

AGENDA

Negotiated Rulemaking Committee on Resident Physician Expansion Program

April 11, 2014

9:30a – 4:30p

Board Room

Texas Higher Education Coordinating Board

1200 E. Anderson Lane

Austin, TX 78752

- I. Introductions
- II. Brief Overview of the Negotiated Rulemaking Process: What it is, What it's not
- III. Overview of Roles and Responsibilities
 - A. Role of Facilitator
 - B. Role of Sponsor Agency
 - Technical and administrative support
 - C. Role of Committee Members
 - Representative role
 - Commitment to negotiate in good faith
- IV. Consideration of Facilitator
- V. Procedural Issues
 - A. Discussion and Consideration of Ground Rules
 - B. Discussion and Consideration of Definition of Consensus
- VI. Discussion of Draft Rules Language on Resident Physician Expansion Program
- VII. Consideration of Proposed Rules Language on Resident Physician Expansion Program

Senate Bill 215

Applicable Provisions Relating to Negotiated Rulemaking and Allocation Methodology for Other Trusteed Funds

SECTION 29. Subchapter B, Chapter 61, Education Code, is amended by adding Section 61.0331 to read as follows:

Sec. 61.0331. NEGOTIATED RULEMAKING REQUIRED. The board shall engage institutions of higher education in a negotiated rulemaking process as described by Chapter 2008, Government Code, when adopting a policy, procedure, or rule relating to:

(1) an admission policy regarding the common admission application under Section 51.762, a uniform admission policy under Section 51.807, graduate and professional admissions under Section 51.843, or the transfer of credit under Section 61.827;

(2) the allocation or distribution of funds, including financial aid or other trusteed funds under Section 61.07761;

(3) the reevaluation of data requests under Section 51.406; or

(4) compliance monitoring under Section 61.035.

SECTION 46. Subchapter C, Chapter 61, Education Code, is amended by adding Section 61.07761 to read as follows:

Sec. 61.07761. FINANCIAL AID AND OTHER TRUSTEED FUNDS ALLOCATION.

(a) For any funds trusted to the board for allocation to institutions of higher education and private or independent institutions of higher education, including financial aid program funds, the board by rule shall:

(1) establish and publish the allocation methodologies; and

(2) develop procedures to verify the accuracy of the application of those allocation methodologies by board staff.

(b) The board shall consult with affected stakeholders before adopting rules under this section.

AN ACT

relating to the consolidation of the Higher Education Enrollment Assistance Program and the Higher Education Assistance Plan and the transfer of certain enrollment assistance duties to institutions of higher education and to measures to enhance medical education.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter U, Chapter 51, Education Code, is amended by adding Section 51.810 to read as follows:

Sec. 51.810. HIGHER EDUCATION ASSISTANCE PLANS. (a) In this section:

(1) "Coordinating board" means the Texas Higher Education Coordinating Board.

(2) "Institution of higher education" and "private or independent institution of higher education" have the meanings assigned by Section 61.003.

(b) The institution of higher education in closest geographic proximity to a public high school in this state identified by the coordinating board for purposes of this section as substantially below the state average in the number of graduates who enroll in higher education institutions shall enter into an agreement with that high school to develop a plan to increase the number of students from that high school enrolling in higher education institutions. Under the plan, the institution shall:

(1) collaborate with the high school to:

1 (A) provide to prospective students information
2 related to enrollment in an institution of higher education or a
3 private or independent institution of higher education, including
4 admissions, testing, and financial aid information;

5 (B) assist those prospective students in
6 completing applications and testing related to enrollment in those
7 institutions, including admissions and financial aid applications,
8 and fulfilling testing requirements; and

9 (C) target efforts to increase the number of
10 Hispanic students and African American male students enrolled in
11 higher education institutions; and

12 (2) actively engage with local school districts to
13 provide access to rigorous, high-quality dual credit opportunities
14 for qualified high school students as needed.

15 (c) An institution of higher education must include a plan
16 developed by the institution under this section and the results of
17 that plan in its annual report to the coordinating board under
18 Section 51.4032.

19 (d) The coordinating board shall include in its annual
20 "Closing the Gaps" higher education plan progress report a summary
21 of the results of the plans developed and administered under this
22 section.

23 (e) The coordinating board may adopt rules to implement this
24 section.

25 SECTION 2. Subtitle A, Title 3, Education Code, is amended
26 by adding Chapter 58A to read as follows:

27 CHAPTER 58A. PROGRAMS SUPPORTING GRADUATE MEDICAL EDUCATION

1 SUBCHAPTER A. GENERAL PROVISIONS

2 Sec. 58A.001. DEFINITION. In this chapter, "board" means
3 the Texas Higher Education Coordinating Board.

4 SUBCHAPTER B. GRADUATE MEDICAL EDUCATION

5 RESIDENCY EXPANSION

6 Sec. 58A.021. ADMINISTRATION. The board shall allocate
7 funds appropriated for purposes of this subchapter and may adopt
8 necessary rules regarding the allocation of those funds.

