

Cost-Saving Measures & Reduction in Force

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Cost-Saving Measures

In the current financial climate many school districts are looking for ways to reduce costs and save money. With personnel expenses accounting for approximately 80% of most school district budgets, significant cost savings will likely require some form of reduction in personnel costs. School districts must evaluate all available options for reducing personnel expenses in order to determine which method or combination of choices works best given their specific community needs, the real cost savings, and the legal risks, if any, that come with these options. The choices discussed below are in no particular order of importance or difficulty. All have advantages and disadvantages, and all need to be considered based on individual district needs and circumstances.

A. Other Cost-Saving Measures

1. Freezing / Reducing Pay for “Teachers”

A school district may consider freezing pay for classroom teachers, librarians, counselors, and nurses so long as they are paid not less than the minimum monthly salary specified by state law. Tex. Educ. Code § 21.402; 19 T.A.C. § 153.1021.

- (a) **Raises Not Required.** Except in the case of school districts that do not pay any amount above the state minimum salary schedule, a school district is not required to give a pay raise, even if it has traditionally done so.
- (b) **Reducing Pay.** A contract employee’s pay may be reduced the following school year because of changes in schedule, contract length, or assignment, as long as the employee is provided prior notice of the reduction, and that notice is given with enough time before the penalty-free resignation date so that the employee has time to consider whether to accept the new pay or to resign without penalty. According to cases decided by the Commissioner of Education, a school district lawfully cannot reduce total compensation to a level lower than the teacher would have received under the previous year’s compensation package if at the time of notice, the teacher cannot unilaterally withdraw from the contract under state law. After the penalty-free resignation date, a school district is obligated to pay educators at least the amount they received the previous year, since that is what they reasonably relied on when deciding to remain with the district.

Remember, pay reductions greater than 20% may entitle the employee to unemployment compensation.
- (c) **Reducing Elements of Pay (Stipends, Etc).** A school district may consider reducing or discontinuing payment of local stipends or supplements for

specific assignments (e.g., math, science, extracurricular activities). An educator is entitled to receive total pay that is at least as much as the previous year. An educator is not, however, entitled to the previous year's level of any single component of compensation such as supplemental duty stipends or local supplements.

- (d) Widespread Salary Reductions.** A “widespread salary reduction” is one in which the annual salaries paid to classroom teachers are reduced based primarily on district financial conditions rather than on teacher performance. If this occurs, the district must also reduce the annual salaries paid to district administrators and other professional employees by the same percentage.

Before implementing a widespread salary reduction, the district must first involve the instructional staff in developing the salary reduction proposal and second, it must conduct a public meeting where school employees are given an opportunity to express opinions about the salary reduction, and the board and administration must present information regarding options considered for managing the district's resources, including a tax rate increase and use of any fund balance; how the salary reduction will help limit the number of personnel who may be discharged or nonrenewed; and the local option residence homestead exemption.

2. Freezing / Reducing Pay for Other Employees

A district can freeze or reduce pay of at-will employees as long as each individual is earning at least the minimum wage under federal law. Non-certified contract personnel may have their salary reduced between contract years or as established in the contract.

3. Schedule Changes

Employees' schedules or work calendars could be considered for reduction. For example, changes can be made to schedules for 11-12 month employees by a few weeks or a few days. Such changes will need to be consistent with the district's contracts. For contracts that do not specify days or months, the employee should be notified with enough time before the penalty-free resignation date so that he or she has a meaningful opportunity to seek employment elsewhere.

4. Student-Teacher Ratio

In some districts, it is feasible to increase student to teacher ratios, except in cases where the maximum ratios have already been met. Keep in mind that a district must maintain an average ratio of 1 teacher for each 20 students in average daily attendance and follow all other laws regarding class ratios.

5. Reduce Health Insurance Benefit Payments

Past practices of providing salary supplement, health insurance coverage or other benefits does not, standing alone, bind a district. The reduction of health insurance payments can occur even after the penalty-free resignation date, unless otherwise specified in an employment contract. The standard TASB contracts and most school district contracts do not contain such specifications.

The portion (dollar amount) of health insurance benefits a teacher is required to pay is not compensation, but the portion of benefits paid by a district is compensation.

