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## A Survey of the Texas Reform Package: House Bill No. 72 Symposium on Education Law.

William C. Bednar Jr.

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**A SURVEY OF THE TEXAS REFORM PACKAGE:  
HOUSE BILL NO. 72**

**WILLIAM C. BEDNAR, JR.\***

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## I. INTRODUCTION

In the spring of 1984, the Texas Legislature, spurred by increasingly strident calls for reform at the national level and pressure on several fronts at the state and local levels, met in special session to consider the most wide-ranging set of changes to the Texas system of public education in thirty-five years. Several nationally publicized reports had attacked the quality of public education generally and had suggested a wide range of cures.<sup>1</sup> In the preceding general session, a teacher pay raise had been rejected, along with the tax increase necessary to fund it.<sup>2</sup> There was evidence of acute teacher shortages in several subject areas<sup>3</sup> and concern for the quality of teacher education programs.<sup>4</sup> Scholastic achievement test scores had continued to decline.<sup>5</sup> Further litigation loomed over the equalization of state educa-

1. See M. ADLER, *THE PAIDEIA PROPOSAL* (McMillan 1982); EDUCATION COMMISSION OF THE STATES' TASK FORCE ON EDUCATION FOR ECONOMIC GROWTH, *ACTION FOR EXCELLENCE* (Educ. Comm'n of the State 1983); NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK* (U.S. Govt. Printing Office 1983); TWENTIETH CENTURY FUND TASK FORCE ON FEDERAL ELEMENTARY AND SECONDARY EDUCATION POLICY, *MAKING THE GRADE* (Twentieth Century Fund 1983). *But cf.* Howe, *Education Moves to Center Stage: An Overview of Recent Studies*, PHI DELTA KAPPAN, Nov. 1983, at 167; James & Tyack, *Learning From Past Efforts to Reform the High School*, PHI DELTA KAPPAN, Feb. 1983, at 400.

2. See TEX. S.B. 750, 68th Leg. (1983) (referred to Senate Finance Committee, Apr. 11, 1983); TEX. H.B. 1319, 68th Leg. (1983) (referred to subcommittee, Mar. 14, 1983).

3. This shortage was principally in mathematics, science, vocational education, special education, and bilingual education. See TEXAS EDUCATION AGENCY, *A STUDY OF THE AVAILABILITY OF TEACHERS FOR TEXAS PUBLIC SCHOOLS 40-41* (TEA office of Planning and Research, Nov. 12, 1982); see also TEXAS EDUCATION AGENCY, *STUDY OF THE AVAILABILITY OF TEACHERS FOR TEXAS PUBLIC SCHOOLS 51-53* (TEA Office of Planning and Research, Feb. 10, 1984).

4. There had been warm debate in the press, see Lyons, *Why Teachers Can't Teach*, TEX. MONTHLY, Sept. 1979, at 122, and at TEA hearings on new uniform standards for teacher education institutions, see TEA Commentary, 9 Tex. Reg. 3215-26 (1984). After May 1, 1984, applicants were required, for the first time, to pass an examination of basic skills for admission to teacher education programs. See Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 141.4(a) (Shepard's May 1, 1982). Forty-six percent failed the first administration of the test. See TEXAS EDUCATION AGENCY, *P-PST DATA- March 1984* (available from TEA Div. of Professional Assessment, Austin, Tex.).

5. From 1972 to 1982, the national mean SAT scores declined from 485 (math) and 453 (verbal) to 467 (math) and 429 (verbal). During the same period, Texas mean SAT scores declined from 476 (math) and 445 (verbal) to 454 (math) and 418 (verbal). See TEXAS EDUCATION AGENCY, *EXECUTIVE SUMMARY: INFORMATION ON STUDENT ACHIEVEMENT IN TEXAS (SCHOLASTIC APTITUDE TEST)*, Fig. 1, at 2 (Sept. 9, 1983). The same is not true for tests of basic skills, which showed small annual increases from 1981 to 1983 in percentages of students mastering objectives. See TEXAS EDUCATION AGENCY, *TEXAS ASSESSMENT OF BA-*

tional funds.<sup>6</sup> In 1981, the legislature had revised and expanded the Texas public school curriculum and assigned major curriculum development responsibilities to the State Board of Education, but implementation had been slow.<sup>7</sup> The State Board of Education and Commissioner of Education had mired themselves in textbook controversies.<sup>8</sup> There was a general sense in the public mind that reforms to the state educational system were urgently needed.

It was in this climate of urgent need, bureaucratic busy work, and public scrutiny that the governor made several key appointments to the Select Committee on Public Education (SCOPE) in June of 1983, naming Mr. H. Ross Perot, of Dallas, as its chairman.<sup>9</sup> This committee had existed since 1981 with some legislative success,<sup>10</sup> but under the leadership of Mr. Perot traversed an extraordinary agenda of school reform. The SCOPE recommendations reported in April 1984 included: (1) an appointed State Board of Education; (2) more equalization of school finance through a weighted-pupil method of distributing state funds; (3) an increase in teacher base salaries; (4) a performance-based career ladder for teachers; (5) smaller classes in early grades; (6) a longer school day and year; (7) limitations on extracurricular activities; and (8) several new programs, such as pre-kindergarten for four-year-olds.<sup>11</sup>

SIC SKILLS—STATEWIDE AND REGIONAL RESULTS 1983, TEA Doc. No. GE3 442 O3, Figs. 1-3, at 15-17 (Sept. 1983).

6. See *Edgewood Indep. School Dist. v. Bynum*, No. 362,516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, May 23, 1984).

7. See TEX. EDUC. CODE ANN. § 21.101 (Vernon Supp. 1985). Section 1 of the 1981 amendatory act required the State Board to implement the curriculum changes "in a timely and appropriate manner" and for the 1981-1982 school year "[t]o the extent possible." See Act of June 1, 1981, ch. 274, § 1, 1981 Tex. Sess. Law Serv. 727, 728 (Vernon). Implementing rules were not proposed until January 1984. See *Tex. Educ. Agency*, 9 Tex. Reg. 7 (1984). The rules were not adopted until June 1984. See *Tex. Educ. Agency*, 9 Tex. Reg. 3305-3455 (1984) (prop. to be codified at 19 TEX. ADMIN. CODE § 75). Thus, the implementing rules did not have any educational effects until the 1984-1985 school year.

