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## Education

Ellen Williams

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# EDUCATION

*Ellen Williams\**

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\* B.A., J.D., The University of Texas. Ms. Williams served as general counsel for Senate Bill 1, the revision of the Texas Education Code, from 1993-95. She would like to thank Senator Bill Ratliff and Representative Paul Sadler, the bill's authors.

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*The first SMU Law Review survey of Texas school law appears in a year when the Texas Legislature dramatically trimmed the size and transformed the scope of the laws governing public education. The most noteworthy changes in the survey period<sup>1</sup> occurred in the overhaul of the Texas Education Code by the passage of Senate Bill 1.*

## I. INTRODUCTION

THE most significant school law opinion issued in the survey period cleared the way for the most significant legislative changes in school law in fifty years.<sup>2</sup> The Legislature's court-ordered struggle with school finance had consumed three regular and three special sessions, eclipsing other school law issues.<sup>3</sup> In January 1995, the Texas

1. October 1, 1994 through September 30, 1995.

2. See Foundation School Program Act, 51st Leg., R.S. 1949 Tex. Gen. Laws 625; Act of June 8, 1949 51st Leg.; R.S. 1949 Tex. Gen. Laws 647 (Gilmer-Aikin Bills). Like the authors of Senate Bill 1, Sen. Ratliff and Rep. Sadler, the legislators who carried significant school reform in the late 1940s were from East Texas.

3. On June 1, 1987, State District Judge Harley Clark ruled that the school finance system was unconstitutional. The Third Court of Appeals reversed and rendered, 761 S.W.2d 859, and the Texas Supreme Court reversed and affirmed the trial court judgment as modified, ordering the Legislature to overhaul the system by May 1, 1990, *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989) [*Edgewood I*]. The Texas

Supreme Court in *Edgewood Independent School District v. Meno* finally upheld the constitutionality of a school finance plan.<sup>4</sup> The Legislature, for the first time in years, had the leisure to consider school law issues other than finance.

In fact, the Legislature had no choice; it had to put in place a new Texas Education Code by September 1, 1995. Senate Bill 7, which set up the constitutional school finance system, also laid the groundwork for massive reforms by repealing most of Titles 1 and 2 of the Education Code and abolishing the state education agency effective September 1, 1995. Ironically, the Legislature, after years of acting under school finance court orders threatening to close the schools, now faced its own "act-or-else" mandate to force legislative action and consensus before a set deadline. Senate Bill 7 also directed a Select Committee to study the workings of the education agency and instructed the commissioner of education to submit a proposed revision of the Education Code in the summer of 1994.<sup>5</sup> At the same time, education reform became a key issue in a heated governor's race. During and after the election, the winner, George W. Bush, focused on reducing the state's education bureaucracy; increasing local control through means such as charter schools and home-rule school districts; emphasizing a back-to-basics curriculum; maintaining a stringent accountability system; and creating safe schools. With strong leaders in the Senate and House, Lt. Gov. Bob Bullock and Speaker Pete Laney, major reform was about to begin.

On February 14, 1995, State Senator Bill Ratliff, chairman of the Senate Education Committee and co-chairman of the Select Committee, filed Senate Bill 1, which at 1,088 pages weighed in as the largest substantive bill in Texas history.<sup>6</sup> Despite its size, the bill as enacted reduced the size of the public Education Code by one-third.<sup>7</sup>

Senate Bill 1 took a three-part approach to deregulation that focused primarily on improving education. First, Senate Bill 1 trimmed the code of unnecessary mandates and baggage that detracted from education. Second, it placed authority at the proper level, devolving substantial

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Supreme Court subsequently held other legislative attempts unconstitutional. *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 498 (Tex. 1991) [*Edgewood II*]; *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 524 (Tex. 1992) [*Edgewood III*]. On Jan. 30, 1995, the Court affirmed the constitutionality of the school finance plan enacted in Senate Bill 7. *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450, 459 (Tex. 1995) [*Edgewood IV*].

4. *Edgewood IV*, 893 S.W.2d 450 (Tex. 1995). For more on *Edgewood IV*, see *infra* Part VIII.

5. See FINAL REPORT OF THE JOINT SELECT COMMITTEE TO REVIEW THE CENTRAL EDUCATION AGENCY, Dec. 1994; LIONEL R. MENO, TEXAS EDUCATION CODE PROPOSED REVISION, July 1994. See also Acts 1993, 73rd Leg., ch. 347, §§ 7.11, 8.33-8.35.

6. Senate Bill 1 when filed was 1,088 pages and when passed to engrossment by the Senate was 1,209 pages. Much of the rewrite was done by Sen. Ratliff on his laptop computer. The recodification bill's size was due largely to its complete reorganization of the code into a logical order.

7. Titles 1 and 2, Texas Education Code, were reduced in size by approximately one-third according to a computer word count comparison between the old and new law.

power to the local level.<sup>8</sup> In this system, accountability follows authority. The state sets standards and decides *what* students, at a minimum, must learn. Local educators, schools, and districts are given the authority to determine *how* best to achieve those goals—and are held accountable for the results.<sup>9</sup> Third, Senate Bill 1 let local citizens and governing bodies who want more flexibility and local control choose a charter arrangement that further frees the district, campus, or program from state control. Thus, a local district or school can perform to the state-set minimum without state law encumbering it in excess regulation. This approach ensures that the education system focuses on results.

## II. GOVERNANCE

### A. STATE

Three levels of governance control Texas public education: state, regional, and local. At the state level, under Senate Bill 1, the Texas Education Agency (“TEA”) consists of the commissioner of education and the agency staff, but it no longer includes the fifteen-member elected State Board of Education (“SBOE”), which under prior law was the agency’s policy- and rule-making component.<sup>10</sup> The commissioner, who was formerly the executive officer of the SBOE,<sup>11</sup> is now the TEA’s executive officer and the SBOE’s executive secretary.<sup>12</sup>

Accountability starts at the top with greater gubernatorial power. Education, in most recent gubernatorial elections, has been a key issue. If voters expect that a governor, when elected, will carry out campaign promises on education, then the governor should have the power to do so. Therefore, the commissioner is now directly accountable to the governor. The governor can appoint and remove the commissioner with the advice and consent of the Senate; previously, such action required SBOE involvement.<sup>13</sup> The governor also fills SBOE vacancies<sup>14</sup> and appoints members of and fills vacancies on the newly created State Board for Edu-

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8. The Select Committee used a table that listed all key players in the education system, from the parent to the Legislature, and listed hundreds of educational functions, such as ensuring student attendance, determining time on task, and setting class sizes. The committee then attempted to match the educational function with the appropriate actor.

9. For more discussion of this educational philosophy, see T. Luce, *NOW OR NEVER: HOW WE CAN SAVE OUR PUBLIC SCHOOLS* 43 (1995).

10. Compare TEX. EDUC. CODE ANN. § 7.002 (Vernon 1996) with *id.* § 11.01 (Vernon 1991). See *Amarillo Indep. Sch. Dist. v. Meno*, 854 S.W.2d 950, 956 (Tex. App.—Austin 1993, writ denied). Senate Bill 1 changed “Central Education Agency” to its more common moniker, “Texas Education Agency.”

11. TEX. EDUC. CODE ANN. § 11.25(a) & 11.52(a) (Vernon 1991).

12. *Id.* § 7.055(a)(2) (Vernon 1996).

13. *Id.* § 7.051. Previously, the SBOE nominated a candidate and the governor either could reject the person or could appoint the person with the advice and consent of the Senate. *Id.* § 11.51(a) (Vernon 1991).

14. SBOE vacancies are filled by the governor, with the advice and consent of the Senate, rather than by the remaining board members. Compare *id.* § 7.104 (Vernon 1996) with *id.* § 11.22 (Vernon 1991).

cator Certification.<sup>15</sup>

### 1. Rulemaking

Although Senate Bill 1 gave the governor more power, it diminished the power of state government as a whole, allowing greater freedom at the local level. Throughout the code, the state's powers are defined and limited.<sup>16</sup> For example, prior law required that "the State Board of Education shall take actions necessary to implement legislative policy for the public school system of the state."<sup>17</sup> Senate Bill 1 replaced this broad power—which the SBOE used to make rules in the absence of express authority—with specifically defined authority.<sup>18</sup> If a state entity has power to make rules in a particular area, the statute will expressly grant that power to that entity. Thus, a multitude of rules in the Texas Administrative Code no longer have any statutory basis and are no longer good law.<sup>19</sup> Gone, for example, is the rule that prohibited school districts from holding back a child more than twice between kindergarten and the eighth grade.<sup>20</sup> This more limited power at the state level allows authority and accountability at the local level.

### 2. Appeals

In addition to limiting state rulemaking, Senate Bill 1 restricts the state's role in appeals. Under prior law, the commissioner had jurisdiction over cases (such as federal claims) for which the commissioner could not grant complete relief.<sup>21</sup> The commissioner also heard disputes over local school board policies such as cheerleader tryouts.<sup>22</sup> The new scope of appeals is limited to written grievances based on: (1) Titles 1 and 2 of the Education Code and rules adopted under those titles; (2) a school board's actions or decisions that violate a provision of Titles 1 or 2 or rules adopted under those titles; and (3) a school board's actions or decisions that violate a written employment contract between the district and its employee, provided the violation causes or would cause the employee monetary harm.<sup>23</sup> Under the latter two bases, Senate Bill 1 limits the review given a school board's action or decision. Previously, for most

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15. *Id.* §§ 21.033 & 21.034 (Vernon 1996).

16. TEX. EDUC. CODE ANN. § 7.003 (Vernon 1996).

17. *Id.* § 11.24(a) (Vernon 1991).

18. *Id.* § 7.102(a) (Vernon 1996); see *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 444 (Tex. 1994); *Spring Indep. Sch. Dist. v. Dillon*, 683 S.W.2d 832, 839-40 (Tex. App.—Austin 1994, no writ) ("state-level school authorities have or claim discretionary power in numerous matters" that pertain to local school operation, management, and government).

19. TEX. EDUC. CODE ANN. § 7.102(f) (Vernon 1996).

20. 19 TEX. ADMIN. CODE § 75.195(j) (West 1995); see Gregory Curtis, *What Does 'Jolt' Mean?*, TEX. MONTHLY, Dec. 1995.

21. TEX. EDUC. CODE ANN. § 11.13 (Vernon 1991); see *Texas Educ. Agency v. Cypress-Fairbanks Indep. Sch. Dist.*, 830 S.W.2d 88, 90-91 (Tex. 1992).

22. See, e.g., *Julia Kirchoff v. Silsbee Indep. Sch. Dist.*, Commissioner Decision No. 274-R5-689 (June 24, 1991).

23. This does not include a case (e.g., termination, suspension, or term contract nonrenewal) to which appeals to the commissioner may be had under Subchapter G, Chapter 21.

appeals the school board held a hearing and then the commissioner on appeal held a second hearing;<sup>24</sup> now the commissioner will review the record developed at the district level under a substantial evidence standard of review.<sup>25</sup> The local record must include, at a minimum, an audible electronic recording or written transcript of all oral testimony or argument.<sup>26</sup> Both the grievant and the district would be well advised to at least tape record the local proceedings and to clearly identify each speaker on that recording.<sup>27</sup> It also would be instructive to review the Administrative Procedure Act requirement for a record in a contested case.<sup>28</sup>

Under this section, appeal may be had to Travis County district court if a person is aggrieved by the commissioner's decision or an action of the "agency" (including the commissioner or agency staff but no longer including the State Board of Education, as under prior law, or the new State Board for Educator Certification).<sup>29</sup> Rules of the SBOE or SBEC, however, are "school laws of this state," and a person may appeal to the commissioner if the person is aggrieved by the SBOE or SBEC rules or by a school board's actions or decision that violate them.<sup>30</sup>

### 3. *Waivers*

Although prior law set up a fairly rigid legal structure, it gained some flexibility in 1990 when the Education Code was amended to allow the commissioner to waive many state laws and rules.<sup>31</sup> Waivers inject common sense into the process by letting the state's educational leader decide, on a case-by-case basis, whether a state restriction unduly frustrates a district's or school's educational objectives. In recent years, the commissioner granted waivers to allow students to be exempted from final examinations, allow longer grading periods, allow alternative grading methods, and allow block scheduling.<sup>32</sup> The laws necessitating these waivers are no longer in the code or have been modified to allow more flexibility.<sup>33</sup> Waivers, in a sense, led the way in reforming the Education

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TEX. EDUC. CODE ANN. § 7.057(e)(1) (Vernon 1996). It also does not include a case to which a more specific exclusion applies. *See, e.g., id.* § 21.103(a).

