



Reductions in Force

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During difficult financial times, many districts face the hard choice of whether to cut expenses by reducing personnel. For some districts, this means implementing a “reduction in force” (RIF). This memo 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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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 Financial Exigency RIF policy is Policy DFFA(LOCAL) and the Program Change RIF policy is Policy DFFB(LOCAL).¹ Policy DFF(LEGAL) contains the statutory guidelines for termination of contracts through a RIF.

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

A district facing a budget shortfall may first consider other options to reduce personnel costs 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) and (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 contract period* (typically, the end of the school 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 Policy DFAA(LEGAL). A reduction in personnel 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.

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

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).

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. If such a policy change is made, the district should work with local counsel to transition employees previously issued Chapter 21 contracts to a new employment arrangement. See TASB Policies DCB(LOCAL) and DCE(LOCAL). *Harris v. Royse City Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 057-R1-0506 (Mar. 5, 2009).

Reassignments: Reassigning personnel away from marginal programs to more financially viable programs without filling their former, now vacant, positions, is another way to avoid or delay a RIF.

Reduction in salary or benefits: A district may reduce an at-will employee's compensation at any time, so long as the district continues to pay employees subject to the Fair Labor Standards Act (*nonexempt employees*) at least minimum wage. 29 U.S.C. § 206(a)(1). In some circumstances, the district may reduce the total compensation of Chapter 21 employees in between contract years by following certain steps. If a reduction is permitted, the district must give sufficient notice before the penalty-free resignation date. *Brajenovich v. Alief Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 021-R10-1106 (Mar. 6, 2009); Tex. Educ. Code § 21.210 (stating the penalty-free resignation date for teachers employed under a term contract). 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 (10 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.

Widespread salary reduction: For any school year in which a district reduces the salaries of classroom teachers based primarily on financial conditions, the district must reduce the salary of each district administrator or other professional employee by the same percentage. Tex. Educ. Code § 21.4032(b).

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

Furlough program: Under certain circumstances, a district may implement a program to furlough educators for up to six days, even if the furlough would reduce salaries below the state minimum and reduce the duty schedule below 187 days. This requires certification from the commissioner that the district will be provided with less state and local funding for that year than was provided to the district for the 2010-11 school year. A district wishing to implement a furlough program must also hold a public meeting and give employees the opportunity to express feedback. Tex. Educ. Code §§ 21.4021, .4022. Note: Because the Texas legislature revised the school finance system significantly in the 86th Texas Legislative Session, it is unlikely that funding levels will dip below 2010-2011 levels. Therefore, a furlough program is unlikely to be available to districts in the future.

WORD TO THE WISE: Consider the cost of unemployment compensation.

When calculating the effect of the district's cost-saving measures, do not forget to factor in the potential cost of unemployment. Unemployment compensation is paid after the district has paid any salary, severance pay, or unused leave pay owed to the employee. Even reductions in salary can result in unemployment liability. As a general rule, an overall pay reduction (including benefits) of 20 percent or more will provide an employee with good cause to voluntarily resign and claim unemployment compensation. Districts should keep this rule in mind when deciding how much to reduce compensation.

3. When can a district implement a RIF?

A RIF may occur 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 a 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 based on a financial exigency can constitute “good cause” for the mid-year termination of a probationary or term contract. Tex. Educ. Code §§ 21.211, .104.

- Texas Education Code section 21.211 states that a board may terminate a term contract at any time for: (1) good cause as determined by the board; or (2) a financial exigency that requires a RIF. Tex. Educ. Code § 21.211(a).
- A board may also terminate a probationary contract at any time for good cause as determined by the board. Tex. Educ. Code § 21.104(a).

Mid-year terminations based on program change: A question exists as to whether a RIF due to program change would be considered good cause to terminate, rather than nonrenew, a term contract, or to terminate a probationary contract in the middle of the school year. At least one hearing examiner has found that a program change is not good cause for mid-year termination. *Austin Indep. Sch. Dist. v. Decierdo*, 123-LH-0510 (July 13, 2010). TASB Policy DFFB(LOCAL) limits a RIF due to program change to nonrenewal of term contracts.

Termination of non-Chapter 21 contracts: For non-Chapter 21 contracts, a standard other than “good cause” may apply to termination as the result of a RIF. *See, e.g., Firova v. United Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R2-1208 (Apr. 13, 2012) (concluding that non-Chapter 21 administrator contract could be terminated by district due to program change based in whole or in part on administrator’s performance).

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?