8. See *Op. Tex. Att'y Gen. No. JM-134* (1984) (State Board of Education regulations requiring textbooks address evolution as "theoretical rather than factually verifiable" are unconstitutional).

9. See *Appointments made June 15, 1983*, 8 Tex. Reg. 2453 (1983).

10. See *Tex. S. Con. Res. 22*, 67th Leg., 1981 Tex. Gen. Laws 259 (1981). The committee was largely responsible for a long overdue revision to chapter 19 of the Texas Education Code, enacted in 1983, in regard to the creation, consolidation, and abolition of school districts. See generally TEX. EDUC. CODE ANN. § 19.001 (Vernon Supp. 1985).

11. See SELECT COMMITTEE ON PUBLIC EDUCATION, RECOMMENDATIONS (Apr. 19, 1984) (available from Senate and House Committee on Education, Tex. Legislature).

The result is House Bill No. 72 (H.B. 72),<sup>12</sup> which embodies many, but not all, of the SCOPE recommendations. The statute makes substantial changes in five major areas: (1) governance structure; (2) teacher compensation and performance; (3) student performance and discipline; (4) educational programs; and (5) school finance. This article will survey the provisions of H.B. 72, comparing them to previous Texas law where appropriate and pointing out some issues of statutory construction.

## II. GOVERNANCE STRUCTURES

By way of background, it will be useful to understand that the statutory framework of public education in Texas establishes separate structures for government and financing at the state level and local levels. At the state level, the agency for the government of education is the Central Education Agency (hereinafter the Texas Education Agency, or TEA), which possesses broadly expressed but limited and delegated powers. It consists of four entities:<sup>13</sup> (1) the State Board of Education, which formulates policies and rules to carry out the duties imposed on it or the TEA by the legislature;<sup>14</sup> (2) the State Board for Vocational Education, which has the same membership as the State Board of Education and formulates policies and rules in matters of vocational education;<sup>15</sup> (3) the State Commissioner of Education, who is the chief administrative and executive officer of the state school system;<sup>16</sup> and (4) the State Department of Education, which is the professional, technical, and clerical staff of the Texas Education Agency.<sup>17</sup> Financing at the state level is accomplished by means of the Permanent School Fund, the Available School Fund, and the Foundation School Program, which are all administered by the Texas Education Agency.<sup>18</sup>

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12. See Act of July 13, 1984, ch. 28, 1984 Tex. Sess. Law Serv. 269 (Vernon). H.B. 72 was effective Sept. 1, 1984, except article II, §§ 19, 20, 22 (a)(1) which are effective Sept. 1, 1985, and art. IV, part B which is effective June 1, 1985.

13. See TEX. EDUC. CODE ANN. § 11.02 (Vernon 1972) (general powers and duties); *id.* § 11.01 (Vernon Supp. 1985) (TEA consists of State Board of Education, State Board for Vocational Education, State Commissioner of Education, and State Department of Education).

14. See *id.* §§ 11.24-.28 (Vernon 1972 & Supp. 1985).

15. See *id.* §§ 11.34, .41 (Vernon 1972).

16. See *id.* § 11.52 (Vernon 1972 & Supp. 1985).

17. See *id.* §§ 11.61-.63 (Vernon 1972).

18. See TEX. CONST. art. VII, §§ 2, 4-6; TEX. EDUC. CODE § 15.01(a) (Vernon 1972) (Permanent School Fund); TEX. CONST. art. VII, § 5; TEX. EDUC. CODE ANN. § 15.01(b)

The basic unit of government at the local level is the school district, which is governed by a locally-elected board of trustees. There are 1098 school districts in Texas, a few of which are classified as "common," but almost all of which are classified as "independent."<sup>19</sup> Generally speaking, the board of trustees is vested with all educational functions not specifically delegated to the Texas Education Agency and with certain specified powers, among which are to manage and govern the public free schools of the district, to adopt rules, regulations, and bylaws, to contract with professional employees, to acquire and hold real and personal property, to sue and be sued, and to receive bequests, donations, or other funds.<sup>20</sup> Financing at the local level is by means of an ad valorem property tax,<sup>21</sup> the revenue from which can be used for the acquisition of buildings and other school purposes.<sup>22</sup>

The Texas Education Agency, nevertheless, exercises substantial supervision and control over local school districts in several ways. TEA calculates and distributes each district's share of the Available School Fund and Foundation School Fund,<sup>23</sup> receives, approves, and audits local budgets,<sup>24</sup> and regulates, allocates, and distributes federal funds.<sup>25</sup> It may grant, modify, or withhold the accreditation of a school district,<sup>26</sup> upon which the district's right to receive state funds

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(Vernon Supp. 1985) (Available School Fund); *id.* §§ 16.001-.524 (Vernon Supp. 1985) (Foundation School Program).

19. See TEXAS EDUCATION AGENCY, 1984-1985 SCHOOL DIRECTORY, at xix-xxxi (Oct. 1984) (Doc. No. RE5 312 01, Oct. 1984). There are nine remaining common school districts governed by chapter 22 of the Education Code, which are artifacts of the county school system largely abolished in 1975 and 1978. See generally TEX. EDUC. CODE ANN. §§ 17.94-99 (Vernon Supp. 1985) (sections dealing with termination of state fiscal support for county school administration). Independent school districts are governed by chapter 23 of the Education Code. See *id.* § 23.01 (Vernon 1972 & Supp. 1985).

20. See TEX. EDUC. CODE ANN. §§ 11.01, 23.26 (Vernon 1972 & Supp. 1985).

21. See TEX. CONST. art. VII, § 3; TEX. EDUC. CODE ANN. §§ 20.01, .02, .46, .47 (Vernon 1972).

22. See TEX. EDUC. CODE ANN. § 20.48(c) (Vernon 1972). Various financing methods utilizing local tax revenues are authorized. See *id.* § 20.01 (bonds and bond taxes); *id.* § 20.05 (Vernon Supp. 1985) (refunding bonds); *id.* § 20.22 (Vernon 1972) (revenue bonds); *id.* § 20.43 (Vernon Supp. 1985) (interest bearing time warrants); *id.* § 20.45 (pledge of delinquent taxes as security for loans); *id.* § 20.49 (negotiable notes).

