



**Texas Association of School Boards**

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*Serving Texas Schools Since 1949*

## **Emergency Delegation of Authority to Superintendent**

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TASB Legal Services has been asked to comment on the request for sample resolutions delegating emergency powers from the school board to the superintendent during the COVID-19 pandemic.

While certain specific delegations of authority might be useful during a period of closure, most boards have already provided the superintendent adequate authority to operate during this crisis. We advise school boards to work closely with the district's school attorney to first assess the particular needs of the school district, based on its current policies and practices, before borrowing a sample resolution and handing over significant decision-making authority to its superintendent, even for a short period of time. For this reason, TASB will not be offering a sample resolution that delegates comprehensive emergency powers to the superintendent. Instead, we have offered single-issue resolutions on topics that may be useful to school boards.

The goal of a resolution should not be simply to avoid conducting board meetings. Given the flexibilities created by the suspension of certain OMA provisions, conducting a board meeting has never been easier. The COVID-19 pandemic, while certainly a disaster, is not one that necessarily requires expansive new powers for the superintendent. Moreover, we think a time of crisis is one in which the board should remain engaged in, not absent from, its oversight role.

The following are examples of potential delegations for a board's consideration.

- **The district will need to request waivers from the Texas Education Agency (TEA) for matters such as attendance and educator appraisals.**

With certain exceptions, Texas Education Code section 7.056 allows a district to apply to the commissioner for a waiver of a requirement, restriction, or prohibition imposed by the Education Code or rule of the State Board of Education or commissioner. Normally a waiver must be submitted in writing not later than the 31st day before the district intends to take action requiring a waiver, and the application must include a written plan approved by the board of trustees that states the objective of the waiver, as well as comments from the district's site-based decision making committee.

TEA has indicated, however, that the Agency will accept a waiver request from a superintendent if the board has taken action to delegate authority to the superintendent to make the waiver request and if the board ratifies the superintendent's request at a future board meeting. Attached below is a sample **Resolution of the Board Regarding Delegation to Superintendent for Waivers**.

- **The district needs to purchase a large amount of equipment or instructional materials to support distance learning, and the board has set a low dollar amount of purchasing authority for the superintendent in CH(LOCAL).**

If a board realizes the dollar amount in CH(LOCAL) is too low to give the superintendent the freedom to buy necessary equipment or materials, the board can act to change policy or temporarily delegate greater purchasing authority. The greater authority may be granted with or without a need to report to the board, and with or without a need for the board to ratify purchases. Delegation of authority to make purchases in excess of the dollar amounts permitted under CH(LOCAL) is not the same as the board's suspension of competitive procurement requirements (see below). Unless a board adopts a resolution to suspend competitive procurement requirements, the administration's purchases still must be made by a procurement method required by law.

- **The district needs to make purchases quickly without adhering to competitive procurement requirements.**

Under Texas Education Code section 44.031(h), the authority to make purchases without following normal competitive purchasing requirements requires that **the board itself** first determine that the COVID-19 pandemic has led to an unforeseen *operational failure* for the district, and therefore the delay posed by the methods provided for in Texas Education Code Section 44.031(a) would prevent or substantially impair the conduct of classes or other essential school activities so that contracts for goods and services needed to *replace* traditional classroom facilities and instructional equipment with alternative goods and services should be made by methods other than those required by Section 44.031(a), including but not limited to the acquisition of resources necessary to implement remote operations and instruction in compliance with the Governor's Executive Orders. The board's determination could also extend to contracts for goods and services necessary to maintain the health and safety of facilities and equipment, including but not limited to resources necessary for cleaning, disinfection, air quality measures, and testing. This determination should only last for as long as the Governor's disaster declaration and executive orders.

Please note two key points about purchasing under the current circumstances:

1. The statute that allows delegation for emergency purchases, Texas Education Code section 44.0312(c), is rather limited. It says, "Notwithstanding any other provision of this code, in the event of a catastrophe, emergency, or natural disaster affecting a school district, the board of trustees of the district may delegate to the superintendent or

designated person the **authority to contract for the replacement, construction, or repair of school equipment or facilities** under this subchapter **if emergency replacement, construction, or repair is necessary for the health and safety of district students and staff.**” Likewise, Section 44.031(h) allowing suspension of competitive procurement addresses “replacement or repair” of facilities and equipment. It may be a stretch to say buying new technology, for example, is “replacing” more traditional classroom instruction. Rather than relying on either of these statutes, the board might be equally well served by increasing the dollar amount of the superintendent’s authority, as suggested above, and sticking with purchases that satisfy competitive procurement such as a DIR catalogue purchase or an interlocal purchasing cooperative.

