Houston
Dallas
Austin

J. David Thompson
Partner

713.554.6767 Office
713.583.8118 Fax

dthompson@thompsonhorton.com

Thompson & Horton LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

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

via email: rules@tea.texa.gov

RE: Comments on Proposed New 19 TAC §103.1301

Dear Mr. Morath:

The following comments are being submitted on behalf of Spring Independent School District ("ISD"), Cypress-Fairbanks ISD, Katy ISD, Humble ISD, and the attorneys of Thompson & Horton who represent numerous school districts in matters regarding students with disabilities.

As a preliminary comment, we believe that the fiscal note for these proposed rules is wholly inadequate. When proposing rules to enforce and/or construe a statute, a state agency must include in its notice a fiscal note that includes "the additional estimated cost to the state and to local governments expected as a result of enforcing or administering the rule." Tex. Gov't Code § 2001.024(a)(4). The fiscal note for S.B. 507 noted that it did not take into account "additional cost" for things such as installation and maintenance, video storage and security, and masking/redacting software and that "[a]ctual costs would vary" based on such factors as "how many classrooms or special education settings were required to be monitored, how many students met the bill's criteria, [and] the number of cameras to be purchased." *See* Fiscal Note, Tex. S.B. 507, 84th Leg. R.S. (2015). Under the Administrative Procedures Act, TEA has a duty to actually calculate such costs and include it in its notice. If the Commissioner's rules are not in "substantial compliance" with this provision, it is voidable. Tex. Gov't Code § 2001.035(a).

The Commissioner's responsibility to accurately estimate the cost to school districts of whichever construction he adopts is particularly important because of the potential conflict between this statute and other statutes relating to how districts budget and spend funds. Specifically, the Texas Education Code prohibits school districts from spending any public funds "in any manner other than as provided for in the budget adopted by the board of trustees." TEX.

education services in a self-contained classroom [singular] or other special education setting [singular] is enrolled." But the reference in the statement of legislative intent regarding allowing cameras "under very limited circumstances," as well as the requirement that the other parents of students in the educational setting that is receiving the cameras be notified (subsection (d)), the prohibition against continual monitoring of the video feed (subsection (h)), and the confidentiality provisions (subsection (i)), make it clear that the Legislature also intended to protect students' privacy rights. By granting the Commissioner authority to adopt rules "regarding the special education settings to which" Section 29.022's requirements apply, the Legislature placed in his hands the responsibility for balancing the two—sometimes competing—purposes of protecting student safety and student privacy.

Within this context, the Commissioner has authority to and *should* adopt rules that limit a single request to a single special education setting. The statute refers to a "request by parent, trustee, or staff member" (all singular) and to placing equipment in a "self-contained classroom or other special education setting" (singular) in which a student (singular) who receives special education services is enrolled. It also states that "[e]ach school or campus that receives equipment shall place, operate, and maintain" such equipment. If the statute intended a single request to trigger a requirement that cameras be placed in *every* applicable special education setting throughout the district, the modifying phrase "that receives equipment" would not be necessary.

Rather than simply parroting the statutory language, the Commissioner should use his authority to adopt rules that fill in the details left unspecified by the Legislature and specify that one request only triggers a camera in one classroom. At the very least, the Commissioner should adopt a rule that says the requestor can limit his or her request to a single classroom. If the rules are changed such that a single parent's request to have cameras placed in their child's special education setting only triggers a requirement for their child's educational setting, such a request would cost Cypress-Fairbanks ISD approximately $1,900 to purchase the recording and audio equipment.

But, if that same request necessarily triggers a requirement that cameras be placed in *every* special education instructional setting that meets the statutory definition, a request by a single parent in Cypress-Fairbanks ISD would trigger the placement of video cameras in 1,256 classrooms—thus impacting the privacy rights of thousands of other students and their parents. Similarly, if a single parent could trigger a request for cameras to be placed in every self-contained classroom or other setting, it would trigger camera placements in 140 classrooms in Spring ISD. As a result, this single requirement would cost Cypress-Fairbanks ISD almost $3 million, in up-front costs, taking into account the necessary recording equipment, video storage,