23. See *id.* § 16.254 (Vernon Supp. 1985).

24. See *id.* §§ 23.46-.49 (Vernon 1972 & Supp. 1985); Tex. Educ. Agency, 19 TEX. ADMIN. CODE §§ 109.1-.61 (Shepard's May 1, 1982).

25. See TEX. EDUC. CODE ANN. § 11.02(c) (Vernon 1972).

26. See *id.* § 11.26(c)(5) (Vernon Supp. 1985); Tex. Educ. Agency, 19 TEX. ADMIN. CODE §§ 97.1-.161 (Shepard's May 1, 1982).

depends.<sup>27</sup> The Commissioner of Education is empowered to hear and determine administrative appeals involving disputes arising under the school laws or decisions of local boards.<sup>28</sup> TEA also approves and adopts textbooks<sup>29</sup> and provides a wide variety of technical assistance, both directly and through regional educational service centers.<sup>30</sup>

The major impact of H.B. 72 upon this system of school governance is at the state level, where a Legislative Education Board has been created, the incumbent State Board of Education has been abolished, an interim appointed State Board of Education has been created, and many duties formerly assigned to the Commissioner have been transferred to the new State Board. There are also significant changes in the allocation of authority between the Texas Education Agency and local school districts.

#### A. *Legislative Education Board*

The bill establishes a Legislative Education Board (LEB), composed of the Lieutenant Governor, the Speaker of the House, the chairmen of the House Public Education, Senate Education, House Appropriations, and Senate Finance Committees, and four other members appointed by the Speaker and Lieutenant Governor.<sup>31</sup> It has the power to administer oaths and to issue subpoenas.<sup>32</sup> The LEB is specifically charged with reviewing biennially the curriculum rules adopted by the State Board of Education, and, more generally, it is to oversee and review "the implementation of legislative education policy, including fiscal policy, by state agencies that have the statutory duty to implement that policy."<sup>33</sup>

This language would presumably encompass not only the Texas Education Agency, but also the Coordinating Board, Texas College and University System,<sup>34</sup> and the various institutions of the Texas

27. See TEX. EDUC. CODE ANN. §§ 16.051, .053 (Vernon Supp. 1985).

28. See *id.* § 11.13.

29. See *id.* §§ 12.11-.36 (Vernon 1972 & Supp. 1985).

30. See *id.* § 11.63(a)(3) (Vernon 1972) (TEA assistance); *id.* §§ 11.32, .33 (Vernon Supp. 1985) (education service centers).

31. See Act of July 13, 1984, ch. 28, pt. A, § 1, 1984 Tex. Sess. Law Serv. 269-71 (codified at TEX. REV. CIV. STAT. ANN. art. 5429p, §§ 1-3 (Vernon Supp. 1985)).

32. See *id.* at 270 (codified at TEX. REV. CIV. STAT. ANN. art. 5429p, § 6(b) (Vernon Supp. 1985)).

33. See *id.* at 270 (codified at TEX. REV. CIV. STAT. ANN. art. 5429p, § 6(a) (Vernon Supp. 1985)).

34. See TEX. EDUC. CODE ANN. § 61.023 (Vernon 1972).

higher education system.<sup>35</sup> Depending on the breadth of the term "legislative education policy," the charge to the LEB may arguably include several other state agencies having educational functions.<sup>36</sup> The LEB is also granted a \$1 million appropriation to study and report on the use of telecommunications in the public schools.<sup>37</sup>

### B. *Membership of the State Board of Education*

A major feature of H.B. 72 is the abolition of the incumbent State Board of Education. Previously, the state board had been composed of twenty-four members, each elected to a staggered six year term from one of the twenty-four Texas congressional districts.<sup>38</sup> A new fifteen member state board is to be elected at the general election in 1988 from newly created districts.<sup>39</sup> In the interim, the statute provides for a fifteen member transitional board appointed by the Governor from a list submitted by the LEB containing three nominees from each of the fifteen new districts. Their terms expire on January 1, 1989, at which time the fifteen members elected at the general election in 1988 will take office and draw lots for two or four year terms.<sup>40</sup> Thereafter, members of the board will serve staggered terms of four years, except in the case of a decennial reapportionment of the districts, when lots will again be drawn for two or four year terms.<sup>41</sup>

One set of issues arising from these provisions, anticipated in the statute itself, was whether the various changes in the composition and methods of electing the State Board of Education would pass muster under the Voting Rights Act of 1965.<sup>42</sup> In specifying an effective date, the legislature expressly recognized that these features of H.B.

35. *See id.* § 51.001 (Vernon Supp. 1985).

36. *See id.* §§ 29.01-.05 (Vernon 1972) (Texas Department of Corrections); *id.* § 31.31 (Vernon Supp. 1985) (advisory council for technical-vocational education); TEX. REV. CIV. STAT. ANN. art. 4413 (29aa), §§ 1, 2(a) (Vernon 1972 & Supp. 1985) (commission on law officer standards and education); *id.* art. 4413 (52) note (Vernon Supp. 1985) (Tex. Department of Community Affairs); *id.* art. 5547-202, §§ 2.01, .19 (Tex. Department of Mental Health and Mental Retardation); TEX. HUM. RES. CODE ANN. § 61.032 (Vernon Supp. 1985) (Tex. Youth Council).

37. *See* TEX. REV. CIV. STAT. ANN. art. 5429p note (Vernon Supp. 1985).

38. *See* Law of June 15, 1971, ch. 5, § 2, 1971 Tex. Laws, 1st Spec. Sess. 25, 25, *amended by* Act of July 13, 1984, ch. 28, pt. B, §§ 1, 2, 1984 Tex. Sess. Law Serv. 269, 271-79, 281 (Vernon) (codified at TEX. EDUC. CODE ANN. §§ 11.21, .22(g) (Vernon Supp. 1985)).

39. *See* TEX. EDUC. CODE ANN. § 11.22 note (Vernon Supp. 1985).

40. *See id.*

41. *See id.* § 11.22 (f), (g).

42. *See* 42 U.S.C. § 1973c (1982).



