

Reductions in Force

TASB Legal Services

During difficult financial times, many districts face the difficult choice of cutting expenses by reducing personnel. For some districts, this will mean implementing a “reduction in force” (RIF).

This material focuses on how to recognize and implement a RIF, with emphasis on developing a record to withstand administrative or judicial challenge.

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This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.

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A. RIF Basics

1. What is a RIF?

A RIF is the elimination of one or more job positions due to a financial exigency or program change. When a RIF occurs, *job positions* are eliminated in various employment areas, and the employees currently holding those positions lose their jobs, even if they have done nothing wrong.

RIFs focus on eliminating positions, not individual employees.

A RIF requires the board and superintendent to take certain preliminary steps before discharging contract employees. Generally, these preliminary steps include declaring a financial exigency or program change, identifying the affected employment areas, and systematically applying preset criteria to identify the individual employees to be discharged.

The RIF procedure must be described in the district's local policy. For districts subscribing to TASB Policy Service, the RIF policy is DFF(LOCAL).¹

2. What steps can be taken prior to implementing a RIF?

A district considering a RIF of certified personnel may first consider other options to permit the easier and less expensive termination of non-certified positions before implementing a RIF.

Elimination of at-will positions: A RIF is not required to eliminate at-will positions. At-will employees may be discharged *at any time* for *any reason* that is not prohibited by law. See TASB Policies DCD(LEGAL)(LOCAL). *Camp v. Union Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997).

End-of-year termination of probationary contracts: Similarly, employees on probationary contracts may have their contracts terminated at the *end of the year* if the board decides that termination is "in the best interests of the district" and provides the proper notice. Tex. Educ. Code § 21.103. See TASB Policies DFAA(LEGAL). A reduction in employee costs may indeed be in the "best interests" of the district, permitting the district to avoid the more complex RIF procedures to terminate the contract.

End-of-contract termination of non-Chapter 21 contracts: Unless the contract or the district's unique policy requires otherwise, terminating non-Chapter 21 contracts at the end of the contract period does not require a RIF or a complex termination procedure under Chapter 21 to terminate the employment relationship. See TASB Policy DCE(LEGAL).

¹ The following analysis to implement a RIF will assume that the district has adopted the TASB recommended Policy DFF(LOCAL). Check and follow your own district's policy.

Moving non-certified administrators to at-will status at end of their contracts: The Texas Education Code does not require employment contracts for non-certified administrators; however, many districts offer non-Chapter 21 employment contracts to non-certified administrators, such as business managers, personnel managers, transportation directors, risk managers, and technology directors. Consider moving any non-Chapter 21 contract employees to at-will status at the end of their contract terms in order to provide flexibility to terminate their employment if budget problems do not improve. Note: A district may have to amend its local policy to take this step. See TASB Policy DCE(LOCAL).

Moving non-certified administrators to non-Chapter 21 contract status at end of their contracts: TASB Legal Services does not recommend that a district offer Chapter 21 rights to non-certified personnel. Those few districts that do so, however, may consider moving those administrators to non-Chapter 21 contracts or at-will status at the end of their contract terms. Note: A district may have to amend its local policy to take this step. See TASB Policy DCE(LOCAL). *Harris v. Royse City Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 057-R1-0506 (March 5, 2009).

Reassignments: Reassigning personnel away from marginal programs to more financially viable programs and not filling their former, now vacant, positions, is another way to either invoke a program change without implementing a formal RIF or to delay a RIF.

Reduction in salary or benefits: A district may reduce an at-will employee’s compensation at any time. In some circumstances, the district may reduce the total compensation of Chapter 21 employees within legal limits. Tex. Educ. Code § 21.402(d).² If a reduction is permitted, the district must give notice before the penalty-free resignation date. *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 021-R10-1106 (March 6, 2009); Tex. Educ. Code § 21.210. This may be a viable option if the district finds itself in a financial exigency in the late spring and early summer, after the nonrenewal deadline (45 days before the last day in instruction) has passed but before the penalty-free resignation deadline (45 days before the first day of instruction in the new school year). Tex. Educ. Code §§ 21.206, .210.

Declining to fill vacant positions: Attrition resulting from staff resignations and retirement creates vacant positions which reduce overall personnel expenses without implementing a formal RIF.

