA relied on to conclude that Trustees “. . . acted individually on behalf of the board, exceeded the scope of their authority, and failed to collaborate with the District’s administration.” On November 29, 2018, Harlandale ISD, through counsel requested additional information concerning Finding No. 3. No response has been received. Notwithstanding the lack of specifics, a few issues have arisen which can be legally analyzed: Trustees directing reassignment of staff; Trustees questioning employees about issues outside scope TEX. EDUC. CODE § 11.051(a-1); Failure to collaborate with Superintendent TEX. EDUC. CODE §§ 11.0512(a), 11/151(b), 11; Trustee Contact with HISD Employees did not Violate Law or Regulation.

Legal Analysis of TEA Fact Finding No. 3.

Trustees Directing Reassignment of Staff. Under the provisions of TEX. EDUC. CODE § 11.201(d)(2), the authority to assign and reassign staff resides with the Superintendent. The HISD Board has reaffirmed this provision in its own adopted local Policy. [*See*, General Exhibit 10, District Policy DK (Local)]. While the Preliminary SAI Report mentions Trustee contacts with HISD Staff, there are no reported incidents in which the Superintendent’s authority has been disregarded or that any employees were in fact reassigned as a result of Trustee input. These vague and general allegations concerning Trustee alleged interference with HISD operations do not rise to the standard of impermissible use of the Trustee’s position. There is little evidence cited in the Preliminary SAI Report as to who initiated any such alleged conversations, or in most cases, with the exception of the HR Director or the Superintendent, with whom those conversations were held. With respect to trustee/employee communications, TEX. EDUC. CODE § 11.153(j) provides that each Texas ISD must adopt an employment policy containing certain provisions, including: The employment policy may not restrict the ability of a school district employee to communicate directly with a member of the board of trustees regarding a matter relating to the operation of the district, except that the policy may prohibit *ex parte* communication relating to: a hearing under Subchapter E or F, Chapter 21; and another appeal or hearing in which *ex parte* communication would be inappropriate pending a final decision by a school district board of trustees. Mere conversations between employees and staff appear to be statutorily protected. Without specific evidence that a Trustee interaction with staff resulted in action that violated the Superintendent’s responsibilities to manage the District under Tex. Educ. Code §11.201, the allegation of an employee/trustee interaction does not indicate any violation of law.

Trustees Questioning Employees. The examples listed at pages 8 and 9 of the Preliminary SAI Report do not rise to the level of Board interference. The cited examples include: questioning qualifications of Benefits Coordinator and asking for job description and job requirements. Trustees are entitled by law, to wit: Tex. Educ. Code §11.1512(c) and by District Policy BBE (Local) [*See*, General Exhibit 13, District Policy BBE (Local)] to access virtually all District records and information when acting in their official capacity as trustees. Asking for information concerning employee qualifications and/or job descriptions is expressly permitted under law.

E-mailing HR Director, then discussing allegations of inappropriate student/staff relationship. Trustees are entitled by law, to wit: Tex. Educ. Code §11.1512(c) and by District Policy BBE (Local) [*See*, General Exhibit 13, District Policy BBE (Local)] to access virtually all District records and information when acting in their official capacity as trustees. Surely, it cannot be argued that such allegations are beyond Board purview in an era of enhanced Title IX enforcement. Trustees have a legal obligation under Title IX, which provides in 20 U.S.C. § 1681(a), that “[n]o person in the United States shall, on the basis of

sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” Title IX includes express authorization of administrative processes that permit federal agencies and departments to terminate or refuse to provide financial assistance or funding to entities that fail to comply with §1681.3. The reach of Title IX has, however, been extended by the Supreme Court by implication. As recounted in the Supreme Court’s opinion in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 281 (1998), the Supreme Court has, in a series of decisions, recognized implied causes of action under Title IX. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court held “that Title IX is also enforceable through an implied private right of action.” In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), the Court concluded “that monetary damages are available in the implied private action” and that “a school district can be held liable in damages in cases involving a teacher’s sexual harassment of a student.” While *Franklin* “d[id] not purport to define the contours of that liability,” the Court “face[d] that issue squarely” in *Gebser*, 524 U.S. at 281. In *Gebser*, a teacher had engaged in a sexual relationship with one of his high school students. The Court held that “damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf has actual notice of, and is deliberately indifferent to, the teacher’s conduct.” Faced with the potentially unlimited enterprise liability arising from Title IX cases, Trustee vigilance over allegations of staff sexual misconduct with students is a positive thing. It is difficult to understand how Trustee vigilance concerning these types of allegations can be construed in a negative light and yet it was.

Trustee Failure to Collaborate with Superintendent. Disagreement over Structural Engineer Recommendation. It is alleged that in October 2017 a single Trustee disagreed with the staff recommendation on the selection of a structural engineer and requested an alternative recommendation be made. Allegedly, his request was not honored, he became angry and left the particular meeting. No attempt is made in the Report to define any applicable standard which would govern the Trustee’s behavior and which was violated. Trustees are free to vote their conscience and to disagree with a recommendation. Trustees are free to disagree with each other. The fact that this incident was cited in the Report as a violation evidences a complete misunderstanding of the roles and responsibilities of Trustees.

Proposing Termination of Superintendent. It is alleged that a Trustee sought support from another Trustee for the proposed termination of the Superintendent. It is not stated in the Report whether this alleged event occurred at a board meeting or in some other context. Superintendents of school districts are term contract employees. Tex. Educ. Code §21.212. Nonrenewal of Superintendents are subject to the provisions Tex. Educ. Code §21.212. Terminations of Superintendents are governed by Tex. Educ. Code §21.211 and Chapter 21, Subchapter F. The Trustee in question was well within his statutory authority in engaging in the discussion alleged.

Trustees Contacting Employees. Trustees Visiting Campuses. TEA Staff has cited no authority for its questioning of Trustee campus visits. This is likely because there is no such prohibition. District Policy BBE (Local) expressly authorizes campus visits, but requires Trustee adherence to posted campus requirements for visitation. The record does not identify how the alleged campus visit was purportedly beyond the Trustee’s role as a Board member. However, given the breadth of the right to information and campus visits set forth at Tex. Educ. Code §11.1512(c) and by District Policy BBE (Local), it is difficult to see how access to information could be denied or violates any applicable standard.

Trustee-HR Director Contact. See discussion under Item IV(4)(B)(ii), above. General Discussion of Board Governance Issues. It is the apparent position of the Agency the entire HISD Board of Trustees as a body, can violate the provisions of Tex. Educ. Code §11.051(a-1) when an individual Board member has discussion with a District staff about District business or visits a campus. The Report appears to condemn the entire Board based upon actions of single Trustees whose actions, by definition, could only be made in

that Trustee's individual capacity. Such acts do not violate Tex. Educ. Code §11.051(a-1) and any finding otherwise places undue restraints upon individual Trustee behaviors.

From the small amount of information which can be gleaned from the Preliminary SAI Report, the matters under review are not alleged to have been conducted in connection with a Chapter 21 hearing nor any other appeal or hearing before the Board as a body. Contrary to TEA Staff assertions, clear provisions of the Texas Education Code expressly require District Policy to allow conversations between a Trustee and a school employee. The Report seems to propose that an individual employee may have been disturbed about the possibility of the Trustee's involvement. However, the employee's subjective belief about the propriety of the Trustee's conduct must yield to clear legal authority. The Commissioner and the TEA are required to uphold the law. The notion that the Trustee somehow violated his or her statutory duties as a trustee by conversing with employees under circumstances expressly permitted by statute is without merit and must be dismissed. A board may act only by majority vote of the members present at a meeting held in compliance with Tex. Govt. Code Chapter 551, at which a quorum of the board is present and voting. Tex. Educ. Code § 11.051(a-1) provides: Unless authorized by the board, a member of the board may not, individually, act on behalf of the board. The board of trustees may act only by majority vote of the members present at a meeting held in compliance with Chapter 551, Government Code, at which a quorum of the board is present and voting. The board shall provide the superintendent an opportunity to present at a meeting an oral or written recommendation to the board on any item that is voted on by the board at the meeting.

The unsupported Agency averment that one or more individual HISD employees may have subjectively felt pressure by having to deal with a Trustee is irrelevant. Here, the question is whether there is any objective evidence to demonstrate that a Trustee acted improperly. There is no evidence whatsoever of improper behavior. There is no evidence that the Trustee invoked pressure on the Superintendent or other school officials. There is no cited evidence that any discussion led to Board, employee, or Superintendent actions.

The Preliminary SAI Report completely fails to provide Harlandale ISD notice of the nature of the matters of review. Other parts of this response have raised procedural issues with respect to the lack of required notice and the requirement of a Commissioner's authorization for review. Those arguments are again incorporated here and throughout this Response.

Additional Analysis of Alleged Board Dysfunction -Responsive to Allegations on Report Page 12 Possibly Relevant to Findings 2 and/or 3. In its enumeration of the provisions of applicable law, in SAI Findings 2 and 3 and in its Analysis and Summary Sections at pages 11-14 of the Preliminary SAI Report, TEA Staff, without citing specifics, has found purported violations, of Tex. Educ. Code §11.151(b). It is fair to say that the Report, taken as a whole, constitutes an effort to second-guess specific decisions made by the HISD Board of Trustees. This is especially so with regard to the Board's selection of engineering consulting firms to be utilized for assistance with the development and implementation of multiple capital improvement projects authorized by several bond issues.

The Preliminary SAI Report states, at page 12: "The evidence reviewed by TEA demonstrates the dysfunction within the HISD administration and lack of collaboration within the Board of Trustees and with the Superintendent, in violation of Tex. Educ. Code §11.1512(a), (b)(3), and (b)(5), which requires the Board of Trustees to work together to provide educational leadership for the district, including leadership in developing the district vision statement and long range education plans, and shall support the professional development of principals, teachers and other staff."

### **TEA'S Informal Review of Finding #3**

Pursuant to Tex. Educ. Code §11.051(a-1), "unless authorized by the board, a member of the board may

not, individually, act on behalf of the board. The board of trustees may act only by majority vote of the members present at a meeting held in compliance with Chapter 551, Government Code, at which a quorum of the board is present and voting. The board shall provide the superintendent an opportunity to present at a meeting an oral or written recommendation to the board on any item that is voted on by the board at the meeting.” In accordance with Tex. Educ. Code §11.1512(a), and (b)(3), and (b)(5), the Board of Trustees and the superintendent are required to work together to provide educational leadership for the district, including leadership in developing the district vision statement and long-range education plans, and shall support the professional development of principals, teachers, and other staff. The evidence provided to TEA demonstrates the dysfunction within the HISD administration that results from this lack of collaboration.

TEA’s finding of Board Member overreach stems from SIU Investigators interviewing the Board of Trustees, the Superintendent, the former Superintendent, employees of the district, documentation and electronic communications. Based on the interviews, documents and electronic communications, SIU investigators determined that Trustees C and G acted outside the scope of their authority and/or for their personal benefit by frequenting the district campuses, directly contacting and questioning district employees about their duties, intimidating them, interfering with construction projects, and disrupting the day-to-day operations of the District in violation of Tex. Educ. Code §11.051(a-1). HISD Board members do not have the authority to act on their own accord to investigate matters which the Board as a body corporate has not authorized. Board members are not permitted to individually exercise a perceived power based on the mere fact they are a Board member.