72 would be subject to review under the Voting Rights Act, directed the Secretary of State to submit them for review by the Department of Justice, and provided for them to take effect as provided in the Act "as modified by the requirements of federal law."<sup>43</sup> Apparently the statute experienced no difficulty, because the U.S. Attorney General gave notice of no objection on September 25, 1984,<sup>44</sup> and the transitional State Board of Education met on October 3, 1984, to assume its duties.<sup>45</sup>

There are several other changes in respect to the State Board of Education. Its chairman is now appointed by the Governor for a two year term rather than being elected by the membership;<sup>46</sup> the number of consecutive terms a chairman may serve has been restricted;<sup>47</sup> and the board is prohibited from electing its other officers by slate.<sup>48</sup> The eligibility criteria for membership on the State Board of Education have been modified and quorum requirements repealed.<sup>49</sup> Finally, the office title, "Member, State Board of Education," has been moved to a higher place on the election ballot.<sup>50</sup>

### C. *Centralization of Authority*

Under previous law, duties and responsibilities relating to the system of public education were variously assigned to the State Board of Education, the State Commissioner of Education, or the Central Education Agency largely as a matter of the historical patchwork in which Texas education laws were enacted. The thrust of H.B. 72 is to make the State Board of Education accountable to the legislature as

43. See TEX. EDUC. CODE ANN. § 11.21 note (Vernon Supp. 1985).

44. See Letter from William Bradford Reynolds, U.S. Department of Justice, to the Honorable Myra A. McDaniel, Secretary of State of the State of Texas (Sept. 25, 1984) (interposing no objection to H.B. 72 under Voting Rights Act) (available at office of Texas Secretary of State).

45. See Notice of Open Meeting of State Board of Education, Tex. Educ. Agency, 9 Tex. Reg. 5168 (1984).

46. Compare TEX. EDUC. CODE ANN. § 11.23(d) (Vernon Supp. 1985) with Act of July 7, 1949, ch. 546, § 1, 1949 Tex. Gen. Laws 1056, 1058 (amended 1984).

47. See TEX. EDUC. CODE ANN. § 11.23(e) (Vernon Supp. 1985) (after chairman serves two consecutive terms, ineligible to serve again for four years).

48. See *id.*

49. Compare *id.* §§ 11.22(b)-(d), 11.23(c) with Act of June 1, 1949, ch. 299, art. II, §§ 5, 8, 1949 Tex. Gen. Laws 537, 540-41 (§ 11.22 amended 1984; § 11.23(c) repealed 1984).

50. Compare TEX. ELEC. CODE ANN. 6.05c (Vernon Supp. 1985) (listed as first district office) with Act of May 17, 1983, ch. 144, § 2, 1983 Tex. Gen. Laws 638, 641 (amended 1984) (listed as third district office).

the primary policymaking body for public education, centralizing in the State Board certain powers heretofore assigned to the Commissioner of Education or Central Education Agency.<sup>51</sup>

There are also measures to subordinate the Commissioner more completely to the authority of the State Board of Education. Eligibility criteria for the office of Commissioner have been liberalized,<sup>52</sup> and the Commissioner now serves at the will of the state board rather than for a four year term and has been subjected to State Board review in his application of the board's rules.<sup>53</sup> The Commissioner has been removed entirely from the textbook adoption process.<sup>54</sup> The responsibility of the Commissioner to publish a school law bulletin has been made more specific, and the State Board now determines its distribution.<sup>55</sup> The State Board also possesses additional discretion regarding the teacher certification recommendations of the Commission on Standards for the Teaching Profession.<sup>56</sup>

Anomalously, it was the State Board of Education that was removed from the process of administrative appeals to the Texas Education Agency, probably as a matter of expediency and convenience. State Board review of the Commissioner's decisions has been eliminated in all types of appeals, enabling a party to proceed from a Com-

51. See TEX. EDUC. CODE ANN. §§ 1.04(c) (equal educational opportunity), 11.10(p), (q), (r) (schools for deaf), 11.12 (school buses), 11.17(b), (c) (bilingual education institutes), 11.18(c) (adult education), 11.26 (general policymaking vote of State Board), 11.28(c) (military reservations), 12.63(b), .65(a) (textbooks), 16.005 (Foundation School Program), 21.008(b), (c) (curriculum), 21.111(a), (b) (adult vocational programs), 21.251(c), (d) (teacher reports), 21.252 (county reports), 21.456(c) (bilingual class size), 21.903(b) (donations to districts), 23.29(b) (mineral sales) & 23.79(e) (depository banks) (Vernon Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 6687b, § 5(a) (Vernon Supp. 1985) (bus drivers).

52. Compare TEX. EDUC. CODE ANN. § 11.51(b) (Vernon Supp. 1985) with Act of June 1, 1949, ch. 299, art. V, § 2, 1949 Tex. Gen. Laws 537, 543 (amended 1984).

53. Compare TEX. EDUC. CODE ANN. § 11.25(b), (c) (Vernon Supp. 1985) with Act of June 1, 1949, ch. 299, art. V, §§ 1, 4, 1949 Tex. Gen. Laws 537, 543 (amended 1984).

54. Compare TEX. EDUC. CODE ANN. §§ 12.11(e), .12, .13, .63(b) (Vernon Supp. 1985) with Act of Apr. 1, 1925, ch. 176, § 42, 1925 Tex. Gen. Laws 417, 432 (§ 12.63(b) amended 1984) and Act of June 1, 1949, ch. 299, art. IV, § 5, 1949 Tex. Gen. Laws 537, 542 (§§ 12.11(e), .13 amended 1984; § 12.12 repealed 1984).

55. Compare TEX. EDUC. CODE ANN. § 11.52(k) (Vernon Supp. 1985) with Act of June 1, 1949, ch. 299, art. V, § 8, 1949 Tex. Gen. Laws 537, 543-44 (amended 1984); Tex. Educ. Agency, 9 Tex. Reg. 4553 (1984) (amending 19 TEX. ADMIN. CODE §§ 81.63, .71, .110, .125-.127, .129), *adopted*, 9 Tex. Reg. 6077 (1984); Tex. Educ. Agency, 10 Tex. Reg. 629 (1985) (amending 19 TEX. ADMIN. CODE § 81.63).

