

Issues Related to Appraisals Due to COVID-19

The closure of schools throughout Texas in light of the COVID-19 public health crisis comes at a time when many districts have not yet completed annual appraisals of teachers, campus administrators, and superintendents—a critical function to assess growth and performance and a requirement of state law. School districts should be aware that the Texas Education Agency (“TEA”) has established a procedure for districts to request and obtain waivers of legal requirements relating to appraisals. In guidance updated on March 26, 2020, the TEA notes that school districts retain discretion as to which aspects of the appraisal process they can complete and which aspects, if any, cannot be completed due to disruptions relating to the COVID-19 pandemic. Each district will, therefore, need to consider how it intends to handle the appraisal process with schools physically closed for a portion, if not the remainder, of the Spring semester. This guidance discusses various issues related to a school district’s ability and obligation to request a waiver from the TEA in regard to appraisals.

Considering the fluid circumstances and unique issues affecting individual school districts, these comments are subject to change, only address certain questions, and do not constitute specific legal advice for any individual school district. Please consult legal counsel for all specific questions regarding waiver requests to the TEA/Commissioner of Education regarding appraisals.

Board waiver vs. Texas Education Agency waiver.

State law permits school districts to use either the Commissioner of Education’s recommended appraisal processes for teachers, administrators and superintendents or locally developed appraisal systems. School districts with locally developed systems for appraisals may face unique questions regarding which body has authority to waive requirements of the appraisal process. To answer these questions, it is critical to refer to the source of the appraisal requirement at issue. If the appraisal requirement was locally instituted as a matter of board policy and not already required under the Texas Education Code or Texas Administrative Code, then the board may simply waive the requirement. But if the appraisal requirement is based on provisions of the Texas Education Code or Texas Administrative Code, it is a requirement as a matter of state law, for which only the TEA/Commissioner of Education may grant a waiver.

Waiver requests under the Texas Education Code.

The Texas Education Code allows school districts, with local board approval, to apply to the TEA/Commissioner of Education for a waiver of certain requirements imposed by state law. This includes requirements under the Texas Education Code and the Texas Administrative Code for an appraisal process. For example, state law requires that an appraisal for most teachers be done once for each school year. Given the present circumstances, it may be difficult for school districts to complete teachers' appraisals for the 2019–2020 school year. Regardless of whether the school district uses T-TESS—the recommended appraisal process for teachers developed by the Commissioner—or its own locally developed appraisal process, if the district cannot complete the appraisal process for teachers it must request a waiver (from the TEA/Commissioner) of the Education Code and Administrative Code provisions concerning completion of an appraisal for each school year.

Importantly, state law requires a school district to obtain local approval from its board of trustees of the plan to request a waiver from the TEA/Commissioner before submitting any waiver application. The TEA has published specific [Instructions for Submitting an Educator Appraisal Waiver](#) (March 26, 2020) that districts should consult when preparing a waiver request.

District boards may also consider enacting an emergency delegation of authority to their superintendents, based on the districts' needs, to enable the superintendents to request waivers from the TEA/Commissioner, including with regard to appraisals, without further immediate board action, and thereby expedite the process. The board could then ratify the superintendent's waiver request at a later date. The Texas Association of School Boards ("TASB") has published [guidance on Emergency Delegation of Authority to Superintendents](#) (March 2020) in relation to the COVID-19 pandemic.

Partial completion of appraisals.

Guidance from the TEA suggests that school districts may partially complete appraisals while requesting waiver for discrete portions of an appraisal required by law. This guidance raises two key issues. First, what aspects of an appraisal can be/have been completed and what aspects cannot be completed due to operational disruption? Second, what effect will partially completed appraisals have on the appraisal system as a whole?

Considerations for continued appraisals.

Timing. Assuming a school district will resume classroom instruction in the 2019-2020 school year, the district must consider whether there will be sufficient time to complete and document appraisals. Critical factors include the status/number of completed appraisals to date and the number of employees that remain to be appraised.

Adequate and fair appraisals. School districts must ensure that employees continue to be adequately and fairly appraised. This should include consideration as to whether a teacher can be adequately and fairly appraised for online or virtual instruction from home.

Appeals. Be mindful that some employees may consider a continued appraisal amid the present circumstances improper for a variety of reasons, leading to an increased number of grievances.

Considerations for appraisals for which a school district requests and receives a waiver.

Compensation. School districts should be prepared to address how a lack of a yearly appraisal for the 2019-2020 school year will affect employee compensation. Equitable alternatives to appraisal-based compensation increases should be contemplated.

Awards and distinguished status. Many school districts tie an employee's appraisal performance to eligibility for various awards or a distinguished status as an educator throughout the district. This may affect opportunities for career advancement as well as compensation.

Previous years' appraisals. Where no appraisal can be performed for the 2019-2020 school year, school districts must decide whether and to what extent previous years' appraisals will come into play.

These considerations are illustrative only and should not be interpreted as an exhaustive list.

Districts of Innovation.

The Texas Education Code provides for Districts of Innovation, which adopt an innovation plan uniquely tailored to the school district. Among other things, districts



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may use innovation plans to exempt themselves from the appraisal requirements under the Texas Education Code and Texas Administrative Code. Whether a board or the TEA/Commissioner of Education has to grant a waiver to a district with an approved innovation plan will depend on what aspect of the appraisal system is being waived. If a district of innovation has already exempted itself from any specific requirements of state law concerning educator appraisal, then requesting a waiver of those same requirements from the TEA/Commissioner of Education is not necessary. But for other statewide appraisal requirements that a district of innovation cannot meet, a waiver would be required.

For additional guidance from the Texas Education Agency, please see:

[Guidance on Educator and Staff Issues and Educator Evaluation and Non-Renewal](#) (March 26, 2020).

[Guidance on Educator and Staff Issues and Educator Evaluation and Non-Renewal](#) (March 31, 2020)

For additional information or clarification or should you have any questions, contact your Thompson & Horton attorney. If you do not have a Thompson & Horton attorney with whom you currently work, please contact [Merri Schneider-Vogel](#) in Houston, [Holly McIntush](#) in Austin, or [David Giddens](#) in Dallas/Fort Worth and they will put you in contact with the most appropriate T&H team member to assist you.