



Texas Association of School Boards

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October 29, 2012

The Honorable Florence Shapiro

Senate Committee on Education

P.O. Box 12068, Capitol Station

Austin, Texas 78711

RE: Senate Bill 8 (SB 8), relating to the flexibility of the board of trustees of a school district in the management and operations of public schools.

Dear Senator Shapiro:

The Texas Association of School Boards appreciates the many hours that you and your colleagues spent crafting legislation to assist school districts during last session's challenging fiscal circumstances. We appreciate the opportunity to give you our view of how this legislation has impacted school districts since then. SB 8, which passed during the 82nd Legislature, 1st Called Session, was enacted to assist school district administrations with managing resources in the face of unprecedented cuts in education. In particular, a large amount of SB 8 was dedicated to helping school districts save jobs, particularly those of educators. Now that we are nearly 1 ½ years out from when SB 8 passed, we can make some observations about the success, or lack thereof, of this legislation.

First and foremost, because SB 8 was passed during the special session and it did not take immediate effect. SB 8 did not become effective until September 28, 2011, which is well into the start of the school year. This created a number of technical and timing issues. For example, a past commissioner decision said that districts may not unilaterally reduce a contract employee's pay unless specific notice is provided 45 days before the beginning of instruction, i.e., the beginning of July.¹ To further put this in perspective, you may recall that this legislation was not signed by the governor until July 19, 2011. Accordingly, TASB is unaware of any district using SB 8 salary reduction provisions for the 2011-12 school year.

Similarly, furloughs were impacted by the late effective date of this bill. There are many pre-requisites prior to a school district instituting a furlough but one is that the commissioner certifies that school districts' per-WADA funding levels are below those of 2010-11 on July 1st of each year. As the bill was not effective until September 2011, the commissioner was not required to make such certifications for the 2011-12 school year. Additionally, to our knowledge, the commissioner has not made this determination for this current school year.

TASB is unaware of school districts using either SB 8 furloughs or salary reductions authority for the either school year of the biennium. If we put aside the fact that the commissioner has not made a determination to allow furloughs for the 2012-13 school year, we might guess at another factors that has allowed schools to avoid using these flexibilities. This factor is time – time to explore and use other options such as tax rate elections, not replacing retiring/leaving staff, offering incentives to staff to resign, campus consolidations delayed campus openings, and other options.

On another point, SB 8 required the commissioner to “adopt minimum standards concerning school district financial conditions that must exist for declaration of a financial exigency by the board of trustees of the district.” Prior to SB 8, this declaration was within the sole authority and discretion of a local school board. Pursuant to language contained in SB 8, the commissioner adopted a final rule in May 2011. In our comments to the commissioner on this rule, we stated:²

¹ *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009)

² Texas Association of School Boards, “Legislative Report, May 4, 2012,

<http://www.tasb.org/legislative/legislative/reports/2012/2012-05-04/0exigency.html>, Accessed October 29, 2012.

The financial exigency rule, as proposed, does not help guide school districts, but rather places financial exigency out of reach of all but the most financially challenged school districts. This is peculiar given the plain reading of the financial exigency rule amendment, its attachment to the school flexibility bill, the statement of the amendment's sponsor before the legislative body, and the definition of "exigency", which simply is "a state of affairs that makes urgent demands." Exigency does not demand that a district be on the brink of insolvency, only that current or foreseen negative financial circumstances demand near-term action.

However, the financial exigency rule, as proposed does:

- Create a new definition of financial exigency that is not found in law or current practice;
- Contain standards and thresholds that are arbitrary and unrealistic; and
- Place the commissioner in the role of determining the presence or absence of financial exigency, rather than help guide school districts in making that determination.