The TEA Final Report provides many examples of overreach, not mere conversations, by Trustees, that raised to the level of violations of failing to collaborate with the district’s administration and that were not within the given authorization to act collaboratively as an elected school board, in violation of Tex. Educ. Code §11.1512(a), and (b)(3), and (b)(5), Tex. Educ. Code §11.051(a-1).

For HISD to state that Board and Committee minutes constitute the official record of all actions of the HISD Board of Trustees is a misleading. The Board has no incentive to record actions that are not required to be recorded by statute if those actions show discord and conflict among the Board. HISD statement shows disregard for the hardworking, upstanding citizens and district employees that provided testimony to the TEA Investigators during their onsite visit. A review of board minutes and documents provided to TEA, investigators confirmed that the Board of Trustees has consistently been divided on two critical issues: the repair of a pier(s) to support the structure at Gillette Elementary School and 2) retaining and overpayment of an outside contractor for the oversight of construction projects, instead of a more cost-effective in-house construction oversight.

TEA references severe concerns of individual Board overreach as well. HISD minimizing the threats made against the Superintendent by one former, and one current, Board member is perplexing. The Superintendent, while in his HISD campus office, was threatened that he would lose his job if he did not follow their directive to terminate the Assistant Supervisor of Maintenance/Operations. These threats represent the cumulation of ongoing problems between various HISD Board members and the Superintendent. As a result of these threats, the Superintendent resigned in August 2012.

Additional examples of overreach concern a board member sending unprofessional emails to the Superintendent on Sunday, appearing in Human Resources (HR) unannounced, calling and texting the office of the HISD Executive Director of Human Resources directly and questioning the qualifications of the HISD Benefits Coordinator, requesting job description and job requirements under the guise of threat, emailing the HISD Executive Director of Human Resources regarding an inappropriate relationship

between a coach and a student that was not before the Board, and raising his voice saying the incident was kept quiet because the student was a former Board Member's granddaughter.

The Agency is not persuaded to change the substance of its findings based on the response provided by Harlandale ISD. TEA determines that Finding Three stands

**Finding #4** The HISD Board of Trustees as a quorum held meetings through electronic means (group text messaging) and deliberated district business but failed to conduct these meetings as open to the public, required in Tex. Gov't Code §551.002. The HISD Board of Trustees written electronic communications (group text messaging) did not meet any exceptions from the definition of meeting or deliberation pursuant to Tex. Gov't Code §551.006, and thus failed to meet the open meetings requirements of the Texas Open Meetings Act, Tex. Gov't Code, Chapter 551.

### **HISD's Response to Finding #4**

#### **LEGAL ANALYSIS OF ALLEGED OPEN MEETINGS ACT ISSUES**

##### **A. THE TEA ALLEGATIONS**

As of January 28, 2019, Harlandale ISO has received 21 pages of unattributed telephone text message screenshots in response to discovery requests set forth on November 29, 2018 and December 20, 2018. The TEA Staff appears to be alleging that the proffered text message communications violate the Open Meetings Act. In fact, the January 28, 2019 TEA letter does not offer any insight into the Agency's analysis. The January 28, 2019 letter provides no analysis whatsoever. Instead, the letter references TEA Finding No. 4 from the November 13, 2018 Preliminary SAI Report, which provides: Finding #4 The HISD Board of Trustees as a quorum held meetings through electronic means (group text messaging) and deliberated district business but failed to conduct these meetings as open to the public, required in Tex. Gov't Code §551.002. The HISD Board of Trustees written electronic communications (group text messaging) did not meet any exceptions from the definition of meeting or deliberation pursuant to Tex. Gov't Code §551.006, and thus failed to meet the open meetings requirements of the Texas Open Meetings Act, Tex. Gov't Code, Chapter 551. At page 9 of the November 13, 2018 Preliminary SAI Report, TEA Staff provides the following: Review of electronic communications (group texts) between HISD Board of Trustees on August 18, 2017, September 22, 2017, and December 30, 2017, show a quorum of the Board conducted a meeting via group text, deliberated HISD public business and public policy over which the Board has supervision or control, which was not open to the public. These electronic communications exchanged information and deliberated regarding city inspection delays, potential delays of a campus opening, district employee work schedules and pay, curriculum issues, and parent complaints. Finally, at Page 6 of the November 13, 2018 Preliminary SAI Report, TEA Staff cites Tex. Gov't. Code §§ 551.002 and 551.006(a) as the statutes which were allegedly violated by the text messages.

##### **B. THE DESCRIBED TEXT MESSAGING**

TEA identifies five different and apparently discrete dates upon which Open Meetings Act violations are alleged to have occurred. A fair reading of the TEA staff's January 28, 2019 data transmission would lead us to conclude that the alleged violations are to be found in the attached 21 pages of text messages, or not at all. The attached communications are the as "Notice" to Harlandale ISD or the underlying facts relied upon by TEA to support an alleged violation. By date, the transmissions can be summarized as follows:

*Thursday, September 21, 2017*

A text sent by David Abundis about phone calls he received regarding freshman as starting quarterback. The recipients of the Abundis text are not identified but include Christina Carrillo and six other recipients. The text did not propose or advocate any Board action. A possible response to the Abundis text was sent on September 22, 2017 from Mancha stating that he had relayed similar complaints to Mr. Madrigal, the Superintendent. It appears that Mr. Mancha was the only person to respond to the Abundis text concerning football. The Mancha text was identified as a "group conversation," but the group is not identified.

*Friday, September 22, 2017*

Christina Carrillo sent a text regarding human trafficking book assigned for a freshman high school student. The text did not indicate the specific addressees, although in the text Ms. Carrillo stated she was addressing "all my colleagues." The text did not propose or advocate any Board action. David Abundis indicated that according to reviews, the text was high school appropriate. Mr. Abundis did not propose or advocate any Board action. Ricardo Moreno asked for what grade was the reading assigned. Mr. Moreno merely asked a question. He did not propose or advocate any Board action. Mr. Tejada said the group should not discuss unless in a meeting. He did not propose or advocate any Board action. Mr. Mancha responded to Ms. Carrillo "good point" and that parents should have been notified "that is the way we recommend it to be done." There was no proposal for Board action proposed or discussed.

*Saturday, December 30, 2017*

In a text apparently addressed to Ms. Camillo plus 4 additional unnamed individuals, Mr. Abundis said he would hold his response until next week and happy New Year. There is no indication as to what the matter under consideration is. There is no indication that the matter involved District business whatsoever. Ms. Carrillo responded to an unidentified remark or question, that the matter did not involve votes. Ms. Camillo also requested that Mr. Tejada stop sending private texts.

*Tuesday, May 8, 2018*

Text from Mr. Tejada to Ricardo Moreno only stating he would not be at the meeting. No deliberation occurred. There was no participation by trustees in a number that even approached a quorum. No matter discussed except Mr. Tejada's absence.

*Saturday, August 18, 2018*

Mr. Gerardo Soto, the HISD Executive Director of Operations, sends a group text to report that City Building Inspector did not show up for a scheduled inspection, so teachers and staff could not report to work over the weekend. Superintendent Madrigal contacted a city council member and city manager to have school inspection raised to a priority. Responses to this text message were sent to the group from Jesus Tejada and Christina Camillo. No deliberation, just threats about reporting open meeting violations. Then a colloquy ensued between Ms. Carrillo and Mr. Tejada as to whether TEA should be notified. Zeke Mendoza just offered a thumbs up and a picture of trustees. But when asked to talk more, he declined.

*Separate Saturday, August 18, 2018*

There were additional texts between Ricardo Moreno and Mr. Tejada only. Mr. Moreno and Mr. Tejada discussed whether there would be overtime for teachers and staff and when the inspector would come



back. Mr. Tejeda advocated patience for the project. In all of the conversation, no Board action was proposed or discussed. No other trustees were participants in this text conversation.

### C. THE TEXAS OPEN MEETING ACT

Prior to an examination in detail of the merits of the TEA Staff's allegations, a review of the relevant legal compliance standards governing the Open Meetings Act is necessary. In general, every regular, special, or called meeting of a governmental body shall be open to the public. Tex. Gov't Code §551.002.

A meeting is:

- (A) a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action; or
- (B) except as otherwise provided by this subdivision, a gathering:
  - (i) that is conducted by the governmental body or for which the governmental body is responsible;
  - (ii) at which a quorum of members of the governmental body is present; that has been called by the governmental body; and
  - (iii) at which the members receive information from, give information to, ask questions of, or receive questions from any third person, including an employee of the governmental body, about the public business or public policy over which the governmental body has supervision or control.

The term does not include the gathering of a quorum of a governmental body at a social function unrelated to the public business that is conducted by the body, the attendance by a quorum of a governmental body at a regional, state, or national convention or workshop, ceremonial event, or press conference, or the attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate, if formal action is not taken and any discussion of public business is incidental to the social function, convention, workshop, ceremonial event, press conference, forum, appearance, or debate. Under Texas law, not every gathering or conversation is considered to be a meeting. The provisions of Tex. Gov't Code §551.002 require multiple elements to constitute a meeting. First, a quorum must be present for a meeting to occur. In the case of Harlandale ISO which has seven trustees, a quorum is four trustees.

### D. THERE WAS NO QUORUM OF TRUSTEES PARTICIPATING IN 3 OF THE 5 TEXT COLLOQUIES.

There is no evidence in the attached pages that a quorum of the trustees conducted a meeting. What is in the attached documents are a series of exchanged text messages among individuals who were not in the same place. In addition, the requirements of having a meeting are that a deliberation take place among the quorum. The deliberation must take place involving a verbal exchange "between a quorum." The combination of these two factors requires that a verbal communication must be exchanged. In other words, at least four Trustees must be involved in a two-way verbal exchange for a meeting to occur. "Meeting in numbers less than a quorum does not present a legal problem." Attorney General Opinion No. GA-0326 (2005) at page 3.

In looking at the exchanged text message chains of the alleged dates, the following quorum observations

are obvious:

- *September 21, 2017 -No Quorum.* At most, 1 Trustee text and one Trustee response.
- *December 30, 2017 -No Quorum.* At most, 1 Trustee text and two Trustee responses, albeit one was not directly responsive to the original text.
- *May 8, 2018 -No Quorum.* At most, 1 Trustee text and one Trustee response.

A careful review of the actual number of Trustee participants in the text message exchanges clearly shows that in five of the six text message chains for which evidence was supplied by TEA, there was no quorum of Trustees who participated in the deliberation. Participation requires an exchange of views among actual participants in the deliberations. TEA has not furnished information so as to determine who were the recipients of the text messages other than the responders. Even if TEA assumes that all trustees were recipients of the original text messages, the passive receipt of a text message, without evidence that it was, will not support a finding of a quorum violation.

#### E. DELIBERATIONS MUST BE ABOUT MATTERS WHERE GOVERNMENTAL BODY HAS CONTROL

The Preliminary SAI Report contains no discussion whatsoever concerning the requirement that in order to be a "deliberation" covered by TOMA, matters "over which the governmental body has supervision or control" must be discussed. There are only two text message chains in which a quorum of members might be shown as recipients in some form or fashion of a qualifying message. However, the Preliminary SAI Report did not analyze the conversations in order to determine whether the matters discussed were within the Board's control or supervision. This failure undermines the TEA Finding No. 4.

