

Report of the Negotiated Rulemaking Committee on Open Educational Resources Grant Program



January 2018

Background

Senate Bill 810, 85th Texas Legislature, Regular Session, relating in part to the use of open educational resources, amends Texas Education Code Chapter 61, Subchapter C, by adding Section 61.0668, Open Educational Resources (OER) Grant Program. Texas Education Code Section 61.0331 contains provision requiring the Texas Higher Education Coordinating Board ("THECB" or "Board") to engage in negotiated rulemaking when adopting policy, procedure, or rule relating to the allocation or distribution of funds.

The THECB engaged institution of higher education in developing these rules through the negotiated rulemaking (NRM) process in accordance with Texas Government Code Section 2008 (Negotiated Rulemaking Act).

Convening

In identifying persons likely affected by the proposed rule, a memo (see Appendix A) was sent August 9, 2017 via GovDelivery to all chancellors and presidents of Texas public universities, community colleges, Lamar State Colleges, and Texas State Technical Colleges soliciting their interest and willingness to participate in the NRM process, or to nominate a representative from their system/institution. From this effort, 21 individuals volunteered or were nominated to participate on the OER grant program negotiated rulemaking committee (NRMC).

The stakeholders who could be significantly affected by this rule and should be represented on this committee were identified as:

1. Public Community Colleges;
2. Public Universities;
3. Lamar State Colleges;
4. Texas State Technical Colleges; and
5. Texas Higher Education Coordinating Board.

Notice of Intent

On September 8, 2017 a Notice of Intent (NOI) to engage in NRM was published in the *Texas Register* for 10 days with a public comment deadline of September 18. The NOI (see Appendix B) included a list of stakeholders and proposed membership for the NRMC. The THECB received no comments.

On September 22, 2017 the Alternative Dispute Resolution (ADR) Coordinator appointed 13 committee members (see Appendix C) to represent the agency and stakeholders. Additionally, the ADR Coordinator appointed Mindy Nobles, Program Director for Academic Planning and Policy as facilitator for the NRMC, subject to the approval of the committee (see Appendix D)

Negotiated Rulemaking Committee Meeting

The NRMC met on November 1, 2017 at 9:30 a.m. in the Board Room of the THECB offices. The following topics were discussed and/or agreed to by the committee:

1. Introductions
2. Brief Overview of the Negotiated Rulemaking Process: What it is, What it's not
3. Brief 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
4. Consideration of Facilitator
5. Procedural Issues
 - A. Discussion and Consideration of Ground Rules
 - B. Discussion and Consideration of Definition of Consensus
6. Discussion of Draft Allocation Methodology for Open Educational Resources Grant Program
7. Consideration of Proposed Allocation Methodology for Open Educational Resources Grant Program

The full committee reached consensus on the proposed rule language.

Rule

On November 17 the proposed rule language with committee consensus was published in the *Texas Register* for 30 days with a public comment deadline of December 17. The THECB received the following comment by the posted deadline:

Comment: The Association of American Publishers suggested three changes to the proposed rules:

(1) The Board should require faculty to report the distribution of letter grades for the grant funded course as well as distribution of letter grades for sections of similar, non-grant funded courses at the institution.

(2) The cost comparison should take into account reduced prices that are available through inclusive access and other discount programs.

(3) The review criteria should also be revised to specifically require that the quality of the educational materials must be considered and that the materials should be aligned with the articulated educational goals of the course.

Staff Response: Staff disagreed with the suggested changes.

The first suggestion, to require faculty to report the distribution of letter grades for the grant funded course as well as distribution of letter grades for sections of similar, non-grant funded courses at the institution, would prove to be unwieldy and burdensome on those faculty and departments not directly receiving benefits from the OER Grant Program, and could potentially violate FERPA protections.

The second suggestion, to take into account reduced prices that are available through inclusive access and other discount programs, requires faculty to 1) know which courses use inclusive access materials, and 2) to have knowledge of the costs associated with such materials. It is unlikely that this information would be available to them and requiring awardees to report such data would be impractical.

Staff believes that the third suggestion, that the review criteria should also be revised to specifically require that the quality of the educational materials must be considered and that the materials should be aligned with the articulated educational goals of the course, is already addressed in 4.236(3). Applications will be evaluated, as per statute, by three qualified reviewers. The RFA is the appropriate place for language that will outline review guidelines. Reviewers can be asked to review each application for quality of proposed materials, alignment of proposed OER materials with the courses student learning objectives (SLOs), and other measures of quality as appropriate.

