

## Agenda Item X-E

Consideration of adopting the Committee's recommendation to the Board relating to a proposed amendment to Chapter 1, Agency Administration, Subchapter E, Section 1.115 of Board Rules concerning Student Complaint Procedure (Referral of Certain Complaints to Other Agencies or Entities).

RECOMMENDATION: Approval

Background Information:

Staff adopts an amendment to Chapter 1, Subchapter E, Section 1.115(2) of Board rules concerning Referral of Certain Complaints to Other Agencies or Entities. Currently, Coordinating Board Rule 1.115(2) requires that the Coordinating Board refer student complaints it receives pertaining to a component institution in the University of Texas System, Texas A&M University System, the University of Houston System, the University of North Texas System, the Texas Tech University System, or the Texas State University System to the appropriate university system for investigation and resolution. Student complainants have raised concerns that such mandatory referrals may lead, in certain cases, to potential conflicts in the complaint being fairly resolved. The amendment would provide THECB with discretion in making these referrals.

The amendment is adopted under Texas Education Code, Section 61.031, which provides the Coordinating Board with the authority to establish policies and procedures relating to complaint investigation and resolution; Section 61.028, which provides that the Board can delegate these responsibilities to the Commissioner; and Section 61.027, which provides the Coordinating Board with the authority to adopt and publish rules and regulations to effectuate the provisions of Texas Education Code, Chapter 61.

Date approved by the Commissioner for publication in the Texas Register: March 11, 2013

Date published in the Texas Register: March 22, 2013

Summary of comments received:

Comment 1: The University of Texas at Austin expressed concern that the proposed rule may create ambiguity and confusion. Specifically, they indicated that this rule change may leave the institution without a clear understanding of the status of a student complaint as the proposed rule does not expressly state that notice must be provided to an institution when a student complaint has been filed. Likewise, they expressed concern that the rule does not indicate that the institution would be given an opportunity to respond or participate in the investigation of or otherwise participate in the resolution of the student complaint. Accordingly, while their preferred method would be to have the student complaint referred directly to UT System or to the institution as appropriate, UT Austin requested that, as an alternative, the rule be amended to require that an institution that is the subject of a complaint receive timely notice of the complaint and that a process for institutional input and participation in the investigation and resolution be established in the administrative code.

Staff Response: Staff agree that the appropriate university system should be provided notice when THECB receives a complaint pertaining to an institution in the system regardless of whether the complaint is referred to the system, unless in the unlikely event, as set forth in TEC § 61.031, such notice would jeopardize an undercover investigation. THECB has amended Rule 1.115(2) accordingly and as consistent with the language of TEC § 61.031(c). Through being informed of the status of the investigation, the system will be able to provide input and participate in the investigation and resolution of the complaint.

Moreover, section 1.116, Agency Investigation of Student Complaint, provides that any complainant must first exhaust all grievance and appeal procedures that an institution establishes. It is feasible that this could involve the institution's university system. It also provides that THECB staff, as appropriate (e.g., the complaint is not frivolous on its face), will request a written response to the complaint from the institution. Along with a request for response, the agency will transmit to the institution a copy of the student complaint form and any attachments thereto. The institution has thirty days from receiving the request for response to provide a written response to the complaint. Agency staff, in its discretion, may contact the institution to obtain additional information upon the Agency's receipt of the institution's response or at any time during the investigation of the complaint. With the above referenced proposed amendment to Rule 1.115(2), for those complaints the THECB does not refer to a university system, the system can have input into the investigation on its own as well as through the responses provided by one of its component institutions.

Comment 2: The University of North Texas System and its component institutions, the University of North Texas, the University of North Texas Health Science Center, and the University of North Texas at Dallas ("UNT System") asserted that THECB does not have statutory authority to investigate and resolve student complaints filed by UNT System students. Rather, the UNT System indicated that the UNT System Board of Regents is solely responsible for investigating complaints filed by UNT System students and for resolving such complaints.