Tex. Educ. Code §11.151 provides in relevant part as follows:

#### Sec. 11.151. IN GENERAL.

- (a) The trustees of an independent school district constitute a body corporate and in the name of the district may acquire and hold real and personal property, sue and be sued, and receive bequests and donations or other moneys or funds coming legally into their hands.
- (b) The trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district. All powers and duties not specifically delegated by statute to the agency or to the State Board of Education are reserved for the trustees, and the agency may not substitute its judgment for the lawful exercise of those powers and duties by the trustees.
- (c) All rights and titles to the school property of the district, whether real or personal, shall be vested in the trustees and their successors in office. The trustees may, in any appropriate manner, dispose of property that is no longer necessary for the operation of the school district.
- (d) The trustees may adopt rules and bylaws necessary to carry out the powers and duties provided by Subsection (b).

Under this legal standard, it is absolutely clear that the Trustees of the District do not manage the districts affairs or its personnel. Those functions belong exclusively to the superintendent. *See* Tex. Educ. Code §11.201. There has been no showing whatsoever by TEA as to how it determined that the Board of Trustees could have taken effective action concerning the parental complaint. With this definition of "deliberation" and the Board's authority in mind, we will review the two text message

chains.

*Friday, September 22, 2017*

The September 22, 2017 text message conversation began when Trustee Carrillo sent a text concerning a human trafficking book assigned as reading for freshman high school students. The matter in question related to the content of a high school text entitled *Sold*. The text was selected and assigned by the teacher. It was not adopted by the Board or any textbook committee. The teacher's selection of the particular text was and is protected by the teacher's academic freedom. The Board of Trustees has no involvement and can have no involvement with selection individual materials for specific reading assignments. In fact, this particular issue was successfully resolved between the parents and the English teacher and an alternative reading assignment was made. The matter in question was resolved without input from the Board, from the District's Central Office, or by the campus principal. It was resolved between the parents and the teacher. Trustee Carrillo, in her text, did not propose or advocate any Board action. David Abundis passed on information that according to reviews, the text was high school appropriate. Mr. Abundis did not propose or advocate any Board action. Ricardo Moreno asked for what grade for the assignment was made. Mr. Moreno did not make a statement or declaration, he merely asked a question. He did not propose or advocate any Board action or position. Mr. Tejeda said the group should not discuss unless in a meeting. He did not propose or advocate any Board action or response substantively to the matter of the assigned reading. Mr. Mancha responded to Ms. Carrillo "good point" and that parents should have been notified "that is the way we recommend it to be done." There was no proposal for Board action proposed or discussed. No public policy was discussed because the textbook discussion was a purely private concern between specific parents of a specific student and a single teacher. The matter would not be appropriate for a public discussion. As a result, there was no deliberation.

*Saturday, August 18, 2018*

The August 18, 2018 colloquy began when Mr. Gerardo Soto, the HISD Executive Director of Operations, sent a group text to report that a City Building Inspector did not show up for a scheduled inspection and teachers and staff could not report to work over the weekend. Superintendent Madrigal contacted a City Council Member and City Manager to have the school inspection raised to a priority. Responses to this text message were sent from Jesus Tejeda and Christina Carrillo. There was no deliberation, only comments. Trustee Tejeda advised patience with the inspection regime- but proposed no action. He raised an open meetings concern. Trustee Carrillo responded only to Mr. Tejeda's open meetings concern. No other trustee discussed open meeting violations. Zeke Mendoza just offered a thumbs up and a picture. But when asked to talk more, he declined. There were additional texts between Ricardo Moreno and Mr. Tejeda only. Mr. Moreno and Mr. Tejeda discussed whether there would be overtime for teachers and staff and when the inspector would come back. The overtime issue was discussed only between these two trustees. In all of the conversation, no Board action was proposed or discussed. No other trustees were participants in this text conversation. Clearly, the Board of Trustees has no oversight or control over a separate governmental agency (City Building Inspector). While this text sequence contained cross-talk about multiple issues, none of those issues involved public policy decisions or proposed actions within the jurisdiction of the HISD Board. None involved consistent participation of a consistent quorum of board members. There was, therefore, no deliberation. The definition of a meeting under the Open Meetings Act necessarily entails the discussion of matters, by a quorum, over which the Board has the authority to act. As it pertains to the specific text messages in this case, a meeting is "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person. during which

public business or public policy over which the governmental body has supervision or control is discussed." *Id.* § 551.001(4)(A). This definition is not met in the context of the text messages at issue.

#### F. Tex. Govt. Code §551.006

Tex. Gov't Code §551.006 authorizes the creation of a message Board for communications between members of governmental bodies "about public business or public policy over which the governmental body has supervision or control." The creation of the message board is not mandatory, nor is applicable to communications among less than a quorum (because communications among less than a quorum cannot constitute a meeting, under Tex. Govt Code §551.002(A)). On its face Tex. Govt Code §551.006 creates a permissible exception to when, under some circumstances, serial communications could be considered a meeting. However, the absence of such a message board does not create or indicate a violation of the Texas Open Meetings Act. A violation occurs only when a statutorily defined "meeting" is held, and that meeting is not open to the public. The TEA Staff's reliance upon TEX. Gov't CODE § 551.006 is misplaced. The focus should be upon whether a meeting has occurred.

#### G. Tex. Govt Code §551.143(a)

The Provisions of Tex. Govt. Code §551.143(a) were not cited by the TEA staff as a basis for concern but should be considered. This provision covers the situation involving a so-called "walking discussion" or "walking quorum."

In *Esperanza Peace and Justice Center v. City of San Antonio*, 316 F. Supp. 2d 473,476 (U.S. Dist. Ct for W.D. Tex. 2001) a federal district court found that in a civil context "meeting in numbers less than a quorum for the purpose of secret deliberations-refers to a quorum or more of a body that attempts to avoid the Open Meeting Act's purposes by deliberately meeting in numbers physically less than a quorum in closed sessions to discuss public business and then ratifying its actions in a physical gathering of the quorum in a subsequent sham public meeting. In *Esperanza*, San Antonio City Council Members passed around a consensus memorandum on the city's budget. A number of council members equaling at least a quorum signed individually, and then adopted the budget reflected in the memorandum at an open meeting without discussing the memorandum's contents. It was without question that the Budget adoption was a specific responsibility of the city council, and that by circulating and signing the budget memo.the City Council was effectively taking action. The court concluded that the Council's actions concerning the budget were void because they constituted a meeting held in violation of the OMA. *See Esperanza*, 316F. Supp. 2d at 478; see also Tex. Govt. Code Ann. §551.141 (Vernon 2004) ("An action taken by a governmental body in violation of this chapter is voidable.). Accord *Willman v. City of San Antonio*, 123 S.W.3d 469, 478 (Tex. App.-San Antonio 2003. pet. denied); Tex. Att'y Gen. Op. No. .JC-0307 (2000) at 8; Tex. Att'y Gen. L0-95-055, at 4; Tex. Att'y Gen. Op. No. DM-95 (1992) at 4; see generally *Hitt v. Mabry*. 687 S.W.2d 791,794 (Tex. App.-San Antonio 1985,no writ).

In *Harper v. Best*. 493 S.W.3d 105 (Tex. App.-Waco 2016, pet. granted), the State of Texas alleged that within two sets of communications, a "walking discussion" between three board members is seen and a dialogue with a fourth board member is referenced. Citing Section 551.143 of the Texas Government Code, the State argued that this was an attempt by Harper to circumvent, and thus, violate the Open Meetings Act. Section 551.143 provides that a member or group of members of a governmental body commits an offense if the member or group of members knowingly conspire to circumvent the Open Meetings Act by meeting in numbers less than a quorum for the purpose of secret deliberations in violation of the Act. Tex. Govt. Code Ann §551.143 (West 2012). The *Harper* Court held that one

governmental official merely texting one or more other officials does not constitute an offense. In order to establish a "walking quorum", it must still be proved that the governmental body was actually conducting "deliberations." The mere reference to another member of the governmental body, or inclusion on a text message without response does not indicate that deliberations were conducted. Acknowledging the text message is also not sufficient, *Harper* holds that a member of the governmental body must address the substantive merits of the item under discussion for a deliberation to occur. In *Harper*, the councilman mentioned that would not "get into" the subject of those motions. The Com1 held that under these circumstances, nothing was presented to show that an exchange occurred. Without evidence of such an exchange, there was no ability to establish by clear and specific evidence that a violation of Section 551.143 of the Open Meetings Act had occurred. The same reasoning dictates that the requisite deliberations did not occur in the text messages at issue in this investigation.

#### **TEA'S Informal Review of Finding #4**

The TEA recognizes the District's effort to have initiated additional Trustee training in order to ensure future statutory compliance. A source of extensive guidance regarding open meetings is the 2018 Open Meetings Handbook, published by the Attorney General of Texas, found here: [https://www.texasattorneygeneral.gov/%20files/og/OMA\\_handbook\\_2018.pdf](https://www.texasattorneygeneral.gov/%20files/og/OMA_handbook_2018.pdf).

The Introduction to the 2018 Texas Open Meeting Handbook, quotes Founding Father, Patrick Henry, regarding the importance of transparency in government, "The liberties of a people never were, nor ever will be, secure when the transactions of their rulers may be concealed from them."

The Texas Open Meetings Act was enacted to ensure that Texas government is transparent, open and accountable to all Texans. It requires that state and local governmental entities conduct public business responsibly and in accordance with the law."

It is for that reason that Texas Association of School Boards (TASB) Legal Services has provided a resource titled "Trustees and Technology": <https://www.tasb.org/services/legal-services/tasb-school-law-source/governance/documents/trustees-and-technology.pdf>.

TEA encourages HISD to utilize this TASB resource to assist them in understanding OMA application to school boards, current case law regarding OMA and school boards, as well as tips on how a school board must conduct open meetings. Of note, beginning on page three of these guidelines, electronic communication among board members is addressed. Specifically: guidance:

#### **"Electronic Communications among Board Members**

##### Texas Open Meetings Act

The purpose of the Texas Open Meetings Act (OMA) is to ensure the public's access to meetings of governmental bodies so "that the public has the opportunity to be informed concerning the transactions of public business." *Toyah Indep. Sch. Dist. V. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W. 2d 377, 380 (Tex. Civ. App. - San Antonio 1971, no writ). The OMA provides that meetings of governmental bodies, including school boards, must be open to the public except for expressly authorized executive sessions. Tex. Gov't Code §§551.001(3)(E), 002. The OMA also provides that the public must be given notice of the time, place, and subject matter of meetings of governmental bodies, Tex. Gov't Code §551.041."

and

“...If there is a deliberation of public business among a quorum of the board, a meeting will occur, even if it is unintentional. According to the Texas Supreme Court, “When a majority of a public decision making body is considering a pending issue, there can be no ‘informal’ discussion. There is either formal consideration of a matter in compliance with the OMA or an illegal meeting.” *Acker v. Tex. Water Comm’n*, 790 S. W. 2d 299, 300 (Tex. 1990).”

