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December 21, 2018

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RESPONSE OF HARLANDALE ISD TO PRELIMINARY REPORT SPECIAL ACCREDITATION INVESTIGATION REPORT DATED NOVEMBER 13, 2018 AND REQUEST FOR INFORMAL REVIEW

Dear Deputy Crabill, Director Hewitt, and Texas Education Agency Legal Staff:

This letter is submitted in response to the attached Preliminary Special Accreditation Investigation Report (hereinafter "Preliminary SAI Report") issued by the Texas Education Agency's Division of Governance on November 13, 2018 to the Board of Trustees and the Superintendent of the Harlandale Independent School District (HISD or District).¹ This Response

¹ Attached hereto as Appendix A.

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to the Preliminary SAI Report and Request for Informal Review (hereinafter “Response”) is submitted on behalf of HISD in accordance with Board authorization taken at lawfully-called meetings held on November 20, 2018 and December 17, 2018, respectively. At those meetings, the HISD Board of Trustees specifically authorized the filing of this Response. In brief, the SAI’s proposal is to lower Harlandale ISD’s accreditation status; to appoint either a Conservator or a Board of Managers, pursuant to 19 Texas Administrative Code (TEX. ADMIN. CODE or TAC) § 157.1133; and to require a forensic audit be conducted. For the reasons set forth in this Response, Harlandale ISD objects 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.

On November 29, 2018, via letter from its Counsel to Director Hewitt, [*See, General Exhibit 1*] Harlandale ISD requested an *in-person* meeting with either the Commissioner or with a Commissioner-designated hearing officer at the TEA headquarters in Austin as contemplated by 19 TEX. ADMIN. CODE § 157.1134(a). The District also requested documents and other information relied on by TEA when reaching its conclusions set out in the Preliminary SAI Report. The District requested an extension of the response deadline until a period of at least ten (10) school business days after the date the requested information was provided. An extension to file a Response was granted until December 21, 2018 but to date the District has not received any of the discovery requested in its November 29 letter. We hereby renew those requests and reserve the right to supplement or amend this Response once the information is provided.

I.

INTRODUCTION – CURRENT CONDITIONS WITHIN HARLANDALE ISD

At the conclusion of the SAI Informal Review process, Harlandale ISD’s accreditation status could be reviewed and possibly adjusted by the Texas Education Agency pursuant to, *inter alia*, TEX. EDUC. CODE § 39.057(e) “. . . if the commissioner determines that the action **is necessary to improve any areas of the district’s performance.** . . including the district’s financial accounting practices.” (Emphasis added). While much of the following Response will address issues concerning HISD financial practices and controls, it is appropriate to briefly highlight Harlandale ISD’s academic and governance status as an integral part of the

District's Response. There are many great things happening in the Harlandale Independent School District. The following provides a brief list of some of HISD's major recent achievements.

A. Curriculum and Instruction

1. Harlandale ISD has continued to have academic growth across all content areas as measured by the State's academic accountability system. This past year academic gains were made at the elementary level improving from 61% to 67% at the "approaches" standard; from 29% to 34% at the "meets" standard; from 12% to 13% at the "masters" standard. At the middle school level there was consistency with a 64% rating at the "approaches" standard; an increase from 30% to 33% at the "meets" standard; and an increase from 35% to 37% at the "masters" standard. High school students achieved an increase from 69% to 72% at the "approaches" standard; from 41% to 46% at the "meets" standard; and from 9% to 13% at the "masters" standard. In comparison to the six neighboring school districts which surround HISD's boundaries and have similar demographics, Harlandale ISD outscores them in overall district index score, in student achievement, and in school progress.
2. HISD's graduation rates have progressively increased over the last 3 years. Rates for the relevant years are as follows: Class of 2015 at 89.1%, Class of 2016 at 92.3% and Class of 2017 at 94.3%.²
3. On May 2018, Harlandale ISD began a District Strategic Planning Process led by the Region 13 Education Service Center. This process involved in excess of 60 individuals coming together to establish areas of focus for the District going forward. Individuals involved in the process included students, parents, community partners, teachers,

² Preliminary data reported by HISD on TEASE system.

administrators, cabinet members, and Superintendent.

4. HISD had the highest number of student enrollment applications submitted to Texas A&M University-San Antonio

B. Finance

1. The state's school financial accountability rating system, Financial Integrity Rating System of Texas (FIRST), ensures that Texas public schools are held accountable for the quality of their financial management practices and that they improve those practices. The system is designed to encourage Texas public schools to better manage their financial resources to provide the maximum allocation possible for direct instructional purposes.
2. Harlandale ISD has received a SUPERIOR ACHIEVEMENT rating for fifteen consecutive years. Harlandale has been found by its external auditor in its most recent financial audit to be "free of any instances of material weakness in internal controls over compliance for local, state, or federal funds". (Emphasis added.) The fiscal indicators met by the District indicate HISD manages its resources prudently thus maximizing the allowed points in this area. The District had sufficient cash on hand to meet 179 days of operating expenditures. This is above the required ninety (90) day benchmark.
3. Under the Texas Education Agency's own rating system, the District is soundly managed fiscally.
4. Harlandale ISD's Bond rating by Standard & Poor's has improved since 2010 to "A+" from a previous rating of "A."
5. The Harlandale Education Foundation, a 501(c)3 non-profit corporation, reflects the support of the Community and employees via donations. The Foundation guarantees a \$1,250 scholarship to every eligible graduating senior who pursues a path to college or technical career. Currently, the fund has a balance of \$882,738, for the fiscal year ending

2017. In the past year, the Foundation had its most successful fund drive ever, with employee contributions to the Foundation exceeding \$65,500.

C. Human Resources

1. The District has created a compensation system that is fair and competitive. Beginning in 2015, the Board engaged the HR Services Division of TASB to conduct a comprehensive review of its employee compensation plan. This study was conducted to objectively examine the competitive job market and determine whether pay practices are internally fair and externally competitive. This pay plan gives the Board tremendous flexibility in considering raises with the marketplace value in mind. Even further, it allows the HISD Board to make consistent adjustments in compensation over time despite the lack of significant State funding support in recent fiscal years. As a result, HISD's teacher pay is competitive and significantly contributes to reduced employee turnover. For example, in 2016 Harlandale ISD's turnover rate was 13.6%. The average ESC-20 district turnover rate was 19.1% for the same time period.
2. The Board, mindful of the national trend of increasing insurance costs, has raised the employer contribution for payment of employee health insurance premiums.
3. The Harlandale Leadership Program was established in 2016. The program provides an interactive system training experience to selected teacher leaders. The program assists teachers to develop and strengthen effective leadership skills as they remain teacher-leaders or as they transition to campus administrative positions. Harlandale ISD believes in creating leaders from among its own employees.
4. An aggressive wellness approach has been promoted to reduce healthcare costs and increase employee productivity. This has resulted in a reduction of the insurance cost to premium ratio from 130.4% of premiums to 99.2% of premiums within the preceding year.

D. Operations

1. With voted community support resulting in the approval of schoolhouse bond financing, the District has been able to continue providing innovative instructional facilities with the completion of a new STEM Early College High School, Health/ Science Technology Building, Automotive Building expansion, comprehensive District-wide camera and surveillance upgrade, and parking lots along with new Carrol Bell Elementary and Vestal Elementary facilities. This milestone brought about the completion of Bond 2015, which was HISD's largest approved bond package of \$64.5 million dollars.
2. HISD is the first district in Bexar County to enter into a partnership with University Health System to provide a School Based Health Clinic.

E. Governance/ Training

1. As stated above, the full HISD Board and Superintendent are actively participating in the Lone Star Governance Training Program.
2. Each of the current Trustees have committed to and expect to complete in the near-term additional training on the requirements of the Texas Open Meetings Act and the Texas Open Government Act.
3. The Board has worked with the Texas Association of School Boards (TASB) to conduct a comprehensive review and update of all of HISD's legal and local policies. A comprehensive review of the District's policies ensures they are up-to-date and consistent with changing legal mandates and evolving local priorities. Participation in the review process has provided significant training to the current Trustees and staff of HISD.

II.

LEGAL ANALYSIS OF PRELIMINARY SAI REPORT PROCESSES AND PROCEDURES

To date, the District has not received a response to discovery requests set forth in its November 29, 2018 letter. [See, **General Exhibit 1**]. As a result, the District's ability to adequately respond to the Preliminary SAI Report has been compromised. All discovery requests are hereby renewed. Moreover, the informal review process fails to comply with the requirements of TEX. EDUC. CODE § 39.058(b) in that the informal appeal does not appear to have been assigned for consideration by the Commissioner or by a Commissioner-designated Hearing Officer.

As detailed below, the Preliminary SAI Report's proposed corrective measures and sanctions, including a proposal to lower the District's accreditation rating, are unwarranted, unlawful and unnecessary. At the current time (the 2017-18 school year), relevant TEA standards show Harlandale ISD has a 2017 FIRST Rating of "A-Superior", a 2017 Accountability Rating of "Met" Standards, and a 2017-18 accreditation status of "Accredited".³ Moreover, a decision after an informal review to uphold the Preliminary SAI Report would be in violation of statutory law governing the preparation and adoption of such SAI reports, and would exceed the TEA's statutory authority. Furthermore, 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 for the reasons discussed below in the balance of this Response.

