

# School Law Buzz

TEXAS SCHOOL LAW E-NEWS



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## Texas 1882 Partnerships – Another Vignette for Dreams of Education Reform

*“A charter licenses us to DREAM.”<sup>1</sup>*

*By Denise Pierce*

Education reformers dreaming about education innovation for the next generation of Texans should consider Texas Partnerships. Authorized by the Texas Legislature in 2017 through Senate Bill 1882, Texas Partnerships marry the best of traditional school districts (established

facilities and enrollment) with the best of charter schools (fresh instructional methods and fierce ‘can-do’ cultures) to improve student outcomes. As the Texas Education Agency (“TEA”) explains it, Texas Partnerships allow traditional school districts to diversify campus options and to bring in targeted charter school expertise for innovation and turnaround support.<sup>2</sup>

The Texas Legislature has invested earnestly in Texas Partnerships. First, state law provides additional funding for partnership campuses. Further, ISD schools with unacceptable academic ratings are eligible to receive a two-year exemption from accountability interventions when they become partnership campuses. To date, nearly 20 school districts have responded to these incentives, resulting in the creation of over 115 partnership campuses statewide.

Our law firm has been privileged to represent several entities in negotiations with school districts to establish and implement successful Texas Partnerships. Whether existing open enrollment charter schools or newly formed tax-exempt corporations, our clients have deeply enjoyed positive collaborations with like-minded school district leaders. Other positive attractions for

<sup>1</sup> Ms. Yvonne Chan, founder of Vaughn Next Century Learning Center in Los Angeles California, featured on the *CharterFolk Oxygen Bar*, Episode 12, Jan 10, 2022,

<https://www.charterfolk.org/captivate-podcast/charterfolk-oxygen-bar-with-yvonne-chan/> as of Feb 23, 2023

<sup>2</sup> <https://txpartnerships.org/> as of Feb 23, 2023

charter leaders include immediate access to an existing school facility (huge!) and a statutory/regulatory landscape that provides them full autonomy in budget, staffing, curriculum, instruction, school calendar, and other aspects of campus operations.

Texas Partnerships flourish when school district boards and administrators fully embrace the autonomy of their partners. Conflicts have arisen when school districts expect to retain measures of financial or campus control, despite contrary terms in the executed partnership agreements and in law. Also, some partners have not delivered on the promise of improved academic outcomes. All told, Texas Partnerships offer a unique opportunity. Those dreaming about education innovation should take a close look. For more information, contact our law firm and dig into these helpful organizations and resources:

**Texas Partnerships Website:** This Texas Education Agency website provides information about the process for creating a Texas Partnership, a model authorizing policy, operating partner application, performance contract templates, and extensive FAQs. <https://txpartnerships.org/tools/>

**Texas District Charter Alliance:** The Texas District Charter Alliance is an association of school district and charter leaders. The Alliance regularly hosts tours of Partnership campuses and advocates for public school funding and transformative policies that allow for partnerships and collaboration among districts, charters, and nonprofits. Their website includes Partnership profiles, model policies, lists of Calls for Quality Schools, and more. <https://www.texasdca.org/>

**Empower Schools:** Empower Schools partners with educators and communities to

reimagine local education systems. [www.empowerschools.org](http://www.empowerschools.org). They have produced a video about Texas Partnerships and how they benefit communities, <https://www.youtube.com/watch?v=rzhYsX3Ae9c>, and soon will release a tool kit designed to advocate for SB 1882 partnerships by providing a broad overview of what partnerships are, how they are formed, and why district and school leaders partner. It will also showcase facts and dispel common misconceptions about Texas Partnerships.

***First Look: An Exploratory Analysis of Senate Bill 1882 Partnerships in Texas:***

This report by the University of Houston Education Research Center documents Texas Partnership policy examines Texas Partnerships approved between 2018 and 2022. It also provides an initial comparison of the performance of Texas Partnership schools and peer campuses. [https://www.uh.edu/education/research/institutes-centers/erc/reports-publications/first\\_look\\_sb1882\\_partnerships.pdf](https://www.uh.edu/education/research/institutes-centers/erc/reports-publications/first_look_sb1882_partnerships.pdf)

**Texas Partnership Laws and Regulations:**

- [Section 11.174, Texas Education Code](#)
  - [Section 48.252, Texas Education Code](#)
  - [19 TAC Section 97.1075](#)
  - [19 TAC Section 97.1077](#)
  - [19 TAC Section 97.1079](#)
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## Texas Permanent Fund Guarantee Program Nears Capacity Limits

*By Janet Robertson and Roxana Rahdaie*

The Texas Permanent School Fund (the “PSF”) Guarantee Program, which enables bonds issued by Texas public schools to qualify for AAA status and therefore bear lower interest rates, is fast reaching its statutory capacity limits, resulting in higher interest rates being assigned to many Texas school bonds since the beginning of 2023.