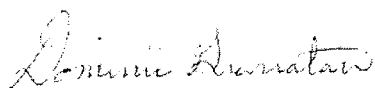
Unfortunately, the commissioner was not persuaded by our arguments regarding his proposed rule and ultimately adopted a rule that is very restrictive. TASB is aware of but five schools that are attempting to declare financial exigency under the adopted rule. While we all hope that no school would ever need to declare financial exigency this number seems low compared to recent history and given recent changes in funding. Additionally, it is difficult to envision these schools being granted financial exigency for any of the rule justifications other than the justification that reads, "any other circumstances approved in writing by the commissioner" standard. This does not represent additional flexibility for schools; instead it is the near removal of any flexibility for schools by consolidating these decisions with the commissioner.

Finally, there were other flexibilities several of which are spoken to below:

- Midyear terminations heard by board or independent hearing examiner – predicated on mid-year terminations as a result of financial exigency. Ability to declare financial exigency greatly impacted by commissioner's rule thus this law has limited application.
- Termination of continuing contracts during a reduction in personnel – Prior law based the reduction on reverse order of seniority, but SB 8 removed this requirement allowing districts to retain best personnel regardless of seniority. Continuing contracts have fallen out of use in recent years but in areas where this might be an issue, this is a welcome flexibility
- Notice of nonrenewal changed for 45 days to 10 days prior to the last day of instruction. This law was not used during the 2011-12 school year as a result of possible litigation and contract issues due to the enactment date of SB 8. This will not be an issue at the end of the 2012-13 school year and we expect most school districts to use this flexibility.
- Fitnessgram limited to students enrolled in a course for physical education credit. – As the bill was being debated some schools polled by TASB reported savings in the thousands. While this amount may be considered small, it's a significant step towards justifying that every cent is spent in its highest value.

In closing, I've attached an article that was printed in TASB's Lone Star publication as a way to flesh out some of the details mentioned briefly in this letter. If I can provide any additional information don't hesitate to contact me at 512-478-4044.

Sincerely,



Dominic Giarratani
Assistant Director

CC: Chairman Dan Patrick, Senate Committee on Education
Members, Senate Committee on Education

The New Normal

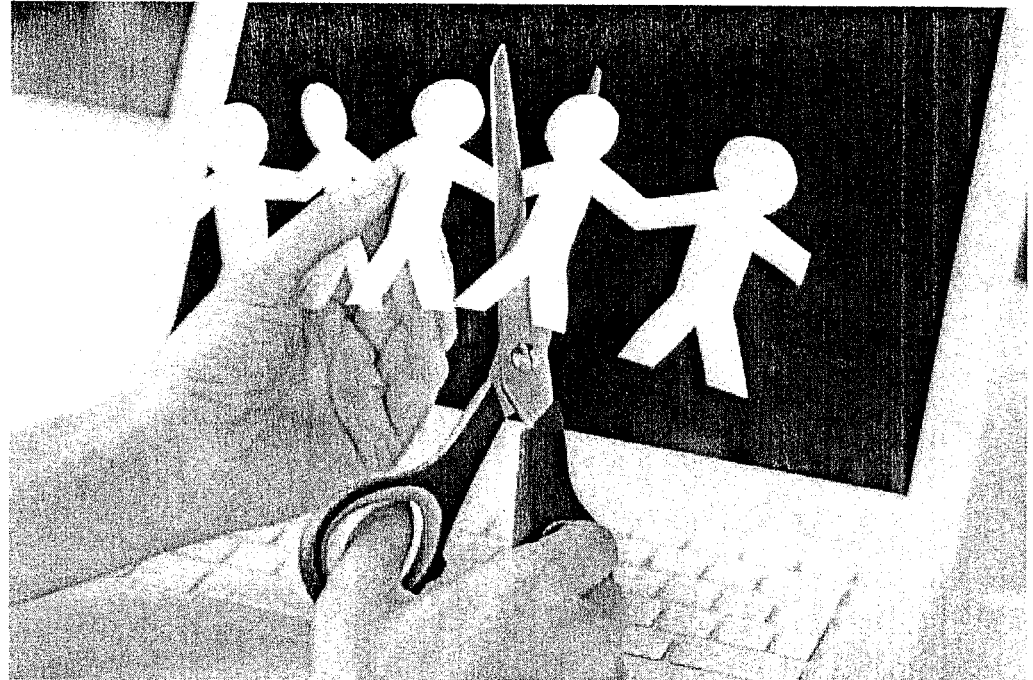
Senate Bill 8 Offers New Flexibilities for Reducing Personnel Costs