A. Procedural Errors in the TEA Authorization of the Harlandale ISD SAI Report

HISD asserts that there are distinct legal and procedural errors committed by TEA Staff regarding the Preliminary SAI Report which preclude it from forming the basis of lawful action by the Commissioner under TEX. EDUC. CODE § 39.102(a)(9), to wit:

1. On August 11, 2017, TEA issued a Notice of Special Accreditation Investigation. [See, **General Exhibit 2**]. The Notice was issued by Brenda Meyers, Director Special Investigations Unit. A copy of the letter was sent, *inter alia*, to Deputy Commissioner Crabill. However, no copy was sent to Commissioner Morath.

³ See, TEA website for 2017-18 Accreditation Statuses. Each is the most current rating available notwithstanding the date assigned to each rating category.
http://tea4avcastro.tea.state.tx.us/accountability/accreditation/2017_2018_accreditation_statuses.html

2. On August 30, 2017, TEA issued an Extended Notice of Special Accreditation Investigation. [See, **General Exhibit 3**]. The Notice was issued by Brenda Meyers, Director Special Investigations Unit. A copy of the letter was sent, *inter alia*, to Deputy Commissioner Crabill. However, no copy was sent to Commissioner Morath.
3. Both Notices of Special Accreditation Investigation indicated on their respective faces, that they were authorized by the Commissioner as required by TEX. EDUC. CODE § 39.057(a). Neither letter explained how such authorization was obtained or provided any evidence of actual Commissioner pre-approval. There is no evidence in the record that the Commissioner delegated his personal responsibilities under by TEX. EDUC. CODE § 39.057(a). The mere recital of such authority, without the proffer of any evidence to support same, is legally insufficient in light of HISD's foregoing challenges.
4. The November 13, 2018 Preliminary SAI Report failed to provide evidence that the SAI was lawfully pre-authorized by the Commissioner, as required by TEX. EDUC. CODE § 39.057(a). Although **General Exhibits 2 and 3** recite via boilerplate language that the investigations were authorized by the Commissioner of Education, neither the Original Notice Letter nor the Preliminary SAI Report provide any information as to how such an authorization happened, if at all. This failure is especially significant in light of the fact that the Commissioner was not copied on either of the Notice Letters.
5. 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. The Report contains Findings relating to matters which were not specifically authorized for investigation in either of the Notice letters. [**General Exhibits 2 and 3**]. As a result, any Findings on investigative issues not specifically authorized by TEX. EDUC. CODE § 37.057(a) must be dismissed. In particular:
 - a. Finding No. 2, relates to the Board's alleged failure to monitor District finances, procedures and records. No allegation concerning these requirements is

included in the items Noticed for investigation in **General Exhibits 2 and 3**. While contract procurement protocols were identified in the both Notice Letters, these issues were restricted to two vendors (Jasmine and Terracon) and to projects at 3 schools (Gillette, Vestal, and Carroll Bell). There was no expressed directive that general finances be evaluated. The issue identified was Contract Procurement.

Specific Commissioner authorization is required by TEX. EDUC. CODE § 37.057(a)(16). Specific procurement issues which were identified in the Notice Letters were discussed in other Findings in the Preliminary SAI Report. The merits of each will be discussed below. However, other than the limited matters relating to the procurement of professional services, there is no discussion of any Board oversight issue (or lack thereof) in the Notice letters or in the Preliminary SAI Report.

SAI Findings not related to matters specifically designated by 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, they can only be investigated "as the commissioner otherwise determines necessary." TEX. EDUC. CODE § 37.057(a)(16). Significantly, there has been no such determination in this case. Finding No. 2 must be dismissed. If there is a specific procurement issue determined to be outside legal requirements, those issues can and should be addressed in connection with the specific activities discussed in HISD's responses to other findings. Since there are no procurement issues, TEA has neither the evidence, nor even the allegations to support a lack of Board oversight as alleged in Finding No.2.

- b.* Finding No. 3, relates to the Board's putative obligation not to exceed the scope

of their authority and obligation to work collaboratively with administration. 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. Finding No. 3 must be dismissed.

- c. Finding No.4 relating to Board obligations under the Texas Open Meetings Act is not included in the items Noticed for investigation by **General Exhibits 2 and 3**. According to the Notice letters, the Board Governance investigative items deal exclusively with the Terracon Agreements discussed under Finding 1. There is no mention of Open Meetings, communication, or quorum issues in either of the two Notice letters. The Report raises the specter of board quorum violations and the like, but fails to note specific matters which can be investigated and for which a response can be adequately made. SAI Findings not related to matters designated by the Commissioner violate the statutory limits of the Agency's Power. This is especially so when relating to matters not designated for investigation under the first fifteen (15) subparts of TEX. EDUC. CODE § 37.057(a)(1-15). Because they are not so designated, they 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 case. Finding No. 4 must be dismissed.
- 6. The November 13, 2018 Preliminary SAI Report fails to provide adequate notice as required by 19 TEX. ADMIN. CODE § 157.1112, particularly in connection with inter-board and trustee/employee communications. The Report fails almost entirely to

identify the individuals alleged to be involved in these communications or matters discussed. In order to cure this shortcoming, Counsel for Harlandale ISD sent a request for discovery to Mr. Hewitt of November 29, 2018. [See, **General Exhibit 1**]. To date no response has been received.

7. The purported informal review process fails to comply with the requirements of TEX. EDUC. CODE § 39.058(b), in that it was not designated for consideration by the Commissioner or a Commissioner-designated Hearing Officer. Demand is hereby made for statutory compliance. Under the TEA-adopted Investigation Procedures [See, **General Exhibit 4**, @ page 1 (bates 22)] the recommendation for the initiation of an SIA is made to the Commissioner or the Commissioner's designee ". . . through the Director of Governance & Investigations for final approval of the SAI." This provision makes two facts clear. First, the Director of Governance is the initiating authority for the final approval of a SAI. Second, the Director of Governance is not the Commissioner's designee for approval of SAI investigations.

Allowing the Director of Governance who was responsible for the final recommendation to the Commissioner to initiate the SAI Investigation, to sit in judgment of the propriety of an investigation for which he was responsible is tantamount to having the him grade his own papers. In general, a hearing examiner should be a neutral and independent finder of fact. Having the individual responsible for the initiation of a SAI placed in a position of judging its factual and legal propriety is simply an unfair procedure. The District objects to same.

8. The TEA Staff is substituting its judgment for the lawful exercise of the Board's powers in violation of TEX. EDUC. CODE § 11.151(b) and TEX. EDUC. CODE § 37.057(b), which in relevant part provides:

(b) If the agency's findings in an investigation under Subsection (a)(6) indicate that the board of trustees has observed a lawfully adopted policy, the agency may not substitute its judgment for that of the board.

In those matters where the Board exercised its statutory discretion, such as in selection of one or more engineering firms as “the most highly qualified provider of such services,”⁴ TEA Staff may not substitute its judgment for that of the Board of Trustees.

9. The Preliminary SAI Report contains no valid evidence, nor does it allude to any evidence which supports its conclusion that “HISD’s Board of Trustees” (plural) acted in their individual capacities on behalf of the board in violation of TEX. EDUC. CODE § 11.051(a-1).

B. LEGAL REQUIREMENTS FOR COMMISSIONER APPROVAL OF SAI INVESTIGATION

1. Texas Education Code § 39.057(a) states that only the Commissioner may authorize a SAI. In addition, TEX. EDUC. CODE § 39.058(a) states that the Commissioner must adopt, and the TEA must follow, written procedures for conducting SAIs. Those procedures are attached hereto as [**General Exhibit 4**]. The TEA adopted procedures provide a clear and unambiguous mandate and processes for obtaining the Commissioner’s approval.
2. Specifically, the TEA’s notice letters [**General Exhibits 2 and 3**] each state, “The Commissioner of Education has authorized this investigation in response to external complaints submitted to TEA.” TEA has not provided HISD any evidence of such complaints. Moreover, the TEA has a history of initiating SAI investigations without Commissioner authorization in violation of TEX. EDUC. CODE §§ 39.057(a), 39.058(a) and its own procedures for conducting SAIs. In this instance, the TEA has provided no evidence of the Commissioner’s authorization of the SAI in the record upon which this proceeding is based. Without evidence showing that the SAI was authorized by the Commissioner, the District asserts that the SAI was not lawfully authorized, in violation of TEX. EDUC. CODE §§ 39.057(a) and 39.058(a).

⁴ See Tex. Gov’t. Code § 2254.004(a)(1)

3. The only statement relating in any way to the Commissioner's authorization to conduct the SAI, is set forth at page 1 of each Notice letter.⁵ Since the Notices were not signed by the Commissioner, they do not and cannot constitute evidence of the Commissioner's delegation. They provide no information whatsoever of any action by the Commissioner. Each of the Notices expressly state that "The Commissioner of Education has authorized this investigation"; indicating that the authorization, if any existed, was contained in a separate document. No separate document has been provided. Furthermore, a delegee of the Commissioner could not have authorized the SAI since the Notices expressly stated that "The Commissioner of Education has authorized this investigation."

There is no evidence of the Commissioner's authorization of the Harlandale SAI investigation in the Record. Without evidence of Commissioner authorization in the Record, there is no basis to demonstrate that the requirements of the Special Investigation Unit Investigation Procedures⁶ and TEX. EDUC. CODE § 39.058(a) have been met.

III.

AUTHORS OF SPECIAL ACCREDITATION REPORT FUNDAMENTALLY MISUNDERSTAND DIFFERENCES BETWEEN REQUIRED METHODS FOR ACQUISITION OF CONSTRUCTION SERVICES AND PROFESSIONAL SERVICES.