2. These statutes are limited to purchases made with state and local funds. Procurement with federal funds must be done in accordance with federal law (2 CFR 200) as modified by [OMB Memoranda M-20-11](#) and [M-20-17](#) and guidance from the Federal Emergency Management Agency (FEMA), if applicable.
- **The district needs the superintendent to lead the transition into remote learning for instructional continuity.**

The superintendent is the instructional leader of the district. This authority is already well established in law and the superintendent’s duties as described at TASB Policy BJA.

- **The board would like to delegate authority to the superintendent to establish rates of pay for nonexempt staff during the period of closure.**

If the board is already adopting a resolution on employee compensation during the closure, as many have, the board can include in the resolution a statement that the superintendent may establish rates of pay for hourly, nonexempt staff within budgeted amounts. TASB Legal Services does not recommend delegating authority to the superintendent to change the school board’s budget. Moreover, a board need not suspend its whole policies on compensation and leave simply to grant the superintendent flexibility on setting pay rates or approving leave during the period of the emergency.

- **The board wants to delegate maximum authority over employment contracts to the superintendent during the period of the closure.**

Working with its school attorney and/or TASB policy consultant, a board can adopt a resolution or policy that delegates more hiring authority to the superintendent either permanently or for a fixed amount of time. This delegation might make it easier for the superintendent to renew existing contracts or hire new certified employees while schools are closed. Only the board, however, may propose the nonrenewal of term contracts or terminate probationary contracts. Board engagement will still be necessary and appropriate during the spring contract season.

In general, we think delegations are best addressed on a case-by-case basis, with specific legal advice, rather than wholesale through a comprehensive resolution that alters the governance structure of the school district.

This document is continually updated, and references to online resources are hyperlinked, at [tasb.org/services/legal-services/tasb-school-law-esource/business/documents/emergency-delegation-of-authority-to-superintendent.pdf](https://tasb.org/services/legal-services/tasb-school-law-esource/business/documents/emergency-delegation-of-authority-to-superintendent.pdf). For more information on this and other school law topics, visit TASB School Law eSource at [schollawesource.tasb.org](https://schollawesource.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.*

### **Resolution of the Board Regarding Delegation to Superintendent for Waivers**

WHEREAS, the U.S. Government has declared a national emergency and the State of Texas has declared a statewide disaster regarding the ongoing COVID-19 pandemic;

WHEREAS, on March 19, 2020, the Texas Governor issued Executive Order No. GA-08 relating to COVID-19 preparedness and mitigation and through this action and in accordance with Guidelines from the President ordered the temporary closure of all Texas school districts;

WHEREAS, Texas Education Code 11.151 gives the Board of Trustees the exclusive power and duty to govern and oversee the management of the public schools of the District;

WHEREAS, Texas Education Code 7.056 permits a district to apply to the commissioner of education for a waiver of a requirement, restriction, or prohibition imposed by the Education Code or rule of the State Board of Education or commissioner;

WHEREAS, TEA has indicated that it will accept a waiver request made pursuant to Texas Education Code 7.056 by a superintendent, if the Board of Trustees has delegated general operational authority or waiver-specific authority to the Superintendent;

WHEREAS, TEA recommends that if the Board delegates authority to the Superintendent to request waivers from the commissioner, that the Board ratify the waiver request at a future Board meeting to ensure compliance with Texas Education Code Chapter 11 and section 7.056;

WHEREAS, the Board finds there is a need for the District to maintain efficient, effective, and consistent District operations during the period of the disaster declaration under these circumstances, which may include the need to request available waivers under state and federal law;

NOW, THEREFORE, BE IT RESOLVED that the Board of Trustees of \_\_\_\_\_ School District makes the following delegation to the Superintendent:

- The authority to pursue any necessary and available waivers from TEA without further action of the Board; and
- In the event other waivers are needed, the Superintendent is authorized to submit other waivers in accordance with guidance from national, state, or local authorities or agencies.

The Board shall ratify any waiver requests made by the Superintendent under this authority at a future Board meeting.

The authority granted by this resolution shall apply until the District resumes full operations at the direction of the Superintendent or the Board takes further action.

Adopted this \_\_\_\_\_ (*date*) day of \_\_\_\_\_ (*month*), \_\_\_\_\_ (*year*), by the Board of Trustees.

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Presiding Officer

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Secretary