56. Compare TEX. EDUC. CODE ANN. § 13.032(b) (Vernon Supp. 1985) with Act of June 13, 1979, ch. 663, § 2, 1979 Tex. Gen. Laws 1540, 1541 (amended 1984).

missioner's decision directly to a district court of Travis County.<sup>57</sup> A possible exception may exist in regard to appeals that involve the Commissioner's application of a State Board rule. Language expressly allowing such appeals was eliminated from the powers and duties of the State Board related to the Commissioner, but was replaced with broader provisions for review,<sup>58</sup> which presumably cannot be implemented except by some form of appeal.<sup>59</sup>

#### D. *Local Districts*

At the local level, H.B. 72 stiffens considerably the supervisory control of the Texas Education Agency over local boards of trustees. The State Board is charged with establishing new performance-based accreditation standards and a new accreditation process.<sup>60</sup> TEA is required to investigate the compliance of each district not less than once every three years and suggest improvements or sources of aid to the board of trustees and campus administrators.<sup>61</sup> TEA is also charged, somewhat vaguely, with providing "assistance to districts which have been found to have difficulty meeting accreditation standards."<sup>62</sup> If a district fails to satisfy the accreditation standards, the Commissioner of Education is required to apply progressively severer sanctions, ranging from confidential notice of a deficiency through appointment of a master to oversee the operations of the district.<sup>63</sup> If these sanctions do not produce compliance, the State Board of Education is directed to revoke the district's accreditation and withhold state funds, in which event appointment of a master is mandatory.<sup>64</sup>

The provisions for appointment of a master are without precedent

57. See TEX. EDUC. CODE ANN. § 11.03(f) (school for deaf appeals), § 11.061(f) (school for blind appeals), § 13.046 (b), (c) (revocation of teacher certificate appeals), § 13.115(c), (d) (continuing contracts), § 13.214(b) (professional practices), § 19.005(c) (annexation appeals), § 21.207(a), (b) (appeals from teacher nonrenewals), § 32.42(a), (d) (proprietary schools appeals), § 11.13 (general appeals) (Vernon Supp. 1985). Rules have been proposed. See Tex. Educ. Agency, 10 Tex. Reg. 972 (1985) (prop. amendment to 19 TEX. ADMIN. CODE §§ 157.1, .21, .22, .41, .50, .52, .60, .62, .63, .68, .71, .73).

58. Compare Act of June 1, 1949, ch. 299, art. III, § 2, 1949 Tex. Gen. Laws 537, 541 (amended 1984) with TEX. EDUC. CODE ANN. § 11.25(b) (Vernon Supp. 1985).

59. See Tex. Educ. Agency, 10 Tex. Reg. 975 (1985) (prop. amendment to 19 TEX. ADMIN. CODE § 157.71(a)).

60. See TEX. EDUC. CODE ANN. §§ 21.751-753 (Vernon Supp. 1985).

61. See *id.* §§ 21.754, .755.

62. See *id.* § 21.756.

63. See *id.* § 21.757(a).

64. See *id.* §§ 21.757(b), .752(a).

in Texas school law or experience and present several questions. The powers granted to the master are "to oversee the district" and to "approve or disapprove any action of the board of trustees or the superintendent of the district."<sup>65</sup> Is the master's role to be entirely reactive to actions of the local board and superintendent? Or does the authority to "oversee" permit the master to act on his or her own initiative? Suppose that the master disapproves a board decision to retain in employment a teacher the superintendent is recommending for dismissal. Does the teacher get fired or not? If so, what are the teacher's administrative remedies, if any? Or, assuming authority in the master to issue orders for the governance of the district, how are such orders to be enforced? By appeal to the Texas Education Agency? By mandamus?

Along with the tighter accreditation standards and rules, there are more specific reporting requirements. Local school districts are now required to file annual performance reports by campus, containing evaluations of the quality of education, test scores, performance trends, costs of instruction and administration, attendance and drop-out rates, discipline, employment trends, and teacher ratios by grade grouping and by program.<sup>66</sup> The annual report of disbursements and receipts required to be submitted with each year's budget has been expanded to include management, cost accounting, and financial information "sufficient to enable the State Board of Education to monitor the funding process and determine educational system costs by district, campus, and program."<sup>67</sup>

Local discretion has been limited in regard to the school calendar. Under prior law, school boards were free to begin school when they wished, subject to the minimum 175 days of instruction and ten days of in-service training required by the Foundation School Program.<sup>68</sup> School is now required to begin on or after September 1, beginning with the 1985-1986 school year.<sup>69</sup>

There are, nevertheless, at least three features of the Act that may

65. *See id.* § 21.752(a), (b).

66. *See id.* § 21.258.

67. *See id.* § 23.48(d).

68. *See* Act of Apr. 15, 1905, ch. 124, § 97, 1905 Tex. Gen. Laws 263, 289 (scholastic year requirement) (amended 1984); Act of July 22, 1977, ch. 1, § 2, 1977 Tex. Laws, 1st Spec. Sess. 11, 12 (days of instruction and in-service training) (amended 1984).

69. *See* TEX. EDUC. CODE ANN. § 21.001(b) (Vernon Supp. 1985); Tex. Educ. Agency, 10 Tex. Reg. 985 (1985) (amending 19 TEX. ADMIN. CODE § 105.71).

help strengthen the governing stance of local school boards. First, the State Board of Education is charged with developing statewide standards on the duties of school board members, and local board members are required to participate in training activities consistent with the standards.<sup>70</sup> Second, with certain exceptions, the courts are now authorized to award attorney's fees in civil suits upon a finding that a suit is "frivolous, unreasonable, and without foundation."<sup>71</sup> Third, in appeals to the Texas Education Agency by a student against a school district, the Commissioner of Education is to apply a substantial evidence standard of review.<sup>72</sup> This last provision may prove troublesome, since a local transcript of the evidence has always been optional under the TEA rules<sup>73</sup> and since evidence important to one side or the other may not be available locally, owing to the lack of authority in school boards to subpoena witnesses.

