



## Hurricane Harvey and Related Legal Issues

TASB Legal Services has received numerous questions related to emergency exceptions to legal requirements due to the impact of Hurricane Harvey. These questions relate to Texas Open Meetings Act (OMA) procedures, competitive purchasing requirements, contracting authority, tax rate and budget adoption, student and personnel issues, records management, and donations. Several of these questions are discussed below; others are addressed in the resources cited.

In many instances, the flooding and destruction from Hurricane Harvey will qualify as an emergency for those districts affected in the manner defined by law.

**The following general resources for emergencies answer frequently asked questions or provide helpful information:**

1. TASB Legal Services' [Emergency Procedures for School Districts FAQs](#), including a sample notice of emergency meeting;
2. TASB Legal Services' [Personnel Issues During School Closings](#), including information about compensation of employees during closing and employment in another district;
3. TASB Legal Services' [Donations To and From Public Schools](#), including information about permissible donations and accounting considerations;
4. TEA's [Weather and Disaster Information](#);
5. TEA's [Hurricane Harvey Resources](#); and
6. FEMA's [Procurement Disaster Assistance Team](#).

### Competitive Procurement—Emergency Purchasing Procedures

**What is the process for procurement in an emergency?**

**General Competitive Procurement Rule:** The general procurement rule under state law requires that goods and services, including construction, valued at \$50,000 or more in a 12-month period be competitively procured in accordance with Texas Education Code section 44.031.

**Emergency Exception with Board Determination:** Section 44.031(h) provides an emergency exception to the general procurement requirements. If school equipment, a school facility or part of a school facility, or personal property is destroyed or severely damaged, and *the board determines* that the delay arising from following the regular purchasing methods would prevent or substantially impair the conduct of classes or other essential school activities, the board is not required to use the regular purchasing methods required by law to contract for replacement or repair of the damage. Tex. Educ. Code § 44.031(h). For immediate, emergency repairs or replacement in an amount that would otherwise require competitive purchasing, board determination of an emergency and action to suspend procurement rules are required. Boards may utilize the procedures for an emergency meeting under the OMA in order to pass a board resolution that complies with Section 44.031(h).

**Federal Disaster Assistance and Procurement:** The Federal Emergency Management Agency (FEMA) provides resources and prepares grants to assist with recovery from the effects of Hurricane Harvey. A school district damaged by the hurricane may be eligible for federal funds if it is located in a jurisdiction included in the presidential disaster declaration. TEA has issued detailed procurement guidance to assist school districts and charter schools with the initial steps that should be taken when seeking FEMA assistance in a [To the Administrator Addressed letter](#).

To be eligible for FEMA reimbursement, school purchases must comply with federal procurement laws. FEMA's [Procurement Disaster Assistance Team](#) (PDAT) assists disaster assistance applicants with adhering to the federal procurement standards as well as FEMA policies and guidance associated with FEMA's Public Assistance grants. While a school board may take action to suspend state procurement requirements under the emergency exception discussed above, such action does not necessarily result in a corresponding exception to the federal procurement rules. Federal law may be more stringent than state law with regard to procurement and emergency exceptions. Consequently, if a district plans to file a FEMA claim for reimbursement, the district should work with FEMA and its school attorney to competitively procure purchases in a manner that is compliant with 2 C.F.R. §§ 200.317-.326.

**Facilities Construction:** TASB Policies CH and CV generally set forth the law and local policies pertaining to school facility construction contracts and competitive procurement, including Texas Government Code chapter 2269. In addition, TASB Legal Services' article [Architect or Engineer](#) answers questions about when a school district is required to hire an architect or engineer for its construction projects. Because these numerous and varied legal requirements will have case-by-case applications to each district's emergency facility work, TASB Legal Services recommends that districts work closely with their school attorney, architects, engineers, procurement staff, insurance experts, TEA, and FEMA on all facilities projects related to Hurricane Harvey.