Staff Response: Staff does not concur that the proposed change to the student complaint rules conflict with THECB's statutory authority under TEC § 61.031. The U.S. Department of Education promulgated Program Integrity regulations which require each state to have a "process to review and appropriately act on complaints concerning higher education institutions including enforcing applicable State laws" in order for the institution to be legally authorized by the state and be eligible for federal Title IV funds. *See* 34 CFR § 600.9(a)(1). Accordingly, in June 2011, THECB asked for an opinion from the Texas Attorney General's Office as to whether TEC § 61.031 granted THECB appropriate statutory authority to establish a state higher education complaint procedure that complied with the Program Integrity regulations. *See* RQ-0982GA (June 24, 2011). The Texas Attorney General opined that TEC § 61.031 did provide THECB such statutory authority. Specifically, as explained in his December 22, 2011 opinion:

"[T]he Texas Legislature granted [THECB] authority to investigate, 'tak[e] action other than to investigate,' resolve, and close the file on a complaint. Based on this broad grant of authority to [THECB], we conclude that [THECB] has authority to 'appropriately act on' complaints, as [the U.S. Department of Education] regulations require."

Op. Tex. Att'y Gen. No. GA-0902 (2011) (internal citations omitted).

As the U.S. Department of Education explained in a "Dear Colleague" Letter regarding state authorization:

**"Question 13: For purposes of acting on complaints, would a governing board that has oversight of multiple institutions as part of a State university system satisfy the requirement that a complainant have access to a process that is independent of any institution?"**

Answer 13: As stated in the preamble to the final regulations, 'The State is not permitted to rely on institutional complaint and sanctioning processes in resolving complaints it receives as these do not provide the necessary independent process for reviewing a complaint. A State may, however, monitor an institution's complaint resolution process to determine whether it is addressing the concerns that are raised within it.' A State *may* rely on a governing board or central office of a State-wide system of public institutions if the State has made the determination the governing board or central office is sufficiently independent to provide successful oversight of complaints for the institutions in that system.'" (Emphasis added.)

"Dear Colleague" Letter from U.S. Department of Education Office of Postsecondary Education, Subject: Implementation of Program Integrity Regulations (March 17, 2011) (internal citations omitted).

Several student complainants have raised concerns that mandatory referrals to university systems of their complaints relating to a component institution lead to potential conflicts in the complaint being fairly resolved. Accordingly, the proposed rule change would provide THECB with discretion to investigate complaints or to refer them to university systems. Staff have determined that the THECB rule is consistent with Op. Tex. Att'y Gen. No. GA-0902 (2011) as well as the U.S. Department of Education's guidance on the Program Integrity regulations.

No additional changes were made as a result of these UNT System comments.

Legal Review:

Approved by the Office of General Counsel \_\_\_\_\_ Date \_\_\_\_\_

The amendments have been prepared in the following format:

- New language is in lowercase, underlined, and shaded.
- Deleted language is bracketed and struck through.
- When new language replaces deleted language, the new language precedes the deleted language.

## CHAPTER 1. AGENCY ADMINISTRATION

### SUBCHAPTER E. STUDENT COMPLAINT PROCEDURE

#### Section

- 1.110 Definitions.
- 1.111 Scope and Purpose.
- 1.112 Institution's Obligation to Provide Information Concerning the Complaint Procedure.
- 1.113 Complaints Not Reviewed by the Agency.
- 1.114 Filing a Complaint.
- 1.115 Referral of Certain Complaints to Other Agencies or Entities.
- 1.116 Agency Investigation of Student Complaint.
- 1.117 Attempt to Facilitate an Informal Resolution to the Complaint.
- 1.118 Recommendation for Resolution Made to the Commissioner.
- 1.119 Written Determination of the Commissioner.
- 1.120 Authority of the Commissioner to Issue Written Determinations Regarding Student Complaints.

1.110 – 1.114 (No change.)

1.115. Referral of Certain Complaints to Other Agencies or Entities.

Once the Agency receives a student complaint form, the Agency may refer the complaint to another agency or entity as follows:

(1) (No change.)

(2) Complaints pertaining to an institution in the University of Texas System, Texas A&M University System, University of Houston System, University of North Texas System, Texas Tech University System, or Texas State University System may [shall] be referred to the appropriate university system for investigation and resolution. If a complaint is not referred to a university system for investigation and resolution, the Agency will notify the system, at least quarterly until final disposition of the complaint, of the status of any investigation unless the notice would jeopardize an undercover investigation.

(3) – (4) (No change.)

1.116 – 1.120 (No change.)