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SCHOOL LAW BUZZ

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LEGISLATIVE CHANGES

Onboarding Employees Under House Bill 3

By Joe Hoffer

As you begin the process of onboarding new employees, you should take into consideration changes in state law under House Bill (HB) 3 that impact your hiring process. Importantly, HB 3 added Subchapter C-1 to Chapter 22 of the Tex. Ed. Code. In the new Subchapter C-1, the TEA is required to maintain and make available a registry of persons who are not eligible to be employed by a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center, or shared services arrangement (for purposes of our discussion here, “public education entities”). TEA is required to establish the registry on an internet portal, which shall also include information indicating that a person is under investigation for alleged misconduct to be provided through a procedure other than the registry. In the new Subchapter C-1, we find Tex. Ed. Code §22.092(b) which requires public education entities to discharge or refuse to hire a person listed on the registry. The requirement to discharge or refuse to hire a person listed on the registry does not extend to individuals against whom an allegation of misconduct has been made and who is under investigation by the TEA and the public education entity. In this regard, HB 3 added Tex. Ed. Code §22.094 to afford certain persons accused of misconduct an opportunity for a hearing on the merits of the allegations of misconduct.

Significant to charter schools, HB 3 amended Tex. Ed. Code §12.1059 to require charter schools to confirm that the applicant for a teacher, librarian, educational aide, administrator or school counselor is not included in the registry before hiring the applicant into any of these positions. HB 3 also added Tex. Ed. Code §12.1151 and amended Tex. Ed. Code §12.115 to make it a material charter violation for failing to discharge or refuse to hire an individual on the registry.

In addition to the above, HB 3 includes in the new Subchapter C-1 provisos enacted into law under Senate Bill 7 by the 85th Texas Legislature (RS) and codified in Tex. Ed. Code §21.006. However, HB 3 now gives the commissioner of education essentially the same oversight authority as that given to the State Board of Educator Certification (SBEC) under §21.006. One important difference is that HB 3 added Tex. Ed. Code §22.093 which applies to a public education entity employee who does not hold an SBEC certification or permit. To ensure compliance, the legislature added Tex. Ed. Code §22.096 to require the TEA to periodically conduct site visits to review school records demonstrating that the school discharged or refused to hire persons listed on the registry.

HB 3 also added other provisions under the new Subchapter C-1 which will be addressed, in addition to the matter discussed herein, in a separate advisory to be issued by the Firm.

Employer Contributions to TRS

By Ramón Medina

By now, we have all heard of the provision in HB 3 that amended Tex. Gov't. Code §825.405 to require charter schools to pay the state's contribution to the Teacher Retirement System of Texas (TRS) on the portion of a TRS member's salary exceeding the state's minimum salary. This new requirement applies to charter school employees classified in the following positions:

- (a) Administrative Officer,¹
- (b) Counselor (full-time),
- (c) Educational Diagnostician,
- (d) Instructional/Administrative Officer,²
- (e) Librarian (full-time),
- (f) Nurse (full-time),
- (g) Occupational Therapist,
- (h) Physician, M.D.,
- (i) Principal (includes assistant principal),
- (j) Psychological Associate,
- (k) Psychologist,
- (l) Physical Therapist,
- (m) School Social Worker,
- (n) Speech Pathologist (full-time),

¹ Individuals employed in this type of position serve under the superintendent or a high grade administrative officer or work in administrative capacity in personnel, business, accounting, planning, research, etc.

- (o) Special Education Related Service Personnel,
- (p) Superintendent, and
- (q) Teacher.

This change in law will result in an increased outflow of funds to TRS.

Additionally, Senate Bill (SB) 12 made further changes to the amounts that charter schools will have to pay into TRS. The purpose of the changes to contribution rates under SB 12 was to improve TRS' actuarial soundness. In addition to increased contribution rates for employees,³ SB 12 will require charter schools to increase their contribution rates into TRS regardless of whether the school participates in Social Security. For example, effective on September 1, 2019, charter schools must contribute 1.5% of an employee's compensation into TRS. Previously, this contribution rate was required of only charter schools that did not contribute into Social Security. Additionally, whereas prior to September 1, 2019, the state's contribution rate into TRS was 6.8%, it will now be 7.5%. For an employee that exceeds the state's minimum salary, the increased contribution rate further increases the amount of funds a charter school will need to contribute into TRS.

By way of example, let's assume that a superintendent has eight (8) years of service, is employed for 250 calendar days and earns \$250,000 in total compensation. Also, let's assume that the charter school elected to participate in Social Security (i.e., was not

² Individuals employed as a key specialist or director of a major instructional, instructional related or pupil service program.

³ For employees, an increase in contribution rates will not take effect until September 1, 2021, at which time the current contribution rate will increase from 7.7% to 8%.

previously required to contribute 1.5% into TRS). Using the new minimum salary schedules published by the TEA to calculate the applicable state minimum salary, we determine that the charter school's TRS contribution will be \$1,204.34. Refer to Exhibit A: Calculation of Increased Contribution to TRS.