In response to this situation, the State Board of Education (the “SBOE”) voted on February 3, 2023 to revise the PSF Bond Guarantee Program rules to reduce the required program reserves from 5.0% to 0.25%. Coupled with the expected paydowns and maturities of outstanding PSF-guaranteed bonds on February 15, 2023, this increase in capacity will create some breathing room for the program, but it is only a temporary fix.

The ultimate capacity limit on the PSF is dictated by the Internal Revenue Code (the “Code”) and that number is currently fixed at \$117,318,653,038 (the “IRS limit”). According to *The Bond Buyer’s* “Texas school bond guarantee program capacity falls below \$27 million,” as of December 31, 2022, there was only a projected \$26.65 million available and that amount has undoubtedly fallen in the new year. A bill introduced by Senator Lloyd Doggett that would permanently remove the IRS limit is currently pending before the national legislature, but unless and until that bill becomes law – or the Internal Revenue Service (the “IRS”) takes other action – the limit will remain.

### ***Why does the IRS limit the principal amount of bonds that may be guaranteed by the PSF in the first place?***

The answer is buried in the history of the PSF, which was created in 1854 as an endowment designed to benefit public schools in Texas. Part of that mission has long been to provide guarantees of bonds issued by local school districts and, since 2014, public charter school districts. Bonds issued by government entities like traditional public school districts and qualified 501(c)(3) organizations like Texas open enrollment charter schools are issued on a tax-exempt basis under the Code, meaning that interest on such bonds is excludable from the gross income of the holders. This results in lower interest rates on the bonds because holders who do not have to pay taxes on their income are typically willing to charge a lower interest rate on the bonds that they buy. However, since the holders receive an exemption from Federal income tax, the IRS has authority to regulate the tax-exempt bond market.

Part of that regulation involves placing arbitrage investment restrictions on the proceeds of tax-exempt bonds, restricting the amount that can be earned on such proceeds to an amount equal to the yield on the related bonds. In general, earnings in excess of that yield are required to be rebated to the Federal Government. These arbitrage restrictions apply not only to ordinary proceeds from the sale of tax-exempt bonds and related investment earnings but also to funds that are classified by the IRS as “replacement proceeds.” Notice 2010-5 promulgated by the IRS (“Notice 2010-5”) describes how these replacement proceeds include “pledged funds” that are pledged to secure the repayment of tax-exempt bonds. Because perpetual trust funds such as the PSF otherwise meet the definition of replacement

funds, the IRS created a special exception from the arbitrage restrictions for such trust funds that meet certain parameters, chiefly that the volume of bonds insured does not exceed a specified amount. The Code of Federal Regulations currently sets the IRS limit for the PSF at \$117,318,653,038, which is a sum calculated as of the date that Notice 2010-5 was received by the Texas Education Agency (December 16, 2009) and based on the cost value of Fund assets on that date. The problem with a static IRS limit that was calculated based on the level of PSF assets in the fund on December 16, 2009 is that both PSF assets and the principal amount of PSF-guaranteed school bonds being issued has increased greatly over the intervening 13+ years.

#### ***How does the PSF Guarantee reduce interest rates for Texas School Bonds?***

Because the PSF has a book value of \$42,511,350,050 and a market value of \$56,754,515,757 (based on the Annual Comprehensive Financial Report of the PSF for the fiscal year ended August 31, 2022), Moody's Investors Service, S&P Global Ratings and Fitch Ratings rate bonds guaranteed by the PSF "Aaa," "AAA" and "AAA," respectively. School districts (whether traditional or charter) do not typically qualify for such high ratings. But school district bonds guaranteed by the PSF are rated based on the credit quality of the PSF and bonds with a higher rating carry a lower interest rate. Bonds guaranteed by the PSF carry with them the assurance that, in the event of a default by the obligated school district, the PSF will take over the payment of the bonds.