The NRMC agreed with the staff assessment and response.

The proposed rule language was considered and adopted (see Appendix E) at the January 25, 2018 Board meeting (Agenda Item VII-B) and the committee was disbanded.

Appendix A: Convening Memo



Texas Higher Education Coordinating Board



TO: Chancellors and Presidents of Texas Public Universities, Community Colleges, Lamar State Colleges, and Texas State Technical Colleges

FROM: Laurie A. Frederick, Convener, Negotiated Rulemaking

RE: Nomination for the Negotiated Rulemaking Committee on Open Educational Resources Grant Program

Senate Bill 810, 85th Texas Legislature, relating in part to the use of open educational resources, amends Texas Education Code (TEC) Chapter 61, Subchapter C, by adding Section 61.0668, Open Educational Resources Grant Program. TEC Section 61.0331 directs the Texas Higher Education Coordinating Board (THECB) to employ the negotiated rulemaking process described in Texas Government Code Chapter 2008 (Negotiated Rulemaking Act) when adopting rules relating to trustee funds allocation methodologies. Pursuant to the Act, I have been appointed to serve as the Convener for the negotiated rulemaking process.

The purpose of this memo is to solicit your willingness to participate on the **Negotiated Rulemaking Committee on Open Educational Resources Grant Program** or to nominate a designee from your system/campus for potential selection by the THECB's Alternative Dispute Resolution Coordinator. Please respond to me via email at Laurie.Frederick@theeb.state.tx.us by no later than 5 pm on August 25, 2017.

Targeted dates for convening the committee are October 23, 30, November 1, and 2 from 9:30 am to 4:30 pm at the THECB offices in Austin. We ask that you hold these dates on your calendar in the event you are selected to serve on this committee, or if you nominate someone from your system/institution, please share these dates with your nominee as well.

If you have questions or concerns, feel free to contact me at (512) 427-6446. Thank you in advance for your assistance in this matter.

Enclosures

c: Jacob Fraire, President, Texas Association of Community Colleges
Chief Academic Officers
Chief Instructional Officers
Institution Liaisons

- [SB+810.pdf](#)
- [TEC+61.0331%2C+Financial+Aid+%26+Trusteed+Funds.pdf](#)
- [Government+Code%2C+Section+2008%2C+NRM+Act.pdf](#)



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Appendix B: Notice of Intent

TEXAS HIGHER EDUCATION COORDINATING BOARD

NOTICE OF INTENT TO ENGAGE IN NEGOTIATED RULEMAKING--OPEN EDUCATIONAL RESOURCES GRANT PROGRAM

(Texas Public Universities, Community Colleges, Lamar State Colleges, and Texas State Technical Colleges)

Senate Bill 810, 85th Texas Legislature, Regular Session, relating in part to the use of open educational resources, amends Texas Education Code Chapter 61, Subchapter C, by adding Section 61.0668, Open Educational Resources Grant Program. The Texas Higher Education Coordinating Board ("THECB" or "Board") intends to engage in negotiated rulemaking to develop rules for the Open Educational Resources Grant Program allocation methodology for public universities, community colleges, Lamar State Colleges, and Texas State Technical Colleges and to develop procedures for THECB staff to verify the accuracy of the application of that allocation methodology. This is in accordance with the provisions of Texas Education Code 61.0331.

In identifying persons likely affected by the proposed rules, the Convener of Negotiated Rulemaking sent a memo via email to all chancellors and presidents at Texas public universities, community colleges, Lamar State Colleges, and Texas State Technical Colleges soliciting their interest and willingness to participate in the negotiated rulemaking process, or to nominate a representative from their campus.

From this effort, 21 individuals responded (out of approximately 149 affected entities) and expressed an interest to participate or nominated someone from their institution to participate on the negotiated rulemaking committee for Open Educational Resources Grant Program. The positions held by the volunteers and nominees include coordinators, team leaders, deans, directors, and professors. This indicates a probable willingness and authority of the affected interests to negotiate in good faith and a reasonable probability that a negotiated rulemaking process can result in a unanimous or, if the committee so chooses, a suitable general consensus on the proposed rule.