² TASB Legal Services has posted a memorandum about Freezing and Reducing Pay for the 2011-12 school year. www.tasb.org/services/legal/esource/personnel/documents/reducing_compensation_jan2011.pdf.

3. When can a district implement a RIF?

A RIF may be done either at the end or in the middle of a school year.

End of the school year: The board may nonrenew term contracts based on a RIF, if RIF is listed as a potential reason for nonrenewal in district policy. Tex. Educ. Code § 21.203. See TASB Policy DFBB(LOCAL).

During the school year: A RIF can constitute “good cause” for the mid-year termination of a probationary or term contract. Tex. Educ. Code §§ 21.211, .104. A RIF arguably constitutes “good cause” or whatever standard is required to terminate a non-Chapter 21 contract during the contract term.

4. What contracts are subject to a RIF?

RIF procedures may be used to terminate the following contracts:

- A Chapter 21 probationary contract *during* the contract period,
- A Chapter 21 term contract *during* the contract period,
- A Chapter 21 term contract *at the end* of the contract period, or
- A non-Chapter 21 contract *during* the contract period.

5. What are the special rules for continuing contracts?

Continuing contracts are not subject to the district’s RIF policy. The Texas Education Code prescribes special procedures to terminate or otherwise modify continuing contracts under a “necessary reduction of personnel,” as opposed to a “reduction in force.” Tex. Educ. Code § 21.157. The statute imposes two special requirements in this non-RIF procedure:

- Continuing contracts can be terminated only at the end of a school year, not during the school year.
- Reductions are made in the reverse order of seniority in the specific teaching fields.

Tex. Educ. Code § 21.157. See TASB Policy DFCA(LEGAL).

A district can modify instead of terminate continuing contracts, such as to reduce the number of duty days and thus reduce salary for the next school year, as long as it does so before the penalty-free resignation date (45 days prior to the first day of instruction of the next school year). *Sanford v. La Porte Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 262-R3-593 (Nov. 4, 1994).

A district should work closely with its attorney when considering termination of any continuing contracts.

6. What are the permitted reasons for a RIF?

Under TASB Policy DFF(LOCAL), a RIF can be implemented for either one or a combination of both of the following reasons:

- Financial exigency, and/or
- Program change

7. What is a “financial exigency”?

TASB Policy DFF(LOCAL) defines “financial exigency” as any event or occurrence that creates a need for the district to reduce financial expenditures for personnel including, but not limited to, a decline in the district’s financial resources, a decline in enrollment, a cut in funding, a decline in tax revenues, or an unanticipated expense or capital need.

“Exigency” means crisis, a pressing or urgent situation requiring immediate attention.

8. How do you prove the existence of a “financial exigency”?

Situations showing a financial exigency:

- Actual or expected decline in enrollment. *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999); *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988); *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999); *Loftin v. Rogers Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 003-R1-990 (Aug. 30, 1991).
- Decrease in tax base: *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988); *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989); *Camp v. Union Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997); *Ruiz v. Edinburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 241-R3-787 (Sept. 19, 1989); *Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 205-R2-687 (March 9, 1990).
- Decrease in tax rates: *Camp v. Union Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997).
- Decrease in non-tax revenue: *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999) (loss of oil properties owned by the district).
- Decline in appraisal values: *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999).

- Decrease in tax revenues: *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999); *Wheeler v. Port Aransas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 061-R2-1091 (July 15, 1992); *Camp v. Union Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997).
- Loss of funding: *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999) (decline in revenue as result of S.B. 351); *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988) (decline in state aid because of decline in ADA funding); *Ruiz v. Edinburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 241-R3-787 (Sept. 19, 1989) (decline in state funding).
- Dangerous reduction in fund balance: A board need not demonstrate that it has a fund balance of zero. The board should be able to show, however, that expenses or revenue have changed significantly and the district is making efficient use of the money it does have. *Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 205-R2-687 (March 9, 1990); *Wheeler v. Port Aransas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 061-R2-1091 (July 15, 1992); *Peevey v. Liberty Hill Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 417-R1-691 (Nov. 19, 1992); *Camp v. Union Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997).
- No ability to tax at a higher rate to generate more revenue: *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001).
- Current and projected deficits: *Guidry v. Shelbyville Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 101-R1-598 (June 23, 1998) (even after six positions were eliminated, deficit was projected unless six more eliminated); *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999); *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003).
- Increased teacher salaries: *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989).
- Increased premiums for workers compensation insurance: *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989).