24. *Id.* § 11.13(b) (Vernon 1991).

25. *Id.* § 7.057(c) (Vernon 1996); *see* TEX. GOV'T CODE ANN. § 2001.174 (Vernon Supp. 1996) (substantial evidence review under Administrative Procedures Act).

26. TEX. EDUC. CODE ANN. § 7.057(f)(1) (Vernon 1996).

27. *See* TEX. GOV'T CODE ANN. § 551.023 (Vernon 1994).

28. *Id.* § 2001.060.

29. *Compare* TEX. EDUC. CODE ANN. § 7.057(d) (Vernon 1996) *with id.* §§ 11.13(c) & 11.01 (Vernon 1991). Actions or decisions of SBOE or SBEC may still be appealed to Travis County District Court under the Administrative Procedures Act. TEX. GOV'T CODE ANN. § 2001.176(b) (Vernon Supp. 1996).

30. TEX. EDUC. CODE ANN. § 7.057(a), (e) (Vernon 1996).

31. *Id.* § 11.273 (Vernon Supp. 1995); *id.* § 7.056 (Vernon 1996).

32. *See* TEA Waiver Report (1994); *see also* Memorandum from Ellen Williams to Rep. Sadler (Oct. 20, 1994) (on file with author).

33. *See* TEX. EDUC. CODE ANN. § 21.723 (Vernon 1987) (prohibiting students from being exempted from final examinations that other students are required to take). *Compare id.* § 21.722 (Vernon 1987) (requiring maximum six-week grading period) *with id.*

Code, because they made apparent many constraints that bound educational innovations. Legislators in the future will likely look at waiver requests and denials for future legislation, especially because Senate Bill 1 sets a thirty-day deadline for the commissioner to act and requires the commissioner to object to a waiver application in writing.<sup>34</sup> Senate Bill 1 also defined more concretely those laws and rules the commissioner cannot waive<sup>35</sup> and added the accountability system to the list of unwaivable laws and rules.<sup>36</sup>

## B. REGIONAL

The state's twenty regional service centers provide training and assistance to most districts in Texas. The Select Committee recommended that all state-supported training and assistance activities be transferred from the TEA to the regional centers and that the centers should receive limited state funding to give them the capacity to offer services. The committee also recommended that the centers should be forced to compete with other vendors of training and assistance to actually sell those services to districts and campuses.<sup>37</sup> Senate Bill 1, following those recommendations, moves TEA-provided training and assistance services to service centers and emphasizes that the centers should provide service, not regulation.<sup>38</sup> In addition, Senate Bill 1 made service center funding more market oriented and allowed districts and campuses to purchase services from any service center in the state.<sup>39</sup> This chapter of the code is repealed effective August 31, 1997 to allow the commissioner to develop the most efficient, market-driven system for providing training and assistance to school districts.<sup>40</sup>

## C. LOCAL—SCHOOL DISTRICTS

### 1. Types

Most districts in Texas are organized as "independent school districts." Eight chapters of the prior Education Code were devoted to school districts or county systems that were organized in a different manner;<sup>41</sup>

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§ 28.022(a)(2) (Vernon 1996) (requiring maximum 12-week grading period); *compare id.* § 21.721 (Vernon Supp. 1995) (established criteria in grading and advancement policy) *with id.* § 28.021(a) (Vernon 1996) (requiring promotion be based on academic achievement or demonstrated proficiency in subject matter or grade level); *compare id.* § 13.902 (Vernon 1991) (requiring 45-minute teacher planning and preparation time within each 7-hour school day) *with id.* § 21.404 (Vernon 1996) (requiring 450 minutes of classroom teacher planning and preparation within each two-week period).

34. *Id.* § 7.056(c) (Vernon 1996).

35. *Compare id.* § 7.056(e), (f) *with id.* § 11.273(e), (h) (Vernon Supp. 1995).

36. *Id.* § 7.056(e)(3)(B) (Vernon 1996).

37. *See* SELECT COMMITTEE, *supra* note 5, at 13-14.

38. TEX. EDUC. CODE ANN. § 8.054 (Vernon 1996).

39. *Id.* § 8.002(b).

40. *See* Acts 1995, 74th Leg., ch. 260, § 59.

41. These were former chs. 17 (county administration), 18 (countywide equalization fund or county unit system of equalization taxation), 22 (common school districts), 24 (municipal school districts), 25 (rural high school districts), 26 (rehabilitation districts for hand-



those chapters are no longer in the code. Several of the chapters were obsolete because those types of districts had not existed in many years. A savings clause lets the remaining districts or county systems continue to operate under the former chapter and any state law that applies generally to school districts, if that law does not conflict with the former chapter.<sup>42</sup> A common school district or municipal school district may become an independent school district, following procedures contained in the prior law.<sup>43</sup>

## 2. *Creation, Detachment and Annexation, and Consolidation*

Senate Bill 1 substantially changed provisions on creating a new school district by detaching territory. Previously the territory had to come from two or more school districts.<sup>44</sup> The new law lets a new district break away from a single district or from more than one district.<sup>45</sup> The law retains the requirement that new and old districts be not less than nine square miles each and adds a new requirement that the new and old districts must have a minimum of 8,000 students each, which legislators said was an optimum size for districts.<sup>46</sup> To quell fears that the changes were an attempt to break up large districts such as the Houston Independent School District, legislators also added a requirement of twenty-five percent turnout for the breakaway election to be effective.<sup>47</sup>

The bill also made minor changes in procedures for detachment and annexation and for consolidation, generally strengthening the board of trustees' role. If both boards of trustees disapprove a petition to detach territory from one school district and annex it to another school district, that decision can no longer be appealed to the commissioner. Appeal is available only if both school boards disagree.<sup>48</sup> For uninhabited land to be detached and annexed, a petition need only be signed by a majority of landowners, instead of the previous implied requirement that the petition be signed by all landowners.<sup>49</sup> In consolidations of two or more school districts, the board of trustees may now initiate consolidation by resolution.<sup>50</sup> And the board of trustees, rather than the county judge, is now

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icapped persons), 27 (county industrial training school districts), and 28 (countywide vocational school district and tax).

42. TEX. EDUC. CODE ANN. § 11.301(a) (Vernon 1996).

43. *Id.* § 11.301(b).

44. *Id.* § 19.024(a) (Vernon 1991).

45. *Id.* § 13.101 (Vernon 1996).

46. *Id.* § 13.102. A breakaway election was considered in the Waco Independent School District. However, the district has less than 16,000 students, which means it could not break into two 8,000-student districts. See Mike Wallace, *TEA: Breakaway District Not an Option*, WACO TRIBUNE HERALD, Sept. 12, 1995.

47. TEX. EDUC. CODE ANN. § 13.104(c) (Vernon 1996).

48. Compare *id.* § 13.051(j) (Vernon 1996) (if both district boards disapprove petition decision cannot be appealed) with *id.* § 19.022(i) (Vernon 1991) (if either district board disapproves petition decision can be appealed).

49. Compare *id.* § 13.051(b)(1)(A) (Vernon 1996) (by majority of registered voters) with *id.* § 19.021(c)(1) (Vernon Supp. 1995).

50. Compare *id.* § 13.152 (Vernon 1996) (consolidation is initiated by resolution or petition) with *id.* § 19.052 (Vernon 1991) (consolidation is initiated by petition).

the authority that both reviews a petition requesting an election on consolidation and orders the election.<sup>51</sup>

### 3. *Composition and Elections of Boards of Trustees*

Under prior law, boards of trustees had term lengths of two, three, four, or six years. According to estimates, less than one percent of districts had two-year or six-year terms. To provide uniform options statewide, Senate Bill 1 standardizes the terms of trustees to three or four years and requires boards of trustees with two-year or six-year terms to transition to either a three-year or four-year term system.<sup>52</sup> To avoid gamesmanship, after a board of trustees has made the required change, the board cannot alter the terms of office.<sup>53</sup> In another attempt to encourage uniformity among boards of trustees, a district with a board of trustees of three or five members may by resolution increase and transition its membership to the more standard seven-member board, instead of holding an election on the issue as required by prior law.<sup>54</sup>

In the old code, certain large districts were required to have nine trustees, with seven elected from single-member districts and the president and vice-president elected at large.<sup>55</sup> That law is continued but not recodified; the district "shall continue electing trustees and officers in that manner until a different *method of selection* is adopted by resolution of the board of trustees."<sup>56</sup> Instead, the code retains a more general law under which any independent school district may obtain single-member districts.<sup>57</sup> That section is silent on whether a trustee must be elected by a majority, and a trustee therefore must be elected by plurality under the general law in the Election Code.<sup>58</sup> If election by majority vote is a "method of selection," it appears that the large districts could continue to use a majority vote requirement until they later choose to adopt a plurality vote under the new code.<sup>59</sup>

Majority vote also was eliminated from the law on electing trustees by position;<sup>60</sup> again, the plurality vote requirement prevails by default.<sup>61</sup> Many other items were eliminated from the Education Code because they either conflicted with or duplicated the Election Code.<sup>62</sup>

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51. Compare *id.* § 13.153 (Vernon 1996) with *id.* § 19.053 (Vernon 1991).

52. TEX. EDUC. CODE ANN. § 11.059 (Vernon 1996); see also *id.* §§ 23.13-23.16 (Vernon 1987).

53. *Id.* § 11.059(c) (Vernon 1996).

54. Compare *id.* § 11.051(c) (Vernon 1996) with *id.* § 23.021(a) (Vernon 1987).

55. *Id.* § 23.023 (Vernon Supp. 1995).

56. *Id.* § 11.062 (Vernon 1996) (emphasis added).

57. *Id.* § 11.052.

58. TEX. ELEC. CODE § 2.001 (Vernon 1986).

59. TEX. EDUC. CODE ANN. § 11.062 (Vernon 1996).

60. Compare *id.* § 11.058 with *id.* § 23.11(h) (Vernon 1987).

61. TEX. ELEC. CODE § 2.001 (Vernon 1986).

62. See, e.g., TEX. EDUC. CODE ANN. §§ 23.04, 23.06, 23.07, 23.08, 23.10 (Vernon 1987).

A new law was added allowing cumulative voting for the first time in the history of Texas general law. Some school districts had cumulative voting systems put in place after litigation and court order; the new law allows boards of trustees the authority to adopt cumulative voting instead of going through expensive litigation. The law allows boards of trustees that elect trustees at large to order elections using cumulative voting.<sup>63</sup> At an election at which more than one trustee position is to be filled, all voters of the district vote for the positions.<sup>64</sup> Each voter may cast a number of votes, equal to the number of positions to be filled at the election, and may cast one or more of the votes for one or more candidates in any whole-vote combination.<sup>65</sup> The winning candidates are those, in the number to be elected, with the most votes.<sup>66</sup>

The effectiveness of the statute, however, is in question. The United States Department of Justice has questioned why school districts with cumulative voting systems must maintain staggered terms and adopt three or four year terms of office. Staggered terms and specific terms of office would put fewer candidates up at a time, which could impact minority voters' ability to elect candidates of choice under a cumulative voting system.<sup>67</sup> Boards of trustees should carefully consider such issues and be aware of the potential for litigation when considering adoption of a cumulative voting scheme.

#### 4. Powers and Duties

Although Senate Bill 1 generally provides more flexibility to school districts, it also specifies who does what within an independent school district.<sup>68</sup> In doing so, the Legislature tried to allocate power where it was best suited for educational purposes. A district that wants to try another approach may do so through a local or home-rule charter or a waiver from the commissioner.