The Texas Education Code prescribes special procedures to terminate or otherwise modify continuing contracts under a “necessary reduction of personnel,” as opposed to a RIF. 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 based on teacher appraisals in the specific teaching fields.

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

Most districts no longer issue continuing contracts; however, even districts not issuing new continuing contracts may have employees with older continuing contracts. Districts with continuing contracts should consider adopting a local policy addressing reduction of continuing contract employees before beginning the RIF process. A district should work closely with its attorney when considering termination of any continuing contracts. Even experienced school attorneys consider it a challenge to coordinate the elimination of continuing contract positions with a RIF of term contract positions. See TASB Policy DFFC(LOCAL).

To avoid the challenge of terminating continuing contracts in a RIF, a district could consider modifying rather than terminating continuing contracts. For example, a district could 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).

6. What are the permitted reasons for a RIF?

A RIF can be implemented for either one or both of the following reasons:

- Financial exigency
- Program change

TASB model policies DFFA(LOCAL) and DFFB(LOCAL) address RIF based on financial exigency and program change, respectively.

7. What is a “financial exigency”?

By rule, financial exigency means that the financial position of the district as a whole is such that “the financial resources of the district are insufficient to support the district’s instructional programs or the school district is unable to finance the full compensation of staff for the current or succeeding fiscal year.” 19 Tex. Admin. Code § 109.2001(a). A district’s board of trustees may declare a financial exigency under one or more of the following conditions:

- A decrease of more than 20 percent in unassigned General Fund balance per student in weighted average daily attendance over the past two years or a projected reduction of 20 percent compared to the current year;
- A decline in enrollment by more than ten percent over the past five years;
- A reduction of more than ten percent in total General Fund total funding per student in weighted average daily attendance or a projected reduction of ten percent compared to the current year;
- An unforeseen natural disaster requiring significant expenditures for repair or remediation in excess of 15 percent of the current year General Fund budget;
- An unanticipated major expense, including significant repair costs; litigation expenses, excluding lawsuits against the state; or tax refunds in excess of 15 percent of the current year General Fund budget; or
- Any other circumstances experienced by a district approved in writing by the commissioner.

Tex. Educ. Code § 44.011; 19 Tex. Admin. Code § 109.2001; TASB Policy CEA(LEGAL).

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

TEA has issued a sample resolution that districts can use to declare a [financial exigency](#), available on the TEA website. A district may use the form resolution to identify one or more of the reasons for financial exigency enumerated in the commissioner’s rule. The form can also be used to describe other circumstances giving rise to a financial exigency and to provide documentation in order for the commissioner to issue written approval of the district’s unique reason(s) for a financial exigency RIF. The resolution must be signed by the board president and superintendent and submitted to TEA. A sample resolution to extend a financial exigency is also available on the TEA website.

9. What is a “program change”?

TASB Policy DFFB(LOCAL) defines “program change” as: any elimination, curtailment, or reorganization of a program, department, school operation, or curriculum offering including for example:

- A change in curriculum objectives;
- A modification of the master schedule;
- The restructuring of an instructional delivery method; or
- A modification or reorganization of staffing patterns in a department, on a particular campus, or district-wide.

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). The commissioner upheld a program change RIF based on 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); Districts have also been successful after using a RIF to eliminate positions based on a redirection of financial resources to meet the educational needs of the students. *See, e.g., Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (upholding program change from block schedule to seven-period day); *Clifton v. Rocksprings Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 127-R1-698 (July 27, 1998) (upholding RIF based on reduction in special education program).

Prior to the current definition of financial exigency, the commissioner recognized a program change in combination with a financial exigency. *See, e.g., Morales v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 104-R2-0811 (Oct. 18, 2011) (concluding, prior to passage of Senate Bill 8 in 2011, that state law and local policy permitted district to vote on program change prior to declaring 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 prior to the current definition of financial exigency).

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

If budget pressures are increasing, 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.

There are six basic steps to implement a RIF:

1. Board declares the need for a RIF and files a financial exigency resolution with TEA if required.
2. Board identifies affected employment areas.
3. Superintendent applies RIF criteria, for example:
 - Qualifications
 - Performance
 - Extra Duties
 - Professional Background
 - Seniority
4. Superintendent considers RIF employees for open positions.
5. District begins the nonrenewal or termination process.
6. Board declares that any 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 (1) a financial exigency and/or (2) a program change.