TASB’s provides further guidance that outside of an official online message board, for a

“...board member to email, text message, instant message, or otherwise contact the rest of the board to discuss school business outside of public meetings...are generally not excepted from the OMA.” “An illegal meeting can occur if a quorum deliberates school business outside of a posted meeting, even if the quorum does not meet at one time or place. *Hitt v. Mabry*, 687 S.W. 2d 791 (Tex. App. – San Antonio 1985, no writ); Tex. Att’y Gen. LO-95-055 (1995). *See also Harper v. Best*, 493 S.W. 3d 105 (Tex. App. – Waco 2016, pet. Granted) (involving series of text messages among board members). As a result a board member should avoid involving a quorum of the board in an e-mail or other electronic conversation outside of a public meeting. This can occur when a board member sends e-mails or text messages to the entire board, copies the rest of the board on correspondence, or engages in a chain of electronic communications that add up to a quorum deliberating school business. *See Tex. Att’y Gen. Op. No GA-326* (2005) (concluding that a member of a governmental body could commit a criminal violation of the OMA if he had successive communications about school business with a quorum of the governing body outside of a posted meeting.)

Earlier this year, the Court of Criminal Appeals in *State v. Doyal* struck down a single criminal provision of the Act that prohibited members from conspiring to circumvent the Act by meeting in numbers of less than a quorum. The Court concluded that Tex. Gov’t Code, §551.143(a) was unconstitutionally vague on its face. The Court’s decision was limited to Tex. Gov’t. Code §551.143, and all other provisions of the Act remain valid and binding. *See Tex. Att’y Gen. Op. No. KP-0254*. Under the plain language of the statute and definitions provided by the Legislature, if a quorum of a governmental body deliberates about public business within the jurisdiction of the body outside of a meeting authorized by the Act, the governmental body violates the Act. *Id.*

TASB states further:

“Both a court and the attorney general have defined deliberation to include a one-way communication spoken by one member of a governmental body and heard by the rest of a quorum. *See, e.g., Bexar Medina Atascosa Water Dist. V. Bexar Medina Atascosa Landowners’ Ass’n*. 2 S.W. 3d 459 (Tex. App.-San Antonio 1999, pet. Denied), Tex. Att’y Gen. Op. No. JC-203 (2000) (both holding that a governmental body failed to comply with e OMA when a quorum of the body was present at a public meeting of another entity and one member of governmental body discussed public business in front of the rest of the quorum). In other words, if a quorum of a school board is together and one member of the quorum talks about school business, a meeting has occurred, even if none of the other trustees respond. A back-and-forth discussion is not required for a *deliberation* under the OMA.”

The text messages provided to the district, and analyzed by the district itself in its February 11, 2019, response to TEA, contain violations containing various elements of prohibited deliberations under the Act, such as:

- Non-transparency by not allowing the public to be present during a Board Meeting
- Exchanging text messages with board members that constitute a quorum.
- Exchanging text messages with board members by nature of copying them in on the text message.
- Board members involving in an “informal” discussion
- Text messaging board members with school business outside of public meetings and outside an official online message board.
- Board Member(s) sending text messages to the entire board, copies the rest of the board, engages in a chain of electronic communications that add up to a quorum deliberating school business.

The HISD Board of Trustees actions are in direct opposition the Texas Open Meetings Act, Tex. Gov’t. Code §551, and transparency in government.

The Agency is not persuaded to change the substance of its findings based on the response provided by Harlandale ISD. TEA determines that Finding Four stands.

**Finding # 5** The HISD Board of Trustees approved six (6) contract amendments and change orders that resulted in a changed contract over \$1 million and total change orders exceeding more than 25 percent over the original contract amount, in violation of Tex. Educ. Code §§44.0411(d), as well as, Tex. Educ. Code §11.1511(b)(15).

**Finding #6** The District circumvented the bidding process in that the contracts with the Commissioning Agent did not contain an effective end-date, allowing the commissioning agent to continue its work through six contract amendments and multiple change orders, thus exceeding the \$50,000 threshold, in violation of Tex. Educ. Code §44.031(a), Tex. Gov’t. Code §2269, local policy, as well as, Tex. Educ. Code §11.1511(b)(15).

### **HISD’s Response to Finding #5 and Finding #6:**

#### Matters Relating to Jasmine Engineering, Inc.

##### A. Facts relevant to TEA Finding No. 5 and 6 – Contracts with Jasmine Engineering, Inc.

##### Annotated Chronology of Events, Activities, and Agreements

At all times material to the Preliminary SAI Report, Jasmine Engineering, Inc. has been a professional engineering firm. It has been licensed by the Texas Board of Professional Engineers since December 15, 2000 to offer professional engineering services within in the State of Texas. (Firm # 2461). As with Terracon Consultants, Inc., the failure by TEA Staff to understand the significance of these facts, or to even cursorily review the nature of the engagements of these two firms resulted in the mis-citation of applicable law and the resulting inevitable error in the conclusions reached.

On March 1, 2007, at a Special Called Board Meeting the HISD Board of Trustees voted to issue an RFQ for commissioning agents for Bond 2006 projects.

On May 3, 2007, at a Special Called Board Meeting Jasmine Engineering, Inc. was the highest ranked of two submitting vendors was selected by the Board of Trustees to serve as commissioning agent for the 2006 Bond Program.

On August 13, 2007, the HISD Building Committee, based upon staff recommendations, voted to recommend to the full Board a 1.5% commissioning fee for Jasmine Engineering for secondary schools only.

On August 20, 2007, the HISD Board voted to enter into a contract with Jasmine Engineering for commissioning services for Harlandale Middle School, Kingsborough Middle School, Leal Middle School, Terrell Wells Middle School, McCollum High School, Harlandale High School and additional projects to be added upon agreement. The agreed amount was 1.5% of \$35,798,648 for a fee of \$535,639.72 with reimbursable amounts not to exceed \$10,000., Board Minutes of 8/20/07.

On August 22, 2007, an Agreement for Commissioning Services between HISD and Jasmine Engineering, Inc, incorporating the terms approved by the HISD Board August 20, 2007 was executed by HISD Superintendent Guillermo Zavala, Jr.

On November 5, 2007, HISD Building Committee voted to recommend that Jasmine Engineering's scope of services be amended to include total commissioning of the secondary schools and the elementary school roofs, secondary gyms, HVAC's, Tejada classroom addition, and Pre-Kindergarten classrooms at a cost of 4% of \$45,487,000 projected cost.

On November 28, 2007, at a Special Called Board Meeting the Board approved the Board Building Committee's recommendation to approve 4% for the full scope of commissioning of \$45,755,487.

On November 28, 2007, an Amended Agreement for Commissioning Services between HISD and Jasmine Engineering, Inc, incorporating the terms approved by the HISD Board on November 28, 2007 was executed by HISD Superintendent Guillermo Zavala, Jr.

On April 22, 2008, the terms and conditions of the Jasmine agreement, as amended, was reviewed by HISD former legal counsel at a Building Committee Meeting.

On September 21, 2009, the HISD approved additional services from Jasmine Engineering for the design and the incorporation of the science labs at McCollum High School and Harlandale High School from awarded grant funds. The Amendment was recommended by HISD staff.

On December 10, 2009, the Board Building Committee met and discussed whether Jasmine Engineering should be considered to oversee the Bond 2009 program. No action was taken.

On December 21, 2009, during a Special Called Board Meeting the Board approved an Amendment Jasmine Engineering's services for the Bond 2009 program (Renovations of Field Houses, Renovations of Band Halls, Fencing, Security Cameras, Parking Lots, Bleachers, Athletic Field Upgrade and Concession Stand) and amended the contract to set the fee at 6%.

On January 29, 2010, a Second Amended Agreement for Commissioning Services between HISD and Jasmine Engineering, Inc, incorporating the terms recommended to the HISD Board. On February 3, 2010 the Second Amendment was executed by HISD Board President Jesse Jay Alaniz.

On February 1, 2010, the Board Building Committee discussed Jasmine Engineering's scope of work. Superintendent Robert Jaklich informed the committee that Jasmine Engineering was only overseeing projects assigned to her in the agreement.

On April 15, 2010, Superintendent Jaklich drafted and sent a memo concerning the Board vote to approve budget amendments of District Bond funds including the use of interest earnings of the Bond 2006 program,



and the combining of other bond resources for a total of \$4,093,000 to add to the Bond 2009 program projects, together with an additional fee of 6% of the newly allocated funds for payment of the Total Building Commissioning Authority.

On April 18, 2011, Superintendent Jaklich drafted and sent to the HISD Board a memo concerning the reporting of payments to Jasmine Engineering for both the 2006 and 2009 Bond programs.

On November 6, 2012, Superintendent Madrigal discussed new projects and fees for Jasmine Engineering with the Building Committee.

On November 12, 2012, at a regular meeting the HISD Board, based upon the recommendation of Superintendent Madrigal, voted to approve an agreement with Jasmine Engineering for Commissioning and Consulting multiple projects for possible renovation and re-purposing.

On December 6, 2012, Superintendent Madrigal executed a Professional Services Agreement for Consulting Services for the items discussed and approved on November 12, 2012.

On January 28, 2013, at a Special Board Meeting the HISD Board approved specific payment amounts to Jasmine Engineering for project services or additional scope of work added to the Bond 2006 and Bond 2009 programs.

On September 16, 2013, at a Regular Board Meeting the Board approved a contract with Jasmine Engineering for Project Oversight and Total Building Commissioning on Fall 2013 Projects (Gillette Elementary, Leal Middle School Field Drainage, Security Installment Project, Career Tech Project, Auto Tech Project, and Early College High School Project). The motion included amending Jasmine Engineering's consulting agreement to include the University Health System School Based Clinic scope of work

On September 19, 2013, Superintendent Madrigal executed a First Amendment and Second Amendment to Professional Services Agreement for Consulting Services for the items discussed and approved on September 16, 2013

On December 3, 2013 at a Special Called Board Meeting the Board approved payment to Jasmine Engineering for priority projects.

On December 6, 2013, Superintendent Madrigal executed a Third Amendment to Professional Services Agreement for Consulting Services calling for the inclusion of the items discussed and approved on December 3, 2013.

On March 17, 2014, the Board voted to approve the change to the construction method for the UHS campus health clinic from Construction Manager at Risk to Competitive Sealed Proposals; and as a result, to Amend the Jasmine Consulting Agreement to include the project.

On May 19, 2014, the Board approved an assessment targeting the needs of Carroll Bell Elementary and Vestal Elementary. The Superintendent was instructed to negotiate a contract with Jasmine Engineering and report the final cost for the assessment to the Board.

On June 16, 2014, the Board voted on a motion for the Superintendent to execute an amendment to approve a proposal from Jasmine Engineering, after receiving advice from District former legal counsel.

On December June 26, 2014, Superintendent Madrigal executed a Fifth Amendment to Professional Services Agreement for Consulting Services for the items discussed and approved on June 16, 2014.

On October 29, 2015 Special Called Board Meeting District staff gave a presentation regarding Programming, Project Management, and Commissioning. Staffs' presentation included a comparison of current District construction practices to that of other districts. Board voted to continue contract Jasmine Engineering as Project Manager and Commissioning Agent to oversee construction for a fee of 5% with no reimbursable

On November 17, 2015, Superintendent Madrigal executed a Sixth Amendment to Professional Services Agreement for Consulting Services for the items discussed and approved on October 29, 2013.