9 Sec. 58A.022. PLANNING GRANTS. (a) The board shall award
10 one-time planning grants to entities located in this state that:

11 (1) have never had a graduate medical education
12 program; and

13 (2) are eligible for Medicare funding of graduate
14 medical education.

15 (b) The board shall award planning grants on a competitive
16 basis according to criteria adopted by the board. The board shall
17 determine the number of grants awarded and the amount of each grant
18 consistent with any conditions provided by legislative
19 appropriation. A grant received under this section must be used for
20 the purpose of planning additional first-year residency positions.

21 (c) An application for a planning grant for a state fiscal
22 year must be submitted to the board not later than July 15 preceding
23 that fiscal year. Not later than August 15, the board shall make
24 decisions about grant awards for the following state fiscal year.

25 (d) An entity that is awarded a planning grant and
26 establishes new first-year residency positions after receipt of the
27 grant is eligible for additional funds for each such position

1 established, as provided by appropriation.

2 Sec. 58A.023. GRANTS FOR UNFILLED RESIDENCY POSITIONS. (a)
3 The board shall award grants to graduate medical education programs
4 to enable those programs to fill accredited but unfilled first-year
5 residency positions. The board shall determine the number of
6 grants awarded and the amount of each grant consistent with any
7 conditions provided by legislative appropriation.

8 (b) A grant received under this section must be expended to
9 support the direct resident costs to the program, including the
10 resident stipend and benefits.

11 (c) A grant application must include proof of the accredited
12 but unfilled positions to which the application applies. An
13 application for a grant must be submitted to the board not later
14 than October 1 preceding the period for which the grant is made.
15 The board shall make decisions about grant awards not later than
16 January 1 preceding the grant period.

17 (d) The board may distribute a grant amount for a residency
18 position only on receiving verification that the applicable
19 residency position has been filled.

20 (e) Grant amounts are awarded under this section for two
21 consecutive state fiscal years. For each first-year residency
22 position for which a program receives an initial grant amount in a
23 fiscal year, the board shall award the program an equal grant amount
24 for the following fiscal year.

25 Sec. 58A.024. GRANTS FOR PROGRAM EXPANSION OR NEW PROGRAM.

26 (a) The board shall award grants to enable existing graduate
27 medical education programs to increase the number of first-year

1 residency positions or to provide for the establishment of new
2 graduate medical education programs with first-year residency
3 positions. The board shall determine the number of grants awarded
4 and the amount of each grant consistent with any conditions
5 provided by legislative appropriation.

6 (b) A grant received under this section must be expended to
7 support the direct resident costs to the program, including the
8 resident stipend and benefits.

9 (c) A grant application must include a plan for receiving
10 accreditation for the increased number of positions or for the new
11 program, as applicable. An application for a grant must be
12 submitted to the board not later than October 1 preceding the period
13 for which the grant is made. The board shall make decisions about
14 grant awards not later than January 1 preceding the grant period.

15 (d) The board may distribute a grant amount for a residency
16 position only on receiving verification that the applicable
17 residency position has been filled.

18 (e) Grant amounts are awarded under this section for three
19 consecutive state fiscal years. For each first-year residency
20 position for which a program receives an initial grant amount in a
21 fiscal year, the board shall award the program an equal grant amount
22 for the following two fiscal years.

23 Sec. 58A.025. PRIORITY GRANTS; ADJUSTMENT OF AMOUNTS. (a)
24 If the board determines that the number of first-year residency
25 positions proposed by eligible applicants under Sections 58A.023
26 and 58A.024 exceeds the number authorized by appropriation, in
27 awarding grants the board:

1 (1) may give priority for up to 50 percent of the
2 funded first-year residency positions to be in primary care or
3 other critical shortage areas in this state; and

4 (2) may not reduce grant amounts awarded per resident
5 position, but may proportionately reduce the number of positions
6 funded for each program.

7 (b) If the board determines that, based on applications
8 received, the entire appropriation will not be awarded for that
9 year for graduate medical education residency expansion under
10 Sections 58A.023 and 58A.024, the board may transfer and use the
11 funds for the purposes of Section 58A.022 and may adjust the number
12 of grants awarded under that section accordingly.

13 Sec. 58A.026. GRANTS FOR ADDITIONAL YEARS OF RESIDENCY.

14 (a) If the board determines that funds appropriated for purposes of
15 this subchapter are available after all eligible grant applications
16 under Sections 58A.022, 58A.023, and 58A.024 have been funded, the
17 board shall award grants from excess funds to support residents:

18 (1) who have completed at least three years of
19 residency; and

20 (2) whose residency program is in a field in which this
21 state has less than 80 percent of the national average of physicians
22 per 100,000 population, as determined by the board.