The trustees as a body oversee the management of the district public schools.<sup>69</sup> In keeping with authority bestowed upon the superintendent and others, the prior law's "power to manage and govern" is changed to "power and duty to govern and oversee the management of" the public schools of the district.<sup>70</sup>

63. *Id.* § 11.054(a) (Vernon 1996).

64. *Id.* § 11.054(b).

65. *Id.* § 11.054(b), (c).

66. *Id.* § 11.054(e).

67. Letter from Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to the Honorable Antonio O. Garza, Secretary of State (Aug. 14, 1995) (on file with SMU Law Review).

68. For more on assigned authority, *see* discussion *infra* Part III, B; *see also* TEX. EDUC. CODE ANN. subch. A, ch. 44 (Vernon 1996), for provisions governing adoption of a district budget.

69. *Id.* § 11.051(a) (Vernon 1996).

70. *Compare* TEX. EDUC. CODE ANN. § 11.151(b) (Vernon 1996) with *id.* § 23.26(b) (Vernon 1987). Prior law also stated that all educational functions not delegated to the agency shall be performed by "district boards of trustees," while the new law states that all non-delegated functions are "reserved to and shall be performed by *school districts*" or

Besides boards of trustees, at least four other persons and entities have assigned powers and duties within an independent school district. The superintendent is the educational leader and chief executive officer of the district, charged with the day-to-day operations of the school district and other statutorily assigned duties.<sup>71</sup> The principal is the instructional leader of the school and, among other duties, develops the campus' budget and assumes responsibility for discipline.<sup>72</sup> The district and campus committees, which are set up to involve professional staff, parents, and community members, are given tasks such as assisting superintendents and principals in developing, reviewing, and revising district and campus improvement plans.<sup>73</sup>

Despite these impositions on their power, many of which were in prior law, boards of trustees have more freedom than under prior law. Senate Bill 1 eliminated many mandates, such as the law that required each district to perform a utility billing audit every four years.<sup>74</sup> Also gone are restrictions imposed due to State Board of Education preemption.<sup>75</sup>

In addition, Senate Bill 1 deleted many authority-granting laws that said a board "may" do something; either they contained restrictions (a board may do X as long as it does X in the following way) or they duplicated the board of trustees' broad authority to govern and oversee the management of the district (a board may do X). However, because some authorizing laws serve as legal and political refuges for school districts, a few were kept or added. For example, a provision was added to allow a board of trustees to adopt rules requiring students to wear uniforms, but if the board does so it must determine that it would improve learning, designate funds to provide uniforms to poor students, and exempt or transfer students whose parents object.<sup>76</sup> Another example is the law authorizing districts to allow students who fail state assessments to participate in graduation ceremonies.<sup>77</sup>

Even though it eliminated many authorizing laws, the Legislature chose to retain a 1993 law that says the board of trustees may contract

open-enrollment charter schools. *Id.* § 23.25 (Vernon 1987); *id.* § 11.151(b) (Vernon 1996) (emphasis added). This allows for flexibility in local charters and in board-delegated power as well as mirroring authority assigned to other persons and entities within the school district. *See also id.* § 11.011.

71. *Id.* § 11.201 (Vernon 1996); *see also id.* § 13.351 (Vernon Supp. 1995).

72. *Id.* § 11.202 (Vernon 1996); *see also id.* § 13.352 (Vernon 1991). For further discussion of the principal's role in discipline *see infra* Part VI.

73. *See* TEX. EDUC. CODE ANN. subch. F, ch. 11 (Vernon 1996), for duties assigned to the district and campus committees; *see also id.* §§ 7.056(b)(2), 11.011, 21.352, 21.354, 21.451(b), 37.001(a), 39.094. Given their duties and control, an unanswered question is whether these committees must comply with the Open Meetings Act. *See* TEX. GOV'T CODE ANN. § 551.001(3)(H) (Vernon 1994); *see also* Sierra Club v. Austin Transp. Study Policy Advisory Comm., 746 S.W.2d 298 (Tex. App.—Austin 1988), *appealed after remand*, 843 S.W.2d 683, (Tex. App.—Austin 1992 reh'g overruled, error denied).

74. TEX. EDUC. CODE ANN. § 23.34 (Vernon Supp. 1995) (as added by Acts 1993, 73d Leg., ch. 660, § 18).

75. *See supra* note 20.

76. TEX. EDUC. CODE ANN. § 11.162 (Vernon 1996).

77. *Id.* § 28.025(b).

with a public or private entity for the provision of educational services.<sup>78</sup> During the legislative session, the Texas Attorney General issued an opinion that dampened enthusiasm for using the section in privatization efforts.<sup>79</sup> The opinion states that the section does not relieve school districts that enter such contracts from complying with statutory mandates applicable to school districts.<sup>80</sup> Many mandates in the code expressly apply to school districts and to students enrolled in a school district. Even if the district contracts for their education, those students would still be students of the district, and thus districts must ensure compliance with mandates such as class-size limits, minimum number of days of instruction, the "no-pass no-play" suspension from extracurricular activities, and annual state examinations. On the other hand, some laws such as the right to a duty-free lunch do not apply to as many educators after Senate Bill 1.<sup>81</sup> In the new law, a "classroom teacher" is an educator who is directly employed by a school district.<sup>82</sup> If the entity contracts with the educator, and the board of trustees contracts with the entity, the educator is not employed by the district, is not a "classroom teacher," and is not subject to those requirements. On the whole, however, many mandates still apply to contract entities, unless the contract is for alternative education placement.<sup>83</sup>

#### D. LOCAL—CHARTERS

The contracted services provision may be of limited use in achieving flexibility in educational arrangements. Many mandates apply, while protections, such as eligibility for state retirement benefits and limitations on liability, do not apply. To allow districts, educators, and parents the flexibility to create educational systems that work best for children, Senate Bill 1 set up a system of charters.<sup>84</sup> If a district or school has a charter, protections such as retirement and limitations on liability apply, but many mandates do not.<sup>85</sup>

In a way, the state school laws can be divided into "essentials" (*e.g.*, school finance and the accountability system) and "best practices" (*e.g.*, class size and staff development). Some laws are essential and must apply to all public schools, because the Texas Constitution requires them or simply because they are integral to the public education system. However, some laws, while splendid ideas, do not suit every student or situa-

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78. *Id.* § 23.34 (Vernon Supp. 1995) (as added by Acts 1993, 73rd Leg., ch. 347, § 402).

79. Op. Tex. Att'y Gen. No. DM-335 (1995).

80. *Id.* at 220.

81. TEX. EDUC. CODE ANN. § 21.405 (Vernon 1996). Because they have no similar requirement of district employment, librarians would still be entitled to duty-free lunch.

82. *Id.* § 5.001(2).

83. *See id.* § 37.008(c) (off-campus alternative education programs are not subject to requirements in Title 2 of Education Code other than limitations on liability, reporting requirements, or requirements imposed by the discipline or accountability chapters).

84. *Id.* § 12.002. Lt. Gov. Bob Bullock actively promoted charter schools, and his staff presented the concept to the Select Committee.

85. *Id.* §§ 12.012-12.013, 12.055-12.057, 12.103-12.105.

tion. The latter laws set up the Legislature's ideal of an educational system, but the charter law in effect allows local entities to opt out and use their own ideas.

The idea behind charters is to allow more freedom to those who want it. Senate Bill 1 creates three types of charters, each with its own threshold for freedom from state mandates.<sup>86</sup> A home-rule school district charter is adopted by a majority of the district's voters.<sup>87</sup> A campus or campus program charter may be granted by the board of trustees of a district if a majority of parents and teachers sign a petition requesting the charter.<sup>88</sup> At an open-enrollment charter, which is granted by the State Board of Education, students attend and teachers work at the school by choice.<sup>89</sup> A charter allows innovation and experimentation. At the same time, each charter type is focused on student performance because each must comply with the state's accountability system to retain its charter status.

### 1. *Home-Rule School District Charter*

A primary reason for a home-rule school district charter is to allow local citizens to release a district from state mandates and design a system tailored to local needs. Instead of special interest groups negotiating compromises at the state level regarding, for example, who should have the authority to hire, fire, and promote employees, those issues can be decided locally, much as they are in home-rule municipalities. Politically, home-rule school districts change state-level debate. In the future, it should be more difficult to impose a state mandate—especially an unfunded mandate—on a home-rule school district than to impose a mandate on school districts generally, as is the case with home-rule and general-law municipalities.

A home-rule charter, adopted by a district's voters,<sup>90</sup> lets the district comply with a reduced set of Education Code mandates while retaining all the powers of school districts. The home-rule school district is subject to federal laws, state laws (other than the Education Code), and the following Education Code provisions: criminal offenses; limitations on liability; data reporting requirements necessary to monitor compliance with the home-rule law; educator certification; educator rights regarding joining groups and salary deductions for dues; criminal history records; student admissions, attendance, or inter-district or inter-county transfers; elementary class-size limits for any low-performing campus; high school graduation requirements; federal and state laws and court orders related to bilingual or special education programs; pre-kindergarten programs; textbooks; health and safety provisions, including school bus safety; the

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86. TEX. EDUC. CODE ANN. § 12.002 (Vernon 1996).

87. *Id.* § 12.021(a).

88. *Id.* § 12.052.

89. *Id.* § 12.101.

90. *Id.* § 12.021(a).

"no-pass no-play" suspension from extracurricular activities; the state school finance system; the state accountability system; and school district bonds, tax rates, and purchasing requirements.<sup>91</sup>

Significant mandates that do not apply to home-rule districts include teacher contracts, minimum salary schedule, appraisals, staff development, elementary class-size limits (except for low-performing campuses), compensatory education programs, expulsion, and alternative education programs.

The less the state law mandates, the more the district can innovate; because of this broader autonomy, the home-rule charter law also enhances citizen input and emphasizes consensus. A home-rule charter is initiated either by a petition signed by at least five percent of the district's registered voters or by a two-thirds vote of the board of trustees.<sup>92</sup> At that point the board appoints a fifteen-member charter commission.<sup>93</sup> A majority of the members must be parents of district students, and at least twenty-five percent of the members must be classroom teachers elected by their peers.<sup>94</sup> The commission has one year to complete a charter proposal.<sup>95</sup> The proposed charter is sent to the commissioner for legal review and to the Texas Secretary of State, who almost certainly will direct the board of trustees to send the charter to the United States Department of Justice ("DOJ") for preclearance review under the Voting Rights Act.<sup>96</sup> The board of trustees sets the election. For the home-rule charter to take effect, a majority of voters must approve it and at least twenty-five percent of the district's registered voters must vote in the election in which the charter adoption issue is on the ballot.<sup>97</sup> Most likely this will require coordination with a presidential or gubernatorial general election.

A charter amendment is initiated by action of the home-rule governing body or by petition signed by five percent of the voters.<sup>98</sup> No charter commission is needed before an election may be called, and the election turnout requirement is twenty percent.<sup>99</sup> An election on rescission of a home-rule charter must be ordered if two-thirds of the governing body vote or if five percent of the voters sign a petition to do so, and the turnout requirement is twenty-five percent.<sup>100</sup> Thus, the requirements for getting in and out of a charter are the same.

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91. TEX. EDUC. CODE ANN. § 12.012-12.013 (Vernon 1996). For a more comprehensive analysis of applicable laws, see The Office of the Governor, "The Home-Rule School District Education Code," Sept. 1995 (on file with the author).

92. TEX. EDUC. CODE ANN. § 12.014.

93. *Id.* § 12.015(a).

94. *Id.* § 12.015(b).

95. *Id.* § 12.015(c).

96. TEX. EDUC. CODE ANN. § 12.017 (Vernon 1996). The Secretary of State's office has indicated that it will recommend any charter be sent to the U.S. Department of Justice.

97. *Id.* §§ 12.021-12.022.

98. *Id.* § 12.020.