**Payment and Performance Bond:** The emergency exception of Section 44.031(h) discussed above relieves districts only from compliance with the regular purchasing methods; districts still must comply with requirements pertaining to performance and payment bonds. Payment bonds are required for construction projects that exceed \$25,000, and performance bonds are required for construction projects exceeding \$100,000. Tex. Gov't Code § 2253.021. See TASB Policy CV(LEGAL).

## Contracting Authority—Emergency Purchasing Procedures

### What authority does the superintendent or designee have as to contracting in an emergency?

**Purchasing Authority Governed by Local Policy:** Board policy CH(LOCAL) defines the scope and limitations on purchasing authority that a board has delegated to a superintendent or designee. Many districts limit the delegated purchasing authority to a certain amount, including amounts less than \$50,000. Consequently, even if competitive procurement is not required because the amount is less than \$50,000 or an emergency exception applies, board approval of a contract for purchase of goods or services may still be required by a district’s local policy. School districts should review this policy before authorizing repairs or other purchases.

**Board Delegation of Contracting Authority in an Emergency:** In the event of a catastrophe, emergency, or natural disaster affecting a school district, the board of trustees may delegate to the superintendent or designated person the authority to contract for the replacement, construction, or repair of school equipment or facilities if emergency replacement, construction, or repair is necessary for the health and safety of district students and staff. Tex. Educ. Code § 44.0312(c). This delegation of contracting authority is not automatic and requires board action as to the specific authority granted by the board to the superintendent or designee.

**Cautionary Case on Emergency Contracts:** Despite the urgency, when entering into contracts for emergency repairs, districts should exercise the usual due diligence, including legal review of contracts, before signing binding agreements. Contracts with unfavorable terms entered in haste may still be enforced to a district’s detriment. A recent case in which a district claimed fraud and price gouging as to restoration services provided in the wake of Hurricane Ike resulted in an adverse judgment and contract damages against the district. *Clear Creek Indep. Sch. Dist. v. Cotton Commercial USA, Inc.*, No. 14-16-00466-CV, 2017 WL 3271173 (Tex. App.—Houston [14th Dist.] Aug. 1, 2017). We recommend that written contracts for emergency goods and services be entered only after review and approval by the school district’s attorney.

## Emergency Meetings Issues

### What is the process for postponing and later convening a posted meeting?

**72 Hour Extension Period for Postponement of Properly Posted Meeting:** If a catastrophe prevents a governmental body from convening an open meeting that was otherwise properly posted, the body may convene the meeting in a convenient location *within 72 hours* pursuant to Section 551.0411(b), (c) of the OMA if the action is in good faith and not done in order to circumvent the OMA. See TASB Policy BE(LEGAL). Based on the phrase *convenient location*, the district may select an alternate meeting location within the district’s jurisdiction if the posted meeting location is not available due to the emergency conditions.

**Notice of Postponement:** The statute is silent as to the requirements for providing notice of the postponement. In general, districts should attempt to provide notice in the same manner that they provided notice for the meeting; however, if circumstances based on safety concerns do not allow for such notice, TASB Legal Services recommends that school officials use their best judgment in consultation with counsel.

### **What are the procedural options for emergency meetings?**

**Legal Standard for Emergency Board Meetings.** An emergency exists only if immediate action is required because of: (1) an imminent threat to public health and safety, or (2) a reasonably unforeseeable situation. Tex. Gov't Code § 551.045(b). The sudden relocation of a large number of residents from the area of a declared disaster to a governmental body's jurisdiction is considered a reasonably unforeseeable situation for a reasonable period immediately following the relocation. Tex. Gov't Code § 551.045(e).

**Notice of the Emergency Board Meeting:** The district must post notice of an emergency meeting or an emergency addition to an existing agenda no less than two hours before the scheduled time of the meeting. The notice of the emergency meeting or the additional agenda item must clearly identify the emergency or urgent public necessity justifying the short notice. Tex. Gov't Code § 551.045(a), (c). Additionally, if the board is holding an emergency meeting due to the sudden relocation of a number of residents from the area of a declared disaster to the district's jurisdiction, the district must give notice of the meeting to the news media no later than one hour before the scheduled time of the meeting. Tex. Gov't Code §§ 551.045, .047. See TASB Policy BE(LLEGAL).