A. Legal Analysis in Response to "Applicable Law" Section of Preliminary SAI Report

At pages 5-7 of the Preliminary SAI Report, TEA Staff provides a listing of legal provisions which TEA Staff allege are relevant to the Preliminary SAI Report. The Applicable Law Section of the Report merely lists and summarizes incomplete excerpts from multiple statutory provisions. However, the Applicable Law section does not apply the statutory list to the factual observations made elsewhere. In particular, the Preliminary SAI Report lists provisions

⁵ See, General Exhibits 2 and 3.

⁶ See, General Exhibit 4 at page 2.

TEX. EDUC. CODE §§ 44.0311(a) and 44.0411(d) as being relevant to the facts described elsewhere in the Report. These provisions are not relevant to the procurement of professional services⁷ which are subject to the provisions of the Professional Services Procurement Act, TEX. GOV'T. CODE Chapter 2254.⁸

The failure to properly apply the relevant legal provisions create fatal flaws in conclusions reached in the Preliminary SAI Report. The errors stem from two primary causes: First, the TEA Staff assumed that the Agreements with Terracon Consulting, Jasmine Engineering, and any or all of the engineers evaluating repairs at Gillette Elementary were "construction" agreements subject to the provisions of Chapter 44, Subchapter B of the Texas Education Code. They were not.

Texas Education Code, Chapter 44, Subchapter B in general, and in particular, TEX. EDUC. CODE § 44.031 deal generally with school district purchasing practices. TEX. EDUC. CODE § 44.031(a) specifically provides:

- (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:

However, TEX. EDUC. CODE § 44.031(f) exempts certain types of professional services from the section 44.031 requirements as follows:

- (f) This section does not apply to a contract for professional services rendered, including services of an architect, attorney, certified public accountant, **engineer**, or fiscal agent. **A school district may, at its option, contract for professional services rendered by a financial consultant or a technology consultant in the manner provided by Section 2254.003, Government Code, in lieu of the methods provided by this section.** (Emphasis added.)

Similarly, TEX. GOV'T. CODE, Chapter 2269, which is cited as a source of legal authority for an alleged purchasing violation, contains the following section among its provisions:

§ 2269.058. USE OF OTHER PROFESSIONAL SERVICES.

⁷ All of the services discussed in the Preliminary SAI Report deal with services being provided by one or more engineering firms to HISD. Professional engineering services are specifically listed under Tex. Gov't. Code § 2254.002(2)(A)(vii) as being covered by Chapter 2254.

⁸ It is significant that Tex. Gov't Code, Chapt. 2254 is not listed by TEA Staff as being Applicable law.

- (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.** (Emphasis added.)

Simply stated, none of the contractual agreements discussed in the Preliminary SAI Report, and alleged by the Report's authors to have violated legal mandates, were approved in violation of Chapter 44 of the Texas Education Code and/or Chapter 2269 of the Texas Government Code. The contracts are simply not covered by the provisions of which they are alleged to have violated. Don't just take our word for it, the following organizations uniformly agree that competitive bidding statutes do not apply to professional services:

- **THE TEXAS ATTORNEY GENERAL'S OFFICE** - AG Opinion No. JC-0374 @ pages 1-2, May 1, 2001 [**General Exhibit 5**].
- **TEXAS ASSOCIATION OF SCHOOL BOARDS** – *School Board Member's Guide to Purchasing* @ page 11 [**General Exhibit 6**].
- **TEXAS MUNICIPAL LEAGUE**- *Municipal Procurement Laws Made Easy 2017 Edition*, @ pages 34-35, [**General Exhibit 7**].
- **TEXAS EDUCATION AGENCY**- TEA Resource Guide-Purchasing, Update 14 (2010) at Sec 3.2.3.1 @ page 22, [**General Exhibit 8**].

The fundamental misunderstanding of the law and processes applicable to the selection and contraction for providers of professional services by governmental entities pervades almost the entire SAI Report. The fundamental misunderstanding of the legal requirements causes a gross misinterpretation of the facts alluded to, but curiously enough, not discussed in the Preliminary SAI Report. The Facts relating to all of the Findings contained in the Preliminary SAI Report will be discussed below in detail.

IV.

RESPONSE TO PRELIMINARY SAI REPORT FINDINGS AND COMMENTS

We have attempted to cluster the factual presentations around the Preliminary SAI Report's so-called "Findings" in the Preliminary SAI Report. However, because of the Report's non-linear organizational structure we believe that the responses can best be addressed according to vendor, with the exception of the Gillette School Matter. Additionally, in order to facilitate legal review, we have organized Exhibits relevant to the identified findings into discrete groups. For example, items relating to Finding No. 1 (and therefore Terracon) are designated as "Exhibit Finding 1 - ##." We have attempted to identify, locate, and to the greatest extent possible attach all relevant documents. It is our contention that TEA Staff's misinterpretation of these documents led to multiple erroneous conclusions. We offer the attached evidence to "prove" that our legal assertions are indeed supported by the evidentiary record.

1. TEA Finding No. 1 – Terracon Consultants, Inc.

A. 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). [*See, Exhibit Finding 1-B*]. 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. [See, **Exhibit Finding 1-C**, agenda item summary and Board Minutes]. 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. [See, **Exhibit Finding 1-D**]. The amounts paid were well within the budgeted authority for such expenditures. [See, **Exhibit Finding 1-E**, Budget]. 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. [See, **Exhibit Finding 1-F**]. Each of the Purchase Orders was identified as being responsive to Bid No. 101015. As explained by the Superintendent during the investigative phase, [See, **Exhibit 1-G**], 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, [See, **Exhibit Finding 1-C**]. 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 . . .” [See, **Exhibit Finding 1-L**, Board Minutes 1/23/12]. The Terracon engagement was within the HISD budget for facilities for the 2014-15 fiscal year. [See, **Exhibit Finding 1-E**]. 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 [**Exhibit Finding 1-C**], 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. GOV'T. 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 \$25,000⁹ 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.

[See, **Exhibit Finding 1-B**, District Policy CH (Local)].

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. GOV'T CODE § 2269.053(a), by HISD Policy CH (Local) [See, **Exhibit Finding 1-B**] 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. [See, **Exhibit Finding 1-C**]. TEA Staff may not substitute its interpretation of HISD Board Policy CH (Local) for that of

⁹ Prior to September 2009, the limit was \$15,000.

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. [See, **Exhibit Finding 1-M**, Letter from CPA Rene E. Gonzalez 12-7-18]. The contracts cited by Mr. Gonzalez in resolving his concerns are attached hereto as [**Exhibit Finding 1-H through K**]. Each of the attached four contracts are for materials engineering, testing and inspection services which are subject to TEX. GOV'T. CODE §2269.058(a). As such, the provisions of TEX. GOV'T. CODE §2269.058(b) direct the procurement of such services through TEX. GOV'T. 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 at need. [See, **Exhibit Finding 1-C**].

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.

2. TEA Finding No. 2 – Financial Oversight

A. Facts relevant to TEA Finding No. 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.

B. Legal Analysis of TEA Finding No. 2

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.

3. TEA Finding No. 3 – Trustees Acting Individually

A. 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:

- i. Trustees directing reassignment of staff
- ii. Trustees questioning employees about issues outside scope TEX. EDUC. CODE § 11.051(a-1)
- iii. Failure to collaborate with Superintendent TEX. EDUC. CODE §§ 11.0512(a), 11.151(b), 11.
- iv. Trustee Contact with HISD Employees did not Violate Law or Regulation

B. Legal Analysis of TEA Fact Finding No. 3

i. 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.¹⁰ 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:

(j) 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:

- (1) a hearing under Subchapter E or F, Chapter 21; and
- (2) 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

¹⁰ Of course, campus assignments are also subject to Principal concurrence under the provisions of Tex. Educ. Code § 11.202,

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.

ii. 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:

a. 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.

b. 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.

iii. Trustee Failure to Collaborate with Superintendent

a. *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.

b. 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.

iv. Trustees Contacting Employees

a. 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. [See, **General Exhibit 13**, District Policy BBE (Local)]. 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.

b. Trustee-HR Director Contact

See discussion under Item IV(4)(B)(ii), above.

C. 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. GOV'T. 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.

D. 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 reviewed¹¹ 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

¹¹ The Preliminary SAI Report wholly fails to disclose what evidence was reviewed, or which conduct, or lack thereof, led to these conclusions. See, Letter of November 29, 2018 to Director Hewitt. See, **General Exhibit 1**.

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.”

i. Items Not at Issue in Preliminary SAI Report

The Preliminary SAI Report paints with a broad brush and includes condemnations against the Board for matters which are demonstrably not at issue on the record. Contrary to the Staff assertion at page 12 of its Report:

a. The District has both a Board-adopted Vision¹² and Mission¹³ Statement. They are prominently displayed on the HISD Website.¹⁴

b. On an annual basis, the District adopts District-wide and campus improvement plans. In addition, the District has adopted multiple campus turn-around plans, technology plans facilities/bond plans and programs and the like.

c. There is not a single reference at any place in the Preliminary SAI Report where staff development or professional development of any HISD employee is discussed.

ii. Board/Board and Board/Superintendent Collaboration

¹² Vision Statement: Inspiring our students to be the change

¹³ Mission Statement: Harlandale: A family working together to create a high quality education where all students graduate to become productive and successful citizens for the 21st century.

¹⁴ <http://www.harlandale.net/cms/one.aspx?portalId=829982&pageId=1702970>

Clearly, TEA Staff purports to have evidence, albeit undisclosed, which shows Trustees do not always agree with each other or with the Superintendent. However, there is absolutely no legal requirement that Trustees, amongst themselves or with the Superintendent, agree on everything, or for that matter, on anything.¹⁵ In analyzing the HISD Trustees' ability to comply with the duties of their respective offices, the Agency failed to adequately consider the provisions of TEX. EDUC. CODE § 11.151(b), which provides:

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.**" (emphasis added)

The statutory limit on special accreditation investigations is set forth in two interrelated provisions. TEX. EDUC. CODE §39.057(a)(6) provides that a SAI investigation may be authorized only:

(6) in response to an allegation involving a conflict between members of the board of trustees or between the board and the district administration **if it appears that the conflict involves a violation of a role or duty of the board members or the administration clearly defined by this code.** (Emphasis added.)