6. Retire-Rehire Employees

For retirees working a TRS-covered position who retired after September 1, 2005, school districts are required to pay to TRS mandatory contributions and, if applicable, a TRS health insurance surcharge. In order to reduce this cost, a school district may want to pass on a portion of these contributions and surcharge to the retiree. Because there can be a legal risk with passing on such costs, a school district should consult with its legal counsel.

7. Resignation Incentives

Most resignations and retirements that are to be effective at the end of a school year do not occur until late in the spring, even after the employee has signed a contract. In order to encourage employees who are planning to leave anyway to provide advance notice and thus help administrators make staffing and planning decisions earlier, the district could offer an early-notice incentive payment.

If offered, early notification incentives may be available to any employee category in which the district may be overstaffed or to all employees if the staff reductions are needed throughout the district. The incentive program should be communicated to all staff to whom it applies, and it should be clear that the notification is only for resignations effective at the end of the school year. Notices to employees should specify that the amount is subject to appropriate deductions.

By law, school districts cannot offer or provide a financial or other incentive to encourage an employee to retire. Tex. Educ. Code § 22.007. Therefore, school districts must exercise caution when identifying which groups of employees are eligible for the early resignation notice incentive. If in doubt, seek legal advice to see if the incentive would constitute an illegal retirement incentive.

8. Severance Agreements

In lieu of implementing a RIF, some school districts may wish to offer a severance agreement to those individuals that would otherwise be subject to the RIF. A severance agreement is a legal contract between the school and an employee that specifies the terms of an employee's separation from employment. Generally the employee receives a payment and other benefits in exchange for resigning from employment and waiving any employment rights or existing claims against the employer. There are also several issues involving the employees possible entitlement to unemployment benefits. Because of the numerous legal issues at play, severance agreements should be reviewed by legal counsel.

9. Hiring Freeze for Vacancies

Many personnel reductions can be addressed through attrition by not filling vacancies.

10. Eliminate Extra Planning Periods

In some districts where teachers have two planning periods, one can be eliminated so that each teacher can be assigned an extra class. Tex. Educ. Code § 21.404.

11. Furloughs

School boards may adopt a furlough program, by policy, and reduce the number of days of service otherwise required by statute by no more than 6 days if the Commissioner of Education certifies that the district will receive less state and local funding per student than was received for the 2010-2011 school year.

Before initiating a furlough, the school board must develop a furlough policy. What is more, the district must also follow a specific process to develop a furlough program, which includes involving instructional staff and conducting a public meeting.

There are a variety of days which cannot be considered as furlough days and restrictions placed on application of these days which should be reviewed by legal counsel.

Because this new law did not take effect until after the July 1st deadline for the Commissioner to issue determinations on funding levels, a school district will not be able to take advantage of the furlough option until the 2012-2013 school year.

REDUCTION IN FORCE

Reduction in force or RIF is a phrase used to describe a layoff or reduction in staff by a school district due to either a financial exigency or program change. The decision to undergo a RIF is not a decision that is made lightly by a school district nor is it a process that is easily accepted by employees since it means the loss of a job. Even so, with thoughtful planning and careful execution, a RIF can be implemented successfully to achieve significant savings.

A. Reduction in Force Generally

1. RIF Nonrenewal or RIF Termination

A RIF is predicated on either a program change or a financial exigency. The process of determining which employees will be subject to layoff as part of the RIF is largely determined by local policy and procedures. Once the affected individuals have been identified through application of the RIF policy, the typical termination or nonrenewal procedures outlined in Chapter 21 of the Education Code will apply. Thus, there can be a RIF termination that takes the form of a discharge during the contract term or a RIF that takes the form of a nonrenewal at the end of the contract term. Although most RIFs result in nonrenewal of the employee's contract, a termination RIF can be an alternative when waiting until the end of a contract is not a viable option, such as where the employee is under a multiple-year contract. The primary difference is the procedure utilized to end the contract.

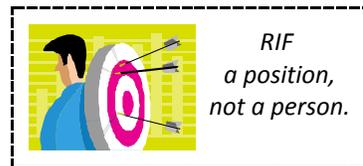
Because a RIF is a reason for nonrenewal or termination, it carries its own costs, including the cost of a full due process hearing that may be requested by affected employees. Affected employees have the right to a hearing to challenge the basis for the RIF, such as whether there truly is a financial exigency or need for a program change. These RIF-based nonrenewal or termination hearings are a significant investment of time and financial resources. Because of that, a school district should consider other actions that can significantly cut costs for personnel (such as those discussed in Part One of this handout) without triggering potential nonrenewal or termination hearings.