An emergency meeting without 72 hours' notice must be limited to items requiring immediate action.

### **Meeting Exceptions for Phone Conference and Quorum:**

A board may hold a meeting by telephone conference call if an emergency or public necessity exists as defined by the OMA and the convening at one location of a quorum of the board is difficult or impossible. Tex. Gov't Code §§ 551.045, .125. The notice of the telephone conference call meeting must specify as the location of the meeting the location where meetings of the governmental body are usually held. Tex. Gov't Code § 551.125(d). Each part of the telephone conference call meeting shall be recorded and open and audible to the public.

The recording shall be made available to the public. Tex. Gov't Code § 551.125(e). The meeting location shall provide two-way communication during the entire telephone conference call meeting and the identification of each party to the telephone conference shall be clearly stated prior to speaking. Tex. Gov't Code § 551.125(f).

A quorum is not required for a board to act if: (1) the district's jurisdiction is wholly or partly located in the area of a disaster declared by the president of the United States or the governor; and (2) a majority of the members of the board are unable to be present at a board meeting as a result of the disaster. Tex. Gov't Code § 418.1102.

## **Adoption of Budget and Tax Rate**

### **What if a board must cancel its noticed meeting for adopting the budget and tax rate?**

Hurricane Harvey, in addition to being horribly destructive, also came at a bad time for school districts in the process of adopting their budgets and tax rates. Tex. Educ. Code § 44.004. With a budget adoption deadline of August 31 for many districts, the notice of public meeting to discuss proposed budgets and tax rates had already been published for meetings to occur during the week of August 28–September 1.

Statutory authority is not clear on how to proceed in every circumstance; thus, districts should consult with their school attorneys. Generally speaking, districts are encouraged to proceed in the manner that considers foremost the safety of citizens, personnel, and the board, as well as transparency to the public regarding any rescheduling.

School boards typically publish two types of notice before meeting about the budget and tax rate. The first is the OMA notice required for any board meeting. Under the OMA, meetings may be postponed or rescheduled in accordance with the emergency exceptions to the Act, described above.

The second is the Comptroller's "Truth in Taxation" notice published in the newspaper to announce the date and time of the public hearing on the budget and tax rate, along with related information. The statutes and rules regarding this newspaper publication do not include emergency notice provisions. One assumes state and local officials will recognize the necessity of delay; however, at this time, there has been no public announcement regarding the effectiveness of prior notice for public hearings rescheduled due to emergency conditions.

Remember that although school boards often adopt a budget and tax rate at the same meeting following a public hearing, the statutory deadlines for these events are independent.

- The budget must be adopted before spending funds in the new fiscal year, which means a deadline of August 31 for districts with a September 1 fiscal year. Tex. Educ. Code §§ 44.004(f), .006(a), .0011. If possible, using the emergency provisions of the OMA if necessary (including meeting by teleconference), school boards should adopt a budget before the new fiscal year.

- A public hearing on the budget and proposed tax rate must occur 10-30 days following newspaper notice. Tex. Educ. Code § 44.004. On the advice of counsel, some school boards may be able to reschedule their public hearings within 30 days of their original newspaper notice, using the emergency options in the OMA. Districts with a more significant delay may choose to publish a second newspaper notice, again in consultation with counsel.
- The tax rate must be adopted before the later of September 30 or the 60th day after the date the district receives the certified appraisal roll. Tex. Tax Code § 26.05(a). A district that cannot adopt a tax rate before the statutory deadline or that cannot safely conduct a public hearing before adopting the tax rate should consult with its school attorney.