TEX. EDUC. CODE § 38.057(b) limits the discretion of the investigators with respect to conflicts between trustees and district administration by providing:

If the agency's findings in an investigation under Subsection (a)(6) indicate that the board of trustees has observed a lawfully adopted policy, the agency may not substitute its judgment for that of the board.

All Trustees have a right to meaningfully participate in the deliberations of the Board of

¹⁵ Although there is no legal requirement that Trustees agree, the Board and Building Committee Minutes attached to and referenced in the chronologies contained in the following Sections of this Response show a remarkable record of shared consensus among the Board and HISD Executive Staff. TEA Staff's unsupported assertion of dysfunction is not supported by the evidence.

Trustees. All Trustees have a right to meaningfully participate in discussions with the Superintendent who is required by TEX. EDUC. CODE § 11.201 to develop budgets, policies, procedures and other recommendations to the Board for adoption. Disagreement and debate amongst Trustees may legally occur with respect to any agenda item. That is democracy. As a result of the statutory right conferred upon Trustees by the Legislature to participate in the deliberative and legislative processes of the Board, all statements made in the course of exercising this statutory right are legally privileged. Statements in exercising statutory rights regarding participation in a called Board meeting cannot be used to sanction a Trustee or the Trustees as a whole.

It is well-settled that the Board is the policy-making body of a Texas school district, which is a legislative function. *Jett v. Dallas ISD*, 7 F.3d 1241, 1245-46 (5th Cir. 1993)(opinion on remand from U.S. Supreme Court). As noted by the Texas Supreme Court, the federal and state courts have extended the legislative immunity doctrine beyond federal and state legislators to other individuals performing legitimate legislative functions. *In Re Rick Perry*, 60 S.W.3d 857, 860-61 (Tex.2001). In *Bogan v. Scott-Harris*, 523 U.S. 44, 50, 118 S.Ct. 966, 970, 140 L. Ed 2d 79, 85, the U.S. Supreme Court expressly held that legislative immunity and privilege applied to local legislators. The whole purpose of these immunities is to nourish and encourage legislative debate.

Under clearly established precedent, school trustees have the constitutionally protected right to dissent. As noted by the Texas Supreme Court in the *Perry* case, Texas courts have held the same regarding legislative privilege and immunity, as in *Clear Lake City Water Authority v. Honorable Felix Salazar, Jr.*, 781 S.W.2d 347, 349-50 (Tex. App—Houston [14th Dist.] 1989, orig. proceeding). *Perry*, 60 S.W.3d at 860. More recently, a federal district court in Texas held that the legislative immunity and privilege applied to all members of a school district Board of Trustees. *Cunningham, Sr. v. Chapel Hill ISD*, 438 F.Supp. 2d 718, 720-21 (E.D.Tex.2006) (citing *Gravel v. U.S.*, 408 U.S. 606, 616, 92 S.Ct. 2614, 2622, 33 L.Ed. 2d 583, 597 (1972)). It is not a governance issue when Trustees disagree or dissent, even vociferously, in their exercise of their roles.

TEX. EDUC. CODE § 11.1512(b) requires the Board and superintendent to work collaboratively, TEX. EDUC. CODE § 11.1511(b)(4) requires the Board to ensure the superintendent meets performance goals; TEX. EDUC. CODE § 11.1511(b)(9) requires the Board to monitor district finances and maintain financial procedures and records; and TEX. EDUC. CODE § 11.1511(b)(14) requires the Board to make determinations relating to the termination of Chapter 21 employees, including the superintendent. Each of these provisions has the possibility of creating legitimate policy disagreements among the parties. Dissent does not equal disfunction.

As in any exercise of oversight, employee performance evaluations can invoke conflict and differences of opinion. Educators are employable under a term employment contract governed by Chapter 21, Subchapter E, Texas Education Code. *See*, TEX. EDUC. CODE § 21.201(1); *see also*, TEX. EDUC. CODE § 11.201(b). Chapter 21 term contract employees are subject, *inter alia*, to the provisions of TEX. EDUC. CODE § 21.211 which expressly authorizes a Board of Trustees to evaluate and propose the termination of an employee, including a superintendent, for “good cause” as determined by the Board. The Board of Trustees has considerable discretion in the determination of what constitutes good cause. *See, Esparza v Edinburg CISD*, TEA Docket No, 017-R2-01-2017 (March 17, 2017). The Board’s invocation of this process and any related deliberation, cannot, as a matter of law, constitute a violation of TEX. EDUC. CODE § 11.1512(b) or of TEX. EDUC. CODE § 11.151(b). Such actions are within the parameters of the Board’s lawful discretion and constitute **the lawful exercise of those powers and duties by the trustees**. As such, disagreements cannot be the basis removal of the Board of Trustees, and the disenfranchisement of the voters of a district.

iii. Board Access to Information, Discussions by Trustees Concerning Employee Conduct, and its Impact on Board/Superintendent Collaboration.

School Trustees have an express right to virtually all available information concerning school operations. TEX. EDUC. CODE § 11.1512(c), which is an integral part of the Statute governing Board/Superintendent collaboration provides:

(c) A member of the board of trustees of the district, when acting in the member's official capacity, has an inherent right of access to information, documents, and records maintained by the district, and the district shall provide the information, documents, and records to the member without requiring the member to submit a public information request under Chapter 552, Government Code. The district shall provide the information, documents, and records to the member without regard to whether the requested items are the subject of or relate to an item listed on an agenda for an upcoming meeting. The district may withhold or redact information, a document, or a record requested by a member of the board to the extent that the item is excepted from disclosure or is confidential under Chapter 552, Government Code, or other law.

The foregoing provision is not, on its face, restricted to information in written form. A mere discussion between a Trustee and District employee does not violate any legal prohibition. The Preliminary SAI Report provides no reference to any statutory or regulatory provision which has been violated by an alleged Trustee/employee conversation or interactions.

iv. Trustee Contact with HISD Staff

In Finding 3 of its Preliminary SAI Report, Agency staff determined that:

“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).”

We have examined the Preliminary SAI Report very carefully. We have been unable identify any substantive policy or statutory violation committed by HISD with respect to the Superintendent or the Board of Trustees. We reserve the right to amend this Response to include additional information once we are given specifics by the Agency as required by law and TEA Rule.

Notwithstanding the lack of specifics, the examination of the minutes of multiple meetings leads to the conclusion that TEA Staff is grossly incorrect about its allegations concerning the lack of cooperation among Trustees or between the HISD Staff and Trustees. We have attached hereto copies on actual Board and Committee Minutes which constitute the official record of actions of

the Harlandale ISD. See Exhibit _____. Those minutes span multiple Trustee terms, multiple Superintendents, multiple issues, multiple vendors, and multiple projects. Those minutes¹⁶ show a distinct pattern in which the Superintendent and staff make recommendations, the Board discusses those recommendations, and in most cases, adopts those recommendations. While not all votes were unanimous, unanimity is not a legal requirement and the lack thereof is not a basis for legal sanctions.

4. TEA Finding No. 4 – Alleged Open Meetings Violations

See objections raised in Section 1 of this Response and the District's November 29, 2018 letter to Director Hewitt requesting additional information concerning this allegation. On the record before us, there is simply no way to respond to the Preliminary SAI Report's Finding of Open Meetings violations. For obvious reasons, before a proper response can be made the District must be provided the substance of the alleged text messages and the number and identify of Trustees who actually participated in the alleged deliberations. As evidenced by certificates attached hereto, Trustees are completing additional training concerning the Texas Open Meetings Act. See Exhibit _____.

5. TEA Finding No. 5 & 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

¹⁶ The Preliminary SAI Report, offers no factual basis whatsoever to support its conclusions of dysfunction.

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. [See, **Exhibit Finding 5-A**, Board Minutes of 3/1/07].

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. [See, **Exhibit Finding 5-B**, Board Minutes of 5/3/07].

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. [See, **Exhibit Finding 5-C**, Committee Minutes of 8/13/07].

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. [See, **Exhibit Finding 5-D**, 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. [See, **Exhibit Finding 5-E**, Commissioning Agreement of 8/22/07].

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, Tejeda classroom addition, and Pre-Kindergarten classrooms at a cost of 4% of \$45,487,000 projected cost. [See, **Exhibit Finding 5-F**, Committee Minutes 11/5/07].

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. [See, **Exhibit Finding 5-G**, Board Minutes of 11/28/07].

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. [See, **Exhibit Finding 5-H**, Amendment to Commissioning Agreement dated 11/28/07].

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. [See, **Exhibit Finding 5-I**, Committee Minutes 4/22/08].

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. [See, **Exhibit Finding 5-J**, Board Minutes of 9/21/09]. The Amendment was recommended by HISD staff. [See, **Exhibit Finding 5-K**, Perez Memo of 9/21/09].

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. [See, **Exhibit Finding 5-L**, Committee Minutes 12/10/09].

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%. [See, **Exhibit Finding 5-M**, Board Minutes 12/21/09].

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, 201 the Second Amendment was executed by HISD Board President Jesse Jay Alaniz. [See, **Exhibit Finding 5-N**, Second Amendment to Commissioning Agreement dated 2/3/10].