#### ***Will the PSF Guarantee Program shut down if it reaches its limit?***

As noted in the *Texas Tribune* article "A Texas Program That Backs School Districts' Bond Debt Is About To Reach Its Limit – and It Could Mean Raising Taxes" dated December 5, 2022, the last time the PSF reached capacity, the program was forced to close for a year in 2009. It was not reopened until 2010 after the IRS lifted their limit by publishing Notice 2010-5. According to Jim Moore, Bond Guarantee Program administrator in the TEA's State Funding Division, current plans are to continue operating at reduced capacity instead of shutting down. Capacity is being allocated based on the school district's wealth per Average Daily Attendance ("ADA"), with charter school districts being assumed to be at the state average wealth per ADA. Mr. Moore advises that the basic rule is that an issue has to be guaranteed in full and there is no holding over of applications. So, if the amount of a bond issue exceeds the balance of PSF capacity available, the guarantee program shuts down until the next month. Any capacity that is left over is then retained for the next month. Application fees are being returned when the monthly capacity is used up and a new application must be filed for the next month.

In a "PSF Bond Guarantee Program Capacity Update" circulated on February 13, 2023, to all financial advisors and bond counsels on the Bond Guarantee Program disclosure email list, Mr. Moore advised of the upcoming rule change approved by the SBOE, which should make additional capacity available for the February round of new money bond guarantee applications. Mr. Moore encourages prospective applicants, specifically "including those who were denied over the past several months and have not yet sold bonds," to consider re-applying for

inclusion in the February round of new money bond guarantees before the deadline of 5 p.m. Central Standard Time on February 28, 2023. Approval letters for February applicants are scheduled to go out on March 21, 2023.

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## **SLHA Welcomes New Attorneys Elizabeth Angelone, Senior Counsel and Jade Heep, Associate**

*By Joe Hoffer*

Schulman, Lopez, Hoffer & Adelstein, LLP is pleased to announce Attorneys Elizabeth Angelone and Jade Heep have joined the Firm.

Elizabeth Angelone, Senior Counsel, a graduate of St. Mary's University School of Law, brings perspective to her legal practice as a former public-school teacher and school district administrator, specializing in special education. Her legal practice continues to focus on education matters including discipline, civil rights, civil litigation, and grievances, as well as special education matters under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act. You may reach her at [eangleone@slh-law.com](mailto:eangleone@slh-law.com).

Jade Heep, Associate, a graduate of St. Mary's University School of Law, brings practical litigation experience to our team. She assists in handling complex civil litigation, personal injury defense, business litigation and employment law defense in state and federal courts. Jade has tried several cases as lead attorney to final verdict/ award in both jury trials, as well as arbitrations. She has briefed numerous

complex legal issues throughout the course of her career, including pre-trial briefing for a jury trial in which she and her prior law firm received a multi-million-dollar verdict. You may reach her at [jheep@slh-law.com](mailto:jheep@slh-law.com).

Please join us in welcoming the newest members of our attorney team.

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## **Four Day Instructional Week**

*By Karen Ice*

In the last few years, many schools throughout Texas have considered transitioning to a four-day instructional week. There are many academic and instructional implications as well as concerns related to employment, financial and operational decisions. TEA views this transition as a significant change to a charter's educational program, thereby necessitating submission of a non-expansion amendment request. It is important that your school's Board has received and approved adequate analysis and rationale supporting the schedule change and non-expansion amendment. Within your non-expansion amendment submission, we recommend schools include a summary of the factors your school board and administration considered, such as improving student outcomes and morale, how you are mitigating the consequences of one less instructional day per week and considered the impact this transition will have on students served under IDEA, Section 504 as well as Accelerated Instruction requirements. Your school board will also need to consider the potential impact of a shortened instructional week on dual credit and workforce preparation programs, and existing contracts with meal service vendors, transportation providers, and after-school partnerships.



These non-expansion amendment requests will be submitted using the same process for seeking approval of other forms of non-expansion amendments. Your school must complete a non-expansion amendment request form, including signed attestations found at the end of the form, along with a signed and dated board resolution and any applicable attachments to the amendment form. TEA has informally suggested that schools might first consider other innovative scheduling options as well as staffing changes that avoid loss of an instructional day. Those changes may not necessarily trigger a charter amendment requirement.

For more details, please see our January 24, 2023, advisory: 'Transitioning to a Four-Day Instructional Week.'

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## **The Who, What, When, Where, Why and How of the Real Estate Process**

*By Mary Kendall*

Focusing on helping students achieve academic excellence and personal growth is what you do. Helping you to plan and execute your vision for both today and in the future is what we do. We want to help guide you through the steps in your school's current and future real estate projects. This is the first in a series of real estate articles focusing on walking you through the people, places and things that make for successful planning and implementation of real estate projects...and the pitfalls that should be avoided.