## B. Legal Analysis Findings 5 and 6

Harlandale ISD entered into ten separate Agreements or Amendments with Jasmine Engineering, Inc. related to multiple projects beginning in 2007 through 2015. From the chronology set forth in the foregoing Section, it is clear that the Harlandale ISD Board of Trustees deliberated and approved each contract or amendment involving Jasmine Engineering. Jasmine Engineering, Inc. was originally hired by the HISD Board on March 1, 2007 at a Special Called Board Meeting when the Board voted to issue an RFQ for commissioning agent for Bond 2006 projects. After a review of the proposals, on May 3, 2007 at a Special Called Board Meeting, Jasmine Engineering, as the highest ranked of two submitting vendors, was selected by the Board to serve as Commissioning Agent for the District, initially for Bond 2006 projects.

While it is true that the original contract did not have a specific termination date, it was not open-ended in terms of the set tasks to be executed under the specific terms in the Agreement.

The original contract was for Jasmine Engineering to act as the District's Commissioning Agent for a discrete list of 5 specific projects identified along with specific budgets for each project. The original agreement did provide that additional work could be added at a later time upon a subsequent agreement with HISD. It is important to note that project commissioning activities expressly defined in Article I of Exhibit Finding 5-E, beginning at page 1, involve tasks that begin From a review of the text of the attached Jasmine Engineering, Inc. contracts, each was for the completion of specifically delineated tasks. prior to the initiation of the architectural design of the project and continued through the District's occupation of the constructed facilities. This significant fact was completely ignored by TEA investigators.

It is axiomatic that a construction project's duration cannot be anticipated prior to the time when the project is even designed. Instead, the District sought to and accomplished the issue of control of Jasmine's activities by designating specific projects to be undertaken, setting a specific project budget, and limiting the consultant's remuneration to a fixed percentage of the budgeted project budget amounts. Any intimation that specific time parameters were required or even particularly desirable at the initial phases of project development evidences a complete lack of understanding of the project development process by TEA. Additionally, TEA Staff did not point to any legal requirement for the inclusion of a set project termination date in this type of contract. No such legal constraints exist. By insisting, as it did at page 12 of the Preliminary SAI Report without citation to any controlling legal authority, that the Jasmine contracts required "an effective end date", TEA Staff is guilty of conjuring up non-existent legal requirements in order to find a violation of law where none exists.

Similarly, all of the subsequent agreements or amendments were for the accomplishment of specific tasks. As with the original Agreement, subsequent agreements were for the development of specifically identified

projects. As set forth in the preceding paragraph, the establishment of a specific timeline is often not practical and it is certainly not legally mandated. When assessing the legal conduct of school districts, neither the Commissioner nor the TEA Staff may substitute their judgment for that of the Board.

i. Procurement Activities for Engineering/Professional Services are Governed by Tex. Govt. Code, Chapter 2254, not by Tex. Govt Code, Chapter 44, Subchapter B

At pages 1, 3, 4 (including specifically Finding 5), and at 6, 12, 13, 14, and 15 of the Preliminary SAI Report TEA Staff alleges that Harlandale ISD acted in violation of the Chapter 44 of the Texas Education Code with respect to procurement activities involving Jasmine Engineering, and Terracon Consultants. There are also references to Texas Education Code §44.0411 which TEA contends limits the prerogative of the HISD Board with respect to its contracting activities with Jasmine Engineering by limiting change orders in relation to certain contracts. TEA's legal analysis is incorrect.

Chapter 2254 of the Texas Government Code prohibits a political subdivision, including a school district<sup>18</sup> from selecting a professional engineer<sup>19</sup> on the basis of competitive bids. See, Texas Attorney General Opinion No JC-0374 (2001). [attached as General Exhibit 5]. According to the Professional Services Procurement Act,<sup>20</sup> "professional services" are defined as services "provided in connection with the professional employment or practice of a person who is licensed or registered as . . ." <sup>21</sup> inter alia, a professional engineer. Tex. Govt. Code §2254.003 provides that awards for professional services be made on the basis of demonstrated competence and qualifications and for a fair and reasonable price. To procure professional services, a governmental entity must first select the most highly qualified provider on the basis of demonstrated competence and qualifications, and then attempt to negotiate a contract at a fair and reasonable price. *Id.* at §2254.004. After a vendor is selected, price negotiations begin. If a satisfactory contract cannot be negotiated with that provider, the next most highly qualified provider is selected and so on with the same process until an agreement is reached.

A contract entered into or an arrangement made in violation of Chapter 2254 is void as against public policy. Tex. Govt. Code §2254.005. The Texas Engineering Practices Act (Act) provides that a political subdivision may not construct a public work involving engineering in which the public health, welfare, or safety is involved, unless: (1) the engineering plans, specifications, and estimates have been prepared by an engineer; and (2) the engineering construction is to be performed under the direct supervision of an engineer. See, Tex. Occ. Code §1001.407. Under the express limitations of Tex. Admin. Code §137.79:

#### §137.79 Standards for Compliance with Professional Services Procurement Act

When procuring professional engineering services, a governmental entity and/or its representative(s) shall comply with the requirements of Subchapter A, Chapter 2254, Tex. Govt. Code and shall select and award on the basis of demonstrated competence and qualifications to perform the services for a fair and reasonable price and shall not select services or award contracts on the basis of competitive bidding.

ii. Tex. Educ. Code §44.0411 was not in effect when the selection process for Jasmine Engineering, Inc. was conducted.

At Findings No. 5, TEA Staff cites to Tex. Educ. Code §44.0411 as the legal basis for the finding of a statutory violation by HISD. As can be seen from the attached Board minutes, Jasmine Engineering was originally approved for hiring on August 20, 2007. The selection was made after the issuance of a Board-ordered RFQ process. and after receiving the recommendation of the Building Committee. The resulting Commissioning Agreement was executed on August 22, 2007. The Agreement was drafted, reviewed, and

approved by HISD's established school law firm of Escamilla & Poneck, P.C. The law firm did not have any qualms concerning its execution. Following the original contract, multiple contract amendments and extension were approved by the Board of Trustees and subsequently executed.

The amendments were reviewed by the school law firm of Walsh & Gallegos which again did not have any reservations concerning their execution. These facts, albeit not in detail and with no mention of legal approval by reputable outside law firms, are referenced at pages 12 and 13 of the Preliminary SAI Report.

The Preliminary SAI Report fails to recognize that the provisions of Tex. Educ. Code §44.0411 are not applicable to contracts advertised prior to September 1, 2011. From the foregoing narrative and from the face of the documents it is clear that the initial contract which was awarded to Jasmine Engineering, Inc. was first advertised and awarded in 2007. Because of this fact, the provisions of Tex. Educ. Code §44.0411 simply do not apply. It is unclear how TEA Staff missed this important caveat. The relevant transitional provisions are printed in the text of the Texas School Law Bulletin, 2018 Edition, at page 630.

The provisions of Tex. Educ. Code §44.0411 were adopted by the 82nd Texas Legislature in 2011 by virtue of the Passage of H.B. 628 and were contained in Section 2.04 of the Bill.22, In general, Section 6.02 provided that the Act would take effect on September 1, 2011. However, the Bill also contained special transitional provisions as follows:

SECTION 6.01. (a) The changes in law made by this Act apply only to a contract or construction project for which a governmental entity first advertises or otherwise requests bids, proposals, offers, or qualification, or makes a similar solicitation on or after the effective date of this Act. (b) A contract or construction project for which a governmental entity first advertises or otherwise requests bids, proposals, offers, or qualifications, or makes a similar solicitation, before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

Under the undisputed facts in this case, the provisions of Tex. Educ. Code §44.0411 simply do not apply. All Findings related to this Section 44.0411 of the Education Code must be dismissed.

### **TEA'S Informal Review of Finding #5 and Finding #6:**

#### **A. TEA Points on Contract History**

- 1) On April 12, 2007, Harlandale ISD (HISD) solicited a Request for Qualifications for Commissioning Services related to Bond 2006. Respondent Qualifications included a strict limitation regarding "Location of respondent firm" requiring a local office in San Antonio, Texas, for a minimum of 12 years. This restriction severely limited other potentially qualified vendors from submitting a response to the RFQ. This severe limitation is highly questionable and contrary to equal opportunity for other commissioning agents who may have been able to establish a local office, or despite location, have more than the 12 years requisite experience commissioning in the San Antonio area. As a result, in May 2007 HISD received only two responses to the RFQ.
- 2) During a special board meeting On May 3, 2017, presentations by the potential commissioning agents were made and according to the minutes, prior to selecting the most qualified vendor, Mr. Perez represented to the Board of Trustees the cost of services JE would charge if selected as the most qualified, specifically a 1%-\$4% CA fee. This disclosure shows that cost/percentage discussions/negotiations for commissioning fees had been undertaken by Mr. Perez on behalf of HISD with JE prior to selection of JE as the most qualified, which is a

- violation of Tex. Gov't Code §2254.003 and HISD – Procurement Policy and Procedures Manual - PP205/Procuring Architectural/Engineering Services, which requiring solicitation of vendors through the RFQ process.
- 3) August 20, 2007, the HISD Board voted on the terms on which to enter into a contract with JE. The terms voted on and approved by the Board was a commissioning agent (CA) fee to JE of \$535,635.72, representing 1.5% of the cost of the work as detailed in the April 12, 2007 RFQ, and the option to add additional projects as mutually agreed. On August 22, 2007, HISD and JE entered into a contract for commissioning services from the Bond 2006 with a fixed 1.5% CA fee for the construction projects included in the contract. This contract specifically states the JE's work is LIMITED to the April 12, 2007 RFQ commissioning and contains the option to add additional projects if bond interest is available with an additional mutual agreement required between the parties, with no increase in CA fee.
  - 4) On November 5, 2007, the HISD Building Committee received JE's Commissioning Agent report as presented by Mr. Perez and subsequent to the presentation, the Building Committee discussed with Mr. Perez and discussed the cost of expanding the scope of services of JE, to "total commissioning" of all of the Bond 2006. A discussion of cost for these services is memorialized in the HISD Building Committee Board Minutes, which specifies the cost charged to HISD by JE would be a 4% total commissioning fee. Prior to discussing this fee, the Building Committee neither discussed whether JE was the most qualified for the expanded scope of total building commissioning, nor the fact that an option to expand JE's scope of services to total commissioning was not part of the April 12, 2007 RFQ for Bond 2006, nor in the contract. Despite this fact, the Building Committee discussed increasing the scope of services in conjunction with an additional scope of work and the cost. HISD failed to consider if other engineering vendors were qualified and neither solicited, through an RFQ process, nor considered in the Board Discussion, whether any other engineering firms were qualified for the expansive total building commissioning.
  - 5) On December 10, 2009, the Building Committee discusses hiring Jasmine Engineering in regard to the 2009 Bond. There is no discussion regarding solicitation of RFQs to review qualifications of potential vendors
  - 6) On December 21, 2009, the Board unanimously votes to award Jasmine Engineering an amended contract to include Total Commission Agent on the Bond 2009. There is no discussion regarding solicitation of RFQ's to review qualifications of potential vendors. Rather, the discussion is focused on cost alone and awards a 6% CA to Jasmine Engineering.
  - 7) On February 1, 2010 the Building Committee Report notes there is confusion and lack of understanding regarding the pending contract and scope of services with Jasmine Engineering on Bond 2009.
  - 8) The Second Amendment for Commissioning Services is titled on January 29, 2010; however, it was signed on February 3, 2010 and awards Jasmine Engineering total commissioning on the all 2009 Bond projects.
  - 9) On November 12, 2012 the Building Committee Report reflects negotiations with Jasmine Engineering are ongoing regarding a contract.
  - 10) On November 12, 2012 the Board Minutes reflect discontent between Board Members concerning the 6% CA fee to Jasmine Engineering. There is no discussion regarding solicitation of RFQ's to review qualifications of potential vendors. Rather, the discussion is focused on cost alone and awards a 6% CA to Jasmine Engineering.