23 (b) Grants shall be awarded under this section in amounts,
24 in the number, and in the residency fields determined by the board,
25 subject to any conditions provided by legislative appropriation. A
26 grant received under this section must be expended to support the
27 direct resident costs to the program, including the resident

1 stipend and benefits.

2 (c) The board may distribute grant amounts only on receiving
3 verification that the applicable residency position has been
4 filled.

5 (d) The board may award grants under this section only from
6 funds appropriated for the state fiscal year beginning September 1,
7 2016, or for a subsequent state fiscal year.

8 SUBCHAPTER C. PRIMARY CARE INNOVATION PROGRAM

9 Sec. 58A.051. PRIMARY CARE INNOVATION PROGRAM. Subject to
10 available funds, the board shall establish a grant program under
11 which the board awards incentive payments to medical schools that
12 administer innovative programs designed to increase the number of
13 primary care physicians in this state.

14 Sec. 58A.052. GIFTS, GRANTS, AND DONATIONS. In addition to
15 other money appropriated by the legislature, the board may solicit,
16 accept, and spend gifts, grants, and donations from any public or
17 private source for the purposes of the program established under
18 this subchapter.

19 Sec. 58A.053. RULES. In consultation with each medical
20 school in this state, the board shall adopt rules for the
21 administration of the program established under this subchapter.

22 The rules must include:

23 (1) administrative provisions relating to the
24 awarding of grants under this subchapter, such as:

25 (A) eligibility criteria for medical schools;

26 (B) grant application procedures;

27 (C) guidelines relating to grant amounts;

1 (D) procedures for evaluating grant
2 applications; and

3 (E) procedures for monitoring the use of grants;
4 and

5 (2) methods for tracking the effectiveness of grants
6 that:

7 (A) using data reasonably available to the board,
8 consider relevant information regarding the career paths of medical
9 school graduates during the four-year period following their
10 graduation; and

11 (B) evaluate whether and for how long those
12 graduates work in primary care in this state.

13 Sec. 58A.054. ADMINISTRATIVE COSTS. A reasonable amount,
14 not to exceed three percent, of any money appropriated for purposes
15 of this subchapter may be used by the board to pay the costs of
16 administering this subchapter.

17 SECTION 3. Subchapter I, Chapter 61, Education Code, is
18 amended by adding Section 61.511 to read as follows:

19 Sec. 61.511. RESIDENT PHYSICIAN EXPANSION GRANT PROGRAM.

20 (a) The board shall administer the Resident Physician Expansion
21 Grant Program as a competitive grant program to encourage the
22 creation of new graduate medical education positions through
23 community collaboration and innovative funding. The board shall
24 award grants to physician residency programs at teaching hospitals
25 and other appropriate health care entities according to the program
26 criteria established under Subsections (b) and (i).

27 (b) The board shall establish criteria for the grant program

1 in consultation with the executive commissioner of the Health and
2 Human Services Commission, with one or more physicians, teaching
3 hospitals, medical schools, independent physician residency
4 programs, and with other persons considered appropriate by the
5 board. The program criteria must:

6 (1) take into account the following factors:

7 (A) the characteristics of existing residency
8 positions that receive state funding;

9 (B) current and projected physician workforce
10 demographics; and

11 (C) state population trends and projections; and

12 (2) support the following goals:

13 (A) creating new residency positions, with an
14 emphasis on creating new first-year residency positions, without
15 adversely affecting existing residency positions;

16 (B) maximizing local or federal matching funds;

17 (C) developing accredited physician residency
18 programs at hospitals that have not previously offered residency
19 programs; and

20 (D) increasing residency positions with respect
21 to:

22 (i) medical specialties having shortages in
23 this state; and

24 (ii) medically underserved areas in this
25 state.

26 (c) The board may provide grants only to support a residency
27 position that:

1 (1) is created and accredited on or after January 1,
2 2014; or

3 (2) was created and accredited before January 1, 2013,
4 but as of that date had not yet been filled.

5 (d) A grant award may be used only to pay direct costs
6 associated with the position, including the salary of the resident
7 physician.

8 (e) Each grant application must specify:

9 (1) the number of residency positions expected to be
10 created with the grant money; and

11 (2) the grant amount requested for each year.

12 (f) The board shall award grants for all residency positions
13 awarded a grant under this section in the preceding year before
14 awarding a grant for a residency position that did not receive a
15 grant in the preceding year, provided that the applicable grant
16 recipient from the preceding year complies with all conditions of
17 the grant as described by Subsection (g).

18 (g) The board shall monitor physician residency programs
19 receiving grants as necessary to ensure compliance with the grant
20 program and shall require the return of any unused grant money by,
21 or shall decline to award additional grants to, a residency program
22 that receives a grant but fails to:

23 (1) create and fill, within a reasonable period, the
24 number of residency positions proposed in the program's grant
25 application; or

26 (2) satisfy any other conditions of the grant imposed
27 by the board.