Financial exigency: TASB Policy CEA(LEGAL) sets out the additional procedures required to declare the need for a RIF due to a financial exigency. First, the board must adopt a resolution declaring a financial exigency based on one or more of the conditions listed in the commissioner’s rules discussed above. Each time a district adopts a resolution declaring or extending a financial exigency requiring a RIF, the board must notify the commissioner within 20 calendar days of the adoption. The notice must include the date of adoption and the reason(s) for the declaration of financial exigency as specified in the commissioner’s rules discussed above. The notice must be signed by the board president and superintendent and submitted to TEA. Tex. Educ. Code § 44.011; 19 Tex. Admin. Code § 109.2001.

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.

Program change: Some districts’ local policies may authorize the superintendent to declare a need for a RIF based on program change. The commissioner has upheld this approach. *See Hendricks-Stewart v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 036-R2-1111 (Jan. 11, 2012) (finding delegation of authority to superintendent to declare program change RIF permissible where board retained broad authority, voted on employment areas to be affected, and voted on specific contract to be nonrenewed).

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

After declaring the need for a RIF and, if necessary, notifying the commissioner of financial exigency, the board must define the scope of the RIF. *See, e.g., Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (finding, in RIF based on program change, “no reasonable construction of [the district’s policy] that would allow the superintendent to determine affected employment areas.”); *but see De Los Santos v. San Diego Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 065-R1-07-2013 (Sept. 4, 2013) (holding superintendent’s recommendation, approved by the board, that a private company take over maintenance, grounds, and custodial services and that duties be reassigned was sufficient to define employment area.) In accordance with TASB Policies DFFA(LOCAL) and DFFB(LOCAL), 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/ELL programs, special education and related services, compensatory education, or migrant education; library programs; or an individual campus. See TASB Policies DFFA(LOCAL) and DFFB(LOCAL).

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) (concluding that board had discretion to consider “behavioral unit” an employment area even though RIF policy listed “special education” as example); *Brewer v. Mexia Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 079-R1-08-2014 (Sept. 18, 2014) (district reasonably applied its policy to declare employment area as “Inclusion Program within the Special Education Department for [specific individual student]”).

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.”

An employment area may consist of one affected employee. *Brosemer v. Union Hill Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 085-R1-0612 (July 10, 2012).

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).

Position in two employment areas: As long as a position is included in an 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. *de los Santos v. San Diego Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 065-R1-07-2013 (Sept. 4, 2013).

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.

If your district uses TASB's model policies DFFA(LOCAL) and DFFB(LOCAL), these criteria, in order of importance, are:

1. **Qualifications for current or projected assignment:** 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 effectiveness, as reflected by:
 - The most recent formal appraisal and, if available, consecutive formal appraisals from more than one year (see TASB Policy DNA(LEGAL)); and
 - Any other written evaluative information, including disciplinary information, from the last 36 months.

See, e.g., Stokes v. Houston Indep. Sch. Dist., Tex. Comm'r of Educ. Decision No. 004-R1-0911 (Nov. 9, 2011) (upholding RIF decision based on appraisal ratings).

3. **Extra duties:** Currently performing an extra-duty assignment, such as department or grade-level chair, band director, athletic coach, or activity sponsor.
4. **Professional background:** Professional education and work experience related to the current or projected assignment.

5. Seniority: Finally, if necessary, the superintendent may compare employees' seniority. This is normally defined as the length of time in the district, rather than in a particular job. *See Finch v. Gonzales Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 060-R1-0510 (July 2, 2010) (defining seniority according to most recent date of hire). Note: Although the seniority criterion is listed last in the TASB recommended version of Policies DFFA(LOCAL) and DFFB(LOCAL), some districts choose to consider seniority earlier in the process. Be sure to check your district's local policy.

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 librarians 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. *See, e.g., Brosemer v. Union Hill Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 085-R1-0612 (July 10, 2012) (upholding nonrenewal of assistant principal through RIF where district did not apply criteria to single employee in affected area).

Input from principals: The superintendent is typically 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. *See, e.g., Limbrick-Sanders v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 046-R1-1211 (Feb. 3, 2012) (holding superintendent properly relied on input from principals regarding RIF).

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).

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).

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. See, e.g., *Buchanan v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 033-R1-03-2013 (Apr. 18, 2013) (finding that local record supported district’s decision to nonrenew teacher’s contract).

- **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. *Dela Cruz v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 103-R2-0811 (Oct. 10, 2011). Historically, the commissioner has ruled that a RIF 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, at the salary usually paid for that position, if he were at least as qualified as the successful candidate for the position). The mere fact of an open position for which an employee is objectively qualified, however, does not mean that a RIF was unnecessary.