11) On December 6, 2012 the Board enters a new contract with Jasmine Engineering for Special Projects.

B. Two Contracts, Multiple Amendments

HISD fails to differentiate between: 1) the initial 2007 contract for commissioning services for projects related to Bond 2006, and had two subsequent amendments that expanded services to total commissioning as well as tacking on funding with the 2009 bond, and; 2) the second contract entered into in 2012, with multiple amendments for projects with various sources of funding, that concluded with an amendment relating to the 2015 Bond.

1) Contract One and Amendments

- a. Agreement for Construction Services - August 22, 2007 (Mechanical Commissioning 1.5% CA)
- b. Amendment to Commissioning Agents Agreement – November 28, 2007 (Awards Total Commissioning of 2006 Bond, 4% CA)
- c. Second Amendment for Commissioning Services – February 3, 2010 (Awarded a 6% Commissioning fee on the 2009 Bond projects value of \$11,760,638.00)

2) Contract Two and Amendments

- a. Professional Services Agreement for Consulting Services (Special Projects) - December 6, 2012 (Priority Projects) –contract value: \$102,120.00/ paid: **\$288,043**
- b. First Amendment to Professional Services Agreement for Consulting Services – September 19, 2013 – contract value: \$8,700/ paid: \$28,160
- c. Second Amendment to Professional Services Agreement for Consulting Services – September 19, 2013 various projects paid: **\$1,457,394.00**
- d. Third Amendment to Professional Services Agreement for Consulting Services –December 6, 2013 – additional payment of \$95,237 related to 2012 contract (already included above)
- e. Fourth Amendment to Professional Services Agreement for Consulting Services –March 26, 2014. Additional payment of \$23,160 related to 1<sup>st</sup> amendment (already included above)
- f. Fifth Amendment to Professional Services Agreement for Consulting Services –June 26, 2014. – contract value: \$78,000/paid: \$78,000

Total Amount Paid on Contract Two and Amendments One Through Five (Prior to Sixth Amendment which awarded Jasmine Engineering the 2015 Bond): **\$1,745,437.00**

- g. Sixth Amendment to Professional Services Agreement for Consulting Services –November 17, 2015 (Awarded a 5% Commissioning fee on the 2015 Bond Projects value of \$64,900,000. Additional awarded a construction, non-commissioning fee, with a 4% fee for construction and renovation of parking lots).

C. Internal Audit of Commissioning Expenses and Payments

On July 6, 2015, the report on the Internal Audit of Commissioning Agent – Expenses and Payments, was provided to the HISD Board. This audit determined the HISD paid Jasmine Engineering a total of \$4,987,816 in fees over the course of 8 years, between two contracts and their related amendments.

1. Payments made on 2007 Contract One and Amendments:

- a) Total Amount Paid on 2006 Bond (completed): \$2,058,728

- b) Total Amount Paid on 2009 Bond (completed): \$1,183.651
- 2. Payments made on 2012 Contract Two and Amendments
  - a) Total Amount Paid on Priority Projects (completed): \$288,043
  - b) Fall Projects (ongoing) – Paid to date: \$1,457,394

Despite the fact the RFQ for Bond 2006 was limited in scope of services and source of funds, HISD continued to amend the commissioning contract and entered into multiple ongoing contracts and amendments for scopes of services that were funded out of two additional bonds that were not included in the 2006 Bond RFQ process.

D) Tex. Educ. Code §44.0411

The District’s response indicates that it does not understand the application of Tex. Educ. Code §44.0411(d) as being relevant as a finding. The SAI Preliminary Report cited this provision as clearly relevant, not in a context of addressing the procurement of professional services itself, but rather the issuance of change orders stemming from an engineering company authorizing those change orders, which places a limit of spending the district’s bond monies and tax payers’ hard earned money without any regard for internal controls and justification and regard for the monetary limits given by Tex. Educ. Code §44.0411(d).

Prior to executing the Sixth Amendment of the 2012 contract, the contract had been previously amended in excess of the dollar amount allowed under Tex. Educ. Code 44.0411(d) which states, “If a change order to a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, the total of the subsequent change orders may not increase the revised contract amount by more than 25 percent of the original contract price.” Despite HISD assertion that this provision does not apply to the contract with Jasmine Engineering, it in fact does. The original contract was entered on December 6, 2012, over a year after adoption of the statute on September 1, 2011. Additionally, this provision applies to ALL contracts for purchasing of services, including professional services. It is important to note that Tex. Educ. Code §44.031(f) **only** exempts professional service contracts from the requirements of Tex. Govt Code, Section 44.031. There is no overall exemption of professional service contracts from the Tex. Educ. Code, Chapter 44, including the remaining portions of Subchapter B. As there is no exception for professional service contracts under Tex. Educ. Code §44.0411, as such, the statutory change order limitations apply to the 2012 contract, and amendments, between HISD and Jasmine Engineering.

HISD’s additional argument that the contract and amendments with Jasmine Engineering do not have to be in conformance with Tex. Educ. Code §44.0411 based on the fact an RFQ on Bond 2006 predates the effective date of Tex. Educ. Code §44.0411 in 2011 is misplaced. HISD has failed to take into account that all Bond 2006 Projects are now completed and were not part of the 2012 Contract, and as such, the RFQ for 2006 Bond could not serve to grandfather HISD’s continued noncompliance with the law in 2015 when, at the latest, the ability to continue to amend the 2012 contract ceased. HISD proffering that the HISD Board properly relied on an eight-year-old RFQ related to an expended 2006 Bond with a completed contract work in 2015, clearly shows lack of internal financial controls by the HISD Board, who collectively eliminated all competition from other potential Commissioning Agents for HISD’s contract. The failure of the Board to address the qualifications of Jasmine Engineering and transparency in the award of the Commissioning contract throughout multiple amendments is inexcusable. There is no evidence that prior to or upon execution of each amendment that the HISD Board determined that Jasmine Engineering was the most qualified professional service provider. When the Board did not assure this fact, HISD could not assure it had selected the most qualified provider nor negotiate a reasonable cost for the district as required, thus bootstrapping itself to Jasmine Engineering. The increased scope of services and related amendments occurred over

approximately eight years without qualification reviews or marketplace negotiations on cost, resulting in contracts with Jasmine Engineering being awarded without equal opportunity to other potential commissioning companies to compete for the contract. HISD actions failed to provide fair and open competition in the procurement process. This conduct defies state and local procurement laws which are in place to assure equal opportunity to vendors across the state of Texas. HISD's attempt to justify the continual amendments to the 2012 contract outside the statutorily allowed dollar limits, based solely on the RFQ for Bond 2006, is ludicrous.

The Agency is not persuaded to change the substance of its findings based on the response provided by Harlandale ISD. TEA determines that Finding Five and Six stand.

**Finding #7** The Superintendent's hiring of family members was not substantiated or undetermined as a violation of Tex. Educ. Code §11.1513 and Harlandale ISD Board Policy DBE (Legal) 015904.

#### **HISD's Response to Finding #7:**

TEA Finding No. 7 – Nepotism

With respect to the issue of nepotism and the Superintendent, we remain confused. At Finding No. 7 (page 4) it appears that the charge was found to be unsubstantiated, ergo it was 22 See, General Exhibit 12 HB 628, Engrossed Version, apparently dismissed. Nevertheless, at page 13 of the report, TEA Staff takes what can only be described as a gratuitous criticism of the Superintendent concerning the "appearance of favoritism." We have thoroughly reviewed the provisions of Chapter 573 of the Texas Government Code concerning nepotism. In our review, we failed to identify a definition of or a legal standard concerning an "appearance of favoritism". Under Texas law hiring decisions relating to relatives within the statutory proscriptions are prohibited. Those proscriptions are clear and were not found by TEA investigators to have been violated. The reference to the eligibility of cousins as a possible target of a potential nepotism violation is simply erroneous. Under the methodology described in Tex. Govt. Code §§573.021, 573.022, and 573.023, first cousins are in fourth degree of consanguinity. They are never barred from employment by the provisions of Tex. Govt. Code §§ 573.002, 573.041, or 573.042. All references to "appearance of favoritism" should be stricken forthwith. There is no know legal standard which would support its retention.

#### **TEA'S Informal Review of Finding #7:**

As TEA did not make a finding in this instance, no additional review of the investigators word choice in the report is warranted. As such, this portion of the report stands as written.

#### **Applicable Law**

Tex. Educ. Code §11.051 (a) An independent school district is governed by a board of trustees who, as a body corporate, shall: (1) oversee the management of the district; and (2) ensure that the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations. (a-1) Unless authorized by the board, a member of the board may not, individually, act on behalf of the board. The board of trustees may act only by majority vote of the members present at a meeting held in compliance with Chapter 551, Government Code, at which a quorum of the board is present and voting. The board shall provide the superintendent an opportunity to present at a meeting an oral or written recommendation to the board on any item that is voted on by the board at the meeting.



Tex. Educ. Code §11.1511(b)(9) The board shall monitor district finances to ensure that the superintendent is properly maintaining the district's financial procedures and records.

Tex. Educ. Code §11.1511(b)(15) The board shall carry out other powers and duties as provided by this code or other law.

Tex. Educ. Code §11.1511(c)(4) The board may enter into contracts as authorized under this code or other law and delegate contractual authority to the superintendent as appropriate.

Tex. Educ. Code §11.1152 (a) In relation to the superintendent of the school district, the board of trustees of the district has the powers and duties specified by Sections 11.1511(b) and (c). The superintendent shall, on a day-to-day basis, ensure the implementation of the policies created by the board. (b) The board of trustees and the superintendent shall work together to: (3) provide educational leadership for the district, including leadership in developing the district vision statement and long-range educational plan; (5) support the professional development of principals, teachers, and other staff.

District board policy CH (Local) X, revised 09/2015, the board delegates to the Superintendent or designee the authority to make budgeted purchases for goods or services. However; any single, budgeted purchase of goods or services that costs \$25,000 or more, regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place.

District board CH (Local) X, prior to 09/2015 revision, the board delegates to the Superintendent or designee the authority to make budgeted purchases for goods or services. However; any single, budgeted purchase of goods or services that costs \$15,000 or more, regardless of whether the goods or services are competitively purchased, shall require Board approval before a transaction may take place.

Tex. Gov't. Code §551.002 Every regular, special, or called meeting of a governmental body shall be open to the public, except as provided by this chapter.

Tex. Gov't. Code §551.006 (a) A communication or exchange of information between members of a governmental body about public business or public policy over which the governmental body has supervision or control does not constitute a meeting or deliberation for purposes of this chapter if: (1) the communication is in writing; (2) the writing is posted to an online message board or similar Internet application that is viewable and searchable by the public; and (3) the communication is displayed in real time and displayed on the online message board or similar Internet application for no less than 30 days after the communication is first posted.