1 (h) The board shall use money forfeited under Subsection (g)
2 to award grants to other eligible applicants. With respect to the
3 physician residency program forfeiting the grant, the board may
4 restore grant money or award additional grants, as applicable, to
5 the program as soon as practicable after the program satisfies all
6 conditions of the grant.

7 (i) The board shall adopt rules for the administration of
8 the grant program. The rules must include:

9 (1) administrative provisions governing:

10 (A) eligibility criteria for grant applicants;

11 (B) grant application procedures;

12 (C) guidelines relating to grant amounts;

13 (D) guidelines relating to the number of grants
14 to be awarded each year, subject to available funds;

15 (E) procedures for evaluating grant
16 applications; and

17 (F) procedures for monitoring the use of grants;

18 (2) methods for tracking the effectiveness of grants;
19 and

20 (3) any conditions relating to the receipt and use of a
21 grant as considered appropriate by the board.

22 (j) Not later than January 1 of each year, the board shall
23 prepare and submit to the governor, the lieutenant governor, the
24 speaker of the house of representatives, the standing committees of
25 the senate and house of representatives with responsibility for
26 oversight of health and human services issues, and the Legislative
27 Budget Board a report that:

1 (1) specifies each of the following with respect to
2 the preceding program year:

3 (A) the number of grants awarded under the
4 program;

5 (B) the amount of each grant awarded under the
6 program;

7 (C) the number of residency positions created
8 with the support of grant money;

9 (D) the medical specialty of the residency
10 positions created; and

11 (E) whether physicians who complete their
12 training through residency positions created under the program
13 choose to practice in this state and which medical specialties they
14 choose for their practices; and

15 (2) makes appropriate recommendations for legislative
16 changes as necessary.

17 SECTION 4. Section 61.532, Education Code, is amended to
18 read as follows:

19 Sec. 61.532. ELIGIBILITY. (a) To be eligible to receive
20 repayment assistance, a physician must:

21 (1) apply to the coordinating board;

22 (2) at the time of application, be licensed to
23 practice medicine under Subtitle B, Title 3, Occupations Code;

24 (3) have completed one, two, three, or four
25 consecutive years of practice;

26 (A) in a health professional shortage area
27 designated by the Department of State Health Services; or

1 (B) in accordance with Subsection (b), after
2 funds have been fully allocated for the program year to physicians
3 qualifying under Paragraph (A); and

4 (4) provide health care services to:

5 (A) recipients under the medical assistance
6 program authorized by Chapter 32, Human Resources Code;

7 (B) enrollees under the child health plan program
8 authorized by Chapter 62, Health and Safety Code; or

9 (C) persons committed to a secure correctional
10 facility operated by or under contract with the Texas Juvenile
11 Justice Department [~~Youth Commission~~] or persons confined in a
12 secure correctional facility operated by or under contract with any
13 division of the Texas Department of Criminal Justice.

14 (b) A physician may complete one or more years of practice
15 required by Subsection (a)(3) in a location other than a health
16 professional shortage area designated by the Department of State
17 Health Services if, during the applicable year or years, the
18 physician provides health care services to a designated number of
19 patients who are recipients under the medical assistance program
20 authorized by Chapter 32, Human Resources Code, or the Texas
21 Women's Health Program according to criteria established by the
22 board in consultation with the Health and Human Services
23 Commission. The Health and Human Services Commission shall verify
24 a physician's compliance with this subsection, and the board and
25 the commission shall enter into a memorandum of understanding for
26 that purpose.

27 (c) The board annually shall solicit and collect

1 information regarding the specific number of patients described by
2 Subsection (a)(4)(A) who are treated by each physician receiving
3 loan repayment assistance under this subchapter.

4 SECTION 5. Section 61.5391, Education Code, is amended by
5 amending Subsection (a) and adding Subsection (c) to read as
6 follows:

7 (a) The physician education loan repayment program account
8 is an account in the general revenue fund. The account is composed
9 of:

- 10 (1) gifts and grants contributed to the account;
11 (2) earnings on the principal of the account; and
12 (3) other amounts deposited to the credit of the
13 account, including:

14 (A) money deposited under Section 61.539(b) or
15 61.5392;

16 (B) legislative appropriations; and

17 (C) money deposited under Section 155.2415, Tax
18 Code.

19 (c) Money deposited to the credit of the account under
20 Section 61.5392 may be used only to provide loan repayment
21 assistance to physicians who establish eligibility for the
22 assistance under Section 61.532(a)(4)(A) or (b).

23 SECTION 6. Subchapter J, Chapter 61, Education Code, is
24 amended by adding Section 61.5392 to read as follows:

25 Sec. 61.5392. FEDERAL MATCHING FUNDS. (a) For the
26 purposes of this subchapter, the Health and Human Services
27 Commission shall seek any federal matching funds that are available

1 for the purposes of this section.