99. *Id.* § 12.022(b).

100. *Id.* § 12.030.

The home-rule charter must describe, among other matters, the district's educational programs, any basis for the charter's probation or revocation, and the budget and audit processes.<sup>101</sup> The charter also must describe the governing structure of the district and campuses.<sup>102</sup> Because the DOJ will review the charter under the Voting Rights Act, the charter commission probably should keep the same elected board of trustees structure in place if it wants to avoid a drawn-out preclearance. Also, in light of questions asked by the DOJ in the preclearance of Senate Bill 1, school districts would be well advised to provide copies of the home-rule charter in Spanish.<sup>103</sup>

In cases of annexation involving different statuses (one district has a home-rule school district charter and the other does not), the status of the receiving district is the status for both districts following annexation. In cases of consolidation, the ballot language must specify whether the proposed consolidated district would be governed as a district with a home-rule charter or as a district that does not have a home-rule charter.<sup>104</sup> School districts should include any change in the method of election in the notice of any election to consolidate or annex one or more home-rule districts. That is, if one district has at-large positions and the other has cumulative voting or single-member districts, the election notice should explain what voting system would exist upon consolidation or annexation. The DOJ seemed concerned that such notice is not provided directly on the ballot.<sup>105</sup>

The charter may be placed on probation or revoked if the SBOE determines, after a public hearing, that the district committed a material violation of the charter, failed to satisfy generally accepted accounting standards, or failed to comply with the home-rule subchapter or other applicable laws. If a district has been rated academically unacceptable for two years under the state accountability system, the commissioner may request the State Board of Education to revoke the district's home-rule charter.<sup>106</sup> If a home-rule charter is revoked or rescinded the district operates under the general laws that apply to all school districts.<sup>107</sup>

## 2. *Campus or Campus Program Charter*

A second form of charter gives autonomy to a school district campus or a program at a campus. The board of trustees may grant a campus or campus program charter to parents and teachers upon receiving a petition signed by the parents of a majority of the students at that campus and a majority of the classroom teachers at that campus.<sup>108</sup> The board

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101. TEX. EDUC. CODE ANN. § 12.016 (Vernon 1996).

102. *Id.* § 12.016(4).

103. See Patrick, *supra* note 67.

104. TEX. EDUC. CODE ANN. at § 12.029(b) (Vernon 1996).

105. See Patrick, *supra* note 67.

106. TEX. EDUC. CODE ANN. § 39.131(a)(10) (Vernon 1996).

107. TEX. EDUC. CODE ANN. § 12.027(a) (Vernon 1996).

108. *Id.* § 12.052.



may not "arbitrarily deny" a charter.<sup>109</sup> A charter is in the form of a contract between the board president and chief operating officer of the campus or program.<sup>110</sup> The charter is contingent upon satisfactory student performance in the state accountability system.<sup>111</sup> A board of trustees may place on probation or revoke a charter if it determines, after a hearing, that the campus or program materially violated the charter, failed to satisfy accounting standards, or failed to comply with applicable laws and rules. These are limited reasons; a board of trustees might carefully consider beforehand what constitutes a material violation of the charter. For example, the charter could require a minimum attendance level so that the program or campus does not become too costly for the district.

If the charter is granted, the campus or program can be exempt from rules and policies of the board of trustees and only has to comply with Education Code provisions relating to criminal offenses; data reporting requirements necessary to monitor compliance with the charter law; criminal history records; high school graduation requirements; special education and bilingual education; prekindergarten programs; the "no-pass no-play" suspension from extracurricular activities; health and safety provisions; and the state accountability system.<sup>112</sup> Unlike entities that contract for educational services, campus or campus programs are considered governmental bodies, and retirement benefits and limitations on liability apply.<sup>113</sup>

A potential drawback of this form of charter is that a minority of parents and teachers who oppose the petition may want state law protections to apply, but they have no choice, because students and teachers can be assigned to the school. For this reason, boards of trustees may want to include in the charter either an opt-out or an opt-in clause for parents and teachers. Another drawback is the potential for squelching a charter for a small, one-classroom program that is intensely supported by the parents and teachers who would be involved but does not get signatures from a majority of parents and teachers at "that school campus" who are suspicious or indifferent. Interestingly, revision of a program charter only requires a petition signed by a majority of the parents and classroom teachers "in the program."<sup>114</sup> Perhaps future revision of this law could allow one-hundred percent of the parents and teachers expected to be involved in the program to petition for program charters, with stipulations that other students could not be assigned to the program without their parents' consent and other teachers could not be transferred to the

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109. *Id.* § 12.052(c). Most likely denial will require the board of trustees to make a finding listing its reasons.

110. *Id.* § 12.059.

111. *Id.* § 12.058(2).

112. TEX. EDUC. CODE ANN. § 12.055 (Vernon 1996).

113. *Id.* § 12.055.

114. *Id.* § 12.061.

program over their objection.<sup>115</sup>

### 3. *Open-Enrollment Charter School*

Many laws exist because educators, employees, or students want protection in a public school system that is effectively a monopoly. When a campus or board of trustees does not respond to the desires of parents or teachers, their only options may be turning to the Legislature or dropping out of the public schools. Thus the code contains laws giving teachers minimum salaries and duty-free lunch and giving elementary students class-size limits.<sup>116</sup> Because students and teachers are assigned to a school and cannot go elsewhere for public education or, arguably, employment, these protections provide a balance against what is effectively a monopoly.

If schools were available to provide an alternative, and the choice to attend that school was optional, many state law protections would not be needed in the schools. If a school wants to stay in business, by keeping students and good teachers, it will behave accordingly. In exchange for minimal mandates, these schools would be subject to market accountability. In addition, the schools would be subject to the state accountability system to ensure that the students are not educationally shortchanged and to provide information to parents on the quality of education provided by that school.<sup>117</sup>

Senate Bill 1 sets up open-enrollment charter schools to provide parents this option.<sup>118</sup> The SBOE is authorized to grant no more than twenty charters for an open-enrollment charter school and may only grant such a charter to institutions of higher education, governmental entities, or non-profit corporations. A school may be operated in a school district facility with the agreement of the board of trustees, but an educator employed by a school district cannot be transferred to the charter school over the educator's objection.<sup>119</sup>

The open-enrollment charter school is subject to the same laws as the campus or program charter.<sup>120</sup> Likewise, its governing body is subject to laws on open meetings and open records, retirement benefits, and limitations on liability.<sup>121</sup> Funding is derived from state and local funding that

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115. See, e.g., *id.* § 12.101(d) (example of the non-coercion of educators).

116. See, e.g., *id.* ch. 26 (parental rights). Senate Bill 1 added chapter 26 because many parents feel helpless in the present system.

117. TEX. EDUC. CODE ANN. §§ 12.102(3) & 12.111(3)-(4) (Vernon 1996) (charter sets level of student performance on state assessment instruments). This flexibility allows open-enrollment charter schools to target special populations.

118. In fact, the law encourages and requires opportunities for parent input. See *id.* § 12.110(c) & 12.116(b).

119. *Id.* § 12.101.

120. *Id.* § 12.104.

121. TEX. EDUC. CODE ANN. § 12.105 (Vernon 1996); see also TEX. GOV'T CODE ANN. § 821.001(7) (Vernon Supp. 1996) (retirement system definition of "employer" now includes "agencies in the state responsible for public education").

would have been spent on the student in the student's resident district.<sup>122</sup> The school may not charge tuition and must provide transportation<sup>123</sup> to the same extent a school district is required by law to provide it.<sup>124</sup> A charter must describe the geographical area served by the program and may draw from all or part of one or more districts.<sup>125</sup> A charter must prohibit discrimination in the school's admission policy based on sex, national origin, ethnicity, religion, disability, academic or athletic ability, or resident district, but a charter may allow exclusion of students with documented histories of criminal or discipline problems.<sup>126</sup>

The SBOE sets up criteria for selecting a program and may approve or deny an application based on criteria it adopts.<sup>127</sup> The SBOE may modify, place on probation, revoke, or deny renewal of the charter if it determines that the person operating the school materially violated the charter, failed to satisfy accounting standards, or failed to comply with applicable laws.<sup>128</sup> The SBOE must also designate an organization to evaluate student performance, student discipline, and parental and student satisfaction with the schools.<sup>129</sup> This again emphasizes the theme of open-enrollment charter schools: parental and student satisfaction.

Senate Bill 1 also continues a prior law authorizing the State Board of Education to create and appoint boards of trustees for special-purpose school districts,<sup>130</sup> which are similar to open-enrollment charter schools. These niche districts include military reservation school districts<sup>131</sup> and districts for the education of students in special situations whose educational needs are not adequately met by regular school districts.<sup>132</sup>

### III. TEACHERS AND EMPLOYEES

#### A. CERTIFICATION AND PERMITS

##### 1. *State Board for Educator Certification*

Senate Bill 1 creates the State Board for Educator Certification to recognize educators as professionals and to let the profession, though a majority-educator state licensing board, largely regulate itself.<sup>133</sup> The board, which the governor appoints, has the authority to specify classes of educator certificates; specify the qualifications for each certificate and the period for which it is valid; provide for disciplinary proceedings, including

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122. See TEX. EDUC. CODE ANN. § 12.106-12.107 (Vernon 1996). District debt service is excluded from the amount that follows the student.

123. *Id.* § 12.108.

124. *Id.* § 12.109.

125. *Id.* § 12.111(13).

126. *Id.* § 12.111(6).

127. TEX. EDUC. CODE ANN. § 12.110(a) (Vernon 1996).

128. *Id.* § 12.115.

129. *Id.* § 12.118.

130. *Id.* § 11.351; *id.* § 11.28 (Vernon Supp. 1995).

131. *Id.* § 11.355 (Vernon 1996).

132. TEX. EDUC. CODE ANN. § 11.351(a) (Vernon 1996).

133. *Id.* § 21.031.

the suspension or revocation of certificates; provide for the adoption, amendment, and enforcement of an educator's code of ethics; and provide for continuing education, a new requirement that is consistent with other professions' regulations.<sup>134</sup> The State Board of Education has veto authority over State Board for Educator Certification rules and may reject a proposed rule upon a two-thirds vote. If the SBOE fails to act on a proposed rule within ninety days, the rule is approved.<sup>135</sup>

## 2. *School District Teaching Permits*

Senate Bill 1 also allows school districts to issue a teaching permit and employ a person who holds a baccalaureate degree or will teach career and technology education.<sup>136</sup> The district must send the commissioner a statement outlining the person's qualifications and the subject or class the person will teach.<sup>137</sup> Pending the commissioner's action, the person may teach the subject or class;<sup>138</sup> if the commissioner fails to act within thirty days the district may issue the person a school district teaching permit for that subject or class.<sup>139</sup> If within 30 days the commissioner informs the district that the person is not qualified to teach, that person may not teach.<sup>140</sup> Teaching permits are not transferrable across districts and may be revoked for cause.<sup>141</sup> A district is effectively limited in the number of permits it can grant because it must employ enough teachers certified by the SBEC to maintain an average ratio of not less than one certified teacher for each twenty students in average daily attendance.<sup>142</sup>

## 3. *Educators*

An educator is a person who is required to hold a "certificate" issued under Subchapter B, Chapter 21, which is the subchapter that contains both SBEC certificates and school district teaching permits.<sup>143</sup> Clearly, the "certificate" at issue is the kind issued by the SBEC; the provision that requires a person to hold a certificate differentiates between certificates and permits.<sup>144</sup> Laws that refer to "educators" therefore refer only to persons issued certificates by the SBEC. This includes "classroom teachers," who are required to be "educators."<sup>145</sup> Thus, districts are not required to give permittees the same kind of Education Code benefits that

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134. *Id.* § 21.041.

135. *Id.* § 21.042. This arrangement is akin to the SBOE's relationship to the University Interscholastic League, whose rules must be consistent with SBOE Rules. *Id.* § 33.083(a).

136. *Id.* § 21.055(b).