Tex. Educ. Code §44.031(a) "Except as provided by this subchapter, all school district contracts for the purchase of goods and services, except contracts for the purchase of produce or vehicle fuel, valued at \$50,000 or more in the aggregate for each 12-month period shall be made by the method, of the following methods, that provides the best value for the district: (5) a method provided by Chapter 2269, Government Code, for construction services.

Tex. Educ. Code §44.0411(d). Change Orders state a contract with an original contract price of \$1 million in addition or more may not be increased under this section by more than 25 percent. If a change order for a contract with an original contract price of less than \$1 million increases the contract amount to \$1 million or more, the total of the subsequent change orders may not increase the revised contract amount by more than 25 percent.

Tex. Educ. Code §11.1513(a)(2) The superintendent has sole authority to make recommendations to the board regarding the selection of all personnel other than the superintendent, except that the board may delegate final authority for those decisions to the superintendent.

District board policy DC (Local), Employment of Contractual Personnel, and DC (Legal): The Superintendent has sole authority to make recommendations to the Board regarding the selection of contractual personnel. The Board retains final authority of reemployment of contractual personnel.

### **Amendments to Applicable Law**

Tex. Govt. Code §2254.003. Selection of Provider; Fees (a) A governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award: 1) on the basis of demonstrated competence and qualifications to perform the services; and 2) for a fair and reasonable price. (b) The professional fees under the contract may not exceed any maximum provided by law.

Tex. Govt. Code §2254.004 Contract for Professional Services of Architect, Engineer (a) In procuring architectural, engineering, or land surveying services, a governmental entity shall: (1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications; and (2) then attempt to negotiate with that provider a contract at a fair and reasonable price. (b) If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering, or land surveying services, the entity shall: (1) formally end negotiations with that provider; (2) select the next most highly qualified provider; and (3) attempt to negotiate a contract with that provider at a fair and reasonable price. (c) The entity shall continue the process described in Subsection (b) to select and negotiate with providers until a contract is entered into.

Tex. Govt. Code §2269.057 Architect or Engineer Services (a) An architect or engineer required to be selected or designated under this chapter has full responsibility for complying with Chapter 1051 or 1001, Occupations Code, as applicable. (b) If the selected or designated architect or engineer is not a full-time employee of the governmental entity, the governmental entity shall select the architect or engineer on the basis of demonstrated competence and qualifications as provided by Section 2254.004.

Tex. Govt. Code §2269.058 Use of Other Professional Services (a) Independently of the contractor, construction manager-at-risk, or design-build firm, the governmental entity shall provide or contract for the construction materials engineering, testing, and inspection services and the verification testing services necessary for acceptance of the facility by the governmental entity. (b) The governmental entity shall select the services for which it contracts under this section in accordance with Section 2254.004.

Tex. Govt Code §2269.201-.208 Construction Manager-Agent Method

Tex. Govt. Code §2269.201 Contracts for Facilities: Construction Manager-Agent. (a) In this chapter, the "construction manager-agent method" is a delivery method by which a governmental entity contracts with a construction manager-agent to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors. (b) A construction manager-agent is a sole proprietorship, partnership, corporation, or other legal entity that serves as the agent for the governmental entity by providing construction administration and management services described by Subsection (a) for the construction, rehabilitation, alteration, or repair of a facility. (c) A governmental entity may retain a construction manager-agent for assistance in the construction, rehabilitation, alteration, or repair of a facility only as provided by this subchapter.

Tex. Govt. Code §2269.203. Limits on Construction Manager-Agent. A construction manager-agent may not: (1) self-perform any aspect of the construction, rehabilitation, alteration, or repair of the facility; (2) be a party to a construction subcontract for the construction, rehabilitation, alteration, or repair of the facility; or (3) provide or be required to provide performance and payment bonds for the construction, rehabilitation, alteration, or repair of the facility.

Tex. Govt. Code §2269.204. Fiduciary Capacity of Construction Manager-Agent. A construction manager-agent represents the governmental entity in a fiduciary capacity.

Tex. Govt. Code §2269.207. Selection of Construction Manager-Agent. A governmental entity shall select a construction manager-agent on the basis of demonstrated competence and qualifications in the same manner that an architect or engineer is selected under Section 2254.004.

Harlandale ISD Procurement Policy and Procedures Manual - PP205/Procuring Architectural / Engineering Services. Purpose: To establish procedures for the procurement of architectural or engineering services. Scope: This procedure applies to all solicitation of architectural or engineering services. Procedures: 1. Solicit vendors to respond in a non-financial format their proposal including their demonstrated competence and qualifications. 2. Rank the best qualified firms according to their demonstrated competence. 3. Attempt to financially negotiate a contract with the highest-ranking firm. 4. If a satisfactory contract cannot be achieved with the most highly qualified provider of architectural or engineering services, the District will formally end negotiations with that firm, select the next best qualified company and attempt to negotiate a fair and reasonable price. The District shall continue this process with other firms until a contract is entered into.

### **Amended Facts**

TEA has amended the facts to properly reflect the use of the term “request for qualifications” in lieu of “request for bids.”

On October 19 - 22, 2015, the District’s Auditor contacted the district’s procurement department inquiring about the \$60,000 payment made in fiscal year 2014-2015 to a consulting firm without board approval.

On October 22, 2015, the district responded that the district has been using their services since 2009, as needed at unplanned dates, due to the nature of unpredictable construction activity. It further responded: “To present them to the Board prior to construction activity would lead to questions if we do not use their services (or any other engineering firm) for construction testing. To present them to our Board after their services have been rendered would also lead to questions as this type of ratification has never been used for this type of construction testing service”.

HISD’s Report on Conduct of Audit for the Year Ended June 30, 2015, Section IX, Internal Control and Other Matters, page 5, noted that during the year the “District made eight payments totaling \$60,925 to an engineering firm. The district entered into four (4) related agreements for construction materials testing services. The four agreements total \$141,500 and were signed by the Superintendent; however, no effective dates were specified in the agreements. It appears that Board approval was not obtained for these agreements.”

The Superintendent responded to the allegation stating: “Although the total of the purchase orders were \$141,500.00 and above the \$25,000.00 threshold, the purchase orders would not have to have been

presented to the Board for approval since the consulting firm was one of the approved engineers to provide this service and the District had a satisfactory experience with them and chose to use them based on their qualifications, experience and service to the District. The total payments the fiscal year of 2014-2015 was \$60,925.00”

HISD Board of Trustees is currently comprised of seven board members.

SIU investigators interviewed HISD Board of Trustees A-G, as well as former and current district employees. SIU reviewed electronic communications between Trustees and official reports.

SIU’s interviews and review of documentation revealed the following:

- Significant dysfunction exists among Board of Trustees in the form of distrust, in-fighting and bullying, biased bid ranking, and alliances among the Trustees;
- An improper dependency relationship between certain Board Members and an outside contractor for possible exchange of monies, gifts, meals, and other in-kind donations;
- Trustees A, B, D, E, F and G acted outside the scope of their authority by frequenting the district’s campuses, by directly contacting and questioning district employees about personal and district matters, by intimidating them, disrupting the day-to-day operations of the Superintendent and District employees, and thereby impeding the district’s ability to govern and make decisions to carry out the business of HISD.

Examples SIU identified as overreach by HISD Trustees, included:

- Trustee A acted outside the scope of his authority when he accepted a dinner invitation from the former outside contractor discussing the possibility of terminating the current law firm for the district and retrieving Trustee A’s campaign money through fundraisers.
- Between August 4, 2017, and March 3, 2018, Trustee E emailed the Superintendent on Sunday, he appeared in Human Resources (HR) unannounced, he called and texted the office of the HISD Executive Director of Human Resources directly and questioned the qualifications of the HISD Benefits Coordinator, asking for job description and job requirements, he e-mailed the HISD Executive Director of Human Resources regarding an inappropriate relationship between a coach and a student, he raised his voice saying the incident was kept quiet because the student was a former Board Member’s granddaughter. He further stated he had “heard stuff” about her and as a Board Member he had a right to know, and that he was disappointed with her. He called the office asking staff to text him the HR Director’s cell phone number and demanding to speak to him before she left work that day, he disrupted the day-to-day operation of school staff by visiting the school campus and circumventing the security/guest sign-in procedures and demanding information that did not pertain to his role as a Board of Trustee.
- On or about October 19, 2017, Trustee E requested district staff to select a different vendor than the one that was selected from the RFQ for the Structural Engineer. Trustee E was told that the selection was presented to the Board and the Board Members voted on the vendor. He was told he was micro-managing and he was not in line with his duties. Trustee E became angry and left.
- On or about March 3, 2018, Trustee E asked Trustee D to support him in terminating the Superintendent and re-hiring the former Commissioning Agent. Trustee E would keep on giving the Superintendent a hard time because he does not want the Superintendent to continue working with the District.

SIU’s review of board minutes and documents confirmed that the Board of Trustees has been consistently divided on two critical issues: 1) the repair of a pier(s) to support the structure at Gillette Elementary School

and 2) retaining and overpayment of an outside contractor, Jasmine Engineering, for the oversight of construction projects, instead of a more cost-effective in-house construction oversight.

The former Superintendent, who resigned effective close of business August 31, 2012, informed the TEA that he was threatened by one former and a current Board of Trustees with the loss of his job if he would not follow their directive to terminate the Assistant Supervisor of Maintenance/Operations.

Review of electronic communications (group texts) between HISD Board of Trustees on August 18, 2017, September 22, 2017, and December 30, 2017, show a quorum of the Board conducted a meeting via group text, deliberated HISD public business and public policy over which the Board has supervision or control, which was not open to the public. These electronic communications exchanged information and deliberated regarding city inspection delays, potential delays of a campus opening, district employee work schedules and pay, curriculum issues, and parent complaints.

The Board disregarded the Building Committee Report dated November 6, 2012, regarding Slay Engineering's recommendation to repair one Pier at Gillette Elementary School. Later, the Board followed Jasmine Engineering's recommendation to repair thirty-six piers instead, at a much higher cost for the district than originally quoted by Slay Engineering.

The pier repairs for Gillette Elementary School have been ongoing for over five years and has not yet been completed. The pier repair costs have increased exponentially, from an original proposal to repair one pier, at a cost of approximately one hundred eighty-five thousand dollars (\$185,000.00) to an estimated cost of four million, four hundred thousand dollars (\$4,400,000.00) to repair thirty-six piers. In addition, the Board of Trustees have also paid approximately two hundred and twelve thousand dollars (\$212,000.00) to Jasmine Engineering, for the oversight of the project.

The current Superintendent informed the TEA that he was threatened by Jasmine Azima that he would lose his job if he did not support her as the District's Project Manager.

SIU requested to interview Jasmine Azima, the representative of Jasmine Engineering. Jasmine Azima declined to be interviewed on the advice of her attorney.