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. [See, **Exhibit Finding 5-O**, Committee Minutes 2/1/10].

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. See, **Exhibit Finding 5-P**, Superintendent Recommendation Memo-Approved 4/15/10].

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. [See, **Exhibit Finding 5-Q**, Superintendent Memo 4/18/11].

On November 6, 2012, Superintendent Madrigal discussed new projects and fees for Jasmine Engineering with the Building Committee. [See, **Exhibit Finding 5-R**, Committee Minutes 2/1/10].

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 repurposing. [See, **Exhibit Finding 5-S**, Board Minutes and Supt. Recommendation Minutes 11/12/12].

On December 6, 2012, Superintendent Madrigal executed a Professional Services Agreement for Consulting Services for the items discussed and approved on November 12, 2012. [See, **Exhibit Finding 5-T**, Professional Services Agreement dated 12/6/12].

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. [See, **Exhibit Finding 5-U**, Board Minutes 1/28/13].

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. [See, **Exhibit Finding 5-V**, Board Minutes 9/16/13].

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. [See, **Exhibit Finding 5-W**, First & Second Amendment Professional Services Agreement dated 9 /19/13].

On December 3, 2013 at a Special Called Board Meeting the Board approved payment to Jasmine Engineering for priority projects. [See, **Exhibit Finding 5-X**, Board Minutes 12/3/13].

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. [See, **Exhibit Finding 5-Y**, Third Amendment Professional Services Agreement dated 12/6/13].

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. [See, **Exhibit Finding 5-Z**, Board Minutes 3/17/14].

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. [See, **Exhibit Finding 5-BB**, Board Minutes 5/19/14].

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. [See, **Exhibit Finding CC**, Board Minutes 6/16/14].

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. [See, **Exhibit Finding 5-DD**, Fifth Amendment Professional Services Agreement dated 12 /6/13].

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 [See, **Exhibit Finding 5-EE**, Board Minutes 10/29/15].

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. [See, **Exhibit Finding 5-FF**, Sixth Amendment Professional Services Agreement dated 11 /17/15].

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 2017. 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. [See, **Exhibit Finding 5-A**]. 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. [See, **Exhibit Finding 5-B**, Board Minutes of 5/3/07]. [See also, **Exhibit Finding 5-E**, Commissioning Agreement of 8/22/07].

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.¹⁷ 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

¹⁷ 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. GOV'T. CODE, Chapter 2254, not by TEX. GOV'T. 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 district¹⁸ from selecting a professional engineer¹⁹ 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,²⁰ "professional services" are defined as services ". . . provided in connection with the professional employment or practice of a person who is licensed or registered as . . ." ²¹ *inter alia*, a professional engineer. TEX. GOV'T. 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. GOV'T. 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

¹⁸ Tex. Gov't. Code §2254.002(1)(B)

¹⁹ Tex. Gov't. Code §2254.002(2)(B)(vii)

²⁰ Tex. Gov't. Code §2254.001

²¹ Tex. Gov't. Code §2254.002(2)(B)

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, TEXAS GOVERNMENT 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. [See, **Finding Exhibit 5-D**, Board Minutes 8/20/07]. The selection was made after the issuance of a Board-ordered RFQ process. [See, **Finding Exhibit 5-A**, Board Minutes 3/1/07], and after receiving the recommendation of the Building Committee. [See, **Exhibit Finding 5-C**, Committee Minutes 8/13/07]. The resulting Commissioning Agreement was executed on August 22, 2007. [See, **Exhibit Finding 5-E**]. 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.

6. 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. GOV’T 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. GOV’T 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.

7. Response to Concerns Related to Gillette Elementary Repairs

Although not contained in a specific “Finding”, the Preliminary SAI Report at pages 9-10 criticizes HISD Board conduct with respect to the oversight of repairs at Gillette Elementary School. The TEA Staff’s treatment of the series of events is cursory, and ignores most of the issues that led to the ongoing discussions concerning the repairs. An annotated chronology is necessary to understand the events. The focus of the criticism appears to be on the apparent rising cost of the Gillette repairs. While cost estimates for the proposed repairs did increase, there was no analysis of how such increases may have been related to project scope issues. As will be discussed below, there were three major engineering reports presented to the HISD Board for repairs at Gillette Elementary School. The reports predict there would be significant differences in the estimated costs associated with the completion of the various engineer-recommended remedial measures.

A review of the three studies, which are attached hereto,²³ makes clear there are significant differences of opinion with respect to the scope of the remedial measures proposed

²³ See, Exhibits Gillette 5, Gillette 12, and Gillette 24.

to the Board as necessary. Those differences can best be summed up as the first report²⁴ was directed to the resolution of only the immediate problem, the second report²⁵ offered a more comprehensive solution set and the third report²⁶ proposed (albeit through alternate proposal) an even broader scope of remedial work. The cost of construction issue is a non-issue. To date, HISD has not undertaken any repairs at Gillette Elementary. As a result, it appears the Preliminary SAI Report criticizes Harlandale ISD for construction expenditures which to date have not incurred.

What follows is a record of careful Board consideration of the issue, as well as options it considered for addressing the problem, including the potential pursuit of warranty claims from the original construction. In order to understand the issue. We must resort to an annotated chronology.

A. *Gillette Chronology of Events*

In 2010, in response to RFQ No 101016, the HISD Board of Trustees issued a list of vendors in four engineering disciplines, [*See, **Gillette Exhibit 1**-Approved Engineering Vendor List 2010*]. Slay Engineering Group was identified in 2010 as a vendor for the provision of Civil Engineering Services.

On March 7, the District received a proposal from Slay Engineering for consulting engineering work for Gillette Elementary and contracted with Slay Engineering to assess and report on the status of the foundation at Gillette Elementary. [*See, **Exhibit Gillette 2**, Proposal from Slay Engineering 3/7/12*]. The price for the described services was \$7,305.00. [*Id.*].

²⁴ Exhibit Gillette 5, Slay Report

²⁵ Exhibit Gillette 12, Sparks Report

²⁶ Exhibit Gillette 24, Lundy & Franke Report

The proposal was accepted by HISD on April 27, 2012 by both Superintendent Jacklich and by Mr. Maldonado, Assistant Superintendent for Operations. [See, **Exhibit Gillette 2**, Proposal from Slay Engineering 3/7/12].

On May 31, 2012 Slay Engineering issued a report to HISD concerning "Report on cracking in Room 155 Area" at Gillette Elementary School. [See, **Exhibit Gillette 3**, Slay Report on Gillette 5/31/12].

In making its report to HISD, Slay Engineering was sub-advised by a report issued at its request by Lundy & Franke Engineering, dated May 27, 2012. [See, **Exhibit Gillette 4**, Lundy & Franke Report on Gillette 5/27/12].

On June 4, 2012 Slay Engineering issued another report to HISD concerning "Report on cracking in Room 155 Area" at Gillette Elementary School proposal. [See, **Exhibit Gillette 5**, Slay Report on Gillette 6/4/12].

On July 12, 2012, Slay was paid \$7,305 for its services in accordance with its original proposal. [See, **Exhibit Gillette 6**, Check to Slay 7/30/12].

On July 30, 2012 the Slay recommendation was presented to the Building Committee by Mr. Madrigal. Mr. Madrigal was instructed to pursue a potential warranty claim. [See, **Exhibit Gillette 7**, Committee Minutes 5/27/12]. No other action was taken.

On October 18, 2012 Slay Engineering submitted a new proposal for Engineering Services for Pier Replacement and Associated repairs for Gillette Elementary School. [See, **Exhibit Gillette 8**, Slay Proposal 10/18/12]. On November 6, 2012 the new Slay recommendation was presented to the Building Committee by Mr. Madrigal. Mr. Madrigal was again instructed along with legal counsel to potentially pursue a warranty claim. [See, **Exhibit Gillette 9**, Committee Minutes 11/6/12]. No other action was taken.

On January 28, 2013 Slay Engineering submitted a third proposal for Engineering Services for Pier Replacement and Associated repairs for Gillette Elementary School. [See, **Exhibit Gillette 10**, Slay Proposal 1/18/13]. No action was taken on this proposal.

On September 19, 2013, Jasmine Engineering and HISD, as part of the Second Amendment for Professional Services [See, **Finding Exhibit 5-W**, Second Amended Consulting Agreement] included Gillette Elementary as one of the projects under oversight.

On April 4, 2014 Sparks Engineering, Inc. executed an Agreement for Forensic and Consulting Services for Gillette Elementary [See, **Exhibit Gillette 11**, Sparks Agreement 4/4/14].

On June 19, 2014 Sparks Engineering presented an Initial Forensic Assessment with respect to Gillette Elementary School. [See, **Exhibit Gillette 12**, Sparks Agreement 6/19/14]. The Sparks Assessment recommended a much broader set of recommendations for the proposed remedial work at Gillette Elementary school than the previous June 2012 Slay Engineering Reports. The Sparks report estimated a probable cost of remediation to be approximately \$2,770,000. The Sparks report was presented to the HISD Building Committee on July 2, 2014. [See, **Exhibit Gillette 13**, Committee Minutes 7/2/14]. The Sparks report was presented to the HISD Board on July 21, 2014. After review, the Board voted to accept the report and proceed with the repairs as recommended by Sparks. [See, **Exhibit Gillette 14**, Board Minutes 7/21/14].

On August 18, 2014, based upon the Superintendent's recommendation, the Board voted to adopt the Construction Manager at Risk (CMAR) method for the Gillette Elementary Foundation Repair Project. [See, **Exhibit Gillette 15**, Board Minutes and Recommendation 8/18/14].

