



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 19, 2007

Mr. Timothy A. Braaten, Executive Director  
Texas Commission on Law Enforcement  
Officer Standards and Education  
6330 U.S. Highway 290 East, Suite 200  
Austin, Texas 78723

Opinion No. GA-0532

Re: Whether an open-enrollment charter school  
is authorized to operate a commissioned police  
force (RQ-0531-GA)

Dear Mr. Braaten:

You ask whether an open-enrollment charter school is authorized to operate a commissioned police force.<sup>1</sup>

The Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) is responsible for, among other things, establishing reporting standards and procedures for the appointment and termination of peace officers and reserve law enforcement officers by a law enforcement agency. *See* TEX. OCC. CODE ANN. § 1701.153(a) (Vernon 2004). Under TCLEOSE rules, an “agency” is a “law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by [TCLEOSE].” 37 TEX. ADMIN. CODE § 211.1(a)(5) (2006) (TCLEOSE, Definitions). Such agencies must comply with TCLEOSE’s reporting requirements to hire or appoint a licensee. *See id.* § 217.7 (TCLEOSE, Reporting the Appointment and Termination of a Licensee). TCLEOSE may deny or reject an entity’s application or report if the entity does not have the authority “to appoint persons in the capacity of the license sought.” *Id.* § 217.5(a)(7) (TCLEOSE, Denial and Cancellation).

Section 37.081 of the Education Code authorizes the board of trustees of a school district to commission peace officers and establish a school district police department; thus, such a board may be an agency authorized to appoint a person licensed or certified by TCLEOSE. *See* TEX. EDUC. CODE ANN. § 37.081 (Vernon 2006). You state that in the past, TCLEOSE has likewise recognized open-enrollment charter schools as agencies with authority to appoint TCLEOSE licensed or certified persons. *See* Request Letter, *supra* note 1, at 2. You indicate that TCLEOSE has reconsidered its position after an open-enrollment charter school received legal advice that such a school lacks the legal authority to establish a commissioned police department. *See id.* After

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<sup>1</sup>*See* Letter from Timothy A. Braaten, Executive Director, Texas Commission on Law Enforcement Officer Standards and Education, to Honorable Greg Abbott, Attorney General of Texas (Sept. 18, 2006) (on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter].

consulting with several attorneys, TCLEOSE has denied recent applications by open-enrollment charter schools, some of which are appealing the denials. *See id.* at 2–3. Thus, you ask: “Are Open-Enrollment Charter schools authorized by law to operate a commissioned police force like independent school districts?” *Id.* at 3.

Chapter 12 of the Education Code authorizes three different classes of charter schools: home-rule school district charter schools (subchapter B), campus or campus program charter schools (subchapter C), and—the subject of your inquiry—open-enrollment charter schools (subchapter D). *See* TEX. EDUC. CODE ANN. §§ 12.002, .011, .052, .101 (Vernon 2006). The State Board of Education may grant a charter to operate an open-enrollment charter school to a public, private, or independent institution of higher education, “an organization that is exempt from taxation under Section 501(c)(3), Internal Revenue Code of 1986,” or “a governmental entity.” *Id.* § 12.101(a). The entity receiving approval of its charter is designated as the “charter holder.” *Id.* § 12.1012(1).

Open-enrollment charter schools are generally “subject to federal and state laws and rules governing public schools.” *Id.* § 12.103(a). However, the Education Code and rules adopted under that code apply “only to the extent the applicability to an open-enrollment charter school . . . is specifically provided.” *Id.* § 12.103(b) (emphasis added).

We have found no statute specifically providing that an open-enrollment charter school has authority to commission or appoint peace officers. Section 12.104(b) of the Education Code lists several provisions that specifically apply to open-enrollment charter schools. *See id.* § 12.104(b). While this list includes one provision from Education Code chapter 37 (“Discipline; Law and Order”), the list does not include section 37.081, which authorizes school district police departments. *See id.* §§ 12.104(b)(2)(J), 37.081. Section 37.081 in particular does not expressly authorize open-enrollment charter schools to commission or appoint peace officers. Rather, section 37.081 expressly states only that “[t]he board of trustees of any school district may employ security personnel and may commission peace officers to carry out this subchapter.” *See id.* § 37.081(a) (emphasis added). And while other provisions throughout the Education Code specifically state that they apply to open-enrollment charter schools, none are pertinent to your inquiry. *See, e.g., id.* §§ 7.003 (reserving educational functions not delegated to the Texas Education Agency or to the State Board of Education to independent school districts and open-enrollment charter schools), 37.007(e) (requiring open-enrollment charter school to expel a student who brings a firearm to school), *id.* § 39.114(c) (Vernon Supp. 2006) (authorizing open-enrollment charter schools to receive a certain high school allotment “in the same manner as a school district”).