by Holly Claghorn

One of the hallmarks of the special legislative session this year was Senate Bill 8 (SB 8), a bill providing flexibilities for school district management. SB 8 made a number of significant changes to the laws affecting school district employees. This article provides an overview of the provisions of SB 8 that modify nonrenewal and termination procedures, permit salary reductions, and provide for furloughs of employees on Chapter 21 (probationary, continuing, or term) contracts. Notably, SB 8:

1. Changes the notice deadline for nonrenewal of term contracts or end-of-year termination of probationary contracts and specifies procedures for delivery of such notices
2. Permits board hearings for mid-contract termination of probationary, term, and continuing contracts due to financial exigency
3. Permits alternative hearing procedures for nonrenewal of term contracts for any reason in larger districts
4. Permits widespread salary reductions under certain conditions
5. Permits the implementation of furloughs under certain conditions

SB 8 takes effect on September 28, 2011. However,



districts will not be able to begin implementing all of the bill's provisions immediately due to practical constraints. Issues related to the effective date and implementation of SB 8's flexibility are addressed in turn below.

Nonrenewal Notices

First, SB 8 changes the deadline for a district to provide notice of nonrenewal of a term contract or notice of end-of-year termination of a probationary contract. Current law requires a district to deliver these notices by 45 days before the last day of instruction. Tex. Educ. Code §§ 21.103(a), .206(a). SB 8 moves this deadline to 10 days before

the last day of instruction. Tex. Educ. Code §§ 21.103(a), .206(a).

SB 8 also specifies a process for delivering these notices. Current law does not address notice delivery. Under SB 8, the notice must be hand-delivered on the campus where the employee is employed. Tex. Educ. Code §§ 21.103(a), .206(a), .207(a). If the employee is not present on the campus on the date that hand-delivery is attempted, the district must send the notice by prepaid certified mail or express delivery services (e.g., UPS or FedEx) to the employee's address of record with the district. Notice that is postmarked on or before the

10-day deadline is considered timely. Tex. Educ. Code §§ 21.103(a), .206(a).

Effective date: Most school attorneys agree that these statutory changes are procedural in nature and can be implemented in the spring of 2012 without impairing teachers' contract rights. Nevertheless, for one-year contracts expiring in the spring of 2012, some districts may wish to give 45 days' notice to avoid any argument about the effective date of this change.

Board Hearings on Financial Exigency

SB 8 authorizes board hearings for the mid-contract termination of probationary,

continuing, or term contracts due to financial exigency.

Under current law, a proposed mid-contract termination for any reason must be heard by an independent hearing examiner (IHE) appointed by the Texas Education Agency (TEA). Tex. Educ. Code § 21.251(a). SB 8 specifies that, if termination is based on a financial exigency declared under new Texas Education Code Section 44.011, the employee is entitled to a hearing "in the manner provided for nonrenewal of a term contract." Tex. Educ. Code §§ 21.1041, .159. Term contract nonrenewal cases are heard by the board or, at the board's option, by an IHE. Tex. Educ. Code § 21.207. Thus, SB 8 permits a hearing on a proposed contract termination due to financial exigency to be heard by the board or by an IHE, as determined by the board.

The flexibility to conduct a board hearing is tempered by new restrictions on a board's ability to declare a financial exigency. SB 8 adopts new Texas Education Code Section 44.011, specifically addressing declaration of financial exigency. Section 44.011 permits a board to adopt a resolution declaring a financial exigency. A declaration expires at the end of the fiscal year in which it was made unless the board adopts a resolution before the end of the fiscal year declaring a continuation for the following fiscal year. A board must provide notice to the commissioner each time it adopts a resolution declaring a financial exigency. Tex. Educ. Code § 44.011(a), (d).