The following is a list of the stakeholders who are significantly affected by this rule and will be represented on the negotiated rulemaking committee for Open Educational Resources Grant Program:

1. Public Universities;
2. Public Community Colleges;
3. Lamar State Colleges;
4. Texas State Technical Colleges; and
5. Texas Higher Education Coordinating Board.

The THECB proposes to appoint the following 13 individuals to the negotiating rulemaking committee for Open Educational Resources Grant Program to represent affected parties and the agency:

Public Universities

Thomas Halling, Associate Professor, University Libraries, Texas A&M University
Demetrios Kazakos, Ex-Dean, Professor of Mathematics, Texas Southern University
Justin Louder, Associate Vice Provost, World Wide eLearning, Texas Tech University
Kris Helge, Assistant Dean, Libraries, Texas Woman's University
Ashley Purgason, Assistant Vice President, Strategic Initiatives, The University of Texas at Arlington
Owen Ellard, Senior Director, Libraries, The University of Texas Health Science Center at San Antonio

Public Community Colleges

Phillip Anaya, Digital and Open Education Resource Coordinator, Alamo Colleges
Carrie Gits, HLC Librarian and Open Educational Resources Team Leader, Austin Community College
Julie Penley, Interim Vice President, Research and Accountability; Associate Vice President, Instruction and Student Services, El Paso Community College
Jotisa Klemm, Director, Library Services (Southeast Campus), Tarrant County College District
Karla Bryan, Director, Learning Resource Centers, Trinity Valley Community College

Texas State Technical Colleges

Kyle Smith, Associate Vice Chancellor for Dual Enrollment and Innovation, Texas State Technical College

Texas Higher Education Coordinating Board

Rex Peebles, Assistant Commissioner, Academic Quality and Workforce

Meetings will be open to the public. If there are persons who are significantly affected by these proposed rules and are not represented by the persons named above, those persons may apply to the agency for membership on the negotiated rulemaking committee or nominate another person to represent their interests. Application for membership must be made in writing and include the following information:

- *Name and contact information of the person submitting the application;
- *Description of how the persons are significantly affected by the rule and how their interests are different than those represented by the persons named above;
- *Name and contact information of the person being nominated for membership; and
- *Description of the qualifications of the nominee to represent the person's interests.

The THECB requests comments on the Notice of Intent to engage in negotiated rulemaking and on the membership of the negotiated rulemaking committee for Open Educational Resources Grant Program. Comments and applications for membership on the committee must be submitted by September 18, 2017 to: Laurie A. Frederick, Convener, Negotiated Rulemaking, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, TX 78711, Fax: (512) 427-6127, Email: laurie.frederick@theccb.state.tx.us.

TRD-201703421
William Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: August 30, 2017

Appendix C: Committee Roster

Public Community Colleges

Carrie Gits, HLC Librarian and Open Educational Resources Team Leader, Austin Community College

Jotisa Klemm, Director, Library Services (Southeast Campus), Tarrant County College District

Julie Penley, Interim Vice President, Research and Accountability; Associate Vice President, Instruction and Student Services, El Paso Community College

Karla Bryan, Director, Learning Resource Centers, Trinity Valley Community College

Phillip Anaya, Digital and Open Education Resource Coordinator, Alamo Colleges

Public Universities

Ashley Purgason, Assistant Vice President, Strategic Initiatives, The University of Texas at Arlington

Demetrios Kazakos, Ex-Dean, Professor of Mathematics, Texas Southern University

Justin Louder, Associate Vice Provost, World Wide eLearning, Texas Tech University

Kris Helge, Assistant Dean, Libraries, Texas Woman's University

Owen Ellard, Senior Director, Libraries, The University of Texas Health Science Center at San Antonio

Thomas Halling, Associate Professor, University Libraries, Texas A&M University

Texas State Technical Colleges

Kyle Smith, Associate Vice Chancellor for Dual Enrollment and Innovation

Texas Higher Education Coordinating Board

Rex Peebles, Assistant Commissioner, Academic Quality and Workforce

Appendix D: Facilitator

Mindy Nobles

Program Director, Academic Quality and Workforce
Texas Higher Education Coordinating Board

Mindy Nobles has been employed with the Texas Higher Education Coordinating Board since 2013 and serves as Program Director in the Academic Quality and Workforce Division. She supervises the T-STEM Challenge Scholarship Program and performs administrative and grant management duties in the Carl D. Perkins Grant Program. Ms. Nobles also assists with Methods of Administration monitoring for compliance with Civil Rights in Vocational Education regulations of the U.S. Department of Education. Among her other duties, Ms. Nobles has served as key staff to field of study advisory committees.