Deference to local boards: The commissioner of education generally defers to local boards in determining the existence of a financial exigency. *See, e.g., Ruiz v. Edinburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 241-R3-787 (Sept. 19, 1989). The commissioner has even upheld a board’s decision when the only evidence offered to prove financial need was the oral testimony of the superintendent. *Salinas v. Monte Alto Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 080-R1-502 (June 28, 2002).

9. What information should the board include in the record?

Make the record: The key to a successful RIF is to make a good record, in the form of documentation and testimony, to provide substantial evidence for the board's decision.

A. Documents: The following documents can be used to illustrate a financial exigency:

- Letters from TEA questioning the financial condition of the district or recommending staff changes. *Day v. Perryton Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 367-R2-792 (Sept. 2, 1994);
- TEA guidelines on administrative expenses, supervisor ratios, etc;
- Letters of refusal from underwriters, lenders, etc. declining credit based on the district's poor financial condition;
- Financial statements;
- Spreadsheets, graphs, and charts showing projected budget shortfalls, trends, and projected savings from the RIF; and
- Pupil/teacher ratio and pupil/staff ratio, with savings to increase pupil/teacher ratio. *See* TEA Financial Fact Sheet for Budget Development—2004-05 (Appendix).

B. Witnesses: The following witnesses can testify to conditions supporting the existence of a financial exigency:

- Superintendent. *Salinas v. Monte Alto Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 080-R1-502 (June 28, 2002);
- Business Manager. *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989);
- Accountant. *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001);
- Auditor. *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989);
- Personnel Administrator; and
- Outside Consultant. *Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 205-R2-687 (March 9, 1990).

10. What is a “program change”?

TASB Policy DFF(LOCAL) defines “program change” as any elimination, curtailment, or reorganization of a curriculum offering, program, or school operation, such as:

- A change in curriculum objectives;
- A modification or reorganization of staffing patterns on a particular campus or district wide. *See, e.g., Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984) (upholding RIF based on a program change to eliminate overstaffing, despite continued availability of federal funds);
- A redirection of financial resources to meet the educational needs of the students. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (district changed from block schedule to seven-period day, accomplishing substantial savings due to reduced need for staff); *Clifton v. Rocksprings Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 127-R1-698 (July 27, 1998) (reduction in special education program);
- A lack of student response to particular course offerings;
- Legislative revisions to programs;
- A reorganization or consolidation of two or more individual schools or school districts;
- A change of curriculum objectives; and
- A modification or reorganization of a program.

A program change can also arise in combination with a financial exigency. *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001) (upholding RIF based on both program change and financial exigency).

Subject to the district’s proof presented to the commissioner, “[a] school district is always free to change its organizational structure as it seeks to increase its efficiency.” *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988).

11. How does the district plan for an imminent RIF?

If budget pressures increase at each board meeting, a district can do the following to help prepare the staff and the community for a RIF:

- Avoid filling positions as they become vacant by attrition;
- Avoid creating new personnel positions;
- Talk openly and often about the budget pressures;
- Review potential programs and educational areas for a future RIF;

- Avoid spending money on optional, non-core projects or programs, such as building new tennis courts the same year the district lays off core classroom teachers. After the board declares a need for a RIF, be prepared for close examination by the staff and the community of the district's recent expenditures;
- Retain an outside financial consultant to recommend ways to restore financial stability to the district. Be sure it is someone familiar with public school finances;
- Be up front with staff and the community about the reasons for the financial difficulty and the steps the district is taking to avoid a RIF. Present documents and charts to back up your decisions. Do not let a financial exigency or program change come as a surprise to the district's staff and the community;
- Brief appropriate district planning committees under the district's site-based decision-making plan. Involving these groups to explore options will help foster their support if a RIF is implemented. However, neither the Texas Education Code nor most districts' policies require these committees to approve a district's proposed reorganization or RIF. Tex. Educ. Code § 11.251.

B. RIF Procedures

1. What are the necessary steps for a RIF?

It may help to imagine the RIF process as a funnel; it starts broadly, but narrows until eventually it focuses on the affected employees. How does this "funnel" work?