A school's vision for its own growth has to start with a review of what it has and where it wants to go. This is the same with a school's real estate plan. Whether it is the first

campus or the tenth campus, a lease or a purchase, a bond, cash or other form of financing, every real estate project presents unique challenges and characteristics.

### **The Real Estate Process:**

The decision to critically analyze your school's growth plan takes courage, but is necessary in order to translate it into a workable plan of action with clearly defined actionable steps. Let's explore what a plan of action might include for a real estate project.

#### 1. The Who:

Knowing your "Who" is critically important and needs to be established first. Without a strong team working alongside of you, focusing on any of the other factors beforehand is putting the cart before the horse because you don't have the correct teammates in place to implement the school's plan. So who should be on your Who's Who list?

- Attorneys to navigate potential legal hurdles, which includes the general school counsel, real estate and financing teams since all aspects of the school need to be covered when considering a new campus location (along with compliance with TEA's regulations and requirements).
- Real Estate Broker to assist in site location and provide guidance on pricing for the location and, if applicable, improvements.
- Financial advisor to analyze the school's numbers to determine what can be afforded and which financing options would be best for the school for the specific project.
- Owner's representative/Project Manager to be the owner's eyes and ears during the construction portion

of the project and provide due diligence guidance on construction issues that can (and almost always do) arise.

- Architect to assist in designing the improvements to bring the school's vision out to something that can be built, and assist in providing pricing and guidance in cost-saving measures.
- Engineers (civil, mechanical, environmental) to assess and design the project to ensure it works correctly, safely and coordinates with the applicable governmental authorities' requirements (along with the architect).
- General contractor to put the architect's and engineer's designs into reality and build the school's vision for the project.
- All of your school's project team members to ensure the school's vision is being accounted for in the project.

Knowing your Who and each of their competencies prepares your team for a successful project.

## 2. The What:

Once you have established your team, your next step to defining a plan of action for a real estate project is to clearly define your "What." Every plan is different and is as unique as each school's vision for its students. It is important to determine as a team what you want to accomplish in terms of growth for your students and how your team plans to implement your "What" – turning your dream of a new campus into a reality for your students. Ask yourselves the hard questions.

- Have you done anything like this before or is this your first campus?

- Do you have the right team in place?
- What has worked in the past?
- What would you change from prior projects?

## 3. The When:

Now that you know your "Who" and your "What", let's look at the "When." Anyone who has managed any type of project, construction or otherwise, can testify to the importance of developing a realistic schedule based on analysis of what needs to be done with the project, including any equipment, furniture, fixtures or specialty items that could have long delay times in being obtained. It is critical that you consider your schedule as part of your action plan. You know when you want that new campus to be ready for your students, but it doesn't just become part of the actionable plan. You have to consider your schedule and work backwards, considering your deliverables and expecting the unexpected. Think worst case scenario and use your team to assist in coming up with a realistic schedule that can be implemented in real time.

## 4. The Where:

Any real estate project clearly turns on the importance of an understanding of your "Where." Keeping your options open allows for potentially more growth. For real estate, remember it's all about location, location, location! This doesn't just mean physical location, but your "Where" can be the attributes of that location.

- Is it platted or not platted?
- Are there available utilities to the site?
- What's the status of the building ownership?
- Is there a shared use (if leased)?

- Are there necessary improvements or renovations?

Your “Where” attributes can be discovered by the right “Who” asking the right questions at the right time.

#### 5. The Why:

Keeping the school’s goals in mind, your “Why”, is of the utmost importance. Otherwise, it is far too easy to get frustrated with the process and get overwhelmed. This is where having a good team in place can help minimize these issues and get the school to the finish line.

#### 6. The How:

After the Who, What, When, Where, and Why have all been defined, there will always be the need for additional, step-by-step implementation partners to come alongside you to help. If financing is being considered, bring in your partners as part of the decision and not as an afterthought. There are also partners to assist with training, constant continuing education, communication and coordination as needed.

The successful implementation of a plan of action for a real estate project can only truly happen when partners, stakeholders, the executive leadership and board, and your teams work together for a common goal. Knowing your school’s very own “Who, What, When, Where, Why and How of the Real Estate Process” will get you one step closer.

#### ***Next in the Real Estate Series:***

Stay tuned for the next installment of Agreements and Contracts and Forms...Oh, My: How to Navigate the Real Estate Process for Schools.

Jason Adelstein leads the Firm’s commercial real estate and natural resources practice for both public and private clients and his team is available to support your next project.

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#### **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 Joe Hoffer at [jhoffer@slh-law.com](mailto:jhoffer@slh-law.com) or at (210) 538-5385.