An additional $\$250,000 \times 0.015 = \$3,750.00$ will also need to be contributed since the charter school, in this example, does participate in Social Security.

Obviously, the changes in law enacted through HB 3 and SB 12 will have real fiscal implications for charter school budgets and actual expenses. Thoughtful consideration should be given as to how these changes in law should be addressed.

TEA Report on Fees and Leavers

By Ramón Medina

As the summer trods on, you will likely continue to hear about HB 3 and the various new and amended state laws that will impact your school's finances and other operations. Among the many new legal requirements is a provision included in the General Appropriations Act that will require charter schools to provide information on the fees that it collects and the students that fail to complete the school year. Specifically, in the General Appropriations Act, we find the following rider:

58. Reporting on Open-Enrollment Charter Schools. Out of funds appropriated above, the Texas Education Agency shall annually collect information from each open-enrollment charter school concerning fees collected from students by the open-enrollment charter school under the authority of Section 12.108 (b), Education Code, and information

about students enrolled in an open-enrollment charter school who do not complete the school year at the school. The agency shall produce and submit to the legislature by January 1 of each year a report that details the following:

- a. the amount each open-enrollment charter school collects for each type of fee listed by Section 11.158 (a), Education Code; and
- b. the number of students enrolled in the charter school who do not complete the school year at the school by leaver code and by the six-week period the student exited.

In addition to all the things that you will need to consider as you prepare yourself for the upcoming school year, you should give some thought to assembling any information and records relating to student fees and leavers, beyond that already required in state law or rule. To avoid any potential compliance issues, which some charter schools have encountered, you may want to ensure that any fees collected are consistent with the legal requirements set forth in Tex. Ed. Code §§ 12.108(b) and 11.158.

When A Windfall Creates A Headache: Increasing Compensation

By Joe Hoffer

In HB 3 we find the following subsection that was added to Tex. Ed. Code §48.051 (formerly, §42.101):

- (c) During any school year for which the maximum amount of the basic allotment provided under Subsection (a) or (b) is greater than the maximum amount provided for the preceding school year, a school district must use at least 30 percent of the amount, if the amount is greater than zero, that equals

the product of the average daily attendance of the district multiplied by the amount of the difference between the district's funding under this chapter per student in average daily attendance for the current school year and the preceding school year to provide compensation increases to full-time district employees other than administrators as follows:

(1) 75 percent must be used to increase the compensation paid to classroom teachers, full-time librarians, full-time school counselors certified under Subchapter B, Chapter 21, and full-time school nurses, prioritizing differentiated compensation for classroom teachers with more than five years of experience; and

(2) 25 percent may be used as determined by the district to increase compensation paid to full-time district employees.

(d) In this section, "compensation" includes benefits such as insurance premiums.

To assist public schools determine who is to receive how much and in what form, TEA has published guidance at https://tea.texas.gov/About_TEA/Government_Relations_and_Legal/GR/House_Bill_3/, including To The Administrator Addressed letters, Frequently Asked Questions, and a presentation on Budget Planning for Teacher Compensation. Still, questions abound. Here is some general guidance.

Under HB 3, charter schools are required to provide permanent, not temporary (e.g.,

stipends, "bonuses"), compensation increases to full-time employees.⁴ Particularly, charter schools must favor teachers with more than five (5) years of experience (hereafter, "experienced teachers"). How exactly to comply with this statutory directive is the school's prerogative. In general, compliance may be achieved by raising salaries, paying for all or a portion of out-of-pocket insurance premiums, providing supplemental insurance benefits or a combination of increased salary and benefits. As to the preferential treatment of experienced teachers, this requirement would apply to new hires and not just to returning teachers. In this regard, compliance may be achieved by raising the overall salary scale for experienced teachers by an amount greater than for teachers with less than five years of experience. Also, HB 3 does not specify an amount by which you can demonstrate compliance. Moreover, any incremental amount does not have to be graduated for each additional year of experience (e.g., six years = \$50 more, seven years = \$75 more, etc.). Here, a flat amount will suffice (e.g., 0 to 5 years = \$100 increase, 5+ = \$200 increase).

Although the language in HB 3 may be construed to mean that charter schools may only provide compensation increases to certified teachers, we have since learned that TEA does not necessarily interpret the statutory language in this way. Notably, TEA is aware that many charter schools do not employ certified teachers, since, under Tex. Ed. Code §12.129(a), charter school teachers are only required to hold a bachelor's degree. Thus, charter schools may provide compensation increases to all teachers as long as they have a bachelor's degree.

⁴ Administrators are not eligible for any compensation increase under this provision under HB 3.

Also, TEA has observed that using the additional funding provided under HB 3 to add new (i.e., previously non-existent) teacher positions does not meet the requirement to increase teacher compensation. This policy guidance is consistent with the statutory language and intent of HB 3. However, what if a teacher position that existed during the 2018-2019 school (fiscal) year is left vacant by an employee? Will an adjustment to the salary schedule (pay scale) for teacher positions meet the HB 3 requirement for compensation increases? As adopted, Tex. Ed. Code §48.051(c) does not refer to teachers, which may be construed to mean the position itself and not the individual employee. In this context, we infer that a teacher position that existed during the 2018-2019 school year, was left vacant by the individual employed in said position and was filled by a new employee for the 2019-2020 school year would be considered for determining compliance with the HB 3 compensation increase requirement.