Ms. Nobles has more than 20 years of experience in Texas community and technical college education and administration. At Northeast Texas Community College (NTCC), Ms. Nobles served as Associate Professor of English. In addition to her faculty responsibilities, Ms. Nobles served for three years as Director of Instruction for Humanities and as NTCC's Director of Distance Education ad interim for two years. Prior to coming to NTCC, Ms. Nobles supervised the Job Training Partnership Act (JTPA) Program at Kilgore College (KC) and later served as KC's grants writer. At Texas State Technical College–Marshall, Ms. Nobles served as Workforce Development Coordinator in the college's JTPA program.

Ms. Nobles holds an M.A. and B.A. in English from the University of Texas at Tyler and an A.A. in Liberal Arts from Kilgore College, graduating from all programs with highest honors. She completed doctoral coursework in Written Discourse at Texas A&M University–Commerce prior to joining the Coordinating Board. Ms. Nobles is certified in Dispute Resolution and is an active member of the Austin Association of Mediators.

Appendix E: Proposed/Adopted Rule

AGENDA ITEM VII-B

Consideration of adopting the Negotiated Rulemaking Committee's recommendation to the Board relating to the new Chapter 4, Subchapter O, Sections 4.230 – 4.238 of Board rules concerning the Open Educational Resources Grant Program

RECOMMENDATION: Approval

Background Information:

The intent of the new Chapter 4, Subchapter O, Open Educational Resources Grant Program, Sections 4.230 – 4.238 is to implement Senate Bill 810, passed by the 85th Texas Legislature, Regular Session, which requires the board to establish and administer a new grant program to encourage faculty at institutions of higher education to adopt, modify, redesign, or develop courses that use only Open Educational Resources (OER). The rule amendments proposed for this section were reviewed and approved by the Negotiated Rulemaking Committee on Open Educational Resources Grant Program on November 1, 2017.

Dr. Rex C. Peebles, Assistant Commissioner for Academic Quality and Workforce, will present this item and be available to answer questions.

Date approved by the Commissioner for Publication in the *Texas Register*: November 6, 2017.

Date published in the *Texas Register*: November 17, 2017.

The 30-day comment period with the Texas Register ended on: December 17, 2017.

One comment was received from the Association of American Publishers (AAP).

COMMENT: AAP suggested three changes to the proposed rules, affecting 4.236 (Review Criteria) and 4.237 (Reporting Criteria).

(1) The Board should require faculty to report the distribution of letter grades for the grant-funded course as well as distribution of letter grades for sections of similar, non-grant funded courses at the institution.

(2) The cost comparison should take into account reduced prices that are available through inclusive access and other discount programs.

(3) The review criteria should also be revised to specifically require that the quality of the educational materials must be considered and that the materials should be aligned with the articulated educational goals of the course.

STAFF RESPONSE: Staff disagrees with the suggested changes to proposed rules.

The first suggestion, to require faculty to report the distribution of letter grades for the grant-funded course as well as distribution of letter grades for sections of similar, non-grant funded courses at the institution, would prove to be unwieldy and burdensome on those faculty and departments not directly receiving benefits from the OER Grant Program, and could potentially violate FERPA protections.

The second suggestion, to take into account reduced prices that are available through inclusive access and other discount programs, requires faculty to 1) know which courses use inclusive access materials, and 2) to have knowledge of the costs associated with such materials. It is unlikely that this information would be available to them and requiring awardees to report such data would be impractical.

Staff believes that the third suggestion, that the review criteria should also be revised to specifically require that the quality of the educational materials must be considered and that the materials should be aligned with the articulated educational goals of the course, is already addressed in 4.236(3). Applications will be evaluated, as per statute, by three qualified reviewers. The RFA is the appropriate place for language that will outline review guidelines. Reviewers can be asked to review each application for quality of proposed materials, alignment of proposed OER materials with the courses student learning objectives (SLOs), and other measures of quality as appropriate.

Comments and staff response were sent to the Negotiated Rule Making Committee. The Committee agreed with the staff assessment and response.