The commissioner has clarified the district’s duty with respect to considering employees subject to a RIF for open positions. When a position is eliminated due to a necessary reduction in force, a district must transfer the employee to a different position *if the teacher meets a district’s objective criteria for that position*. Objective

criteria may include credentials, education, experience, applying for the position, and interviewing for the position. A district need not offer a position to a teacher who refuses to apply and interview for an open position. *Amerson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 022-R2-1202 (Feb. 10, 2003).

Burden is on employee: Teachers whose contracts are nonrenewed can prevail on appeal by showing that they are objectively qualified for an open position in the district and followed the district’s reasonable procedures for applying to hold the position. *Buchanan v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 033-R1-03-2013 (Apr. 18, 2013). The burden is on employees who are subject to a RIF to show that they were objectively qualified for an open position. *See, e.g., Brewer v. Mexia Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 079-R1-08-2014 (Sept. 18, 2014) (finding no duty to offer former teacher a job where no evidence showed that she had applied for any jobs for which she was qualified); *see also Patten v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R10-01-2013 (Dec. 11, 2014) (declining to rule that a district must specifically offer a vacant position to certified and qualified teachers whose positions were part of a RIF in order to activate an emergency permit to fill the position).

Open positions need not be of the same type, responsibilities, or salary as eliminated 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).

Limits on district’s duty to assign to open positions: The district’s obligation to consider objectively qualified employees for open positions applies only to known vacancies up to the time of the hearing concerning the employee’s contract subject to the RIF. *Dela Cruz v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 103-R2-0811 (Oct. 10, 2011) (holding that a district must consider individuals for open positions up until the date of the evidentiary hearing held by an independent hearing examiner).

- 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).

- This obligation applies only to actual, not speculative, vacancies. *See Higgs v. Bridgeport Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 243-R1-787 (Dec. 20, 1988) (holding that rumors of a planned resignation did not amount to a vacancy).
- “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).
- A district is not required to restructure its positions to accommodate a RIF’ed employee. *See, e.g., Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (upholding district decision not to restructure open teacher/coach position for teacher subject to RIF).
- **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 Policies DFD(LEGAL) and DFFA(LOCAL).²
- 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. A board’s declaration of a financial exigency constitutes an admission that the district is unstable financially, a condition that may impair the

² Employees receiving notices of a proposed termination typically have the option of requesting a hearing before an independent hearing examiner (IHE) appointed by TEA. Tex. Educ. Code § 21.251. An exception applies to a termination based on financial exigency, unless the board has specifically decided to use the IHE process for appeals of terminations.

district's financial rating and jeopardize a guarantee by the Permanent School Fund for a bond program. See 19 Tex. Admin. Code § 33.65(h). 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.

C. Legal Challenges to a RIF

1. 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 have deferred to the board's discretion.

- "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).

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.

2. 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:

- The district did not follow the RIF policy procedures.
- The RIF policy denied due process or the procedures were too subjective. *Collins v. Wolfson*, 498 F.2d 1100 (5th Cir. 1974) (affirming college's RIF criteria).
- The RIF was a pretext for termination of an individual rather than the position.
 - The RIF was in retaliation for the employee's constitutionally protected speech. See *Miget v. West Oso Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 136-R1b-783 (Apr. 11, 1984) (alleging retaliation for teacher's grand jury testimony); *Collins v. Wolfson*, 498 F.2d 1100 (5th Cir. 1974) (alleging retaliation for professor's

participation in a political demonstration).

- The RIF was motivated by illegal discrimination. *See 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).
- The district could have cut other expenses instead of teacher contracts. *See Stidham v. Anahuac Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 205-R2-687 (Mar. 9, 1990) (alleging that district completed a building project and increased aide compensation rather than meeting its contract obligations to teachers).

3. How does the Open Meetings Act (OMA) 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 OMA authorizes a closed session deliberation about individual employees, not groups of employees or employment areas. Tex. Gov’t Code § 551.074; *Brewer v. Mexia Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 079-R1-08-2014 (Sept. 18, 2014). 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.
- Specific meeting notices are also required during the contract nonrenewal or termination process. The board’s decision can be overturned based on insufficient notice. *See, e.g., Spaniel v. Fort Worth Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 029-R2-1110 (Dec. 21, 2010) (overturning board decision to terminate principal contract based on good cause because agenda item regarding “termination of instructional employees” was not specific enough under OMA).

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

4. 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.

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