There are five basic steps to implement a RIF:

- 1. Board declares the need for a RIF.**
- 2. Board identifies affected employment areas.**
- 3. Superintendent applies RIF criteria, for example:**
 - Certification**
 - Performance**
 - Seniority**
 - Professional Background**
- 4. Superintendent considers RIF employees for open positions.**
- 5. District begins the nonrenewal or termination process.**
- 6. Board declares that financial exigency has passed.**

- **Step One: Board declares the need for a RIF**

First, as discussed above, the board must take action to declare a need for a RIF by declaring either (1) a financial exigency or (2) a program change.

The superintendent's recommendation for a RIF should include clear documentation of the problem, past efforts to cure the problem, and how a proposed RIF will cure the problem.

- **Step Two: Board identifies affected employment areas**

After declaring the need for a RIF, the board, not the superintendent, must define the scope of the RIF. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) ("There is no reasonable construction of [the district's policy] that would allow the superintendent to determine affected employment areas."). In accordance with TASB Policy DFF(LOCAL), however, the superintendent may make recommendations to the board regarding the employment areas to be affected.

RIF policies typically list examples of employment areas, such as: "elementary grades, levels, subjects, departments or programs;" "special programs such as gifted and talented, bilingual/ESL programs, special education, compensatory education, and migrant education;" "library programs;" and "an individual campus." See TASB Policy DFF(LOCAL). *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 170-R1-599 (July 12, 1999).

The possible employment areas to be affected by a RIF should not be limited to the examples in the RIF policy, however. See, e.g., *Arredondo v. Brooks County Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 065-R1-0709 (Aug. 20, 2009) (board had discretion to consider "behavioral unit" an employment area even though RIF policy listed "special education" as example).

In determining the affected areas, the board may combine or coordinate areas. For example, instead of the areas of "elementary grades, levels, subjects, departments, or programs" and "library programs," the board could define the employment area as "elementary school library programs." *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 170-R1-599 (July 12, 1999). Or the board could combine "elementary programs" and "compensatory education programs" to identify an employment area of "elementary compensatory education program."

The board's choice of the affected employment area(s) is significant because once the employment area(s) is defined

- All employees *within* the area(s) must be considered for the RIF, and
- The district may not consider employees *outside* the identified area(s).

employment area identified by the board, there is no need to list a second employment section that also includes that position. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (teacher’s business classes were included in the RIF identified area of “enrichment curriculum” as well as the “compensatory education” area, which was not identified for RIF).

- **Step Three: Superintendent applies RIF criteria**

After the board has declared the need for a RIF and identified the affected employment area(s), the superintendent then applies the preset criteria listed in the district’s RIF policy to all employees in the affected employment area(s) to determine which employees will be recommended for discharge.

The district’s RIF policy should specify the criteria, in order of importance, to be used to identify affected employees within the relevant employment area(s).

The superintendent must apply the criteria sequentially, until a sufficient number of positions have been identified.

See Sample Chart for Applying RIF Criteria (Appendix)
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If your district uses TASB’s policy DFF(LOCAL), these criteria, in order of importance, are:

1. **Certification:** The superintendent should first ensure that all employees within the affected employment area are properly certified or have endorsements for their current or projected assignments. *See, e.g., Loftin v. Rogers Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 003-R1-990 (Aug. 30, 1991) (reversing RIF because certified teacher was able to show that others in her employment area lacked proper certification for some assignments).
2. **Performance:** If further reductions are needed after applying the certification criterion, the superintendent must consider performance, which is normally done by comparing appraisal scores. *See, e.g., Clifton v. Rocksprings Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 127-R1-698 (July 27, 1998) (upholding RIF decision based on appraisal ratings); *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999) (concluding that the board’s methodology for comparing appraisal scores was not an abuse of discretion); *Hood v. Florence Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 236-R1-589 (Feb. 5, 1990) (teacher had the lowest evaluation score of the eleven teachers in the targeted employment area).

3. **Seniority:** This is normally defined as the length of time in the district, rather than in a particular job.³ *Guidry v. Shelbyville Indep. Sch. Dist.*, Tex. Comm’r Decision No. 101-R1-598 (June 23, 1998) (where there was no significant difference between two librarians using the first two categories, it was appropriate to use seniority as the decisive factor).
4. **Professional Background:** Finally, if necessary, the superintendent may compare employees’ professional education and work experience related to their current or projected assignments.