On September 4, 2014 the Building Committee voted to recommend the final agreement with Sparks Engineering to the full Board. [See, **Exhibit Gillette 16**, Committee Minutes 9/4/14].

On September 15, 2014 the Board approved the final agreement with Sparks Engineering to provide design and construction administration of the foundation and drainage project, including hiring and covering the cost of the civil, mechanical geotechnical consulting engineers, and the architectural consultant for a total cost of \$191,400. [See, **Exhibit Gillette 17**, Board Minutes 9/15/14].

In October 2014, Sparks Engineering withdrew from the project. [See, **Exhibit Gillette 18**, Board Minutes 10/20/14]. Subsequent to the Sparks withdrawal, negotiations were conducted by the District's former General Counsel with Lundy & Franke Engineering. [See, **Exhibit Gillette 19**, Committee Minutes 11/11/14]. In accordance with the Administration's recommendation [See, **Exhibit Gillette 20**, HISD Staff Recommendation 11/17/14], the Board voted on a contract with Lundy and Franke Engineers for design and construction administration on the Gillette foundation project.

On December 11, 2014 the Building Committee was updated on the status of the issuance of a competitive advertisement for Construction Manager at Risk Proposals. [See, **Exhibit Gillette 22**, Committee Minutes 12/11/14].

On February 4, 2015 the Building Committee was updated on the status of preparation of construction documents for Gillette. [See, **Exhibit Gillette 23**, Committee Minutes 12/11/14].

On July 27, 2015 Lundy & Franke issued a report containing multiple proposals for Gillette Elementary. [See, **Exhibit Gillette 24**, Lundy & Franke Report 7/27/15].

On July 27, 2015 the Building Committee was updated on the status preparation of construction documents for Gillette. [See, **Exhibit Gillette 25**, Committee Minutes 7/27/15].

On July 30, 2015 the Board approved the Gillette repairs as recommended. The motion passed 3-2 with one abstention. This is the first dissenting vote on any matter concerning Gillette Elementary. [See, **Exhibit Gillette 26**, Board Minutes 7/30/15].

Subsequent to the approval of the design, the Gillette project was advertised but a construction contract was never awarded.

B. Legal Analysis of Gillette Elementary Issues

At page 9 of the Preliminary SAI Report (first full paragraph) the TEA Staff alleges, *inter alia*, that Board Minutes confirm the Board of Trustees has been consistently divided on the repair of the Gillette piers. We have attached the relevant Building Committee and Board meeting minutes at which the Slay and Sparks engineering reports were considered. There was no dissent by HISD staff to the Committee Members recommending the Sparks proposal at the Building Committee Meetings held on July 2, 2014. [See, **Exhibit Gillette 13**]. There was no dissent either by HISD staff to the Board Members approving the Sparks proposal on July 21, 2014. [See, **Exhibit Gillette 13**]. The Board voted unanimously (6-0 with one Trustee, Ms. Carrillo absent from the meeting according to the roll-call) in favor of implementing the Sparks proposal. There was no dissent (7-0 vote) when the Superintendent and staff recommended to the Board, and the Board approved, the adoption of a construction process to construct the repairs recommended by the Sparks Report on August 18, 2014. [See, **Exhibit Gillette 15**, Board Minutes and Recommendation 8/18/14]. There was no dissent either by HISD staff to the Committee Members recommending the Sparks proposal at the Building Committee Meetings held on September 4, 2014. [See, **Exhibit Gillette 16**]. There was no dissent when the Superintendent and staff recommended to the Board, and the Board approved, the adoption of a construction process to construct the repairs recommended by the Sparks Report on September 15, 2014. [See, **Exhibit Gillette 17**, Board Minutes and Recommendation 9/15/14]. There was no dissent on November 11, 2014. [See, **Exhibit Gillette 18**, Committee Minutes 11/11/14]. There was no dissent on November 17, 2014 See, **Exhibit Gillette 20**, Board Minutes 11/17/14]. Finally,

there were 2 dissenting votes at the meeting held on July 30, 2015. This was the first time, since the inception of Board discussions that there was any dissent.

At page 9 of the Preliminary SAI Report, TEA Staff characterizes the proposal for the enhanced repair operation as being the responsibility of Jasmine Engineering, Inc. The characterization evidences a basic misunderstanding of the role of engineering professionals. The enhanced design considered and adopted by the HISD Board of Trustees was originally that of Sparks Engineering. Following Sparks, a Lundy & Franke report was considered and adopted on July 30, 2015. All three sets of recommendations arose out of signed and sealed reports issued respectively by Slay, Sparks Engineering, and finally by Franke & Lundy Engineers to HISD.

As shown in the attached minutes, Jasmine Engineering, acting in its consulting capacity, ultimately agreed with the presented recommendations of Lundy & Franke. Notwithstanding any recommendations from Jasmine Engineering, the design responsibility associated with each of the several reports was the responsibility of the firm offering such reports which remained at all times responsible for their respective contents. The Board, after a lengthy investigatory process, chose the Lundy & Franke recommendation. That decision made on July 30, 2015 was not unanimous.

We have searched in vain for legal authority which imposes a requirement of unanimity with respect to Board Decisions. We found that the State Board of Education has spoken on the matter. Specifically, under the *Framework for School Board Development*, last adopted by the Texas State Board of Education in July 2012²⁷, Standard V provides in relevant part:

The board supports decisions of the majority **after honoring the right of individual members to express opposing viewpoints and vote their convictions.** (Emphasis added.)

²⁷ See:

https://tea.texas.gov/Texas_Schools/School_Boards/School_Board_Member_Training/Framework_for_School_Board_Development/

There were significant differences in costs between the three competing proposals. All engineering firms agreed with Slay on their original proposal. Both Sparks and later, Lundy and Franke, added additional remedial recommendations. Each successive proposal adopted the predecessor recommendations but added additional tasks. Trustees wrestled with issues such as whether cost differences are clearly explained by the significant differences in the remedial measures discussed and recommended.

Unless one or more of the TEA Staff has obtained a license to practice engineering, which has not been disclosed, they have absolutely no legitimate basis to express a preference for one proffered engineering solution over another. While there were significant differences in costs among the three proposals, those differences are clearly explained by the significant differences in remedial measures discussed and recommended. The TEA Staff is plainly and simply unqualified to make engineering judgment as to the best course of action. The Preliminary SAI Report presents no legitimate issues for condemnation by the Texas Education Agency.

8. Response to Concerns Related to Vestal and Carroll Bell Elementary Schools

Although matters relating to procurement at Vestal and Carroll Bell Elementary Schools are listed as allegations in Item 2 (at page 3) of the Preliminary SAI Report, the Report alleges no facts whatsoever with respect to procurement issues relating to these two schools. A review of the contracts indicates that Jasmine Engineering was retained to conduct an assessment of Carroll Bell and Vestal Elementary Schools in the Fifth Amendment to Professional Services Agreement for Consulting Services. 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. [See, **Exhibit Finding 5-BB**, Board Minutes 5/19/14]. 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 former legal counsel. [See, **Exhibit Finding CC**, Board Minutes 6/16/14]. 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. [See, **Exhibit Finding 5-DD**, Fifth Amendment Professional Services Agreement dated 12 /6/13].

On November 11, 2014 Jasmine Engineering presented to the Building Committee the results of their facilities assessment of Vestal and Carrol Bell Elementary Schools and three options for each campus for possible inclusion in a future bond package. [See, General Exhibit **5-BB**]. The propriety of these contract amendments has been thoroughly reviewed in previous sections of this Response. The manner of acquisition of these professional services is consistent with statute.

V.

RESPONSE TO VARIOUS RECOMMENDATIONS PROPOSED BY TEA STAFF

A. Response to Recommendations for Referral

Harlandale ISD recognizes the responsibility of the Texas Education Agency to report to appropriate law enforcement officials evidence which it in good faith believes to constitute wrongdoing by entities under its jurisdiction. However, given this Response, and the extensive documentation which we have provided to the Texas Education Agency, we do raise the following in response to the matters contained in the Preliminary SAI Report.

1. Open Meetings

Harlandale ISD understands TEA Staff believes it has observed violations of Open Meetings laws. On November 29, 2018, in a letter to TEA, we asked that all evidence in the possession of TEA officials relating to the alleged violation be presented to us for analysis and response. To date, we have been given no information. It is impossible to respond to allegations based upon secret evidence and inherently unfair to expect Harlandale ISD to do so. As we have

stated in Article I of this Response, we have initiated additional Trustee training in order to ensure future statutory compliance.

2. TEX. EDUC. CODE § 44.032 Component Purchases

As discussed in multiple locations in the foregoing Response, all of the procurement activities under review (at least all procurement activities discussed in the Preliminary SAI Report) involve the procurement of one of several types of engineering services. As discussed, *ad nauseum* above, the procurement of engineering services is governed by the provisions of the Professional Services Procurement Act, Chapter 2254, TEXAS GOVERNMENT CODE. The provisions of Sections 44.031, 44.032 and 44.0411 simply do not apply to the acquisition of any of the professional services described in the Preliminary Report. Additionally, Section 44.0411 is inapplicable to a series of transactions which commenced prior to its effective date.

B. Response to Recommendations for Corrective Action

Harlandale ISD recognizes the responsibility, in the event that after examination, its practices and procedures fall short of the required norm. However, in response to what can only be seen as boilerplate recommendations set forth at page 14 of the Preliminary SIA Report, Harlandale ISD would show the Hearing Officer and the Commissioner the following:

1. Adopt New Policies

As discussed in Section I(E)(3), above, the Harlandale ISD Board of Trustees has just completed, under the auspices of the Texas Association of School Boards (TASB), a complete review of its policies. It is well known within the Texas Education Agency and by all school districts within the State that TASB Policy Service is the benchmark for up-to-date and fully compliant legal and local policies for public school Districts in Texas.²⁸ The Preliminary SAI

²⁸ The Commissioner of Education, prior to his appointment served as a Trustee of the Dallas Independent school District. During the Commissioner's entire service as a Dallas ISD Trustee, the District used the TASB Policy Service.