With the RIF process being primarily dictated by local school district policy, the vast majority of RIF hearings involve challenges to the way in which the employee was selected and claims that the RIF policy was not precisely followed. It is therefore

vitaly important to thoroughly understand the RIF process and faithfully follow the RIF procedures outlined in local policy.

2. RIF Cannot Be a Sham

Regardless of the type of RIF being conducted, a RIF is not based on an individual's performance. It is about the position itself rather than the person.



Unfortunately, employers frequently look to RIFs because documentation is lacking, and there is no other way to get rid of the troublesome employee. Do not use a RIF as a sham to target a marginal or difficult employee. Many RIF cases are lost that way.

B. Steps to a Successful RIF

1. Become Familiar with the RIF Policy

In the past there was one RIF policy to consider: DFF (local). Recently, however, TASB separated the RIF procedures into two discrete policies as part of Update 92:

- DFFA (local) describes RIFs arising from financial exigency, and
- DFFB (local) outlines the procedures for RIFs based on program change.

Those districts considering a RIF in the Spring of 2012 should consult with legal counsel about the advisability of adopting the new RIF policy to be effective immediately. Given the anticipated legal arguments from teacher representatives that the policy update constitutes a material change to the employment contract, it may be best to adopt the policy changes for prospective school years.

Involve the Campus-Level Planning Committee. According to the Commissioner of Education, a school district must provide an opportunity for the campus-level planning and decision-making committee to be heard when the Board is considering a RIF that would affect the curriculum, staffing patterns, or school organization on the campus. The district must follow policy BQB (legal) and provide the committee with notice and then consult with the committee when planning a

2. Identify Whether a Financial Exigency or Program Change Warrant a RIF

For most school districts, a RIF is permitted for purposes of financial exigency or program change. Thus, the first step for a successful RIF is for the school board to determine if a program change or financial exigency requires nonrenewal or termination of one or more employees. Before beginning the process, it is important to know what the terms program change and financial exigency mean and the legal requirements and ramifications of each.

- (a) **Program Change.** Look to the new model DFFB policy for your District's definition of "program change". contained in Update 92 suggests the following definition of program change; check the school district's policy. "Program change" shall mean any elimination, curtailment, or reorganization of a program, department, school operation, or curriculum offering, including, for example, a change in curriculum objectives, a modification of the master schedule; the restructuring of an instructional delivery method; or a modification or reorganization of staffing patterns in a department, on a particular campus, or district wide. A program change may be due to, for example, a redirection of resources; efforts to improve efficiency; a change in enrollment; a lack of student response to particular course offerings; legislative revisions to programs; or a reorganization or consolidation of two or more individual schools, departments, or school districts.

Luckily, a "school district is always free to change its organizational structure as it seeks to increase its efficiency." *Wassermann v. Nederland Indep. Sch. Dist.*, Dkt No. 171-R1-784 (Comm'r Dec. 1988).

- (b) **Financial Exigency.** In the past school districts had discretion to define financial exigency by local policy. Senate Bill 8 limits that local control by requiring the Commissioner of Education to establish minimum standards for declaring a financial exigency. The Commissioner issued emergency rules on November 21, 2011 which have been proposed as formal rules after the public comment period ends on January 9, 2012. The rules make declaring a financial exigency a more onerous and difficult proposition for districts than in the past.

Under the proposed rules, "financial exigency" occurs when "the financial position of a school district as a whole is such that the financial resources of the school district are insufficient to support existing academic programs or the school district is unable to finance the full compensation of staff for the current or succeeding fiscal year." 19 T.A.C. § 109.2001.

A financial exigency can only be declared by the board of trustees under one or more of the following circumstances:

- (1) A decrease of more than 20% "unassigned" General Fund per student in WADA over the past two years or a projected reduction of 20% compared to the current year;
- (2) A more than 10% decline in enrollment over the past 5 years;
- (3) A decrease of more than 10% General Fund per student in WADA or a projected reduction of 10% compared to the current year;

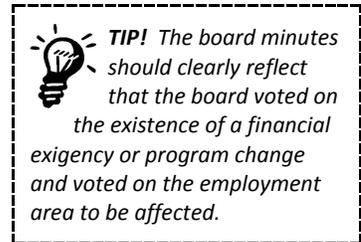
- (4) An unforeseen natural disaster requiring significant expenditures for repair or remediation in excess of 15% of the current year General Fund budget;
- (5) An unanticipated major expense, including significant repair costs; litigation expenses (excluding suits against the state); or tax refunds in excess of 15% of the current year General Fund budget; or
- (6) Any other circumstances approved in writing by the Commissioner of Education.