2 (b) Any amount received under Subsection (a) shall be
3 transferred to the comptroller to be deposited in the physician
4 education loan repayment program account established under Section
5 61.5391. Section 403.095, Government Code, does not apply to any
6 amount deposited under this section.

7 SECTION 7. Sections 61.07622 and 61.088, Education Code,
8 are repealed.

9 SECTION 8. (a) As soon as practicable after the effective
10 date of this Act, the Texas Higher Education Coordinating Board
11 shall adopt rules for the implementation and administration of the
12 programs established under Chapter 58A, Education Code, as added by
13 this Act. The coordinating board may adopt the initial rules in the
14 manner provided by law for emergency rules.

15 (b) Not later than October 1, 2013, the Texas Higher
16 Education Coordinating Board and the Health and Human Services
17 Commission shall enter into the memorandum of understanding
18 required by Section 61.532(b), Education Code, as added by this
19 Act. As soon as practicable after the date of the memorandum, the
20 coordinating board shall begin awarding loan repayment assistance
21 to physicians who establish eligibility under that subsection.

22 SECTION 9. This Act takes effect September 1, 2013.

President of the Senate

Speaker of the House

I certify that H.B. No. 2550 was passed by the House on May 2, 2013, by the following vote: Yeas 142, Nays 5, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2550 on May 24, 2013, by the following vote: Yeas 124, Nays 17, 2 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2550 was passed by the Senate, with amendments, on May 22, 2013, by the following vote: Yeas 31, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

Section

- 1.1. Dates for Regular Quarterly Meetings of the Board
- 1.2. Authority of the Commissioner to Interpret Rules
- 1.3. Educational Data
- 1.4. Rules of Order
- 1.5. Coordinating Board Committees
- 1.6. Advisory Committees
- 1.7. Petition for the Adoption of Rules
- 1.8. Historically Underutilized Business (HUBs) Program
- 1.9. Training for Members of Governing Boards and Board Trustees
- 1.10. Administration of the Open Records Act
- 1.11. Protest Procedures for Resolving Vendor Protests Relating to Purchasing Issues
- 1.12. Foreign Travel
- 1.13. Internal Auditor
- 1.14. Negotiated Rulemaking
- 1.15. Authority of the Commissioner to Propose Board Rules
- 1.16. Contracts for Materials and Services
- 1.17. Authority of the Commissioner to Provide Direct Supervision of the Education Research Centers
- 1.18. Operation of Education Research Centers
- 1.19. Education and Training of Board Administrators and Employees

1.1 – 1.13 (No change.)

1.14. Negotiated Rulemaking

(a) Definitions. The following words and terms, when used in this rule, shall have the following meaning:

(1) Alternative Dispute Resolution coordinator – An agency employee appointed under Chapter 1, Subchapter B, Rule 1.22.

(2) Board or agency– Texas Higher Education Coordinating Board

(3) Commissioner – The Commissioner of Higher Education

(4) Consensus – The negotiated rulemaking committee has reached consensus on a matter only if the agreement is unanimous, unless the committee has unanimously agreed to define consensus in another manner. The absence or silence of a member at the time the final_consensus vote is taken is equivalent to agreement. If consensus is achieved, negotiated rulemaking committee members may not thereafter withdraw their agreement.

(5) Institutions of higher education – As defined in Texas Education Code Section 61.003

(6) Private or independent institutions of higher education – As defined in Texas Education Code Section 61.003

(b) If the Assistant Commissioner whose Division has jurisdiction over the subject matter of the rule or rules to be adopted concludes that the agency may benefit from negotiated rulemaking, he or she shall request that the agency's Alternative Dispute Resolution (ADR) coordinator assist in determining whether it is advisable to proceed under the procedures established in Chapter 2008 of the Texas Government Code.

(1) Scope and Purpose. This rule also implements Texas Education Code Sections 61.0331, 61.0572, 61.058, and 61.07761 which require the Board to engage in negotiated rulemaking with institutions of higher education in accordance with the procedures established in Texas Government Code Chapter 2008 when adopting a policy, procedure, or rule relating to:

(2) the transfer of credit under Texas Education Code Section 61.827 or admission policies regarding:

(A) the common admission application under Texas Education Code Section 51.762;

(B) uniform admissions under Texas Education Code Section 51.807; or

(C) graduate and professional admissions under Texas Education Code 51.843; or

(3) the reevaluation of data requests under Texas Education Code Section 51.406;

(4) compliance monitoring under Texas Education Code Section 61.035;

(5) the standards for cost, efficiency, space need, and space use under Texas Education Code Sections 61.0572 and 61.058 in regards to:

(A) new construction, rehabilitation, repair of buildings and facilities at institutions of higher education; and

(B) the purchases of improved real property added to institutions of higher education's educational and general buildings and facilities inventory; or

(6) the allocation (including the allocation methodologies and related procedures) or distribution of funds, including financial aid or other trusteed funds under Texas Education Code Section 61.07761, to institutions of higher education and private or independent institutions of higher education. For rulemaking on this issue, the Board shall engage in negotiated rulemaking with both institutions of higher education and private or independent institutions of higher education, as applicable.