In the past, boards have had discretion to determine the existence of financial exigency in their individual districts. SB 8 limits this discretion by requiring the commissioner by rule to specify minimum standards concerning the financial

conditions that must exist for a board to declare a financial exigency. The bill specifies that the commissioner may use emergency rulemaking for this purpose. Tex. Educ. Code § 44.011(e)-(f).

Effective date: The new hearing procedures discussed above require a declaration of financial exigency under Section 44.011, which in turn requires rules from the commissioner. Accordingly, districts will not be able to take advantage of these new procedures until the commissioner adopts minimum standards for declaring a financial exigency.

Nonrenewal Hearings

SB 8 authorizes the use of alternate hearing procedures for term contract nonrenewals in districts with an enrollment of at least 5,000 students. Tex. Educ. Code § 21.207(b-1). Again, current law requires that nonrenewal cases be heard by the board or, at the board's option, by an IHE appointed by TEA. Tex. Educ. Code § 21.207. SB 8 creates a third option in these larger districts: The board may appoint a licensed attorney to conduct the hearing and issue a recommendation. Tex. Educ. Code § 21.207(b-1).

The attorney may not be employed by a district, and neither the attorney nor the attorney's law firm may be serving as an agent or representative of a district, a teacher in a dispute between a district and a teacher, or an organization of school employees, school administrators, or school boards. SB 8 specifies procedures for conducting the hearing, preparing the record, considering the designee's recommendation, and making a final decision by the board. Tex. Educ. Code § 21.207(b-1).

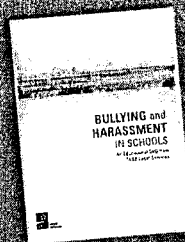
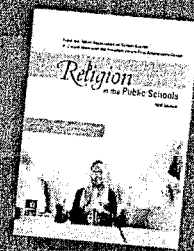
Effective date: This provision applies beginning with the

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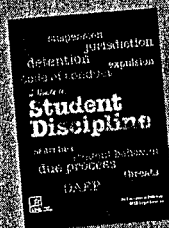
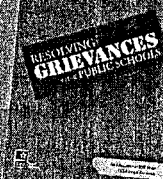
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nonrenewal of term contracts at the end of the 2011-12 school year. As stated above, most school attorneys agree that this procedural change does not impair teachers' rights under their current contracts. Nevertheless, districts choosing this option in 2012 should consult with their school attorneys about this matter.

Salary Reductions

SB 8 repeals limits on a district's ability to reduce salaries but requires that widespread reductions apply across-the-board and establishes a new process for salary reductions.

SB 8 also repeals the salary protections at Texas Education Code Section 21.402(d). Section 21.402(d) had been adopted in House Bill 3646 in the 2009 legislative session. House Bill 3646 mandated pay raises for employees on the state minimum salary sched-

ule—classroom teachers and full-time librarians, counselors, and school nurses, as well as full-time speech pathologists. House Bill 3646 also specified, through Section 21.402(d), that a district could not reduce the salary of any of these employees below 2010-11 levels for as long as the employee was employed in the same district.

The repeal of Section 21.402(d) clears the way for reduction of salaries of individual employees. For group salary reductions, however, SB 8 adopts two new requirements. First, new Section 21.4032 requires that *widespread salary reductions* in teacher salaries be applied to district administrators and other professional employees in the same percentage. A *widespread salary reduction* is a reduction in the annual salaries paid to classroom teachers in a district that is based primarily on district financial conditions rather than

on teacher performance. Tex. Educ. Code § 21.4032. Second, before a district can adopt a salary reduction proposal, the district must follow a special process. Tex. Educ. Code § 21.4021. This process is discussed below, under furloughs.

Effective date: A district may not unilaterally reduce a contract employee's pay below the previous year's level unless the district provides the employee with specific, formal notice before the penalty-free resignation date (PFRD). *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009). Because the PFRD has passed for the 2011-12 school year, most districts will not be able to take advantage of salary reduction flexibility until the 2012-13 school year. A few districts may have already provided formal notice of a salary reduction in anticipation of a change in the law. If your dis-

trict did so, consult with your school attorney about whether to proceed in light of SB 8.