Although charter schools are not subject to the state's minimum salary schedule, HB 3's focus on increased compensation coupled with the employer's contributions into TRS has made it important for charter schools to adopt salary schedules, if such have not been previously utilized. In this regard, in HB 3, Sec. 5.008, by December 1, 2020, charter schools will be required to submit a report on salary and wage increases provided to employees under Tex. Ed. Code §48.051(c). In the report, charter schools will be required to provide for each salary and wage increase:

- (a) the employee's position; and
- (b) the amount of the increase.

If you have a specific concern or question concerning the HB 3 compensation requirement, please contact us.

Thinking Ahead About FIRST

By Ramón Medina

On or about August 8th of each year, TEA will issue a preliminary FIRST rating to all public schools, including charter schools. Roughly thirty (30) calendar days thereafter, all appeals of said rating are due. Subsequently, about sixty (60) days thereafter, TEA issues the final FIRST rating.

If an appeal is filed, TEA will forward the appeal to an external panel of reviewers who will recommend that the appeal either be granted or denied. If an appeal is not filed, the preliminary FIRST rating will be issued as final. If you have ever filed an appeal, you have some idea of the effort and labor that goes into pleading your case.

As Benjamin Franklin is attributed as having said: "An ounce of prevention is worth a pound of cure." With this in mind, consider the following measures to mitigate the risk of an F – Substandard Achievement rating on FIRST.

- (a) Adopt policies, procedures and practices that yield records to support the use of funds and property and that demonstrate compliance with fiscal and other pertinent requirements.
- (b) Limit enrollment to students residing within the charter's approved geographic boundary.
- (c) Adopt a budget that, if implemented as adopted, will yield favorable financial

results conducive to a favorable FIRST rating.⁵

- (d) Using the proposed or adopted budget, prepare an unofficial FIRST rating.
- (e) Monitor compliance with the budget.
- (f) Ensure that all debt payments are timely made.
- (g) Ensure that PEIMS data submissions are accurate and complete and are in agreement with the audited financials.
- (h) Using actual data, prepare an unofficial FIRST rating at least twice (once at mid-year and again at the end of the fiscal year).
- (i) Amend the budget, adjust spending patterns and take other measures during the school year to mitigate the risk of an F rating.
- (j) Timely file all reports and payments with the IRS, TRS, TWC and other governmental agencies that might issue a warrant hold against the school's state aid.
- (k) Post all required financial information on the school's website. (Refer to our advisory in this regard.)
- (l) Ensure that the independent auditor is on track to the timely completion of the annual audit.
- (m) File the annual financial report (AFR) and the required AFR Data Template by

no later than the deadline established in law and rule.

Although many variables need to be considered to make a favorable FIRST rating a reality, the above suggestions may enable you to go down the right path. To further help you on your way, please contact Lori Madla to obtain our template for the 2020-2021 rating based on fiscal year 2020 data, which we will release in late July.

Have Questions? We'll Answer.

If you have any questions concerning the content in this e-newsletter or any other school law matter, please contact Lori Madla at lmadla@slh-law.com or at (210) 538-5385.

⁵ For the 2020-2021 rating year, which will be based on the results of the 2020 fiscal year, a new indicator, 10, will compare budgeted revenues to actual revenues. If a variance of more than ten

percent (10%) is found, based on an average for the last three (3) fiscal years, ten (10) points will be lost.



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Exhibit A: Calculation of Increased Contribution to TRS

Step 1: Calculate monthly state minimum salary amount	State Minimum Salary	Actual Number of Contracted Days	Calculated Annual State Minimum Salary Amount	Monthly Installments	Calculated Monthly State Minimum Salary Amount
	<u>Daily Rate</u>	<u>Days</u>	<u>Salary Amount</u>	<u>Installments</u>	<u>Salary Amount</u>
	\$ 229,221 x	250	= \$ 57,305.25	+ 12	= \$ 4,775.44

Step 2: Calculate monthly actual salary amount	Actual Annual Salary Amount	Monthly Installments	Calculated Actual Monthly Salary Amount
	<u>Salary Amount</u>	<u>Installments</u>	<u>Salary Amount</u>
	\$ 250,000.00 ÷	12	= \$ 20,833.33

Step 3: Calculate monthly employer contribution for salary above state minimum salary	Calculated Actual Monthly Salary Amount	Calculated Monthly State Minimum Salary Amount	Actual Salary Amount Above State Minimum Salary Amount	Employer Contribution Rate	Calculated Monthly Employer Contribution
	<u>Salary Amount</u>	<u>Salary Amount</u>	<u>Salary Amount</u>	<u>Rate</u>	<u>Contribution</u>
	\$ 20,833.33 -	\$ 4,775.44	= \$ 16,057.89	x 7.50%	\$ 1,204.34