(A) With the exception of sections 1.14(a), (b), and (d)(3)-(4), this rule and the procedures set forth herein apply only to those matters, as set forth in (b-1), in which the Board is required to engage in negotiated rulemaking.

(B) In matters other than those addressed in (b-1), the Board retains the right to engage in negotiated rulemaking in accordance with the procedures established in the Texas Government Code, Chapter 2008.

(c) Appointment of Convener. The ADR coordinator will appoint an agency employee to serve as the convener to assist in negotiated rulemaking. The convener may not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the convener.

(d) Duties of Convener. (1) The convener will assist the ADR coordinator in identifying institutions of higher education (and private or independent institutions when rulemaking under 1.14(a)(5) is considered) and other stakeholders (such as students, state agencies, and accreditors) who are likely to be affected by the proposed rule(s), including identifying institutions and other stakeholders who may oppose the issuance of rule(s). The convener will discuss with institution representatives and other stakeholders whether they are willing to participate in negotiated rulemaking, which issues a negotiated rulemaking committee should address, and whether there are other institutions or persons the convener needs to identify who may be affected by the proposed rule(s).

(2) Where the Board is required to engage in negotiated rulemaking, the convener shall report to the ADR coordinator the outcome of the above discussions.

(3) Where the Board is not required to engage in negotiated rulemaking, the convener shall report to the ADR coordinator on the relevant considerations regarding negotiated rulemaking, including, but not limited to:

(i) the number of identifiable interests that would be significantly affected by the proposed rule(s),

(ii) the probable willingness and authority of the representatives of affected interests to negotiate in good faith,

(iii) the probability that a negotiated rulemaking committee would reach a unanimous or a suitable general consensus on the proposed rule(s),

(iv) the adequacy of Board, institution, and citizen resources to participate in negotiated rulemaking, and

(v) the probability that the negotiated rulemaking committee will provide a balanced representation between affected stakeholder interests.

(4) Where the Board is not required to engage in negotiated rulemaking, the convener shall also recommend to the ADR coordinator whether negotiated rulemaking is appropriate.

(5) The report and recommendations of a convener are public information and available on request to any member of the public.

(e) Publishing Notice of Proposed Negotiated Rulemaking. To initiate negotiated rulemaking, the Commissioner will publish a notice of intent to establish a negotiated rulemaking committee to prepare proposed rules. Such notice will be published both in the *Texas Register* and on the Board's website. The ADR coordinator will consider all comments received by the close of the comment period pursuant to the notice of intent. The notice of intent will include:

(1) a statement that the Board intends to engage in negotiated rulemaking;

(2) a description of the subject and scope of the rule(s) to be developed;

- (3) a description of the known issues to be considered in developing the rule(s);
- (4) a list of the interests likely to be affected by the proposed rule(s);
- (5) a list of the individuals the ADR coordinator proposes to appoint to the negotiated rulemaking committee to represent the Board and affected interests (each committee will include at least one agency staff representative);
- (6) a request for comments on the proposal to engage in negotiated rulemaking, including a description of the issues the commenter believes will need to be addressed in developing the rule(s), as well as on the proposed membership of the negotiated rulemaking committee; and
- (7) a description of the procedure through which an institution or person who will be significantly affected by the proposed rule(s) may, before the ADR coordinator appoints members to the negotiated rulemaking committee, apply for membership on the committee or nominate another to represent the institution's or person's interests on the committee (before nominating an individual to the committee, the nominator should confirm that the potential nominee can and will make the necessary time commitment to the negotiations).

(f) Appointment of Negotiated Rulemaking Committee Members. After considering comments and nominations received in response to the notice of proposed negotiated rulemaking, the ADR coordinator will appoint members to a negotiated rulemaking committee to serve until the proposed rule(s) (if any) is adopted by the Board. The ADR coordinator will appoint members to the committee with a goal of providing adequate and balanced representation for the affected interests while keeping the size of the committee manageable. The ADR coordinator shall select individuals with demonstrated expertise or experience in the relevant matters under negotiations and who reflect the diversity of the identifiable interests which could be significantly affected by the proposed rule(s). An individual selected to serve on the committee will be expected to represent the interests of his or her entity, organization or group, and participate in the negotiations in a manner consistent with the goal of developing proposed rules on which the committee will reach consensus.

(g) Costs of Participating in Negotiated Rulemaking.

(1) The Board will provide appropriate administrative support to the negotiated rulemaking committee. Except as provided below, a member of a negotiated rulemaking committee is responsible for the member's own costs in serving on the committee. However, if:

(A) The member certifies that he or she (or the entity, organization or group which the member represents) lacks sufficient financial resources to participate as a member of the committee and provides any requested proof of same; and

(B) The ADR coordinator determines that the member's service on the committee is necessary for the adequate representation of an affected interest,

(C) then, the Board may pay a member's reasonable travel and per diem costs related to the member's service on the committee at the rate set in the General Appropriations Act for state employees.