From 2006 to 2017, the district contracted with an engineering company, Jasmine Engineering, under a Professional Service Agreement. The district continued the agreement through six (6) contract amendments and did not make requests for qualifications

- A review of the original contract and the six (6) contract amendments showed that the contracts were made without the specification of an end-date. This enabled the contractor to keep working for the district without going through the bidding process, which should have occurred after approximately two (2) years. Over the course of the years, the scopes of the projects were increased and by vote of the board, the duration of the contract was amended and prolonged six times.
- Per district statements, the Commissioning Agent, Jasmine Engineering was paid between 1.5% and 6% commission of the Total Project Cost for the oversight of contractors and subcontractors, including hiring, related to the Bond Projects of 2006, 2008, 2009, and 2015, Priority Projects, and Additional Projects unrelated to the Original Priority Projects. Jasmine Engineering also was paid hourly and fixed fees for consulting services as described in contract documents.

The ranking committee for the selection of potential vendor projects included the Commissioning Agent with two of her own employees, and two HISD Board Members, thus giving the appearance that the ranking is biased and unfair to other bidders.

Per cost summary provided by the District, the total commissioning agent fee paid to Jasmine Engineering to date, for Bond 2015, totals three million, one hundred two thousand, one hundred seventy-three dollars (\$3,102,173.00).

During the 2015 Bond Projects, the Board of Trustees added to the scope of work the repair of Piers at the Gillette Elementary School. One of the initial cost estimates was approximately one hundred eighty-five thousand dollars (\$185,000.00) which was declined through HISD Board vote. Per the district's statement, HISD did not find a response to its Request for Proposals for the pier repairs, however; it ended up paying two hundred twelve thousand, one hundred and fourteen dollars (\$212,114.00) in commissioning fees. Per district statement, the piers, as of today, have not yet been repaired.

Per documentation collected from the district, the selection of qualified applicants for the position of Assistant High School Principal was made by an interview committee, which did not include the Superintendent.

Documentation to verify whether the Superintendent engaged in nepotism by hiring his cousin for the position of High School Principal was no longer available, as the district responded that some of the information requested is no longer maintained by the district. The district stated in 1997 the district adopted the Texas State Library and Archives Commission SD and GR schedules.

### Analysis

The Superintendent violated district board policy CH (Local) X, when he did not request board approval for goods or services, regardless of whether the services are competitively purchased, when the amounts were outside the scope of budgeting authority granted to the Superintendent pursuant to Tex. Educ. Code 11.1511(c)(4).

The Board violated Tex. Educ. Code §§11.1511(b)(9) and 11.1511(b)(15) when it failed to monitor the District's finances to ensure that the superintendent was properly maintaining the district's financial procedures and records, when it failed to identify the contracts with Terracon Consulting as outside the budgeting authority granted to the Superintendent or question the payments made to Terracon.

Based on the interviews of the Board of Trustees and former and current district employees, as well as the review of electronic communications and official reports, SIU investigators identified that certain Trustees directed the reassignment of district employees, questioned employees about issues outside their scope, for the sole benefit of that Trustee, in violation of Tex. Educ. Code §11.051(a-1).

The evidence reviewed by TEA demonstrates the dysfunction within the HISD administration and lack of collaboration within the Board of Trustees and with the Superintendent, in violation of Tex. Educ. Code §11.1512(a), (b)(3), and (b)(5), which requires the Board of Trustees and the superintendent to work together to provide educational leadership for the district, including leadership in developing the district vision statement and long-range education plans, and shall support the professional development of principals, teachers, and other staff.

In addition, based on the interviews and documentation, Trustees A, B, D, E, F and G have acted outside the scope of their authority by frequenting the district's campuses, by directly contacting and questioning district employees about personal and district matters, by intimidating them, disrupting the day-to-day operations of the Superintendent and District employees, and thereby impeding the district's ability to govern and make decisions to carry out the business of HISD and resulted in a failure to collaborate with the district's administration, in violation of Tex. Educ. Code §§11.051(a-1), 11.151(b), 11.1512(a) and (b)(3).

Review of the electronic communications, in the form of written texts, between a quorum of HISD Board members deliberating on school confirmed that the electronic communications between Trustees were not posted to an online message board, or similar Internet application, viewable and searchable by the public in real time nor displayed for 30 days, as required by Tex. Gov't. Code §551.006. Tex. Gov. Code §551, restricts members of a governmental body from discussing public business or public policy within their jurisdiction outside of an open meeting (except for expressly authorized executive sessions).

The Board's approval of Jasmine Engineering contract amendments with change orders that resulted in a changed contract over one million (\$1,000,000.00). Once the addition of an approved change order to the original contract resulted in a changed contract over one million (\$1,000,000.00), the Board's approval of change orders resulting in a cumulative sum of more than 25 percent of the original contract to the total changed contract, was in violation of Tex. Educ. Code §44.0411(d).

TEA has amended the following analysis: The District circumvented the procurement process in that the contracts with the Commissioning Agent, Jasmine Engineering, did not contain an effective end-date, allowing the commissioning agent to continue its work through six contract amendments and multiple change orders, thus exceeding the \$50,000 threshold, in violation of Tex. Educ. Code §44.031, Tex. Gov't. Code §2269, and local policy. By doing so, the district did not allow other vendors to participate in a submission in response to an RFQ for the project of Commissioning Agent and deprived the district of its opportunity to find the best qualified vendor and best value for the district. The increases in scope of services over between 2007 through the last contract amendment in 2017, shows a change in Commissioning Agent fees and types of services rendered. A review of the contracts indicates Jasmine Engineering served as a Construction Manager-Agent pursuant to Tex. Govt Code §2269.201-206, in provision of consultation and administration services during the design and construction phases while managing multiple contracts under various bonds. HISD and Jasmine did not contract under Tex. Govt. Code §2269.

The Superintendent did not violate the district or state hiring policy, as he brought the recommendation for the selection of the Assistant High School Principal before the Board of Trustees for voting. The Superintendent's daughter chosen for the position of Assistant High School Principal was qualified, and while having considerably less years of service and experience than other applicants, there was only an appearance of favoritism.

Regarding the Superintendent hiring his cousin, SIU was unable to determine a violation of district or state hiring policy due to lack of documentation available for review.

### **Summary**

The findings establish that a systemic breakdown of the HISD Board of Trustees' ability to govern and manage HISD prevents the Board from carrying out the powers and duties as provided by the Texas Education Code or other law, as required by Tex. Educ. Code 11.151(b)(15). This systemic breakdown is

demonstrated by the Board failing to oversee and monitor the district finances, taking actions outside the scope of their authority in directing district employees to perform tasks that personally benefit the Trustees, and intimidating and questioning former and current employees about their responsibilities, and directing hiring decisions, in violation of Tex. Educ. Code §§11.1511(b)(9), 11.1512(a), (b)(3), and (b)(5). The Board's failure is further evidenced by the Trustees' inability to appropriately collaborate with the Superintendent and refrain from exceeding the scope of their authority within the district as required by Tex. Educ. Code. §11.051(a-1). The HISD Board violated the Texas Open Meetings Act by conducting meetings in which school business was deliberated, with no exception to the open meetings requirements, in violation of Tex. Gov't Code §§551.002.

The HISD Board of Trustees violated contract and procurement requirements in the bidding, contract approval, contract amendment, and change order process required under Tex. Educ. Code §§44.0411(d), 44.031(a), Tex. Gov't Code §2269, local policy, as well as §§11.151(b)(15).

Furthermore, the Superintendent exceeded his scope of authority when he entered into four agreements and made payments to a consulting firm, without board approval, as required by Tex. Educ. Code §11.1511(c)(4). The Superintendent also violated Tex. Educ. Code §11.152(a-b) by failing to ensure the implementation of board policies. The Superintendent's hiring of family members was not substantiated or undetermined as a violation of Tex. Educ. Code §11.1513 and Harlandale ISD Board Policy DBE (Legal) 015904.

### **General Response to Recommendation Comments in the District Response of December 21, 2018**

A Final Report contains recommendations of referral, corrective action, and sanctions which are communicated to TEA's Enforcement Division. The implementation of any recommended action is at the discretion of that unit and subject to a separate hearing process. As a result, TEA is not persuaded to change the substance of its recommendations based on the responses provided by Harlandale ISD. The Agency has determined that the recommendations stand as written.

### **Recommendations for Referral**

As the conduct described above, regarding the Open Meetings Act, may also constitute criminal violations of Tex. Gov't Code §551, SIU recommends referral of its findings related to this conduct by the Members of the Board of Trustees and the Superintendent to the appropriate state or local agencies.

As the conduct described above, regarding contract and procurement, may also constitute a criminal violation of Tex. Educ. Code §44.032, SIU recommends referral of its findings related to this conduct by the Members of the Board of Trustees and the Superintendent to the appropriate state or local agencies.

### **Recommendations for Corrective Action**

1. Harlandale ISD must adopt policies and procedures necessary to ensure that, going forward, required information is obtained and in compliance with the requirements of Tex. Educ. Code §§11.051, 11.151, 11.1511, 11.1512, 11.1513, 44.031, 44.0411, Tex. Gov't Code §2269, Tex. Gov't Code §§551.002, 551.006.
2. Harlandale ISD must present their required policies that delegate specific duties related to Governance of Independent School District, Contract Procurement and Conflict of Interest to Harlandale ISD staff responsible for the execution and adherence of such policies.



3. Harlandale ISD must provide a list to TEA of all individuals charged with performing the duties described in the above-referenced policies. The personnel on this list are required to attend (and confirm to TEA completion of) subject matter training on these policies and procedures. Any future Harlandale ISD employees involved in the policy writing and adherence should attend this training, as well. All training should commence as soon as possible (preferably during the 2019-2020 school year.)
4. An external Forensic Audit related to Contract/Procurement will be conducted by an independent auditor at the expense of the district.

### **Recommendations for Sanctions**

As authorized by Tex. Educ. Code. §§39.057(d), 39A.002, 39A.004, Tex. Admin. Code §§97.1055(b)(2)(B)(ii), 97.1059(b)(1)(E), 97.1073(e)(7)-(8), it is recommended that the Commissioner:

- Lower the Accreditation of HISD, install a TEA Conservator and appoint a Board of Managers to replace the existing Board of Trustees due to the HISD Board of Trustees and the current Superintendent's inability to appropriately govern and oversee the fiscal management of the District without taking actions outside the scope of their authority, in accordance and §39A.002(7). The above recommendation will enable the District to function in the best interest of students, while policies and procedures can be implemented to address the issues raised in this investigation.
- Order a hearing by the HISD Board of Directors to notify the public of the district's insufficient performance, the improvements in performance expected by the agency and the interventions and sanctions that may be imposed under this section if the performance does not improve, in accordance with TEC §39A.002(2).
- HISD is required to post notice of this hearing as a public meeting to ensure that the general public is allowed to attend and may not limit the number of speakers who would like to address the board, nor may the board limit the amount of time any speaker takes to make their statements regarding HISD's noncompliance with Governance of Independent School District, Nepotism, Contract Procurement, Conflict of Interest/Disclosure requirements under Tex. Educ. Code §§11.051, 11.151, 11.1511, 11.1512, 11.1513, 44.031, 44.0411, Tex. Gov't Code §551.006 and §2269.

TEA reserves the right to implement all available interventions and sanctions under Tex. Educ. Code, Chapter 39A, §39.102 and 19 Tex. Admin. Code, §97.1073, including 97.1059(a)(b)(1)(E) to address the current, or any future deficiencies, identified for HISD.