Report does not contain a single instance or reference to show that Harlandale ISD's adopted Policies were lacking in any respect. TEA staff cannot point to a single deficiency in Board-adopted Policy. The imposition of a requirement that Harlandale ISD conduct a new review of its policies, something that it has just completed, is a make-work proposition with no rational basis in the facts presented in the Preliminary SAI Report. Harlandale ISD's current policies are functionally identical to those in place in every other independent school district in the State of Texas. The recommended corrective action is unnecessary.

The facts confirm multiple superintendents and multiple law firms, supported by overwhelming legal authority in the public domain determined that the procurement of professional engineering services was not governed by Chapter 44 of the Texas Education Code. The HISD Board reasonably followed these authorities and advice. On the facts of this case, there is nothing wrong with HISD policies. A re-review is unwarranted unless the Agency can point to a single instance where HISD policies incorrectly state the law or are in some specifically identified way to be inadequate.

2. Board to Present New Policies

As discussed above under Section V(B)(1) the re-review of the District's TASB developed policies is unnecessary. In Recommendation 2, TEA Staff directs Harlandale ISD to "...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." It is unclear what the requirement to "present" means. If it means there should be staff development, we do not disagree in general with such development. However, any effort by TEA Staff to shift the burden of staff development from the Superintendent to the Board of Trustees is in violation of the Texas Education Code. Under TEX. EDUC. CODE § 11.151(b), "[T]he trustees as a body corporate have the exclusive power and duty to govern and oversee the management of the public schools of the district." Under TEX. EDUC.

The District still does.

CODE § 11.1511, Trustees of school districts are given specific duties. Among those duties are the obligation to adopt policy and to ensure the Superintendent is accountable, *See*, TEX. EDUC. CODE § 11.1511(4)-(5). Under TEX. EDUC. CODE § 11.1512(b)(4) the Board is directed to work with the Superintendent to create district-wide policies. Under TEX. EDUC. CODE § 11.1513, the Board is directed to adopt employment policies. Nothing in any statute deals with the shifting of training requirements.

Under TEX. EDUC. CODE § 11.201(d)(1) the Superintendent's duties include: "assuming administrative responsibility and leadership for the planning, organization, operation, supervision, and evaluation of the education programs, services, and facilities of the district and for the annual performance appraisal of the district's staff." Under TEX. EDUC. CODE § 11.201(d)(2) the Superintendent's duties include: "... assuming administrative authority and responsibility for the assignment, supervision, and evaluation of all personnel of the district other than the superintendent." Under TEX. EDUC. CODE § 11.201(d)(5) the Superintendent's duties include: "managing the day-to-day operations of the district as its administrative manager, including implementing and monitoring plans, procedures, programs, and systems to achieve clearly defined and desired results in major areas of district operations." Under District Policy BJA (Local)²⁹ the Superintendent is expressly charged with the following responsibilities:

- i. Oversee a program of staff development and monitor staff development for effectiveness in improving district performance.
- j. Stay abreast of developments in educational leadership and administration.

Based upon all of the foregoing legal precedents, imposing an obligation directly upon the Board for the implementation of staff training would constitute a usurpation of the Superintendent's authority. It is ironic indeed that the TEA Staff is attempting to mis-impose this training obligation in order to ensure the proper delegation of authority.

²⁹ See, General Exhibit 9, District Policy BJA (Local), at page 1

3 Provide a List of Responsible Persons

From the prospective of the Board of Trustees, the response to the requirement that the person responsible for the performance of duties with respect to purchasing, procurement, and governance be listed is a simple matter. These responsibilities belong wholly and fully to the Superintendent. For the reasons set forth in the statutes and policy cited in the foregoing Sections V(B) (1&2), imposing a requirement that the Board of Trustees name individual employees responsible for the execution of administrative duties within Harlandale would violate the statutory prerogatives of the Superintendent as the Chief Executive Officer of the District. With respect to the subject matter of any required training, we again challenge the TEA Staff, or the Hearing Examiner, to identify any occasion whatsoever with respect to procurement in which any person connected with Harlandale ISD made a legal mistake with respect to the procurement process. As can be seen from the foregoing authorities, the multiple decisions to procure professional engineering through the procedures set forth in the Professional Services Procurement Act was a proper one.

With respect to Governance training, the HISD Board of Trustees, along with the Superintendent are enrolled and actively participating in the Lone Star Governance Program. There is no need for staff training concerning governance responsibilities. Trustees are also already attending Open Meetings training. This is not a staff issue.

4. Forensic Audit

In the unlikely event that the Texas Education Agency does determine that several engineering engagements discussed are required to be bid competitively, a forensic audit would still not be needed or appropriate. A forensic audit is defined by the Business Directory as:

The application of accounting methods to the tracking and collection of forensic evidence, usually for investigation and prosecution of criminal

acts such as embezzlement or fraud. Also called forensic accounting.³⁰

Forensic audits are expensive and are designed to provide accounting information about District finances in one way or another, when issues arise with respect to the proper expenditure of such funds. The TEA directive to perform a forensic audit has become a standard recommendation of a SAI. They are virtually always recommended. However, in the case at bar, there is manifestly no need for a forensic audit. Harlandale ISD knows where every penny of its construction funds relating to the transactions discussed herein have been spent. Harlandale ISD knows, and has in this Response, provided precise information in the form of minutes, contracts and purchase orders as to how the vendors were approved and what processes were involved in their approval. There are no disputed factual issues to audit. We have provided documentation in the form of minutes and memoranda which fully document the approval process. In sum, all of the information that would be gathered in a forensic audit is attached. The Harlandale ISD has been extraordinarily transparent in the acquisition of the engineering services identified in the Preliminary SAI Report.

Harlandale ISD has fully identified the legal resources upon which it relied to support its determination that the methods used for the procurement of professional services to meet District needs were well founded in law. The dispute between HISD, supported by its counsel and the legal authority which has been fully described herein, and TEA Staff is a legal issue - not an accounting one. Harlandale ISD has never hidden or obscured the fact that it has not procured professional engineering services through the procedures set forth in Chapter 44 of the Texas Education Code.

Stated simply, based upon the advice of multiple lawyers, the marshaled treatises, and the cited provisions of the Professional Services Procurement Act, Harlandale ISD was authorized to use the clearly set out processes to acquire the professional services at issue in this case. Those services are clearly delineated in the attached agreements. There are no additional facts to

³⁰ See: <http://www.businessdictionary.com/definition/forensic-audit.html>

determine. Either Harlandale properly followed the law, or it did not.

If Harlandale ISD and its legal resources' determinations are demonstrated to be incorrect, Harlandale ISD will willingly conform its conduct to the correct applicable legal standard. However, the unexplained, un-resourced, under-cited, and frankly underwhelming opinion of one or more unidentified TEA Staff investigators is an insufficient basis from which to draw a conclusion that Harlandale ISD erred in its legal interpretations.

C. Recommendations for Sanctions

1. TEX. EDUC. CODE § 39.057(d)

The Preliminary SAI Report partially relies on TEX. EDUC. CODE § 39.057(d) as the basis to propose lowering the District's accreditation status and appointing a Conservator and/or Board of Managers. The statute provides in relevant part:

Based on the results of a special accreditation investigation, the commissioner may:

- (1) take appropriate action under Subchapter E;
- (2) lower the school district's accreditation status or a district's or campus's accountability rating; or
- (3) take action under both Subdivisions (1) and (2).

From its plain reading, the statute does not grant the Commissioner unchecked power to lower the accreditation status based on any finding of a SAI. That interpretation would be absurd, as it would allow the Commissioner to lower a district's accreditation rating based on SAI findings that include virtually no legal violations. This is obviously not the meaning or intent of the statute. Rather, the Commissioner's rules recognize that the Commissioner's discretion to lower the accreditation status based on findings of violations set forth in a SAI is limited to certain circumstances where those findings justify such harsh sanctions.

The required limits to the Commissioner's discretion are described at 19 TEX. ADMIN. CODE § 97.1055(b)(2)(B)(ii), which states that notwithstanding the district's performance under the academic and financial accountability ratings, the Commissioner may assign a district **Accredited-Warning** status if, after an SAI under § 39.057, the Commissioner finds "the district otherwise **exhibits serious or persistent deficiencies that, if not addressed, may lead to probation or revocation of the district's accreditation.**" (Emphasis Added).

As discussed above, with the exception of the alleged procurement issues, which upon review have been shown to be based upon a misreading of (in)applicable law by TEA, there are no serious persistent deficiencies identified in the Preliminary SAI Report that would affect the District's accreditation. As shown above, the Preliminary SAI Report "Findings" were not made in accordance with the legal mandates required by the cited provisions of the Texas Education Code upon which they are based. Nor are they reasonably supported by substantial evidence in the record.³¹ Reliance by the Commissioner or the appointed Hearing Examiner upon the Preliminary SAI Findings would be arbitrary and capricious and does not meet the standard for lowering the District's accreditation rating set forth in 19 TEX. ADMIN. CODE § 97.1055(b)(2)(B)(ii).