Section 12.104(a) states that an open-enrollment charter school possesses “the powers granted to schools under [Education Code, title 2].” *Id.* § 12.104(a) (Vernon 2006). While section 12.104(a) grants open-enrollment charter schools “the powers granted to schools,” section 37.081 grants a school district’s board of trustees—not a school—the authority to create a police department. *Id.* (emphasis added); *see id.* § 37.081. By contrast, the analogous provision for home-rule school district charter schools states that a “home-rule school district has the powers and entitlements granted to school districts and school district boards of trustees under this title, including taxing authority.” *Id.* § 12.013(a) (Vernon Supp. 2006) (emphasis added). We believe that

had the Legislature intended an open-enrollment charter school to have all the powers of school districts or school district boards of trustees, it would have said so in section 12.104(a) as it did in section 12.013(a) for home-rule school district charter schools.

Of course, other statutes may authorize certain charter holders such as institutions of higher education to commission peace officers. *See id.* § 51.203 (Vernon 2006). And an open-enrollment charter school may receive the services of a peace officer of a political subdivision. *See id.* § 25.090(b) (providing that if an open-enrollment charter school's governing body does not select an attendance officer, "peace officers of the county in which the school is located" are to perform the duties of an attendance officer); TEX. OCC. CODE ANN. § 1701.601(1) (Vernon 2004) (defining "school resource officer" as "a peace officer who is assigned by the officer's employing political subdivision to provide . . . a police presence at a public school"). Finally, we do not suggest that the Education Code denies a charter holder of an open-enrollment charter school any right it otherwise has to employ security personnel. But to answer your question, neither section 37.081 nor any other statute authorizes an open-enrollment charter school to operate or maintain a commissioned police force.

S U M M A R Y

The Education Code does not authorize an open-enrollment charter school to operate or maintain a commissioned police force.

Very truly yours,



GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

ELLEN L. WITT  
Deputy Attorney General for Legal Counsel

NANCY S. FULLER  
Chair, Opinion Committee

William A. Hill  
Assistant Attorney General, Opinion Committee



Timothy A. Braaten  
Executive Director

# TEXAS COMMISSION ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUCATION

**RECEIVED**

SEP 18 2006

**OPINION COMMITTEE**

September 18, 2006

FILE # ML-44994-06

I.D. # 44994

Honorable Greg Abbott  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

*RQ-0531-GA*

Re: Request for Attorney General Opinion

Attention: Ms. Nancy Fuller, Chair, Opinion Committee

The Texas Commission on Law Enforcement Officer Standards and Education requests your formal opinion on an application of law that is currently pending before the Commission.

As you are aware, the Texas Commission on Law Enforcement Officer Standards and Education is charged by the Legislature through the Occupations Code 1701 with establishing and maintaining minimum standards for law enforcement officers. The Commission has rule making authority and authority to enforce these rules. As a part of the Commission's general powers and duties, is the responsibility to issue agency numbers to cities, county, school, districts, etc. such that the entity may establish a law enforcement agency and appoint licensed peace officers to perform authorized law enforcement duties.



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enforcement agency*

Phone: (512) 936-7700  
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Austin, Texas 78723

Pursuant to Subchapter C of Chapter 37 of the Texas Education Code, §37.081 *et seq.*, public school districts may apply to the Texas Commission of Law Enforcement Officer Standards and Education (TCLEOSE) for the employment of a chief of police and commissioned peace officer. Once recognized by TCLEOSE as a police department, the board of trustees of the (recognized) school districts may employ and appoint a chief of police and police officers. The board authorizes those officers to enforce the law and district rules, protect the safety and welfare of persons within their jurisdiction. The officers must be licensed by the Commission and are peace officers as defined by the Code of Criminal Procedure, Article 2.12. The jurisdiction of these school district police departments is the property owned or leased by the independent school district.

In the past the Commission has issued agency numbers to "Open Enrollment Charter Schools." In early in 2006, one "Open Enrollment Charter School" notified the Commission that they were voluntarily surrendering their agency number after receiving legal advice from their attorney that they were not legally authorized to have a police department.