Furloughs

SB 8 permits districts to reduce the work schedule of contract employees and reduce pay accordingly. New Texas Education Code Section 21.4021 allows a district to furlough contract employees for up to six days if the commissioner certifies that the district's state and local funding for a school year will be less than 2010-11 levels.



Section 21.4021 imposes a number of restrictions on furloughs. A furlough may not reduce the instructional year below 180 days, and all contract personnel must be furloughed for the same number of days. An educator may not use personal, sick, or any other paid leave while the educator is on furlough. A district may reduce pay in proportion to

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the number of furlough days, and any reduction in pay must be equally distributed over the course of an employee's contract. If a district adopts a furlough program after the PFRD, a teacher who subsequently resigns is not subject to sanctions against his or her certification for abandonment of contract. Tex. Educ. Code § 21.4021.

Process before furlough or other salary reduction: SB 8 establishes a special process that a board must follow before implementing a furlough or other salary reduction proposal. Tex. Educ. Code § 21.4022.

First, the district must use a process to develop the program or proposal that includes involvement of the district's professional staff. Second, the board must hold a public meeting. At the meeting, the board and district administration must present information regarding options considered for managing the district's available resources, including consideration of a tax rate increase and use of the district's available fund balance.

The board and administration must explain how the district intends, through a furlough or other salary reduction, to limit the number of employees who will be discharged or whose contracts will be nonrenewed.

If the district is considering a furlough, the explanation must state the specific number of furlough days proposed.

Finally, the board and administration must provide information regarding the local option residence homestead exemption. The public and employees must be provided an opportunity to comment at the meeting.

A board's decision to implement a furlough program is final and may not be appealed. Tex. Educ. Code § 21.4022.

Effective date: A board may adopt a furlough program only if the commissioner certifies that the district's state and local funding per student will be less than 2010-11 levels. Tex. Educ. Code § 21.4021(a). New Texas Education Code Section 42.009 requires the commissioner to make a determination as to funding levels by July 1 of each year. Section 42.009 also sets forth the methodology the commissioner is to use to make the determination. Tex. Educ. Code § 42.009(b).

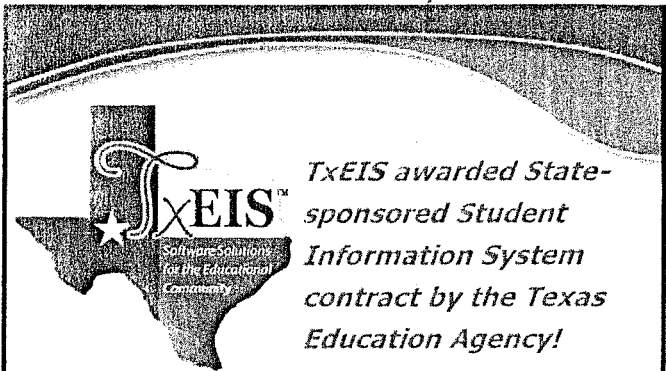
The commissioner was not able to make a funding level determination under Section 42.009 for 2011-12 because the bill did not take effect by July 1 of this year. Moreover, the PFRD has passed, restricting districts' ability to unilaterally reduce salaries of contract personnel in conjunction with a furlough. For these reasons, districts will not be able to take advantage of the furlough option created by SB 8 until the 2012-13 school year, at the earliest.

Conclusion

SB 8 lived up to its promise of increasing school district flexibility. Streamlined hearing processes, repeal of salary protection, and a new furlough option will provide valuable tools for responding to the funding crisis.

However, furloughs and salary reduction flexibility will not apply until the 2012-13 school year, at the earliest. Moreover, districts will need to comply with special procedures before using these new tools. For more information about SB 8 or any other bills from this legislative session, call your school attorney or the TASB Legal Line at 800.580.5345. ★

Holly Claghorn is a senior attorney with TASB Legal Services.



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