Financial exigency must now be declared by resolution of the board of trustees, and the financial exigency expires automatically at the end of a fiscal year unless renewed by resolution. Tex. Educ. Code § 44.011.

A school district will have to notify the Commissioner each time it declares financial exigency. There is no limit to the number of times a financial exigency may be declared, and a board may terminate a financial exigency at any time deemed appropriate. Tex. Educ. Code § 44.011(d).

(c) Program Change Cannot be the Basis for a Mid-Contract Termination RIF.

Based upon the statutory language concerning the termination of term contracts, in a recent recommendation an IHE indicated that a RIF resulting in mid-contract terminations must be based on a school district’s financial exigency, and not upon the sole ground of the school district’s declaration of a program change.



(d) Documentation Needed. Any information supportive of the definitions of a program change and/or a financial exigency, should be presented by administration to the school board in order for the school board to consider and take action to determine whether a program change will take place and/or financial exigency exists.

(e) Board Agenda & Motion. Sample language for a possible RIF resulting in the proposed nonrenewal of district employees would be as follows:

Agenda: Consider the need for a reduction in force arising from a financial exigency and/or program change which may result in the nonrenewal of one or more term contract employees.

Motion: I move that the Board hereby determines that a financial exigency and/or program change is warranted which requires a reduction in force resulting in the nonrenewal of

one or more term contract employees and the Board approve a resolution declaring the same.

3. Identify the Employment Areas to be Affected by the RIF

After determining that either a financial exigency or program change requires the discharge or nonrenewal of one or more employees, the school board must next determine which employment areas will be affected by the RIF. In most cases, the superintendent will make recommendations to the board regarding the employment areas to be affected.

- (a) **Check DFFA (local) or DFFB (local).** Most policies list numerous possible employment areas that can be targeted for a RIF.
- (b) **Careful Wording Needed.** Defining the employment area to be affected requires careful planning and a precise choice of words.
- (c) **Board Agenda & Motion.** The board's action must identify the particular employment areas to be affected by the RIF. Continuing the example from above, suggested language for consideration and action by a board that has previously declared a RIF would be as follows:

Agenda: Consideration and possible action to determine the employment areas to be affected by a reduction in force arising from financial exigency and/or program change.

Motion: I move that the Board hereby determines the following employment area(s) shall be affected by the reduction in force arising from financial exigency and/or program change: *(list each individual employment area subject to the RIF).*

4. Apply Policy-Based Criteria

Once the need for a RIF is established and the employment areas to be affected are identified by the board, the superintendent applies policy-based criteria to determine which employees within the affected employment area will be recommended for nonrenewal or termination as a result of the RIF.

Remember! Most local RIF policies do not apply to the termination of probationary contracts at the end of the school year. In that case, probationary employees should not be included in the RIF nonrenewal pool.

- (a) **Common Criteria.** Most DFFA (local) and DFFB (local) policies list five criteria (in order of importance) to determine which employees in the affected employment area will be nonrenewed: *Qualifications for Current or Projected Assignment, Performance, Extra Duties, Professional*

Background, and Seniority.

- (b) **Application of Criteria.** Typically the superintendent will apply the criteria to all employees in the affected employment area. The criteria are applied sequentially until the necessary number of employees are identified.

5. Consider the Employee for Other Available Positions

Most DFFA and DFFB policies require school districts to allow the proposed employees to apply for other available positions for which they are qualified up to the date of the hearing. If the employee applies for an open position, according to most policies the employee *must* be offered the job if he or she meets the district's objective criteria for that position and is the most qualified internal applicant for the position up until the time the evidentiary hearing is conducted by the IHE, school board, or attorney-designee, or until final action by the board ends the employee's contract in the event the employee does not request a hearing. The following apply:

- (a) **Identical Job Not Necessary.**
- (b) **Employee Must Apply.**
- (c) **Be Prepared to Explain Hiring Decisions.**

6. Go Through the Nonrenewal or Termination Process

After applying the decision-making criteria to the employees in the affected area and considering those employees for other available positions, the school board will determine which employees are to be proposed for RIF nonrenewal or termination. At that point, the nonrenewal and termination procedures described in Part Two above will apply.