## **Student Attendance and Admissions Issues**

### **What should a school district do if their students miss a large number of school days due to an emergency?**

School districts must operate for at least 75,600 minutes per school year. Tex. Educ. Code § 25.081(a). The commissioner of education, however, may approve a waiver of this requirement if disaster, flood, extreme weather conditions, fuel curtailment, or another calamity causes the closing of schools. Tex. Educ. Code § 25.081(b).

TEA has issued [guidance](#) specific to waivers related to Hurricane Harvey. Waivers are also addressed in TEA's [student attendance accounting handbook](#).

### **Will students who miss more than 10 days of school because of a natural disaster be subject to truancy laws at some point?**

Absent an exemption, such as attendance at a private school or homeschool, Texas law requires students age 6–19 to attend school each day that instruction is provided. TEA recommends that evacuated students be given a reasonable period of time to decide whether they will return to their former school district or enroll in another district. TEA further advises that truancy charges should not be filed until that decision can be made.

### **Can Texas students enroll elsewhere if their home district is closed?**

Students that fit into the statutory definition of homeless, discussed below, are eligible to immediately enroll in any school district, regardless of the residence of the student or the student's parent or guardian. Under 42 U.S.C. § 11432, the homeless student is also eligible to attend the school that the student attended when permanently housed, the school in which the student was last enrolled, or the school serving the attendance area where he or she is now located. A district may be required to provide transportation to a student who is homeless, depending on where the student is enrolled.

For students who are not homeless but their home district is currently closed, TEA's weather and disaster information states that the students are eligible to enroll in another district. Once a district reopens, the students may reenroll. If the reopened school district has an adjusted calendar, the students are required to attend instruction on all of the days provided. Districts are advised to use specific PEIMS crises codes to report students enrolling as a result of displacement by Harvey. TEA has released [additional information regarding PEIMS crisis codes](#). This information may be used for assessment and accountability information. TEA has also stated in a [To the Administrator Addressed letter](#) regarding the PEIMS school start date window that students should not be considered leavers for the purposes of PEIMS reporting until the end of the school start window, which has been extended to October 27, 2017. For information about the PEIMS Crisis Code for students displaced by Hurricane Irma, see TEA's [Texas Student Data System \(TSDS\) PEIMS Crisis Code for Hurricane Irma and Fall PEIMS Snapshot Date](#).

TEA has released guidance on funding issues related to an increase or decrease in average daily attendance (ADA) due to districts with potential enrollment losses from displaced students and districts enrolling displaced students. TEA's guidance for funding adjustments can be found in a [To the Administrator Addressed letter](#) regarding adjustments for average daily attendance (ADA) and certain funding issues due to Hurricane Harvey. A [To the Administrator Addressed letter](#), dated October 9, 2017, contains more detailed information regarding the adjustment to ADA for school districts experiencing declines in their 2017-18 enrollment because of Hurricane Harvey. TEA has also released guidance on [requirements for campuses operating over capacity](#) because of Hurricane Harvey. These schools may be operating two campuses with condensed instructional hours within a single school day to accommodate displaced students. This alternative schedule may affect the minutes of operation, but districts may apply for an operational minutes waiver.

### **What is the definition of a homeless student? Are students displaced by a disaster considered homeless?**

The legal definition of homeless can be found in TASB Policy FDC(LEGAL), which includes both 42 U.S.C. § 11302 (defining homeless person) and 42 U.S.C. § 11434a (defining homeless youth and children). Students who are displaced by disaster are likely considered homeless if they lack a fixed, regular, or adequate nighttime residence. This definition includes students who are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations. The definition also include students living in emergency or transitional shelters and those who use places not designed for sleeping as their regular nighttime residence.

Students may also be considered homeless if they are living with family or friends due to the natural disaster (a situation known as "doubling up"). In order to qualify as homeless, the students must be sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.

Students who are homeless due to a disaster qualify for comparable services described in the McKinney-Vento Act, 42 U.S.C. § 11432(g)(4), including transportation services, educational services, and meals through school meals programs.