Legal Review:

Approved by the Office of General Counsel

 Date: 1/8/18

01/18

Chapter 4. Rules Applying to All Public Institutions of Higher Education in Texas
Subchapter O. Open Educational Resources Grant Program

4.230 Purpose
4.231 Authority
4.232 Definitions
4.233 Eligibility
4.234 Grant Application Procedures
4.235 Award Amounts
4.236 Review Criteria
4.237 Reporting Criteria
4.238 General Information

4.230 Purpose

The purpose of this subchapter is to implement rules to establish the Open Educational Resources (OER) Grant Program, under which the Board awards grant payments to eligible institutional faculty employed by a Texas higher education institution, as defined in Texas Education Code 61.003(8), to adopt, modify, redesign, or develop one or more courses using only open educational resources.

4.231 Authority

The authority for this subchapter is found in Texas Education Code, Chapter 61, Subchapter 61.0668, which provides the board with the authority to adopt rules to administer this grant program.

4.232 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the text clearly indicates otherwise.

(1) Board or THECB – The Texas Higher Education Coordinating Board.

(2) Commissioner – The Commissioner of Higher Education.

(3) Eligible Applicant – a faculty member as defined in Texas Education Code 51.917 or group of faculty currently employed at an institution of higher education, as defined in Texas Education Code 61.003(8).

(4) Institution of Higher Education – Any public technical institute, public junior college, public senior college or university, or medical or dental unit, or other agency of higher education as defined by Texas Education Code, 61.003(8).

(5) Open Educational Resources (OER) – A teaching, learning, or research resource that is in the public domain or has been released under an intellectual property license that permits the free use, adaptation, and redistribution of the resource by any person. The term may include full course curricula, course materials, modules, textbooks, media, assessments,

software, and any other tools, materials, or techniques, whether digital or otherwise, used to support access to knowledge.

(6) Request for Applications (RFA) – A type of solicitation notice in which the THECB announces available grant funding, sets forth the guidelines governing the program, provides evaluation criteria for submitted applications, and provides instructions for eligible entities to submit applications for such funding. The guidelines governing the program may include a Letter of Intent, eligibility requirements, performance expectations, budget guidelines, reporting requirements, and other standards of accountability for this program.

4.233 Eligibility

Faculty employed by a Texas public institution of higher education are eligible to apply for a grant under this program

4.234 Grant Application Procedures

To qualify for funding consideration, each eligible applicant must submit an application to Board staff. Each application must:

- (1) Be submitted electronically in a format specified in the RFA; and
- (2) Adhere to the grant program requirements contained in the RFA; and
- (3) Be submitted with proper authorization on or before the day and time specified by the RFA.

4.235 Award Amounts

(1) The maximum amount of funding available to the program is dependent on the legislative appropriation for each biennium. Award levels and the maximum number of awards will be specified in the RFA.

(2) The Board shall delegate to the Commissioner general authority to award all OER grant program grants after receiving recommendations from qualified reviewers.

(3) Award criteria may be adjusted by Board staff to best fulfill the purpose of a single request for applications if those adjusted award criteria are included in the request for applications.

4.236 Review Criteria

Applicants shall be selected for funding based on requirements and award criteria provided in the RFA. Award criteria will include, but may not be limited to, consideration of the following factors:

- (1) The number of students projected to annually enroll in the course;
- (2) The projected amount of money saved by a student due to the use of OER in the course; and
- (3) The evaluation of the application by three selected qualified reviewers of the curriculum of the course, as determined by Board staff.

4.237 Reporting Criteria

Grantees must file reports with Board staff as required by the RFA for each applicable course for each of the four semesters immediately following OER implementation. Grantees will provide information that includes, but is not limited to the following:

- (1) The number of students who have completed the course;
- (2) An estimate of the amount of money saved by a student due to the use of open educational resources in the course;
- (3) A description of the open educational resources used in the course;
- (4) The number of other faculty members, if any, who adopted the curriculum of the course associated with the grant; and
- (5) Any other information required by the RFA.

4.238 General Information

(1) Cancellation or Suspension of Grant Solicitations. The Board has the right to reject all applications and cancel a grant solicitation at any point.

(2) Notice of Grant Award (NOGA). Before release of funds, the successful applicants must sign a NOGA issued by Board staff.