Representing the Commission, the Executive Director Timothy A. Braaten, spoke with several attorneys and consulted the Texas Education Code and determined that "Open Enrollment Charter Schools" could not establish police agencies. One attorney consulted was Mr. Robert A. Schulman, of Feldman & Rogers. At my request, attorney Schulman expressed his opinion in the attached letter. (See attachment # 1)

This change in the past practices of the Commission, reference not issuing agency numbers to "Open Enrollment Charter Schools", resulted in a recent denial of an agency

number to Gateway Charter Academy. On behalf of Gateway Charter Academy, Attorney Lawrence J. Webb of Henslee, Fowler, Hepworth and Schwartz appealed this decision based upon his legal interpretation. I refer you to Attorney Webb's letter which is also attached. (See attachment # 2)

This change in past practice, the appeal from Gateway Charter Schools, and the differing opinions of these two attorneys are the reason for this formal request for an attorney general's opinion.

The question simply stated is, "Are Open-Enrollment Charter schools authorized by law to operate a commissioned police force like independent school districts?"

All parties, including TCLEOSE, desire a definitive statement from the Office of the Attorney General regarding the authority of an open enrollment charter school to establish a police agency and appoint licensed police officers.

Thank you for your attention to this request. If you or your staff requires any additional information, please do not hesitate to contact any of the three parties. Our contact information is:

Timothy A. Braaten

Executive Director

Texas Commission on Law Enforcement Officers Standards and Education

6330 U.S. Hwy 290 East, Ste 200

Austin, Texas 78723

Ph: (512) 936-7000

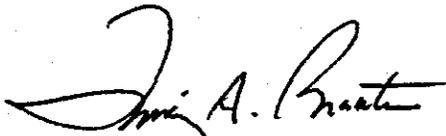
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Respectfully,



Timothy A. Braaten  
Executive Director

TAB/aem

Enclosures

# Attachment No. 1

Letter From

Robert A. Schulman

Attorney at Law

# FELDMAN & ROGERS, L.L.P.

ATTORNEYS AT LAW

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rschulman@feldmanrogers.com

August 23, 2006

By E-Mail Transmission: [timothyb@tclease.state.tx.us](mailto:timothyb@tclease.state.tx.us)

Mr. Timothy Braaten  
Executive Director  
TCLEOSE  
6330 U.S. Hwy. 290 East  
Suite 200  
Austin, Texas 78723

Re: Authority of Charter Schools to Establish a Commissioned Police Department

Dear Director Braaten:

We have discussed my advice to my open-enrollment charter school ("charter school") clients that Texas law does not permit them to operate a commissioned police force as is permitted to independent school districts.

My opinion in this matter is based, in part, on the following analysis.

Pursuant to Subchapter C of Chapter 37 of the Texas Education Code, public school districts may apply to the Texas Commission on Law Enforcement Standards and Education (TCLEOSE) for the employment of a chief of police and commissioned peace officers. Once recognized by TCLEOSE as a police department, the school district's elected board of trustees may employ and commission a chief of police and police officers. The trustees may authorize its peace officers to enforce the general law, as well as school district rules, protect the safety and welfare of persons within their jurisdiction, and even carry weapons. The jurisdiction of school district police departments is stated to be the property "owned or leased" by the independent school district. Tex. Ed Code §37.081.

Charter schools are not subject to the same laws that affect independent school districts. The laws impacting charters are limited to only those laws for which applicability is "specifically provided. Tex. Ed. Code §12.03(b). A list of Texas Education Code

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Mr. Timothy Braaten  
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provisions that are to be applied to charter schools is also set out in Chapter 12, Tex. Ed Code §12.104. This specific list of Education Code charter school laws includes only one reference to Education Code Chapter 37, the Education Code chapter authorizing independent school districts to commission a police department. That one reference, dealing only with disciplinary restraints and special education students, is totally unrelated to law enforcement.

From time to time, in addition to the Education Code provisions listed in §12.104 that are to be applied to charter schools, the Texas Legislature has passed new or amended existing statutes to specifically include charters. But Subchapter C of Chapter 37, permitting the establishment of commissioned police departments in school districts, has never been legislated to apply to charters.

You forwarded a copy of a July 25, 2006 letter you received from Lawrence J. Webb, an attorney for the law firm of Henslee, Fowler, Hepworth & Schwartz, L.L.P. In that letter Mr. Webb takes the position that his client, an open-enrollment charter school, should be allowed to employ peace officers under Education Code Chapter 37. In support of his contention Mr. Webb cites to §§12.101, 12.103 and 12.105, of the Education Code.

Mr. Webb argues that because Education Code §12.101 authorizes charter schools to operate in school district facilities – among other facilities – and because these school districts are permitted to establish a law enforcement agency, charter schools must also be permitted to employ peace officers. While some charter schools may operate in the facilities of a school district, which district employs peace officers, and while those peace officers may patrol and operate on the occupying charter school premises, nothing about this arrangement suggests that charter schools have the authority to employ such officers. Moreover, the jurisdiction of school district peace officers being all the “property owned or leased” by a school district would obviously include property dedicated to a charter school’s use.