Order of application: Applying the criteria out of order is grounds for reversal. *See, e.g., Grant v. La Porte Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 225-R2-493 (June 24, 1994) (reversing RIF of employee with seniority but without proper certification because local policy listed seniority as first criterion).

If no significant difference: If the documented differences in performance between employees are too slight to serve as the basis for a decision, the superintendent may look to the next criterion. *See, e.g., Guidry v. Shelbyville Indep. Sch. Dist.*, Tex. Comm’r Decision No. 101-R1-598 (June 23, 1998) (upholding RIF based on seniority when teachers were appropriately certified and their appraisals showed no appreciable difference).

Single employee: If only one employee is in an identified employment area, there is no need to apply the criteria for a decision. *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001) (no criteria needed to RIF the single employee in program, where program was outsourced to local college); *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999) (librarian was only employee in program identified for RIF); *Camp v. Union Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 084-R2-1293 (Jan. 7, 1997) (abolition of the program requires termination of the sole employee in the program).

Delegation to principals: The superintendent is the person directed by policy to apply the criteria. However, the superintendent is permitted to seek input from campus principals as to possible program changes and budget cuts and then incorporate those suggestions into his recommendations to the board. *Westbrook v. Colorado Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 170-R1-599 (July 12, 1999).

Applied to all employees in the employment area(s): The RIF criteria must be applied to all employees, not just handpicked employees, in the identified employment area(s). *Collins v. Kountze Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 215-R1-589 (Nov. 9, 1989).

³ Although the seniority criterion is listed third in the TASB recommended version of Policy DFF(LOCAL), some districts choose to list this criterion last. Be sure to check your district’s local policy at this point.

Outside the identified employment area(s): The district may not consider employees outside of the identified employment area(s). *Pitts v. Beckville Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 061-R2-1296 (Jan.15 1997); *Peevey v. Liberty Hill Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 417-R1-691 (Nov. 19, 1992).

Superintendent applies criteria to individuals: A RIF may be subject to challenge if the superintendent does not adhere to board policy. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (although the board identified employment areas, superintendent considered elimination of entire programs, not individuals, and applied criteria different from that in policy).

No remediation: An employee in an identified employment area(s) has no right to remediation. See *Clifton v. Rocksprings Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 127-R1-698 (July 27, 1998)

Make the record: Keep worksheets and other documentation to show how the criteria were applied. Be sure that the oral and written recommendation to the board has sufficient detail to show that the criteria were adequately applied. The district has the burden to produce an adequate record to support its RIF implementation. *Loftin v. Rogers Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 003-R1-990 (Aug. 30, 1991); *Carr v. Petersburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 108-R2-299 (March 26, 1999).

- **Step Four: Superintendent considers RIF employees for open positions.**

Once the superintendent has applied the criteria to identify the affected employees, those employees must be considered for other available positions in the district for which they are qualified. *Parr v. Waco Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 264-R1-689 (Apr. 11, 1991). “A legitimate reduction in force is a valid reason for nonrenewal. However, it must be a reason for nonrenewal, not merely an excuse It does not constitute a reason if . . . there is another position for which the teacher is qualified, unless the district has a valid reason, supported by substantial evidence, for not reassigning the teacher to that position.” *Parr v. Waco Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 264-R1-689, at 2 (Apr. 11, 1991).

Positions need not be of the same type, responsibilities, or salary: Reduction in force does not constitute a valid reason for nonrenewal, if on the date of the nonrenewal, there is another position for which the teacher is qualified. *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988) (remanding because the athletic director who was terminated should have been considered for a principal vacancy if he were at least as qualified as the successful candidate for the position, at the salary usually paid for that position). The district may consider part-time positions or assignments to another campus. *Salinas v. Monte Alto Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 080-R1-502 (June 28, 2002).

Consider all known positions: Positions may be considered even if the positions are not actively being advertised. *Wassermann v. Nederland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 171-R1-784 (Sept. 1, 1988).

Once an open position is established and the employee has shown that she is certified and at least minimally qualified for the position, the district has the burden to prove that the employee was not qualified for the open position. *Parr v. Waco Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 264-R1-689 (Apr. 11, 1991) (record did not contain any evidence of the posted qualifications of the open position nor the rationale for the selection committee not recommending the employee for the open position).

Limits on district’s duty to assign to open positions: The district’s obligation to consider affected employees for open positions is not unlimited, however.