137. TEX. EDUC. CODE ANN. § 21.055(c) (Vernon 1996).

138. *Id.*

139. *Id.* § 21.055(d).

140. *Id.*

141. *Id.* § 21.055(e).

142. TEX. EDUC. CODE ANN. § 25.111 (Vernon 1996).

143. *Id.* § 5.001(5).

144. *Id.* § 21.003(a).

145. *Id.* § 5.001(2).

certified educators receive.<sup>146</sup>

## B. CONTRACTS—AUTHORITY AND ENTITLEMENT

### 1. Authority

As in prior law, the code continues to specify who does what in hiring, firing, assigning, and promoting. In hiring, the superintendent has sole authority to make recommendations to the board of trustees regarding the selection of all personnel other than the superintendent.<sup>147</sup> The board may delegate final selection authority to the superintendent or may accept or reject the superintendent's recommendation.<sup>148</sup> If the board rejects the recommendation, the superintendent makes alternative recommendations until the board accepts a recommendation.<sup>149</sup> A campus principal, based on criteria the principal develops after informal consultation with the faculty, approves teacher and staff appointments for that campus from a pool of applicants selected by the district or from applicants who meet district-established hiring requirements.<sup>150</sup> However, the superintendent or superintendent's designee has final placement authority for a teacher transferred because of enrollment shifts or program changes in a district.<sup>151</sup>

The board may set terms of employment with the district or may delegate that authority to the superintendent.<sup>152</sup> The principal must assign, evaluate, and promote personnel assigned to the campus.<sup>153</sup> The principal also must recommend to the superintendent action on the termination, suspension, or term contract nonrenewal of an employee assigned to the campus,<sup>154</sup> and the superintendent initiates the action.<sup>155</sup>

### 2. Entitlement to Contracts

Senate Bill 1 clearly spells out who is entitled to the statutory scheme of contracts: "each classroom teacher, principal, librarian, nurse, or counselor."<sup>156</sup> A district may, but is not required to, hire anyone else under a statutory contract.<sup>157</sup> A district may have a policy that specifies other employees who are entitled to contracts. Likewise, a district may have

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146. See, e.g., *id.* §§ 21.002 (contract requirement for classroom teachers); 21.401 (10 month contracts and minimum days of service requirement for educators); 21.4011, 21.402 (minimum salary schedule); 21.404 (planning and preparation time); 21.405 (duty-free lunch for classroom teachers and librarians). "Educator" does not include a nurse, for example, because the statute does not require a nurse to hold an SBEC-issued certificate. *Id.* § 21.003; see *Dodd v. Meno*, 870 S.W.2d 4, 6 (Tex. 1994).

147. TEX. EDUC. CODE ANN. § 11.163(a)(1) (Vernon 1996).

148. *Id.* § 11.163(b), (c).

149. *Id.* § 11.163(b).

150. *Id.* § 11.202(b)(1).

151. *Id.* § 11.202(d).

152. TEX. EDUC. CODE ANN. § 11.163(c) (Vernon 1996).

153. *Id.* § 11.202(b)(5).

154. *Id.* § 11.202(b)(6).

155. *Id.* § 11.201(d)(4).

156. *Id.* § 21.002(a).

157. TEX. EDUC. CODE ANN. § 21.002(b) (Vernon 1996).

existing, pre-Senate Bill 1 contracts that obligate it to hire certain district employees under the statutory contracts. If either policy or contracts require the district to hire an employee under statutory contracts beyond the Section 21.002 minimum, the employee is a "teacher" for purposes of Section 21.101 and can get a probationary, term, or continuing contract.<sup>158</sup> A superintendent, however, is not eligible as a "teacher" in the probationary and continuing contracts subchapters and can only get a term contract.<sup>159</sup>

By policy, a school board spells out specific positions or categories of positions to which continuing or term contracts apply.<sup>160</sup> The categories of positions may be based on considerations such as length of service.<sup>161</sup> For example, a school board could create a tenure system in which teachers earn their way from term contracts to continuing contracts if they meet certain criteria, which could include degrees earned or student performance.

Before discussing the substance of the new contract law, it should be noted that many of the teacher benefits such as contract law are now limited to full-time certified teachers. The definition of "classroom teacher" is limited to "an educator who is employed by a school district and who, not less than an average of four hours each day, teaches in an academic instructional setting or a career and technology instructional setting."<sup>162</sup> The term does not include a teacher's aide or a full-time administrator.<sup>163</sup> Generally, the narrow "classroom teacher" definition is used where mandates are imposed on districts—*e.g.*, minimum salaries and contracts—and a more broad term such as "employee" or "educator" is used where legal blessings are bestowed—*e.g.*, statutory immunity from liability.<sup>164</sup>

The "classroom teacher" definition provides flexibility. First, as discussed previously, an "educator" is not a person teaching under a school district teaching permit.<sup>165</sup> Second, "[e]mployed by a school district" means that the definition does not reach an open-enrollment charter school. Third, the four hour per day average for teaching<sup>166</sup> means the definition does not include most part-time teachers. For example, a rural school with too few students to warrant a full-time teacher in a subject could hire a part-time teacher, providing students with a class and providing a teacher with a job. Or a teacher could contract her services to sev-

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158. *See id.* § 21.101 ("teacher" to whom contract laws apply does not include a person who is not entitled to a contract under Section 21.002, an existing contract, or district policy).

159. *See id.* §§ 21.101, 21.151, 21.201.

160. *Id.* § 21.002(c).

161. TEX. EDUC. CODE ANN. § 21.002(c) (Vernon 1996).

162. *Id.* § 5.001(2).

163. *Id.*

164. *Compare id.* §§ 21.002, 21.402, 21.404 and 21.405 with *id.* § 22.051.

165. *See* text accompanying note 143 *supra*.

166. The four hour requirement derives from prior law that required teachers to teach four hours per day. TEX. EDUC. CODE ANN. § 13.907 (Vernon 1991).

eral districts with a contract of her own design, allowing one person, rather than a busload of students, to travel between campuses. It also allows flexibility for a school district considering hiring a teacher who had taught in the public schools for the previous five of eight years.<sup>167</sup> If the district had reservations because the teacher had been fired from her last job, the district could hire her to teach an average of three hours each day and keep her on a probationary contract. Last, "academic instructional setting or a career and technology instructional setting" means the definition does not reach persons who teach or work in a different setting. Thus, a coach who teaches math for two hours and coaches for two hours in a non-academic setting is not a "classroom teacher." This reaffirms Justice Gonzalez's observation that a coach with a losing football record does not have a protected property interest in continued employment as a coach.<sup>168</sup>

### C. CONTRACTS, HEARINGS, AND APPEALS

Texas school districts employ a quarter million teachers under a statutory scheme of probationary, term, and continuing contracts.<sup>169</sup> Probationary contracts for beginning teachers have little due process at the end of the probationary term, and a teacher can be terminated if, in the board of trustees' judgment, the district's best interests are served.<sup>170</sup> Term contracts provide procedures for renewal or nonrenewal at the end of the contract term, and boards of trustees adopt reasons for nonrenewal.<sup>171</sup> Continuing contracts are basically tenure. For these three types of contracts, prior law had inconsistencies in the application of contracts, reasons for termination, and processes for termination. Terminating an ineffective teacher was difficult. The substantive statutory reasons for an action were too inflexible, and the process was lengthy and cumbersome.

Senate Bill 1 drastically transformed the law on contract requirements and on teacher discharges and suspensions. While districts were given greater latitude in the substantive reasons for firing a teacher—to let a district free itself of bad or ineffective teachers—the procedural safeguards for mid-contract actions became a more formal administrative process that uses independent fact finders who are certified hearing examiners.

#### 1. Probationary Contract

Prior law had separate laws for probationary contracts under term contracts and continuing contracts;<sup>172</sup> Senate Bill 1 streamlines them into one

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167. See TEX. EDUC. CODE ANN. § 21.102(b) (Vernon 1996).

168. *Grounds v. Tolar*, 856 S.W.2d 417, 420, 424 (Tex. 1993) (Gonzalez, J., concurring) (teacher has property interest in job, but coach does not).

169. TEX. EDUC. CODE ANN. subch. C-E, ch. 21 (Vernon 1996).

170. *Id.* § 21.103(a).

171. *Id.* § 21.203(b).

172. *Id.* §§ 13.101-13.105, 13.109-13.116, 21.209 (Vernon 1987 & 1991 & Supp. 1995).

cohesive law.<sup>173</sup> Initially, a district hires a person under a probationary contract of not more than one year, renewable for two additional one-year periods.<sup>174</sup> A fourth probationary year is allowed if a board of trustees doubts the person should be given a term or continuing contract.<sup>175</sup> The board may terminate employment at the end of a probationary contract if, in its judgment, the district's best interests are served.<sup>176</sup> The board's decision to terminate a person employed under a probationary contract is final and cannot be appealed.<sup>177</sup> A district that does not terminate employment under a probationary contract must grant the teacher either a term or continuing contract.<sup>178</sup> A person on a term or continuing contract may agree to return to probation instead of being nonrenewed or discharged.<sup>179</sup>

## 2. *Term Contract*

Term contract law is similar to prior law. A district still must list reasons for nonrenewal of a term contract, although the teacher "does not have a property interest in a contract beyond its term."<sup>180</sup> This attempts to render moot a Texas Supreme Court decision that held that the Term Contract Nonrenewal Act gives teachers a constitutionally protected property interest in continued employment.<sup>181</sup> A teacher still may request a hearing on a nonrenewal, and the board of trustees must conduct the hearing in accordance with its rules, which may use the new hearing examiner process.<sup>182</sup> An aggrieved teacher may appeal to the commissioner for a review of the decision.<sup>183</sup> As in prior law, the commissioner may not substitute his judgment for that of the board of trustees unless the board's decision was arbitrary, capricious, unlawful, or was not supported by substantial evidence.<sup>184</sup>

Superintendents are limited to term contracts of no more than five years;<sup>185</sup> however, given the financial disincentive in making a severance payment, boards of trustees might be well advised to limit superintendent contracts to no more than one or two years. Senate Bill 1 attempts to dissuade a school board from making costly severance payments when terminating a superintendent's contract by requiring the commissioner to reduce the amount of state funds the district receives in an amount equal to the superintendent's severance payment.<sup>186</sup>

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173. TEX. EDUC. CODE ANN. §§ 21.101-21.106 (Vernon 1996).

174. *Id.* § 21.102(b).

175. *Id.* § 21.102(c).

176. *Id.* § 21.103(a).

177. *Id.*

178. TEX. EDUC. CODE ANN. § 21.103(b) (Vernon 1996).

179. *Id.* § 21.106.

180. *Id.* § 21.204.

181. *Grounds*, 856 S.W.2d at 420.

182. TEX. EDUC. CODE ANN. § 21.207 (Vernon 1996).

183. *Id.* § 21.209.

184. *Id.*

185. *Id.* § 11.201(b).

186. *Id.* § 11.201(c).



### 3. *Continuing Contract and Mid-Contract Actions*

Senate Bill 1 profoundly changed the substance and procedure of continuing contract law. Prior law differentiated between mid-year and end-of-year actions and provided rather limited, rigid lists of reasons for each.<sup>187</sup> The new law collapses all prior lists of reasons for discharge and suspension without pay into the more flexible "good cause."<sup>188</sup> The law eliminates the mid-year and end-of-year distinctions because both occur during a contract and should be treated the same in substance and procedure. The same reasoning applies to mid-contract actions for probationary and term contracts. Thus, a person proposed to be discharged at any time during a continuing contract, or who may be discharged mid-contract under any type of contract, or who may be suspended without pay can request a hearing before a certified hearing examiner.<sup>189</sup>

### 4. *Hearings and Appeals*

The hearings law for continuing contract and mid-contract actions changed dramatically from prior law, which provided full-blown hearings before the board of trustees, the commissioner, and a Travis County district court.<sup>190</sup> The new law streamlines cases by having one hearing at the local level, using either a certified commissioner-appointed hearing examiner or an agreed hearing examiner, and setting concrete deadlines which are designed to resolve the case by the next school year.<sup>191</sup> The board of trustees may reject or change a finding of fact if it is not supported by substantial evidence.<sup>192</sup> The teacher may appeal to the commissioner, who reviews the record and may not substitute his judgment for the board's unless the decision was arbitrary, capricious, unlawful, or the hearing examiner's findings are not supported by substantial evidence.<sup>193</sup> On appeal, a local or Travis County district court may review the local record (and any commissioner record on procedural defects) under the substantial evidence rule.<sup>194</sup>

## D. APPRAISALS

A school district must appraise each teacher and administrator at least annually.<sup>195</sup> The district may adopt either the appraisal instrument recommended by the commissioner or its own instrument.<sup>196</sup> In teacher ap-

187. See TEX. EDUC. CODE ANN. §§ 13.109, 13.110 (Vernon 1991).

188. *Id.* § 21.156 (Vernon 1996) (good cause is "failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly situated school districts in this state.").