7. Choose the Hearing Process

While RIF termination hearings have typically been conducted by an IHE appointed by TEA, Senate Bill 8 provides that the IHE process does not apply to a decision to terminate a probationary or term contract before the end of the contract period based on a financial exigency declared under Education Code § 44.011, unless the school board decides to use this process. Tex. Educ. Code § 21.251. The board may opt to conduct the hearing itself much like a nonrenewal hearing. In districts with 5,000 or more students, the board also has the option of designating an attorney to conduct the hearing as described in the nonrenewal section above. Tex. Educ. Code § 21.207(b-1).

C. Communication is Key to Generating "Buy In"

Because a RIF can have an impact on numerous stakeholders (such as students, parents, community members, and the employees) it is important to educate the interested parties early and often to ensure that they understand the motivation for the RIF, have an adequate opportunity to provide input, and “buy in” to the process to support the school district’s decision. Conducting the RIF process with transparency will improve morale and may even serve to decrease the number of hearings requested by the RIFed employees.

1. Forecast Potential Cutbacks

- (a) Educate the School Board.** Administrators must communicate with the board of trustees regarding the fiscal realities facing the district.
- (b) Inform Community Members.** Educate key community groups and the power-brokers in the community (such as city council, mayor, sheriff, PTA president, etc.) so that they can help disseminate critical information and garner support from their constituents.
- (c) Talk to Employees.** Employees should be told when financial difficulties may necessitate cutbacks.

2. Seek Input Before the RIF

- (a) Solicit Input From Campus Administrators.** solicit the input from the campus administrators in determining how to design the RIF from the “bottom up” so as to best meet the needs of individual campuses.
- (b) Seek Input from Employees.** As the group that is most likely to directly feel the impact of the RIF, it is important to request feedback from district employees as to what they see as priorities and potential areas for reduction. Also offer the campus level planning and decision-making committee an opportunity to be heard regarding staffing patterns, budgeting, planning, curriculum and staff development.
- © Give Parents/Students an Opportunity to Express Their Preferences**

3. Use a Variety of Methods for Collecting Feedback

For example, it may useful to conduct town hall meetings, issue electronic surveys, or create a dedicated email account to receive ideas.

D. Lessons Learned from the 2011 RIFs

1. It’s Okay to Involve Campus Principals in the Process and Vice Versa

- (a)** The Commissioner held in part that there was no violation of law or policy

by having the principal pre-determine which employees will be recommended for RIF because the principal does not have the authority to terminate an employment contract.

- (b) The Commissioner held that it is permissible for the principal to provide input as it is the Board who makes the final decision.
- (c) The Commissioner thus held that it is not improper nor prohibited for central office administrators to assist and provide guidance in helping implement the RIF process on individual campuses.

2. Employees Must Only be Considered for Available Positions Up to the Time of the Evidentiary Hearing

The Commissioner held that the District properly considered the teachers for open positions up until the date of the evidentiary hearing before the IHE in accordance with policy. The District is not required to consider the employees for open positions after the date of their hearing before the IHE.

3. At the Hearing, Employees Cannot Raise Complaints About Appraisals Used in the “Performance” Criteria Unless They Timely Grieved the Appraisal

The Commissioner held that since the employee never timely grieved his appraisals, his contention could not be brought at hearing. As such, the District properly followed its policy in implementing the RIF due to program change.

4. School Districts Are Not Obligated to Terminate Probationary Contracts Before RIFing Term Contract Employees

the Commissioner held that while the district could have eliminated probationary teachers prior to nonrenewing term contracts, it is not required to do so. As for the second argument, the Commissioner held that an employment area may consist of only one person as the Commissioner has held on numerous occasions.

5. Limiting an Employee’s Presentation of His Case Before the Board to One Hour Was Not Arbitrary or Capricious

According to the Commissioner, Texas Education Code § 21.207(b) provides the district with authority to impose a time limit for a hearing. Since the one hour allotted to Murray was not arbitrary or capricious, the Commissioner denied Murray’s appeal.

NOTE: The information in this handout was prepared by Walsh, Anderson, Gallegos Green, & Treviño, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If specific legal advice is sought, consult an attorney.