- If no positions become available before the date of an employee’s hearing, the district has no obligation to give the employee special consideration for vacancies that open up in the future. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).
- If the employee declines an offered position, the obligation is extinguished. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).
- This obligation applies only to actual, not speculative vacancies. *Higgs v. Bridgeport Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 243-R1-787 (Dec. 20, 1988) (rumors of a planned resignation did not amount to a vacancy); *but see Strauch v. Aquilla Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 189-R1a-782 (Aug. 11, 1983) (vacancy that came open after notice of proposed nonrenewal but before hearing should have been filled with qualified teacher instead of proceeding with RIF).
- “The district is not obligated to consider the teacher for another position unless at the time of the nonrenewal hearing it has received an actual resignation for a position for which the teacher is qualified.” *Hood v. Florence Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 236-R1-589 (Feb. 5, 1990) (teacher argued that the district knew or should have known that a vacancy was likely to occur by the following August by attrition; past patterns of attrition during the summer months did not amount to a vacancy).
- A district may require affected employees to express an interest in open positions by applying and interviewing for the jobs. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003) (a requirement that a teacher must apply and interview for a position is an objective requirement and helps ensure that a district has placed the teacher in the best available

position); *Stuessy v. Ysleta Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 345-R2-893 (Apr. 20, 1995) (counselor terminated in a RIF refused to interview for a principal position, erroneously arguing that she was not required to interview until after the board decided her appeal).

- A district is not required to restructure its positions to accommodate a RIF’ed employee. *Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (when open position was a dual position of teacher and coach, and RIF’ed employee was not a coach and thus was not qualified, district was not required to restructure the position to assign another employee to the coaching duty and permit the RIF’ed employee to take the teaching duty).

- **Step Five: District begins the nonrenewal or termination process.**

Just when you think you have reached the end of the RIF process, you are at the beginning of the nonrenewal or termination process. After considering the superintendent’s recommendation (and if no vacancies exist for which the recommended employees are qualified):

- The board must vote to propose the employees for nonrenewal or termination.
- The superintendent then must provide the affected employees the required written notice of and reasons for the proposed action.
- Employees receiving notice of a proposed nonrenewal may request a hearing in accordance with TASB Policies DFBB(LEGAL) and (LOCAL). Employees receiving notice of a proposed termination may request a hearing in accordance with TASB Policy DFD(LEGAL).
- After any appropriate hearings are held under Chapter 21, the board must vote to nonrenew or terminate the employees’ contracts.

- **Step Six: Board declares that financial exigency has passed.**

If your district bases the RIF on a financial exigency, rather than a program change, a word of caution is in order. Some commentators have suggested that a board’s declaration of a financial exigency constitutes an admission that the district is unstable financially, a condition that could impair the district’s financial rating and jeopardize a guarantee by the Permanent School Fund for a bond program. Each district that declares a financial exigency should review the district’s financial condition after the RIF is completed and, where appropriate, declare that the financial exigency has passed due in part to the successful RIF.

2. Why are RIF procedures so important?

If the local school board follows its policy and the record reflects that its choice is reasonable and not based on illegal discrimination, courts and the commissioner of education generally will defer to the discretion of the board and not second-guess the board's choice of affected employment areas.

- “Indeed, if anything may be summarily concluded about the actions of the (district’s) board of trustees, it may be said that it has exhibited extraordinary sensitivity to the expenditure of public federal funds which may stand as an example to other governmental subdivisions. It certainly may not be concluded that a decision to nonrenew an employee on evidence that his or her services are no longer required is lacking a basis of substantial evidence simply because funds are available for the salary of that employee.” *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984).
- “The district made a rational decision that it could save money by eliminating Petitioner’s position.” *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001).
- “It is not the Commissioner’s job to second-guess this decision.” *Guidry v. Shelbyville Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 101-R1-598 (June 23, 1998).
- “The power to allocate district resources is the very core of that discretionary authority delegated by law to local governing boards. In the absence of an abuse of that discretion, local action will be accorded a wide latitude.” *Ruiz v. Edinburg Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 241-R3-787 (Sept. 19, 1989).
- “The district may practice sound financial management to prevent future bankruptcy of the district’s finances. The school board is charged with the responsibility of governance of the district; governance includes the making of responsible choices in managing the finances and personnel of the district.” *Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 205-R2-687 (March 9, 1990).