### III. TEACHERS

Perhaps more far-reaching in the long run than any of the other reforms is the effort in H.B. 72 not only to increase basic teacher pay, but to couple reform of the career-pay structure of teachers with measures calculated to obtain better teaching performance and more teachers. Under pre-existing law, the minimum salaries for teachers and administrators were calculated from a base rate by means of index factors contained in a schedule of eighteen pay grades, each having fourteen longevity steps. No provision was made for merit pay.<sup>74</sup> This salary structure is said to have overemphasized seniority, limited opportunities for career advancement, failed to reward job performance, discouraged retention of new teachers, and contained inequitable pay relationships.<sup>75</sup> Generally, certification as a teacher was available to any English-speaking adult citizen who was of good moral character who knew of and supported the state and federal constitutions, and who was recommended for certification after graduat-

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70. See TEX. EDUC. CODE ANN. § 23.33 (Vernon Supp. 1985).

71. See *id.* § 2.11.

72. See *id.* § 11.13(b).

73. See Tex. Educ. Agency, 19 TEX. ADMIN CODE § 61.252(e) (Shepard's May 1, 1982) (procedural requirements).

74. See Act of Sept. 1, 1975, ch. 334, § 1, sec. 16.056, 1975 Tex. Gen. Laws 877, 879 (amended 1984).

75. For criticism of the former compensation plan and comparison of pay proposals see Tex. Ass'n of School Boards, Texas Lone Star, June 1984, at 13, col. 1.

ing from a TEA-approved teacher education program.<sup>76</sup> There were no state-imposed testing requirements until 1981,<sup>77</sup> and these had barely reached implementation when H.B. 72 was passed. In the same year, the legislature had required annual evaluation of teachers in connection with the nonrenewal of teacher contracts, but districts were left to their own devices as to method, content, and format.<sup>78</sup>

#### A. *Base Pay and Career Ladder Supplements*

H.B. 72 replaces the old salary scheme with a simplified eleven step schedule establishing monthly pay rates ranging from \$1520 at step zero to \$2660 at step ten. For the 1984-1985 school year, each individual entitled to a minimum salary is assigned to the step that will yield at least \$170 per month more than the previous schedule, up to the amount specified for the new step ten.<sup>79</sup> Thereafter, each individual is to advance one step for each year of experience until step ten is reached.<sup>80</sup> The list of positions in the former compensation plan is retained unchanged except for elimination of all pay grade designations and the nine lowest position titles (aides, secretaries, trainees, and non-degree teachers).<sup>81</sup>

Additional compensation beyond the base rates at each step is provided in the form of "career ladder" supplements. Each teacher on the "career ladder" is entitled to an annual supplement of \$2000 at level two, \$4000 at level three, and \$6000 at level four, unless the allotment designated for support of the career ladder does not fully fund these supplements. In that event, a school district may reduce the supplements or impose stricter performance criteria, or both.<sup>82</sup> For 1984-1985, teachers are assigned to level two if they meet the experience and academic requirements as determined by locally-appointed committees; otherwise, they are assigned to level one. For the three school years beginning with 1984-1985, a teacher's actual years

76. See Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 141.3(b)(1), (2) (Shepard's May 1, 1982).

77. See Act of May 7, 1981, ch. 106, § 1, 1981 Tex. Gen. Laws 250, 251 (codified at TEX. EDUC. CODE ANN. § 13.032(e)(Vernon Supp. 1985)).

78. See Act of June 17, 1981, ch. 765, § 2, 1981 Tex. Gen. Laws 2847, 2847 (codified at TEX. EDUC. CODE ANN. § 21.203 (Vernon Supp. 1985)).

79. See TEX. EDUC. CODE ANN. § 16.056 note (Vernon Supp. 1985).

80. See *id.* § 16.056.

81. Compare *id.* § 16.056 with Act of June 13, 1979, ch. 602, § 4, 1979 Tex. Gen. Laws 1300, 1302-03 (amended 1984).

82. See TEX. EDUC. CODE ANN. § 16.057 (Vernon Supp. 1985).

of experience are to be considered for purposes of assignment to level two, without regard to experience at a particular ladder level.<sup>83</sup>

### B. *Career Ladder Appraisal and Assignment*

For 1985-1986 and thereafter, every teacher must be assigned to one of the four career ladder levels on the basis of performance, experience, job-related education, advanced academic training, and job assignments.<sup>84</sup> At the heart of the concept is the process of evaluation, called "appraisal," by which teaching performance is to be measured for purposes of assigning and maintaining a teacher's position on the career ladder. The State Board of Education, with the advice of teachers, is to develop and adopt an appraisal process and performance criteria.<sup>85</sup> The criteria are to be based on "observable, job-related behavior,"<sup>86</sup> which presumably means, but does not say, that they are to measure observable aspects of a teacher's performance on the job. The appraisal process must provide for not fewer than two appraisers, one of whom must be the teacher's supervisor and the other a person approved by the board of trustees. A classroom teacher may not appraise a teacher employed at the same school campus "unless it [sic] is impractical because of the number of campuses."<sup>87</sup> This probably was intended to mean just the opposite of what it says. The training and certification of appraisers is to be uniform statewide, and teacher self-appraisal is to be included in the process.<sup>88</sup> Each school district must use the appraisal process and performance criteria developed by the State Board in assigning teachers to the career ladder and must perform appraisals at least twice per year, except in unusual circumstances. A district may choose to use more than two appraisers per teacher.<sup>89</sup>

Five performance categories are prescribed for evaluating teachers on an appraisal. Beginning at the lowest category and ranging

83. *See id.* § 13.301 note; Tex. Educ. Agency, 10 Tex. Reg. 960, 964 (1985) (emergency rule prop. to be codified at 19 TEX. ADMIN. CODE §§ 149.71, .81).

84. *See* TEX. EDUC. CODE ANN. § 13.301(b) (Vernon Supp. 1985).

85. Interim rules allow the use of locally adopted systems until the State Board's process and criteria have been adopted. *See* Tex. Educ. Agency, 10 Tex. Reg. 987 (1985) (to be codified at 19 TEX. ADMIN. CODE § 149.41).

86. *See* TEX. EDUC. CODE ANN. § 13.302(a), (b) (Vernon Supp. 1985).

87. *See id.* § 13.302(c).

88. *See id.* § 13.302(c).