(2) The costs of the negotiated rulemaking facilitator described in subsection (h) shall be borne equally, on a pro rata basis, by all entities represented on the negotiated rulemaking committee,

unless the negotiated rulemaking committee unanimously agrees to a different cost allocation; or the facilitator is an employee of the Board, in which event the costs of the facilitator shall be borne by the Board.

(h) Appointment of Negotiated Rulemaking Facilitator. The ADR coordinator will appoint a negotiated rulemaking facilitator who will utilize alternative dispute resolution skills to attempt to arrive at a consensus on a proposed rule(s). The ADR coordinator may appoint a Board employee or contract with another state employee or private individual to serve as the facilitator. The ADR coordinator's appointment of the facilitator is subject to the approval of the negotiated rulemaking committee and the facilitator serves at the will of the committee. The ADR coordinator will appoint the facilitator utilizing, among other things, the following criteria:

- (1) The facilitator must possess the qualifications required for an impartial third party under Civil Practice and Remedies Code Section 154.052(a) and (b);
- (2) The facilitator is subject to the standards and duties prescribed by Civil Practice and Remedies Code Sections 154.053(a) and (b) and has the qualified immunity prescribed by Civil Practice and Remedies Code Section 154.055, if applicable;
- (3) The facilitator will not be the person designated to represent the Board on the negotiated rulemaking committee on substantive issues related to the rulemaking; and
- (4) The facilitator will not have a financial or other interest in the outcome of the rulemaking process that would interfere with the person's impartial and unbiased service as the facilitator.

(i) Duties of Negotiated Rulemaking Committee and Facilitator. The facilitator will preside over meetings of the negotiated rulemaking committee and assist the members of the committee to establish procedures for conducting negotiations and will utilize alternative dispute resolution skills to encourage a consensus on the proposed rule(s). The facilitator may not, however, compel or coerce the members to reach a consensus.

(j) Consensus and the Negotiated Rulemaking Committee's Report. If the negotiated rulemaking committee reaches a consensus, the committee will draft and send a report to the Board that contains the text of the proposed rule(s). If the committee determines that only a partial agreement on a proposed rule(s) has been reached, the committee will draft and send a report to the Board that describes the partial agreement achieved, lists the unresolved substantive issues, and includes any other information or recommendations of the committee. The committee's report is public information. If consensus is not achieved, the Board shall determine whether to proceed with proposed rule(s). If the Board decides to proceed with proposed rule(s), the Board may use language developed during the negotiations or develop new language for all or a portion of the proposed rule(s).

(k) Proposed Rulemaking under the APA. If the Board decides to proceed with rulemaking after receipt of the negotiated rulemaking committee's report, the Board shall initiate rulemaking under the regular Administrative Procedures Act (APA) procedures, as prescribed in Texas Government Code Chapter 2001, Subchapter B. In addition to the APA's requirements regarding the contents of notice of proposed rulemaking, the notice will also state that:

- (1) the Board used negotiated rulemaking in developing the proposed rule, and
- (2) the negotiated rulemaking committee report is public information and the report's location at which it will be available to the public.

All published proposed rules will conform to the agreements resulting from consensus, if any, achieved through negotiated rulemaking (as reflected in the negotiated rulemaking committee's report).

(l) Confidentiality of Certain Records and Communications. Civil Practice and Remedies Code (CPRC) Sections 154.053 and 154.073 apply to the communications, records, conduct, and demeanor of the facilitator and the members of the negotiated rulemaking committee as if the negotiated rulemaking were a dispute being resolved in accordance with CPRC Chapter 154. In the negotiated rulemaking context, the Texas Office of the Attorney General, subject to review by a Travis County district court, decides in accordance with CPRC Section 154.073(d) whether a communication or material subject to Section 154.073(d) is confidential, excepted from required disclosure, or subject to required disclosure. Notwithstanding CPRC Section 154.073(e):

(1) a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and

(2) the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with subdivision (1).

(m) The Board hereby delegates to the Commissioner the responsibilities and authority set forth in this section.

GROUND RULES FOR NEGOTIATED RULEMAKING

I. GOAL

To reach consensus on the language of a proposed rule

II. REACHING DECISIONS

- A. Use of Consensus. Negotiations will be conducted with the intent of reaching a consensus decision.
- B. Consensus. Unless the Committee members agree unanimously to another definition at the outset of the process:

Consensus means that all Committee members concur in the decision because their major interests have been taken into consideration and addressed in a satisfactory manner. While committee members may differ in their acceptance of individual terms of the agreement, all committee members can support the final agreement given the trade-offs and current circumstances.

Committee members can reach consensus without embracing each element of the agreement with the same fervor as other members. Some parties may strongly endorse a particular solution while others may accept it as a workable agreement.