When boards’ RIF decisions are reversed, it is rarely due to the reasons for the RIF, but rather because:

- The district did not follow its own RIF policy, or
- The district did not make a good record for review.

3. How does the Open Meetings Act apply to RIFs?

- Be certain that the meeting notices authorize deliberation and action on the RIF.
- The board should deliberate about the RIF in open session. The “personnel” exception to the Open Meetings Act authorizes a closed session deliberation about

individual employees, not groups of employees or employment areas. Tex. Gov't Code § 551.074. RIFs focus on employment positions, not individual employees, at least until the RIF criteria are applied to each employee in the designated employment area or program selected.

Check with the district's attorney to review the meeting notices and which RIF issues should be deliberated in open or closed session.

4. What are the most likely challenges to a RIF?

A review of the RIF cases in Texas reveals patterns of theories commonly asserted by employees affected by a RIF:

- That the district did not follow the RIF policy procedures.
- That the RIF policy denied due process or the procedures were too subjective. *Collins v. Wolfson*, 498 F.2d 1100 (5th Cir. 1974) (affirmed college's RIF criteria).
- That the RIF was a pretext for termination of an individual rather than the position.
 - That the RIF was in retaliation for the employee's constitutionally protected speech. *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984) (teacher's Grand Jury testimony); *Collins v. Wolfson*, 498 F.2d 1100 (5th Cir. 1974) (professor's participation in a political demonstration).
 - That the RIF was motivated by illegal discrimination. *Johnson v. Houston Indep. Sch. Dist.*, 930 F. Supp. 276 (S.D. Tex. 1996) (alleging race discrimination); *Dillon v. Texas City Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 073-R1-601 (Aug. 3, 2001) (alleging age discrimination).
- That other expenses could be cut instead of teacher contracts. *Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 205-R2-687 (March 9, 1990) (teacher argued that district completed a building renovation project and increased aide salaries rather than meeting its contract obligations to teachers).

5. Remember the basics!

- Plan ahead. Try to reduce staff expenses in other ways first.
- Document the reasons for the RIF.
- Communicate with staff and the community.
- Strictly follow each step in the procedures set out in the district's own RIF policy.
- Make a good record to support each step of the district's implementation of a RIF.

**[Sample] Chart for Applying TASB Policy DFF(LOCAL) RIF Criteria
to Individuals in the Identified Employment Areas**

Positions to be eliminated: 6

Personnel expenses reduced by \$240,000

Employment areas identified for RIF: Middle School and High School athletics

<i>RIF</i>	Name	Employment Area/Position	A. Certification	B. Overall Performance	C. Seniority in District	D. Professional Background
2	1. Abby Acura	Middle School/Girls' Volleyball Coach	Yes: Physical Education, Math	Below Expectations	N/a	N/a
1	2. Tom Toyota	High School/Head Football Coach	No: Emergency Permit: Physical Education, Art	N/a	N/a	N/a
	3. Carl Chevrolet	High School/Head Baseball Coach	Yes: Physical Education, Speech	Proficient	8 years	BA degree; MS in progress; 9 years total teaching experience
	4. Valerie Volvo	High School/Head Girls' Volleyball Coach	Yes: Physical Education, Chemistry	Proficient	8 years	BA, MS degrees; 15 years total teaching experience
5	5. Ethan Edsel	High School/Asst Football Coach	Yes: Physical Education, English	Exceeds Expectations	1 year	N/a
	6. Frank Ford	High School/Boys and Girls Golf Coach	Yes: Physical Education, Administrator	Proficient	8 years	BA, MA degrees; 13 years total teaching experience
3	7. Mary Mercedes	High School/Head Girls Softball Coach	Yes: Physical Education, History	Unsatisfactory	N/a	N/a
6	8. Harry Honda	High School/Boys and Girls Tennis Coach	Yes: Physical Education, Biology	Proficient	8 years	BS degree; 8 years total teaching experience
	9. Leonard Lexis	Middle School/Head Football Coach	Yes: Physical Education, Music	Proficient	8 years	BA, MA degrees; 25 years total teaching experience
4	10. Jane Jaguar	High School/Asst Softball Coach and Cheerleader Coach	Yes: Physical Education, Social Studies	Below Expectations	N/a	N/a
	Positions eliminated at this step		1	3	1	1
	Total positions eliminated		1	4	5	6
	If less than 6 positions, go to criteria column:		B	C	D	N/a