189. *Id.* § 21.251.

190. *Id.* §§ 11.13, 13.112-13.115, 21.210 (Vernon 1987 & 1991 & Supp 1995).

191. See TEX. EDUC. CODE ANN. §§ 21.251-260 (Vernon 1996).

192. *Id.* § 21.259(c).

193. *Id.* § 21.303(b).

194. *Id.* § 21.307.

195. *Id.* §§ 21.352(c), 21.354(c).

196. TEX. EDUC. CODE ANN. §§ 21.352(a), 21.354(c) (Vernon 1996).

appraisals, the local instrument must be developed by campus and district committees and approved by the board of trustees;<sup>197</sup> in administrator appraisals the local instrument must be developed in consultation with the district and campus committees.<sup>198</sup> Just as the law has required the use of student performance information in evaluating superintendents and principals, Senate Bill 1 requires teacher appraisals to include consideration of the performance of the teachers' students.<sup>199</sup> Principal appraisals also must include student performance. For those campuses showing the most improvement in student performance, the commissioner may award incentive payments to principals.<sup>200</sup>

The appraisal subchapter also makes confidential "a document evaluating the performance of a teacher or administrator."<sup>201</sup> The interpretation of this ambiguity should be guided by common sense; evaluation of students' performance in a particular teacher's classroom is not intended to be protected from the open records law.

#### E. MINIMUM SALARIES

At the urging of Rep. Paul Sadler, Chairman of the House Public Education Committee and co-author of Senate Bill 1, many teachers received or will receive a pay raise. Senate Bill 1 substantially changed the salary law by expanding the schedule from 11 to 21 steps and phasing out the career ladder stipend.<sup>202</sup> After being placed on the new salary schedule, all teachers must receive the greater of their current salary or the minimum salary identified on the schedule.

After the 1995-1996 school year, the salary at each step of the schedule is not defined in dollars but is instead a function of the amount of money the state appropriates per student.<sup>203</sup> Tying the pay scale to appropriations means that as the state spends more per student, the salary schedule automatically adjusts and increases the minimum salary required at each step. If state spending per student decreases, however, the minimum schedule would remain at the higher amount.<sup>204</sup> The minimum required length of teacher contracts is tied to increases in the minimum schedule: for every three days' worth of pay added to the minimum schedule, teachers will be required to work one additional day.<sup>205</sup>

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197. *Id.* § 21.352(a)(2).

198. *Id.* § 21.354(c)(2).

199. *Id.* §§ 21.351(a)(2), 21.352(a)(2)(B).

200. *Id.* § 21.357.

201. TEX. EDUC. CODE ANN. § 21.355 (Vernon 1996); *see* TEX. GOV'T CODE ANN. § 552.101 (Vernon 1994).

202. TEX. EDUC. CODE ANN. §§ 21.4011, 21.402-21.403 (Vernon 1996). The minimum salary schedule is now limited to classroom teachers and full-time librarians.

203. *Id.* § 21.402(a).

204. *Id.* § 21.402(d).

205. *Id.* § 21.401.

## F. CIVIL IMMUNITY

The prior law on immunity from liability for professional employees is reshuffled but essentially the same. School districts still must adopt policies specifying the duties of each of its professional positions of employment.<sup>206</sup> The wording of the grant of immunity has changed slightly, but does not appear to have been changed in substance.<sup>207</sup> The definition of "professional employee" has been expanded to clarify in statute who qualifies for immunity.<sup>208</sup>

Additionally, Senate Bill 1 added a limitation on liability for private or independent institutions of higher education that provide volunteer services to primary or secondary schools.<sup>209</sup> The bill also retains but divides into two sections the law on frivolous lawsuits against district employees and boards of trustees.<sup>210</sup>

## IV. STUDENTS

## A. ADMISSION AND ENROLLMENT

A number of measures were meant to combat gangs in schools. The first relates to a student who is living apart from his parents and who wants to attend school in the district where the student but not the parents resides. The new code says that a board of trustees does not have to admit the student if the student has been expelled, sent to an alternative education program, or is on probation.<sup>211</sup> Second, the district may require evidence of a person's eligibility to attend district schools.<sup>212</sup> The district must establish minimum proof of residency acceptable to the district and may make reasonable inquiries to verify eligibility.<sup>213</sup> Third, if a person with legal authority to enroll a child in school cannot be located, the district must notify the Department of Protective and Regulatory Services, admit the child, and direct any communication required with the parent to the department.<sup>214</sup>

The bill also allows local control over admissions decisions. A school district can decide for itself who qualifies as legally responsible for the child.<sup>215</sup> In instances in which parents abandon a child, and grandparents

206. *Id.* § 11.163(a).

207. Compare TEX. EDUC. CODE ANN. § 22.051 (Vernon 1996) with *id.* § 21.912(b) (Vernon 1987).

208. *Id.* § 22.051(c) (Vernon 1996); see *LeLeaux v. Hanshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 53 (Tex. 1992) (bus driver is "professional employee"). "Certification" in § 22.051(c)(4) should be read broadly, as (c) refers to several classes of employees who, like bus drivers, will not be certified by the State Board for Educator Certification.

209. TEX. EDUC. CODE ANN. § 22.054 (Vernon 1996).

210. *Id.* §§ 11.161, 22.055.

211. *Id.* § 25.001(d). This does not let a district exclude a student in a residential placement because typically the student is under a court order and thus resides with a "person having lawful control . . . under a court order." *Id.* § 25.001(b)(2).

212. *Id.* § 25.001(c).

213. TEX. EDUC. CODE ANN. § 25.001(c) (Vernon 1996).

214. *Id.* § 25.002(f).

215. *Id.* § 25.001(j).

are left in charge of the child, the grandparents might not be acting under the authority of a court order. The code lets a school board create a policy specifying, for example, that a grandparent of a child is recognized as legally responsible for the child in his or her care until a parent can be located. A district could, if it wished, create a policy specifying proof of legal responsibility, such as a particular degree of consanguinity and tangible evidence (*e.g.*, the child's food and clothing bills).

## B. RIGHTS OF PARENTS AND STUDENTS

Although a major purpose of Senate Bill 1 was local control, it also created a plethora of new rights for parents and students. Perhaps if home-rule school districts and charter schools had existed previously, parents could have addressed many of these rights in a charter on the local level rather than through state law. Instead, the Legislature allocated power where it was best suited for educational purposes. Placing rights such as choice of school with the parent puts the person closest to the student in charge of the student's educational needs. It also affords a more quick, direct approach to meeting a student's needs than waging a lengthy political battle to create or change a charter or elect a new school board. Thus, the burden is shifted: If a community or school district does not want these rights, or wants to address them in a different way than that prescribed by the Legislature, it can opt for a charter, under which many of these laws do not apply.<sup>216</sup>

### 1. Parental Rights

Senate Bill 1 added many new entitlements for parents and students. A new chapter, "Parental Rights and Responsibilities," grants rights concerning academic programs;<sup>217</sup> access to student records,<sup>218</sup> state assessments,<sup>219</sup> teaching materials,<sup>220</sup> and board meetings;<sup>221</sup> right to full information regarding school activities of a child;<sup>222</sup> consent for psychological examinations and for certain videotaping or tape recording;<sup>223</sup> and grievance procedures.<sup>224</sup> In addition, parents have the right to temporarily remove their child from a class or activity that conflicts with their religious or moral beliefs; however, the parent must notify the teacher in writing before removing the child.<sup>225</sup> Removal under this provision cannot be used to avoid a test and does not exempt a child from satisfying grade level or graduation requirements.<sup>226</sup>

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216. *See id.* §§ 12.012-12.013 (listing the laws applicable to home-rule school districts).

217. *Id.* § 26.003.

218. TEX. EDUC. CODE ANN. § 26.004 (Vernon 1996).

219. *Id.* § 26.005. For more on access to state examinations, *see infra* part VII.

220. *Id.* § 26.006.

221. *Id.* § 26.007.

222. *Id.* § 26.008.

223. TEX. EDUC. CODE ANN. § 26.009 (Vernon 1996).

224. *Id.* § 26.011.

225. *Id.* § 26.010.

226. *Id.*

## 2. *Public Education Grant Program*

If a school is clearly failing to educate students, Senate Bill 1 provides an escape hatch for parents to transfer their children to another school in the district or transfer them (and state and local funds) to another district.<sup>227</sup> To be eligible, the student must be assigned to a public school campus at which 50 or more of students did not pass a state assessment instrument in the preceding three years or that at any time in the preceding three years was identified as low-performing.<sup>228</sup>

In the case of transfer to another district, the chosen district may accept or reject the student's application but may not use criteria that discriminate on the basis of race, ethnicity, academic achievement, athletic abilities, language proficiency, sex, or socioeconomic status.<sup>229</sup> When transferring, the student is entitled to receive a public education grant reflecting most of the total state and local funds per student for the home school district.<sup>230</sup>

## 3. *Educational Program Access*

Another provision requires a school district to offer a particular program at a school if the year before parents or guardians of at least 22 students at a school request a transfer to another school in the district to enroll in an educational program offered at that school.<sup>231</sup> The law has great merit in attempting to address educational needs at a school. Some drawbacks, however, may emerge: the district must offer the program the next year even if no one is interested anymore; it does not address the immediate educational needs of the students requesting transfers; the students requesting the program may not be qualified for the program; and, especially in the case of an expensive magnet program, it might be more efficient to bring the students to the program rather than the program to the students.

## 4. *Campus Assignment and Transfers*

Parents' rights to request or object to campus assignment of a student were strengthened slightly.<sup>232</sup> The board now must grant the request in the petition unless the board determines that "there is a reasonable basis for denying the request."<sup>233</sup> As in prior law, the board's decision is final unless an exception and appeal is filed based on denial of a right guaranteed under the U.S. Constitution.<sup>234</sup>

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227. *Id.* §§ 29.201-29.203.

228. TEX. EDUC. CODE ANN. § 29.202 (Vernon 1996).

229. *Id.* § 29.203(c).

230. *Id.* § 29.203(b). The funds included in the grant do not include small district, sparsity, and cost of education adjustments or allotments for technology and transportation.

231. *Id.* § 28.003.