or she provides educational services to students receiving special education The Commissioner—pursuant to his ability to determine the educational settings to which the camera requirements apply—may reasonably define (and limit) the undefined term "staff member" to include only district or charter school staff who have a connection to the special education setting at issue.[1] Such a limit advances the statute's primary purpose of protecting student safety when there is concern that a special education student is being abused, while also both: (a) ensuring that such records occur only in "very limited circumstances" and (b) protecting the privacy rights of students who are not in the particular special education setting that is the target of the suspicion. Allowing any potentially disgruntled staff member to require a school district to place cameras in special education settings to which they have no connection and in which there is no suspicion of abuse or wrongdoing would serve neither Section 29.022's primary purpose of protecting our most vulnerable students from abuse nor the secondary purpose of protecting other students' privacy.

Furthermore, within Section 29.022, the Legislature used the term "employee" when it meant to refer to any person who works for the district or charter school. *See* Tex. Educ. Code §§ 29.022(g) ("This section does not: (1) waive any immunity from liability of a school district or open-enrollment charter school, or of district or school officers or *employees*; or (2) create any liability for a cause of action against a school district or open-enrollment charter school or against district or school officers or *employees*.") (emphasis added), 29.022(i) ("A school district or open-enrollment charter school shall release a recording for viewing by: (1) a school district *employee* or a parent or guardian of a student who ...") (emphasis added). In contrast, in the surrounding provisions of Chapter 29, the Legislature uses the term "staff" or "staff member" when it means to refer to a subset of employees who have a connection to the requirement or program at issue. *See, e.g., id.* §§ 29.011(b) (requiring "local school *staff*" to communicate and collaborate with "local and regional *staff* of various agencies in order to ensure compliance with federal requirements regarding transition plans for students who receive special education services as they age out of the public school system (emphasis added)), 29.160(b) (requiring a memorandum of understanding for assessing various early childhood education programs to provide for "strategies for the colocation and management of *staff* and for facilitation of effective communication among *staff members*" (emphasis added)). Courts presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen. *TGS-NOPEC Geophysical*, 340 S.W.3d at 439. Thus,

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[1] For example, teachers who actually work in the setting at issue, behavioral or instructional specialists who have a nexus to that particular setting, or an assistant principal or principal who supervises the setting.

in the classroom where the camera is in place. This is completely contrary to the stated purpose of the law.

It is imperative that the Commissioner correct what appears to be a typographical error in the proposed rules. The term "or" at the end of 19 TAC § 103.1301(b) (9) (A) should be corrected to read "and". It is only by placing "and" in the rule, instead of "or", that the purpose of the law, the promotion of student safety, will be enacted.

Subsection (e) Dispute Resolution.

We agree that disputes regarding the implementation of the Commissioner's rules and Section § 29.022 are properly considered through a school district's grievance process. The law is not a special education law regarding the provision of a free appropriate public education. Rather, it is a state law to promote student safety. Therefore, disputes regarding the law and regulations should be handled through the regular district grievance process.

Subsection (f) Regular School Year and Extended School Year Services.

We agree that the law should not be interpreted to apply during the summer when extended school year ("ESY") services are being provided to a limited number of students. ESY services are often centralized on one campus during the summer which means that students may be placed in classrooms during ESY services that have a general education population during the regular school year. Applying the statute to classrooms during the summer results in unnecessary increased costs to districts for equipment and maintenance of the video recording in rooms that would not be affected during the regular school year. Also, ESY services centralized at one campus during one summer may move to a different campus during a subsequent summer thereby incurring even more unnecessary costs. Therefore, it is imperative that the proposed rules limit the installation of cameras in classrooms to the regular school year.

Subsection (g) Policies and Procedures.

We recommend that Subsection (g)(6) be amended to make it clear that the video cameras and audio recording equipment need not remain in the classroom after the circumstances that led to the placement of the cameras have changed. The statute specifically directs the Commissioner to adopt rules regarding "the special education settings to which [Section 29.022] applies." Subsection 29.022(b) requires school districts and charter schools to "operate and maintain the camera in the classroom or setting for as long as the classroom or setting continues to satisfy the requirements under Subsection (a)." But the requirements of Subsection 29.022(a) include the