2. Any Adjustment to the current Accreditation Status of Harlandale ISD Cannot Be Based Upon the District's Academic Performance

TEX. EDUC. CODE § 39.052(d) states, "A school district's accreditation status may be raised or lowered based on the district's performance or may be lowered based on the performance of one or more campuses in the district that is below a standard required under this subchapter." 19 TEX. ADMIN. CODE § 97.1055(a)(7) merely restates the standard articulated at § 39.052(d) TEA Staff did not identify the failing academic performance of the District or of any campus as the basis of its proposal to lower the District's accreditation status for the current year to **Accredited-**

³¹ The record in this case consists of: The Notices of Special Accreditation Investigation, [General Exhibits 2 and 3, respectively]; TEA's preliminary SAI Report dated November 13, 2018 [Unnumbered]; HISD's Letter to TEA dated November 29, 2018 [General Exhibit 1]; this Response to the Preliminary SAI Report, and the documents attached hereto as Exhibits.

Warned. Rather, the TEA Staff relies exclusively on alleged violations of purported procurement obligations of the Board under Texas Education Code Chapters 11 and 44 and TEXAS GOVERNMENT CODE, Chapter 2269. Thus, neither TEX. EDUC. CODE § 97.052(d) nor 19 TEX. ADMIN. CODE § 97.1055(a)(7) can provide a lawful basis for lowering the District's accreditation status for 2017-2018.

Since academic performance has not been cited as the basis for accreditation sanctions, the Preliminary SAI Report's results are the only other available source of authority for sanctions against HISD. With respect to academic ratings under Chapter 39, the Commissioner's own rules state:

Unless revised as a result of investigative activities by the commissioner as authorized under TEC, Chapter 39, or other law, an accreditation status remains in effect until replaced by an accreditation status assigned for the next school year.

19 TEX. ADMIN. CODE § 97.1055(a)(4). Under this rule, there is no basis for changing the District's 2017-2018 accreditation status unless it "revised as a result of investigative activities *by the Commissioner*" as authorized under Chapter 39. As discussed above, there is no proof of such authorization.

3. TEX. EDUC. CODE § 39A.002

The Preliminary SAI Report relies on TEX. EDUC. CODE § 39A.002 as a basis for proposing the lowering of the District's accreditation status and appointing a Conservator and/or Board of Managers. The statute provides in relevant part that the Commissioner's authority under this Section can only be triggered by a specific event: "If a school district is subject to commissioner action under Section 39A.001, the commissioner may: . . ." In turn, TEX. EDUC. CODE § 39A.001(2) refers back to TEX. EDUC. CODE § 39.057(d). Because of the referral back, citation to the provisions of TEX. EDUC. CODE § 39A.002 provide no additional authority for TEA or Commissioner action.

4. Appointing a Board of Managers Is Not an Appropriate Sanction

On page 15 of the Preliminary SAI Report, TEA Staff proposes the possibility of appointing a Board of Managers.³² The facts outlined in the Preliminary SAI Report, when viewed through the lens of a proper legal analysis do not warrant sanctions. See TEX. EDUC. CODE §§ 39.057(d), 39.102(a)(9), and 19 TEX. ADMIN. CODE §§ 97.1057(e), 97.1059(b), and 97.1073(e). TEX. EDUC. CODE § 39.057(d), in relevant part, states: “Based on the results of a special accreditation investigation, the commissioner may: (1) take appropriate action under Chapter 39A.” This section does not separately authorize the Commissioner to appoint a Board of Managers, but only authorizes such action if it is “appropriate” under Chapter 39A.

TEX. EDUC. CODE §§ 39A.004 and 39A.006 set the conditions under which such action is appropriate. TEX. EDUC. CODE § 39A.004 states:

Sec. 39A.004. APPOINTMENT OF BOARD OF MANAGERS. The commissioner may appoint a board of managers to exercise the powers and duties of a school district's board of trustees if the district is subject to commissioner action under Section 39A.001 and:

- (1) has a current accreditation status of accredited-warned or accredited-probation;
- (2) fails to satisfy any standard under Section 39.054(e); or
- (3) fails to satisfy financial accountability standards as determined by commissioner rule.

TEX. EDUC. CODE § 39A.006 states:

39A.006. BOARD OF MANAGERS FOR SCHOOL DISTRICT MANAGED BY CONSERVATOR OR MANAGEMENT TEAM.

- (a) This section applies regardless of whether a school district has satisfied the accreditation criteria.

³² See, discussion under Section I.

(b) If for two consecutive school years, including the current school year, a school district has had a conservator or management team assigned, the commissioner may appoint a board of managers to exercise the powers and duties of the board of trustees of the district.

(c) The majority of a board of managers appointed under this section must be residents of the school district.

As of the date and time of this Response, the statutory preconditions for the appointment of a Board of Managers have not been met. Harlandale ISD's current accreditation status is not accredited-warned or accredited-probation. Harlandale ISD has not failed to satisfy any standard under Section 39.054(e). Harlandale ISD has not failed to satisfy financial accountability standards as determined by commissioner rule. There has not been a conservator or management team appointed to the District for two consecutive school years.

When considering appropriate sanctions from those contemplated by statute, the Commissioner of Education has discretion to decline to impose sanctions "to the extent the commissioner determines necessary." TEX. EDUC. CODE § 39.102(a) states:

(a) If a school district does not satisfy the accreditation criteria under Section 39.052, the academic performance standards under Section 39.053 or 39.054, or any financial accountability standard as determined by commissioner rule, or if considered appropriate by the commissioner on the basis of a special accreditation investigation under Section 39.057, the commissioner shall take any of the following actions to the extent the commissioner determines necessary:

The authorized sanctions include the appointment of a Board of Managers [Subsection (a)(10)]. They also include the appointment of a Conservator to oversee the operations of the district [Subsection (a)(7)] or a Management Team [Subsection (a)(8)] to direct the operations of the District in areas of insufficient performance. In other words, the Commissioner is **not required by law to** displace the lawfully-elected Board of Trustees and appoint a Board of Managers.

The Preliminary SAI Report provides no systematic evidence, or for that matter, fails to offer any anecdotal evidence for the Report's assertion that "significant dysfunction exists among Board of Trustees in the form of distrust, infighting, bullying, biased bid ranking and alliances among the Trustees." Without the ability to see the source data upon which these conclusions are drawn, it is literally impossible to make direct responses. One cannot refute facts where none are articulated. Requiring such a response is a violation of due course of law guarantees set forth in Article I, § 3 of the Texas Constitution as well as the specific notice requirements set forth in the TEA Rules and policies governing SAI Investigations. [See, Section 1 of this Response].

In addition to the lack of evidence, the Preliminary SAI Report is wholly lacking in providing any legal standard for Trustee conduct as a benchmark for its conclusions. This oversight is especially glaring in light of the fact that Board collegiality and decorum was not announced as one of the Commissioner-authorized items of investigation. In other words, it appears that the investigators have found the Trustees lacking in an assessment that they did not disclose was taking place. It is completely unfair to expect the Trustees to marshal a defense under these circumstances.

While we have no real specifics to refute, there are some general observations which can be made in response to the Preliminary SAI Report. There is no evidence of any dysfunction. The official minutes, relevant dates of which are attached to this Response, are the official record of actions of the governing body of a political subdivision. They cannot be contested through anecdotal parole evidence. The TEA Investigators conclusions, unsupported by any proof, are at variance with Board actions as recorded in the minutes officially adopted by the Board of Trustees. In their analysis, the TEA Staff have violated long-established Texas Supreme Court precedent. See, *Crabb v. Uvalde Paving Co.* 23 S.W.2d 300 (Tex. 1930). The precedent has been applied by the Commissioner of Education. See, *Castaneda v. Lasara ISD*, TEA Docket No 081-R1-502 (Comm'r Educ. 2002). There is simply no legally admissible evidence in the record to support the claim of lack of Board or of Board-Superintendent cooperation.

The HISD Board of Trustees and Superintendent have made significant efforts to improve processes; ensure the success of the Board and provide strong educational leadership for the District. To provide appropriate support, and ensure the improvement of the District, the Board of Trustees has enrolled in the TEA-initiated Lone Star Governance Training Program. Since the training began, the Board has implemented the Lone Star Governance training model with fidelity.

In light of the above, replacing the current Board of Trustees with a Board of Managers is unnecessary and will effectively replace the voice and will of the District's voters. There is no legitimate basis to conclude that lowering the District's accreditation status and appointing a Conservator or Board of Managers is in the best interests of the present and future students of the District, as asserted by the TEA Staff in its Preliminary SAI Report.

VI. CONCLUSION

Based on the above and foregoing, the District opposes the TEA's findings and recommended corrective actions and sanctions. As demonstrated above, there is no evidence the undertaking of this Special Accreditation Investigation was properly authorized by the Commissioner of Education. Moreover, the Preliminary Report improperly varies from the limited scope of issues addressed in the Notice of Special Accreditation Investigation. TEA has consistently misapplied relevant legal standards or applied irrelevant legal standards when conducting its investigation and issuing its Preliminary Report. TEA improperly relied on irrelevant legal standards to assess draconian corrective actions and sanction against the District and its Board. These actions and sanctions are not supported by statute or other law and offend the legally protected interests of District Trustees to hold elected office.

The District reserves the right to supplement this Response once TEA provides discovery information previously requested via correspondence dated November 29, 2018. All objection

and requests contained in the District's previous correspondence are incorporated herein as if set out verbatim.

The District hereby requests an Informal Review of the Preliminary Report, the appointment of an unbiased Hearing Officer and all other relief to which it is entitled to.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Kevin O'Hanlon", is written above a horizontal line.

Kevin O'Hanlon
O'Hanlon, Demerath & Castillo
Special Counsel to Harlandale ISD