89. *See id.* § 13.303.

upwards, the categories are “unsatisfactory,” “below expectation,” “satisfactory,” “exceeding expectation,” and “clearly outstanding.”<sup>90</sup> After taking such pains to create an objective appraisal process, it is odd that the legislature spoke in terms of “expectations,” which tends to focus more upon the subjective impressions of the teacher’s supervisor than upon the objective criteria for measuring performance. The statute does make clear that only classroom teaching performance is to be appraised, not performance in connection with extracurricular activities.<sup>91</sup>

The State Board of Education is also charged with developing an assessment instrument to evaluate the performance of administrative and teaching personnel for the purpose of remediation and improvement.<sup>92</sup> It may be queried whether appraisals for career ladder purposes or “assessments” for remedial purposes may be used to satisfy the requirement in the Term Contract Nonrenewal Act (TCNA), that teachers be evaluated in writing at annual or more frequent intervals as a matter of local board policy.<sup>93</sup> Since the TCNA does not prescribe the method, content, or format for such evaluations, there would appear to be no reason why a district could not choose to merge the appraisal requirements of H.B. 72 into its evaluation policy under the Act.

The statute establishes four classes of teaching certificates corresponding to the four career ladder levels.<sup>94</sup> Before a teacher can attain a career ladder level, he or she must possess the corresponding certificate and meet other entry requirements. At level one, a teacher can become certified and gain entry by meeting certain basic educational and testing requirements and receiving a rating of “satisfactory” or better in every appraisal category during a probationary year of employment. Thereafter, a teacher must meet progressively greater experience, educational, and performance requirements for certification and entry at levels two, three, and four. Teachers with higher educational credentials and performance ratings need fewer years of experience to progress through the ranks.<sup>95</sup> Level one certificates expire after three years, and level two and level three certificates after

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90. *See id.* § 13.304.

91. *See id.* § 13.318.

92. *See id.* § 13.302.

93. *See id.* § 21.202.

94. *See id.* § 13.305.

95. *See id.* §§ 13.306-310.



five years. They may be renewed only upon the recommendation of the employing school district and the teacher's completion of six additional college hours or the training equivalent.<sup>96</sup> At level four, the certificate is called a "master teacher certificate" and is valid for life. To enter level four, a teacher must not only hold a master teacher certificate and meet minimum experience and performance requirements, but must also have satisfactory performance on a "comprehensive master teacher examination."<sup>97</sup> This is to be developed and administered, with the active participation of classroom teachers, under rules promulgated by the State Board of Education.<sup>98</sup>

In order to maintain the levels they have reached, teachers must continue to earn satisfactory performance marks. At levels two and three, a teacher must be reassigned to the next lower level if he or she does not maintain better than satisfactory performance for two consecutive years and to level one if the teacher's performance is below expectations.<sup>99</sup> At the master teacher level, reassignment to level three is required if the teacher does not meet somewhat stricter performance and classroom teaching requirements, including performance of two "master teacher duties" every three years.<sup>100</sup> There are safeguards in regard to extraordinary personal circumstances, reassignment to another grade level or subject, and previously earned higher education course credits.<sup>101</sup>

The career ladder provisions of most direct concern to lawyers are those dealing with the finality of district decisions and the transferability and legal effect of ladder assignments. Regarding appeal, the statute provides: "A decision of the district is final and is subject to appeal only if the decision of the district was arbitrary and capricious or made in bad faith."<sup>102</sup> This probably means that a district decision may be appealed to the Commissioner of Education under section 11.13 of the Texas Education Code only on those stated grounds and may not be reversed unless the Commissioner finds that it was "arbi-

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96. *See id.* § 13.305(a)-(c).

97. *See id.* §§ 13.305(d), .310.

98. *See id.* § 13.316.

99. *See id.* § 13.312.

100. *See id.* §§ 13.311, .317.

101. *See id.* § 13.312(c) (personal circumstances), § 13.313 (reassignment of duties), § 13.322 (course credit).

102. *Id.* § 13.319.

trary and capricious or made in bad faith.”<sup>103</sup> But what kind of decisions may be appealed, and who may appeal them? A decision not to recommend a teacher for a higher ladder assignment would surely be a clear case for appeal by the teacher. But is a performance rating awarded during the appraisal process a “decision of the district” that can be appealed? What about an “assessment instrument” administered and graded by the district? Does anyone other than a teacher have standing to appeal?

A teacher who has earned a certificate at a given level has a right to retain it until it expires or is duly suspended, revoked, or removed. There is a disclaimer that assignment to a career ladder level is neither a property right nor the equivalent of tenure.<sup>104</sup> A career ladder assignment is transferable between districts, and a district may recognize an appraisal done at another district in determining a teacher’s career ladder assignment. A teacher may waive entitlement to a particular ladder assignment when changing employment from one district to another.<sup>105</sup>

None of the career ladder requirements are intended to affect a teacher’s right to challenge nonrenewal of a contract, discharge during the year, dismissal at the end of the year, or return to probationary contract status, or to present grievances.<sup>106</sup> However, a district is prohibited from renewing the contract of a probationary teacher who fails to perform satisfactorily in each appraisal category at the end of his or her second year,<sup>107</sup> or a teacher who fails to achieve at least satisfactory performance during either of the first two years of experience at level one.<sup>108</sup> Another district would presumably not be precluded from hiring the teacher in either of these circumstances.

### C. *Other Measures to Improve Teacher Performance*

H.B. 72 also takes aim at the various teacher education programs at

103. The TEA regulations define “arbitrary and capricious” as “the use of criteria . . . which are not reasonably related to the purpose of assessing a teacher’s professional merit.” “Bad faith” means “intentionally allowing any factor other than that [sic] mandated by statute, State Board of Education regulation, or local policy to influence the placement of any teacher on the career ladder.” See Tex. Educ. Agency, 10 Tex. Reg. 960, 963 (1985) (emergency rule to be codified at 19 TEX. ADMIN. CODE § 149.71(j)(1)).