**What process should a district follow to determine whether students are truly homeless due to a disaster?**

Districts can make reasonable inquiries to establish that a student is homeless. According to TEA's weather and disaster information, identification showing that the parent is from the areas evacuated is reasonable evidence that a student is an evacuee eligible for services as a homeless student. A utility bill or similar documentation should not be required under these circumstances.

**Is a displaced student also considered a migrant student?**

A student is not considered a migrant student unless the student was designated or falls under the definition of a migrant student independently of or prior to the circumstances that led to the displacement.

**What resources exist for assisting students displaced by Harvey?**

1. [UT DANA Center THEO](#), After Hurricane Harvey: Supporting Displaced Texas Students
2. [National Center for Homeless Education, Disaster Preparation and Response](#)
3. [National Association for the Education of Homeless Children and Youth](#)
4. [TEA Education of Homeless Students](#)
5. [Department of Education, Hurricane Help](#)
6. [Texas Health and Human Services FAQs about Immunization Requirements for School Admittance](#)

For more information about the admission of students displaced by Hurricane Harvey, see TEA's [Hurricane Harvey Enrollment Guidance](#).

**Other Student Issues**

**What resources exist to help schools assist families in their recovery?**

1. [Texas Department of Agriculture Harvey Updates for Texas Nutrition Programs](#)
2. [USDA Food Assistance for Disaster Relief](#)



3. [Texas Health & Human Services Disaster Assistance](#)
4. [FEMA Children and Disasters webpage](#)

**What resources exist to help schools assist their communities with the mental health needs related to Hurricane Harvey?**

Several resources exist. Mental health information related to natural disasters, including a disaster distress helpline, can be found on the [Substance Abuse and Mental Health Services Administration \(SAMSHA\) website](#). SAMHSA is an agency within the US Department of Health and Human Services.

In addition, on October 11, 2017, TEA announced the establishment of the Hurricane Harvey Task Force on School Mental Health Supports. TEA is collaborating with the Texas Higher Education Coordinating Board (THECB), the Texas Health and Human Services Commission (THHSC), and the Meadows Mental Health Policy Institute to provide resources to assist school districts in dealing with the mental health effects caused by Hurricane Harvey. For more information and access to mental health resources for schools and communities, see TEA's webpage [Hurricane Harvey Recovery: Mental Health Resources for Schools](#).

**Can schools not in session still have practices for extracurricular UIL programs?**

Yes. According to [University Interscholastic League \(UIL\) Hurricane Harvey Information](#), during what would normally be a school week, practices should be limited to a maximum of 13 hours. The UIL website also provides information about eligibility for students displaced by Hurricane Harvey, including a link to a Hurricane Harvey eligibility waiver.

**How can districts ensure students with disabilities are receiving appropriate special education services?**

Schools enrolling new students with disabilities must follow the requirements for transfer students found in the Individuals with Disabilities Act (IDEA), which includes providing services comparable to those in the student's individual education program (IEP) from the previous district. 20 U.S.C. § 1414(d)(2)(C). Districts should proceed with holding ARD meetings, conducting initial evaluations and reevaluations, and providing transition services within the regular timelines. For more information, see TEA's FAQs for Special Education Issues Resulting Hurricane Harvey, found on [TEA's Harvey Resources Website](#).

## Records Management: Destroyed or Damaged Records

In addition to damage to physical resources, districts may be facing damage to school district records. In some instances, records that are required to be maintained permanently may be destroyed. The Texas State Library and Archives Commission (TSLAC) article [Documenting Destruction of Records Damaged or Destroyed](#) provides suggestions and resources for managing such records.

## Legal Assistance

Finally, please be aware that many school attorneys were affected by Hurricane Harvey. We know that Texas' dedicated school attorneys are making themselves as available as possible during this time. If you are unable to reach your school attorney, please do not hesitate to call TASB Legal Services.

For more information on this and other school law topics,  
visit TASB School Law eSource online at [schoolawesource.tasb.org](http://schoolawesource.tasb.org).

*This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is not an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. Consult with your own attorneys to apply these legal principles to specific fact situations.*

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