III. AGREEMENT

- A. Final Product/Proposed Rule. The Committee intends for its final work product to be the text of a proposed rule. If the Committee reaches consensus on a proposed rule, the agency will accept the proposed rule as its draft with the recommendation that it be published in the Texas Register as drafted.
- B. Failure to Reach Consensus. If the Committee is unable to reach consensus on a proposed rule, then the Committee will draft a report that specifies the issues on which consensus was reached, the issues that remain unsolved, and any other information that the Committee considers important.
- C. Support of Agreement. The Committee members agree not to take any action to inhibit the adoption or implementation of a rule that conforms to the consensus proposal of the Committee. Furthermore, members agree to advocate for the consensus rule to their membership and to other policy makers both during and after the negotiated rulemaking process. If a member fails to keep this agreement, all other members agree to submit comments to the agency, any other relevant state officials, government bodies, or Courts, stating that:
1. All members concurred in the proposed rule; and
 2. All members supported approval of the final rule that conforms to the consensus proposal of the Committee.

IV. COMMITTEE MEETINGS

A. Meeting Attendance

1. The same Committee members listed at the end of this document need be present at each full meeting of the Committee.
2. Scheduled meetings will proceed even if some members are absent.
3. Absent members are responsible for updating themselves in the proceedings of missed meetings.

B. During the Meetings

1. Meetings will be open to the public. However, participation in negotiations will be limited to Committee members and invited experts.
2. Visitors are requested to respect the process and abide by these ground rules. This request will be stated at the beginning of each meeting.
3. Visitors who wish to comment during the negotiations may do so through the following avenues:
 - a. Channel comments through one of the Committee members;
 - b. Submit written comments to the Committee members; or
 - c. Submit comments through the website, if available.Further, a Committee member may invite a member of the audience to speak, as that member sees fit. Initial comments should be limited to three minutes and may be extended at the Committee's request.
4. The proceedings of the Committee will not be electronically recorded, but the facilitator may prepare draft summaries of the meetings for the convenience of the members. Such summaries shall not be approved by the Committee, and they are not to be construed to represent the official position of the Committee or any member on what transpired at a Committee meeting. Summaries will note issues discussed, any outcome to discussions, requests for data, and any other action items.

C. Caucuses

1. The facilitator may at any time request a confidential caucus with specific members or groups of members to attempt resolution of a specific issue.
2. Any member may request a caucus at any time to consult with other members, but such caucuses are to be used sparingly. The caucusing members will be asked to move into the hallway or another meeting area to conduct the caucus. The length of caucuses will be determined at the discretion of the facilitator who may serve as a mediator during such caucuses.

- ### D. Stakeholder Representatives. Individual members acknowledge that they have been named to the Committee as the representative of all others in their stakeholder class, and not just themselves. To this end, the members pledge to communicate with other members of their organization or stakeholder class to ensure that the deliberations reflect the viewpoints of the stakeholder class as a whole.

V. NEGOTIATING

- A. All members agree to act in good faith in all aspects of these negotiations. Members agree to speak openly and commit to addressing each other's concerns and needs. Members may not use other members' specific offers, positions, or statements made during the negotiations for any purpose outside the negotiation.
- B. All members commit to share relevant information, which if excluded, would damage the credibility or outcome of the consensus. Members will make every effort to provide requested information reasonably in advance of scheduled meetings.
- C. All members will endeavor to tailor their statements during meetings to ensure the opportunity for all members to participate fully on issues in which they have an interest. Members agree to speak one at a time and allow each other a reasonable opportunity for uninterrupted comments. All members will refrain from personal attacks.
- D. Any Committee member may withdraw from the negotiations at any time without prejudice. The remaining Committee members will then decide whether to continue the negotiations.

VI. COMMUNICATIONS

- A. When communicating with the press, Committee members agree to limit their statements to expressions of their own interests. Inquiries from the press may be referred to the facilitators. If the Committee decides to issue a press statement, the Committee will agree on the language of the press statement.
- B. In all communications outside of the Committee, including those to the press, members may give information concerning issues raised and actions taken but agree to refrain from attributing views or positions expressed in a non-public setting and identified as confidential to a particular group or individual, even if that party withdraws from negotiations.

Facilitator Bio

Gary Johnstone

Gary Johnstone joined the Texas Higher Education Coordinating Board in August 2006 and serves as the Deputy Assistant Commissioner in the Planning and Accountability Division. He assists in a range of activities for the State, including development of the funding formulas, review of proposed facilities projects, and generation of numerous mandated annual reports. Prior to joining the Coordinating Board, Gary served as chief business officer at Brazosport College for 22 years.

Gary has completed the 40 Hour Mediation Training at the Austin Dispute Resolution Center. He holds a Bachelor degree in Business and a Master degree in Education Administration from the University of Houston, and is a Certified Public Accountant.