232. Compare *id.* §§ 25.033, 25.034 with *id.* §§ 21.077, 21.078 (Vernon 1987).

233. TEX. EDUC. CODE ANN. § 25.034(e) (Vernon 1996).

234. *Id.*

### 5. *Human Sexuality Instruction*

Parents also have more rights concerning human sexuality instruction. Districts must make all curriculum materials used in human sexuality instruction available for reasonable public inspection and must notify parents of the basic content of the district's instruction and of the parent's right to remove the student from any part of the instruction.<sup>235</sup> Additionally, instruction must emphasize abstinence, and condoms may not be distributed in connection with instruction related to human sexuality.<sup>236</sup> Districts must establish local health education advisory councils to advise boards of trustees.<sup>237</sup>

### 6. *Right to Pray or Meditate*

A newly codified student right is the "absolute right to individually, voluntarily, and silently pray or meditate in school in a manner that does not disrupt the instructional or other activities of the school."<sup>238</sup> A person may not require, encourage, or coerce a student to engage in or refrain from prayer or meditation during a school activity.<sup>239</sup>

### 7. *Programs for Students Who are Deaf or Hard of Hearing*

A new subchapter, concerning programs for students who are deaf or hard of hearing, requires those students to have an education in which their unique communication mode is respected, used, and developed.<sup>240</sup> Their teachers and others involved in their education must understand the unique nature of their condition, and their teachers must be proficient in appropriate language modes or use a certified interpreter.<sup>241</sup> In determining appropriate programs, the parents and their advocates are involved; other individuals may be involved at the parent's or district's discretion.<sup>242</sup>

## C. COURSES OF STUDY

Senate Bill 1 divides the required curriculum into two categories: the foundation curriculum and the enrichment curriculum.<sup>243</sup> The foundation curriculum consists of English language arts, mathematics, science, and social studies, which are the subjects assessed in the state testing program.<sup>244</sup> The SBOE must publish for each subject of the foundation curriculum the essential knowledge and skills that all students should be able

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235. *Id.* § 28.004.

236. *Id.*

237. *Id.*

238. TEX. EDUC. CODE ANN. § 25.901 (Vernon 1996).

239. *Id.*; see also *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992).

240. TEX. EDUC. CODE ANN. § 29.303 (Vernon 1996).

241. *Id.* § 29.304.

242. *Id.* § 29.306.

243. *Id.* § 28.002.

244. *Id.* § 28.002(a)(1).

to demonstrate.<sup>245</sup> All school districts must provide instruction in the essential knowledge and skills at appropriate grade levels for all courses in the foundation curriculum.<sup>246</sup>

Each school district also must offer courses in the enrichment curriculum, which consists of other languages, health, physical education, fine arts, economics, career and technology education, and technology applications.<sup>247</sup> The SBOE publishes the essential knowledge and skills for courses in the enrichment curriculum that school districts use as guidelines for instruction.<sup>248</sup>

The SBOE also identifies curriculum requirements for the minimum, recommended, and advanced high school programs.<sup>249</sup> A student is eligible to graduate and receive a diploma only if the student successfully completes: (1) the curriculum requirements and the state-mandated assessments; or (2) an individualized education program established for special education students.<sup>250</sup> School districts may issue a certificate of coursework completion to students who meet the curriculum requirements but fail to satisfy the state assessment requirements.<sup>251</sup> A district may also allow these students to participate in a graduation ceremony.<sup>252</sup>

#### D. EXTRACURRICULAR ACTIVITIES

Perhaps the most famous of the 1984 education reforms was the "no-pass, no-play" rule: a student who is not passing all classes cannot participate in extracurricular activities.<sup>253</sup> Senate Bill 1 modified the rule after legislators heard testimony that the six-week suspension caused many students to turn to gangs rather than their studies. Under the new law, a student who fails a course will be suspended from participating in any University Interscholastic League or district-sponsored activity for three weeks; however, the student may continue to practice or rehearse.<sup>254</sup> The district must review the student's grades each three weeks.<sup>255</sup> A suspension under no-pass, no-play may not be lifted until the student is performing satisfactorily in all courses.<sup>256</sup>

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245. TEX. EDUC. CODE ANN. § 28.002(c) (Vernon 1996).

246. *Id.*

247. *Id.* § 28.002(a)(2).

248. *Id.* § 28.002(d).

249. *Id.* § 28.025(a).

250. TEX. EDUC. CODE ANN. § 28.025(a) (Vernon 1996).

251. *Id.* § 28.025(c).

252. *Id.* § 28.025(b).

253. TEX. EDUC. CODE ANN. § 21.920 (Vernon 1987 & Supp. 1995).

254. TEX. EDUC. CODE ANN. § 33.081 (Vernon 1996).

255. *Id.* § 33.081(d).

256. *Id.*

## V. OPERATIONS

## A. TEXTBOOKS AND TECHNOLOGY

The main problem with the prior textbook adoption process was the lack of selection resulting from the state's one-size-fits-all approach. First, the statute itself was restrictive. It limited the SBOE to adopting no more than eight textbooks for each subject or course,<sup>257</sup> and it required a district to pick the same textbook for each campus<sup>258</sup>—even if different campuses have different types of students and different needs. Second, the SBOE process was overly prescriptive, which severely limited the number of publishers submitting books and the number of books from which districts could choose. In fact, from 1988 to 1994, publishers submitted only three science texts for consideration in Texas, while twenty-two were submitted in California.<sup>259</sup> Many Texas school districts requested waivers from the commissioner to provide broader selection.<sup>260</sup>

Under Senate Bill 1, the SBOE will be able to provide a much broader selection of textbooks. The SBOE adoption of a textbook is tied to the state curriculum elements on which students are assessed. The SBOE will adopt two lists of textbooks based on the SBOE's determination of the extent to which the submitted textbook covers the essential knowledge and skills of the subject.<sup>261</sup> The "conforming" list includes each submitted textbook that covers each element of the essential knowledge and skills, meets applicable physical specifications, and is free of factual errors.<sup>262</sup> The "nonconforming" list includes each submitted textbook that covers at least half but not all of the elements of the essential knowledge and skills, meets applicable physical specifications, and is free of factual errors.<sup>263</sup>

An issue in interpretation is whether the SBOE may reject a book from a list for another reason. A curriculum provision requires the SBOE and each school district to "foster the continuation of the tradition of teaching United States and Texas history and the free enterprise system . . . in the adoption of textbooks."<sup>264</sup> The same provision also says, "A primary purpose of the public school curriculum is to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage."<sup>265</sup> The question is

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257. *Id.* § 12.14(b) (Vernon 1991).

258. *Id.* § 12.62 (Vernon 1991).

259. Kathy Walt, *State's One for the Books, Publishers Say: Selling Texts to Texas Can Be Risky Business*, HOUS. CHRON., July 3, 1994.

260. TEX. EDUC. CODE ANN. § 11.273(f) (Vernon Supp. 1995); see TEA Waiver Report (1994). Although Senate Bill 1 removed limitations on the commissioner's authority to waive textbook laws and rules, authority to waive the law does not mean the commissioner must or will do so. See *id.* § 7.056 (Vernon 1996).

261. *Id.* § 31.023.

262. *Id.*

263. *Id.*

264. *Id.* § 28.002(h).

265. TEX. EDUC. CODE ANN. § 28.002(b) (Vernon 1996).



whether the SBOE can reject a textbook that does not foster these notions either through absence of mention or active hostility to them.

Once the SBOE adopts a textbook onto a list, the state pays for the cost of a textbook selected by a district, up to a maximum amount set by the SBOE.<sup>266</sup> To allow more local selection, a school district may select a book exceeding the price limit and pay the remainder of the cost.<sup>267</sup> Additional flexibility is allowed in that a district may select a book in the enrichment curriculum that is not on either the conforming or nonconforming list, and the state will pay the lesser of 70 percent of the cost or 70 percent of the price limit.<sup>268</sup> A lingering question is whether publishers of these off-list books are subject to publisher duties and administrative penalties.<sup>269</sup> It appears they must hew to duties regarding sale price, free items, quality, restraint of trade, and guarantee of delivery.<sup>270</sup> Less certain is whether the SBOE could exempt off-list publishers from depository requirements if, for example, districts bought the books at a book store,<sup>271</sup> and whether the publishers must file an affidavit of freedom from factual errors if the off-list publisher does not contract with the SBOE for purchase of an "adopted" textbook.<sup>272</sup>

As in prior law, the definition of "textbook" reflects the emergence of technology-based instructional systems to include electronic media.<sup>273</sup> Prior law's \$30 per student technology allotment is now set aside from the available school fund and sent to districts for purchasing and training in electronic textbooks and purchasing and accessing learning-related technological equipment.<sup>274</sup>

## B. SCHOOL BUSES

In the spirit of stripping non-educational mandates from the Education Code, Senate Bill 1 removed a controversial and expensive requirement that large bus fleets convert to alternative fuels.<sup>275</sup> It repealed requirements that school districts purchase or sell school buses through the state<sup>276</sup> and that the commissioner approve school districts' bus routes.<sup>277</sup>

Senate Bill 1 also allows districts to use passenger cars to transport fewer than ten students to or from school and in connection with school

266. *Id.* § 31.025.

267. *Compare id. with id.* § 12.251(b) (Vernon 1991).

268. *Id.* § 31.101(b) (Vernon 1996).

269. *Id.* § 31.151.

270. TEX. EDUC. CODE ANN. § 31.151 (Vernon 1996).

271. For purchases of \$25,000 or more a district must contract by the method that provides the best value. *Id.* § 44.031.

272. *Id.* § 31.151(a)(8).

273. *Id.* § 31.002(3).

274. *Id.* § 31.021(b)(2). In addition, House Bill 2188 created the Texas Infrastructure Fund which promotes technology for schools.

275. TEX. EDUC. CODE ANN. § 21.174 (Vernon Supp. 1995).

276. *Id.* §§ 21.161-21.162, 21.165, 21.167-21.169 (Vernon 1987 & Supp. 1995).

277. *Id.* § 21.174(b)(2) (Vernon Supp. 1995). Senate Bill 1 also directs the Legislative Budget Board to study the way the state funds transportation. *See* Acts 1995, 74th Leg., ch. 260, § 85(b).

activities.<sup>278</sup> The definition of "passenger car" has been controversial, because of desires to provide school districts maximum flexibility and maximum protection.<sup>279</sup> The Texas Attorney General initially issued an opinion with a restrictive definition of "passenger car," but later vacated the opinion;<sup>280</sup> the issue is still pending.

### C. PURCHASING

Another area that has required Attorney General opinions is the new purchasing law, which applies both to school districts and to junior college districts.<sup>281</sup> Prior law required competitive bidding of contracts for purchase of personal property valued at \$25,000 or more in the aggregate for each 12-month period.<sup>282</sup> Senate Bill 1 allows more flexibility in the ways districts determine to whom to award a contract but also expands the kinds of contracts subject to the purchasing law. It requires that, with a few exceptions, "all school district contracts" valued at \$25,000 or more in the aggregate for each 12-month period—not just those for purchase of personal property—are subject to the purchasing law.<sup>283</sup>

Districts no longer are tied to only competitive bidding. They also can use competitive sealed proposals, a request for proposals, a catalogue purchase, an interlocal contract, or a design/build contract.<sup>284</sup> In determining to whom to award a contract, the district may consider the purchase price, vendor's reputation, quality of the vendor's goods or services, extent to which the goods or services meet the district's needs, vendor's past relationship with the district, impact on compliance with laws on historically underutilized businesses, long-term cost, and other relevant factors.<sup>285</sup>

## VI. SAFE SCHOOLS

School safety has been a growing concern in Texas, with much discussion focused on ways to remove disruptive and violent students from the classroom. At the same time, expelling those students helps neither the society to which they are expelled nor the students themselves. These concerns are addressed by giving teachers the authority to remove disruptive students but providing methods by which these students are not expelled to the streets. For the most part, Senate Bill 1 eliminates the

278. TEX. EDUC. CODE ANN. § 34.003 (Vernon 1996).

279. See Letter from Jorge Vega, First Assistant Attorney General, to Mike Moses, Commissioner of Education (September 8, 1995) (on file with the author).

280. Op. Tex. Att'y Gen. No. DM-362 (1995) (vacated Sept. 8, 1995).

281. See TEX. EDUC. CODE ANN. § 130.084 (Vernon 1991).

282. *Id.* § 21.901 (Vernon Supp. 1995).

283. TEX. EDUC. CODE ANN. § 44.031 (Vernon 1996).

284. *Id.* § 44.031(a). It is debatable whether a district that chooses, for example, competitive bidding must comply with the local Government Code provisions on competitive bidding. See LOC. GOV'T CODE ANN. § 271.024 (Vernon Supp. 1996) (government entity's bidding must comply with competitive bidding statute if entity is required by statute to award contract on the basis of competitive bids).