Mr. Webb’s reliance on Education Code §12.103(a) is also misplaced. He states:

**Section 12.103 states that “an open-enrollment charter school is subject to federal and state laws and rules governing public schools.”**

Mr. Webb forgot the opening phrase to this law, “(a) Except as provided by Subsection (b)...,” and the law, §12.103(b), immediately following:

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**(b) An open-enrollment charter school is subject to this code and rules adopted under this code *only to the extent the applicability to an open-enrollment charter school of a provision of this code or a rule adopted under this code is specifically provided.* [emphasis added]**

The words "this code" in Education Code §12.103 refers to the Texas Education Code. And Chapter 37, the laws permitting independent school districts to establish law enforcement agencies, is a law under "this code."

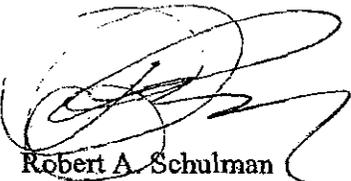
Finally, Mr. Webb claims that because under Education Code §12.105, charter schools are part of the Texas public school system, such schools are "... eligible for the programs granted to those public schools, including a law enforcement agency number." But if this were so, all laws pertaining to school districts would also be applied to charters, and there would be no need for the limitations of §12.103 or §12.104, or for that matter, any of Chapter 12 that distinguishes charters from school districts.

Clearly, open-enrollment charter schools do not possess legal authority to establish and operate commissioned police departments.

I understand that you may wish to submit this letter and Mr. Webb's letter to the Texas Attorney General requesting an opinion on this issue. Please use my letter in any way you wish.

Yours truly,

**FELDMAN & ROGERS, L.L.P.**



Robert A. Schulman

RAS:cp

# Attachment No. 2

Letter From

Lawrence J. Webb

Attorney at Law



**Henslee Fowler  
Hepworth & Schwartz LLP**

HOUSTON DALLAS FORT WORTH HOUSTON SAN ANTONIO TYLER

**Lawrence J. Webb**  
Attorney at Law

lwebb@hfnslaw.com

July 25, 2006

Timothy Braaten  
Executive Director  
TCLEOSE  
6330 U.S. Hwy. 290 East  
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Austin, Texas 78723

Re: *Application for law enforcement agency number by Gateway Charter Academy*

Dear Mr. Braaten:

This letter is with regard to the Texas Commission on Law Enforcement Officer Standards and Education's (TCLEOSE) decision to deny Gateway Charter Academy's application for a law enforcement agency number. Kindly, you should consider this letter to be the Academy's appeal of that decision.

In your letter to Mr. Robert McAllister of Gateway Charter Academy, you correctly point out that Section 37.081 of the Texas Education Code allows for any school district to employ peace officers. This section must be read, though, concurrently with Chapter 12 of the Education Code as it deals with Charter Schools. Specifically, Section 12.103 states that "an open-enrollment charter school is subject to federal and state laws and rules governing public schools." As referenced above, Chapter 37 of the Code is one such state law governing public schools and is applicable to the Academy under Chapter 12. As a result, Chapter 37 authorizes a law enforcement agency number under Chapter 12 as it applies to Charter Schools.

Further, with regard to the status of Charter Schools, Section 12.105 specifically states that "an open-enrollment charter school is part of the public school system of this state." As such, the Academy is eligible for the programs granted to those public schools, including a law enforcement agency number.

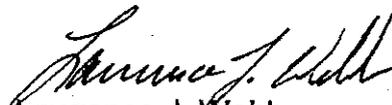
Clearly, the legislature intended Charter Schools to be considered the same as public schools in the eyes of Texas, with the exception of greater latitude with regard to educational opportunities and learning methods. In fact, as you are undoubtedly aware, Section 12.101 of the Code authorizes "open-enrollment charter schools" to operate in school district facilities – among other facilities – and those district facilities are not precluded from having law enforcement agencies. By that very authorization,

it is demonstrated that Charter Schools may have on-campus law enforcement and it is not the intent of the Legislature to distinguish between Charter Schools and the remainder of public schools.

Given these additional Chapters and Sections of the Education Code, and when read together with the Chapters cited by you in your above-referenced letter, we respectfully request a careful review of Gateway Charter Academy's application for a law enforcement agency number and that your Commission grant that application as authorized by the Texas Legislature.

Should you have any questions or concerns, please feel free to contact me at 210-734-3444. In the meantime, thank you for your time and consideration.

Yours truly,



Lawrence J. Webb

LJW/