285. TEX. EDUC. CODE ANN. § 44.031(b) (Vernon 1996).

traditional suspension and expulsion of students and requires removal to an alternative setting.

Prior law had suffocating levels of due process and second guessing.<sup>286</sup> A teacher who wanted to remove a discipline problem from the classroom, for example, could be overruled by the principal, superintendent, board of trustees, and court.<sup>287</sup> Under Senate Bill 1, a teacher may remove a student from the classroom if the student's behavior is so unruly, disruptive, or abusive as to seriously interfere with the ability of the student's classmates to learn or the teacher to teach.<sup>288</sup> Upon such removal, the principal cannot require that the student be returned to the classroom without the teacher's approval, unless a placement review committee—two faculty-selected teachers and one principal designee<sup>289</sup>—determines that such placement is the best or only alternative.<sup>290</sup> The principal may place the student into another appropriate classroom, in-school suspension, or an alternative education setting.<sup>291</sup>

Each school district must provide a separated alternative education setting to which students removed from class may be sent.<sup>292</sup> A student must be removed from class and placed in an alternative education setting if the student commits on school property or at a school-related activity an assault or terroristic threat, controlled substance or alcoholic beverage offense, abusable glue or aerosol paint offense, public lewdness, or indecent exposure. In addition, certain offenses that occur on or off campus now require that a student be placed in an alternative education program if the student engages in conduct punishable as a felony or engages in the offense of retaliation against a school employee.<sup>293</sup>

If a court has ordered a student to attend an alternative education program as a condition of probation once during a school year and the student is again referred to juvenile court during that school year, the juvenile court may not again order the student to attend an alternative education program without the district's consent, unless the county juvenile board has entered into a memorandum of understanding with the school board.<sup>294</sup>

A student must be removed from school and referred to juvenile court for adjudication if the student on school property or at a school-related activity engages in conduct that contains the elements of aggravated assault, sexual assault, weapons offenses, arson, murder, criminal attempt to

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286. For a discussion of due process in public schools, see PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 127-128 & 158-161 (1994).

287. TEX. EDUC. CODE ANN. §§ 21.301(i), 21.3011 (Vernon 1987 & Supp. 1995).

288. TEX. EDUC. CODE ANN. § 37.002 (Vernon 1996).

289. *Id.* § 37.003.

290. *Id.* § 37.002.

291. *Id.*

292. *Id.* § 37.008.

293. TEX. EDUC. CODE ANN. § 37.006 (Vernon 1996). A student may be suspended for up to three days for conduct for which the student could be placed in an alternative education program. *Id.* § 37.005.

294. *Id.* § 37.010(d).

commit murder, indecency with a child, aggravated kidnapping, or felony assault or drug offenses.<sup>295</sup> A student who brings a firearm to school is expelled from the student's regular school for at least one year consistent with a federal requirement.<sup>296</sup> A student may be expelled to the juvenile justice system if the student continues to engage in serious or persistent misbehavior after being placed in an alternative education program.<sup>297</sup> A student also must be expelled if the student, on or off campus, engages in certain serious conduct in retaliation against a district employee or engages in felony criminal mischief.<sup>298</sup>

To ensure that expelled students continue to receive educational services, juvenile boards of counties with a population greater than 125,000 must develop a juvenile justice alternative education program, subject to approval by the Texas Juvenile Probation Commission.<sup>299</sup> For each student in a juvenile justice alternative education program, the affected school districts must send the juvenile board funds equal to the district's average per student expenditure in alternative education programs.<sup>300</sup> For purposes of accountability and state funds, a student enrolled in a juvenile justice program is reported as if the student were enrolled at the student's regularly assigned campus.<sup>301</sup>

Senate Bill 1 requires each school district to adopt a student code of conduct with the advice of the district-level committee and jointly, "as appropriate," with the local county juvenile board.<sup>302</sup> The code of conduct specifies the circumstances for removal from a classroom, campus, or alternative education program; specifies conditions authorizing or requiring an administrator to transfer a student to an alternative education program; and outlines conditions for suspension or expulsion.<sup>303</sup> The code of conduct also must outline the juvenile board's responsibilities and define conditions of payments from the district to the board.<sup>304</sup>

## VII. ACCOUNTABILITY AND ACCREDITATION

The methods of accrediting districts have historically been intrusive, process-and-paper-driven regulation with the TEA making on-site visits into classrooms, interviewing teachers, and looking at curriculum guides. In 1993, Senate Bill 7 began a move to a more performance-based accountability system that is refined by Senate Bill 1.

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295. *See id.* §§ 37.007, 37.009(f), 37.010.

296. 18 U.S.C. § 922(a)(2).

297. TEX. EDUC. CODE ANN. § 37.007(b) (Vernon 1996).

298. *Id.* § 37.007(c) & (f).

299. *Id.* § 37.011(a).

300. *Id.* § 37.012(a).

301. *Id.* § 37.011(h).

302. TEX. EDUC. CODE ANN. § 37.001(a) (Vernon 1996). "As appropriate" is ambiguous: do the district and county boards come together on appropriate matters or do the district and county boards only come together if the county establishes a juvenile justice alternative education program?

303. *Id.*

304. *Id.*

School districts are still required to be accredited by the TEA, but no longer does funding depend on accreditation and compliance with process goals such as class size and minimum salaries standards.<sup>305</sup> The threat of pulling a district's funding—leaving students without an education—simply was unrealistic. Accreditation, instead, is determined mainly by: a district's performance on state assessment instruments, aggregated by grade level and subject area; dropout rates; student attendance rates; the percentage of graduating students whose scores on the exit-level exam equal passing scores on the Texas college freshman exam; the percentage of graduating students who meet course requirements for the SBOE's recommended high school program; and the results of the Scholastic Assessment Test and the American College Test.<sup>306</sup> The SBOE sets the performance levels, and the TEA reviews the performance of each district and campus and determines if an accreditation change is warranted.<sup>307</sup>

## A. ASSESSMENT INSTRUMENTS

### 1. Assessments

The state assessment program emphasizes the foundation curriculum of English language arts, mathematics, science, and social studies.<sup>308</sup> Senate Bill 1 requires that all students in grades 3-8 be assessed in reading and mathematics,<sup>309</sup> that students in grades 4 and 8 be assessed in writing,<sup>310</sup> and that social studies and science be assessed at an appropriate grade level to be determined by the SBOE.<sup>311</sup>

The high school exit-level test in mathematics and English language arts (including writing) will continue to be required for high school graduation.<sup>312</sup> Senate Bill 1 also requires the implementation of four end-of-course assessments not later than the 1998-99 school year: English II, Algebra I, Biology I, and United States history.<sup>313</sup> A student who performs satisfactorily on both the English and algebra assessments and either the biology or history exam will be exempted from the exit-level test.<sup>314</sup>

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305. *Id.* § 11.001. *See also id.* §§ 16.051-16.057 (Vernon 1991 & Supp. 1995).

306. *Id.* § 39.072(b) (Vernon 1996). Additionally, the SBOE may allow TEA to consider compliance with statute and rules relating to data reporting, high school graduation requirements, no-pass no-play, health and safety, purchasing laws, class-size limits, removal of disruptive students from the classroom, at-risk programs, and pre-kindergarten programs, and may consider the effectiveness of the district's special education programs.

307. TEX. EDUC. CODE ANN. §§ 39.024, 39.051, 39.072, 39.073 (Vernon 1996).

308. *Id.* § 39.023(a).

309. *Id.* § 39.023(a)(1).

310. *Id.* § 39.023(a)(2).

311. *Id.* § 39.023(a)(3).

312. TEX. EDUC. CODE ANN. § 39.025(a) (Vernon 1996).

313. *Id.* § 39.023.

314. *Id.* § 39.025(a).

## 2. Test Confidentiality

In December 1994, a district court in Harris County ordered the State to allow parents to view the Texas Assessment of Academic Skills (TAAS) test.<sup>315</sup> The case currently is on appeal. The issue involves the right of a parent to see confidential field test questions. The Legislature, at the SBOE's request, now requires public disclosure of all test questions upon which a student is graded at the end of each year.<sup>316</sup> "Field test" questions are not disclosed, to ensure a valid bank of questions each year, but the questions will be disclosed once they are no longer being field-tested.<sup>317</sup>

### B. SANCTIONS

If a school district or campus is not performing to state expectations, the commissioner can step in with sanctions.<sup>318</sup> A federal judge panel, in *Casias v. Moses*,<sup>319</sup> warned that some of the state's accountability sanctions "could result in the replacement of the elected Board with the appointed management team."<sup>320</sup> Senate Bill 1 narrows the scope of the functions that may be performed by a commissioner-appointed master or management team (but, curiously, not by a board of managers) by preventing them from taking any action concerning a district election, changing the number and method of selecting trustees, setting a district tax rate, or adopting or altering a budget for the school district. Senate Bill 1 also limits the duration of the appointment of a master or management team by requiring renewal every 90 days.<sup>321</sup> *Casias* is on appeal. The U.S. Department of Justice has taken the position that every action of this nature by the commissioner needs Voting Rights Act preclearance.<sup>322</sup>

## VIII. SCHOOL FINANCE

In January 1995, after four opinions and six years, the Texas Supreme Court in *Edgewood Independent School District v. Meno* declared constitutional "in all respects" the state school finance system that lets each property-wealthy school district decide how to reduce its wealth per student.<sup>323</sup> The opinion focuses on the Legislature's duty to provide for "a general diffusion of knowledge." Accreditation is the legislatively defined level that achieves the constitutional mandate of a general diffusion

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315. *Maxwell v. Pasadena Indep. Sch. Dist.*, No. 92017184 (295th Dist. Ct., Harris County, Tex., Dec. 30, 1994).

316. TEX. EDUC. CODE ANN. §§ 26.005, 39.023(d) (Vernon 1996).

317. *Id.* § 39.023.

318. *Id.* § 39.131(a).

319. Civil Action No. SA-95-CA-0221 (W.D. Tx. May 11, 1995), at 8.

320. *Id.*

321. TEX. EDUC. CODE ANN. § 39.131(e) (Vernon 1996).

322. Patrick, *supra* note 67.

323. *Edgewood IV*, 893 S.W.2d at 484.

of knowledge.<sup>324</sup> The accountability system meets this obligation, because only districts achieving the state's goals can receive an accredited rating.<sup>325</sup> Under the school finance system, children in property-rich and property-poor districts now have substantially equal access to the funds needed to meet accreditation requirements. Thus, the system is constitutional.

The court also held that tax rate limits are not constitutionally required.<sup>326</sup> Once all districts are provided with sufficient revenue to satisfy a general diffusion of knowledge, allowing districts to tax at a rate above the statutory \$1.50 limit creates no constitutional issue.<sup>327</sup> Senate Bill 1 raises the tax limit; maintenance and operations taxes are now capped at \$1.50, and new debt service, defined as debt issued after September 1, 1992, is capped at \$0.50.<sup>328</sup>

### IX. CONCLUSION

Senate Bill 1 was an enormous advance toward local control. At its heart is the accountability system. The state sets specific and measurable goals, gives authority to those persons responsible for results, and measures and rewards results. Educators who desire more authority can use a charter arrangement, which gives parents more voice and choice in their children's education. Under the new Texas school law, citizens and parents should be able to improve their education system by going through the local level. With the Senate Bill 1 options and with greater authority and citizen control at the local level, perhaps there will be less need in the future for state school law.

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324. *Id.* at 463.

325. Although *Edgewood IV* relied on the state's public education goals, Senate Bill 1 changed the goals section to "Public Education Mission and Objectives," which adds parental involvement and safe schools as objectives. TEX. EDUC. CODE ANN. § 4.001 (Vernon 1996). Senate Bill 1 also added "Public Education Academic Goals," which call for students to demonstrate exemplary performance in reading and writing the English language and in understanding mathematics, science, and social studies. *Id.* § 4.002.

326. *Edgewood IV*, 893 S.W.2d at 466.

327. *Id.*

328. TEX. EDUC. CODE ANN. § 41.002(d) (Vernon 1996).