104. See TEX. EDUC. CODE ANN. § 13.320 (Vernon Supp. 1985).

105. See *id.* § 13.321.

106. See *id.* § 13.323.

107. See *id.* § 13.306(d).

108. See *id.* § 13.307.

colleges and universities in Texas. The existing authority of the State Board of Education to prescribe accreditation standards for these programs has been strengthened with the addition of progressive sanctions, which the Commissioner may impose for failure to meet any prescribed standard.<sup>109</sup> Each teacher education program is required to submit an annual performance report detailing the number of students admitted and their performance on a professional skills test, the number of students admitted to student-teaching, the number of students completing the program and their performance on exit tests, the employment success of graduates, and other matters.<sup>110</sup>

The competency examinations required for certification of teachers and administrators have been tightened up and applied to all certificate holders. Separate and more rigorous examinations are to be developed for the certification of teachers of primary grades, teachers of secondary grades, and administrators.<sup>111</sup> In 1981, the legislature made no provision for the competency testing of individuals who already possessed certificates.<sup>112</sup> H.B. 72 requires these individuals to pass similar competency examinations on or before June 30, 1986, as a condition to continued certification, subject to certain exceptions and safeguards.<sup>113</sup> Beginning with the 1984-1985 school year, no examinations other than these may be used to test the competency of teachers and administrators.<sup>114</sup>

There are also provisions for defining the roles and increasing the competence of administrators who supervise teachers. The positions of superintendent and principal are specifically defined,<sup>115</sup> and each district is required to offer training and management skills for all district administrators in accordance with State Board standards and rules emphasizing the methodology for general management, instructional leadership, and teacher evaluation.<sup>116</sup> The State Board is to develop a pilot program for training school superintendents and prin-

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109. *See id.* § 13.033.

110. *See id.* § 13.034. Regulations have been proposed. *See Tex. Educ. Agency*, 10 Tex. Reg. 969 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE. § 137.69).

111. *See TEX. EDUC. CODE ANN.* § 13.032(e) (Vernon Supp. 1985). Article III, part C., § 2 of the 1984 amendatory act requires the examinations to be administered no later than the beginning of the 1985-1986 school year. *See id.*, § 13.032(e) note.

112. *See Act of May 7, 1981, ch. 106, §1, 1981 Tex. Gen. Laws 250, 251 (amended 1984).*

113. *See TEX. EDUC. CODE ANN.* § 13.047 (Vernon Supp. 1985).

114. *See id.* § 13.047 note.

115. *See id.* §§ 13.351, .352.

116. *See id.* § 13.353.

cipals in management techniques.<sup>117</sup> Somewhat redundantly, the State Board is also to provide for the training and certification of individuals who supervise teachers, emphasizing communication, counseling, goal setting, and teacher review.<sup>118</sup>

On the job, teachers are now required to teach in the classroom not less than four hours each school day, whether they direct extracurricular activities or not.<sup>119</sup> However, two days before school opens in the fall, and one day following the end of each semester, have been reserved for in-classroom preparation.<sup>120</sup> Each teacher actively engaged in the instruction of children is also granted at least one forty-five minute period per day for parent-teacher conferences, reviewing students' homework, and planning and preparation.<sup>121</sup>

#### D. *Obtaining More Teachers*

In the short-term, H.B. 72 attempts to deal with the teacher shortage through alternative certification of persons who are not graduates of teacher education programs<sup>122</sup> and an innovative set of provisions authorizing school districts to establish "technology education programs."<sup>123</sup> On a limited basis, persons with appropriate bachelor's degrees may be hired as "noncertified instructors" to teach mathematics, science, computer science, and related technological subjects in secondary schools.<sup>124</sup>

In the longer term, H.B. 72 provides incentives for students to enter critical teaching fields through various student loan provisions. The Coordinating Board is directed to cancel repayment of loans to students who earn certification and teach for required periods in an area or field of acute teacher shortage.<sup>125</sup> A new loan program is established for primary or secondary students admitted into an approved teacher education program who are preparing to teach subjects for which teachers are critically needed.<sup>126</sup> Another teacher education

117. *See id.* § 13.353.

118. *See id.* § 13.908(a).

119. *See id.* § 13.907.

120. *See id.* § 16.052(b). Teachers are not required to participate in any other activities on preparation days. *See id.* § 16.052(b).

121. *See id.* § 13.902.

122. *See id.* § 13.035.

123. *See id.* §§ 13.501-.506.

124. *See id.* §§ 13.502(a), .503(a).

125. *See id.* § 52.40(b).

126. *See id.* §§ 60.01-.34.

loan program is extended to juniors, seniors, or graduate students with high academic ability and to regularly employed teachers who seek certification or endorsement in subjects for which a teacher shortage has been recognized by the State Board of Education.<sup>127</sup>

#### E. *Teacher Retirement*

Members of the Teacher Retirement System who retired before August 31, 1982, and whose average compensation factors do not exceed \$25,000 have been awarded a benefit increase of between 3% and 9.5%.<sup>128</sup> For the first time, districts are required to make teacher retirement contributions from local funds in certain cases. The state still pays retirement contributions for all employees below the rank of teacher, but for teachers and other professionals pays only a maximum amount equal to the contribution on base pay multiplied by the district's price differential index. If the district pays more salary than this, it must pay retirement on the difference,<sup>129</sup> which may have a depressing effect on local salary supplements.

### IV. STUDENTS

H.B. 72 contains numerous provisions calculated to eliminate distractions and turn students more frequently and directly to the task of learning, almost all of which are unprecedented. In the past, matters such as advancement and course credit, grading intervals, tutorial services, excused absences, extracurricular and non-academic activities, and student discipline were largely within the broad powers of local districts to manage and govern their schools.<sup>130</sup> Now there are statutory standards in all of these areas and more.

#### A. *Emphasis on Academic Performance*

Most of the new provisions are aimed at restoring academic performance as the primary goal of the educational system. A student's progress through grades is now to be based on academic achievement. Social promotions are forbidden, and a minimum grade average of

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127. *See id.* §§ 54.101-.107.

128. *See* TEX. REV. CIV. STAT. ANN. tit. 110B, § 34.203 note (Vernon Pamph. 1985).

129. *See id.* §§ 35.4041, .406.

130. *See* Act of Apr. 15, 1905, ch. 24, § 168, 1905 Tex. Gen. Laws 263, 308 (amended 1984); Tex. Educ. Agency, 19 TEX. ADMIN. CODE § 97.62(d) (Shepard's May 1, 1982) (primacy of local control under TEA accreditation rules).

seventy is required for course credit and promotion to the next grade. The State Board of Education is to provide alternatives for students whose academic achievement is consistently poor.<sup>131</sup> Parents are to be notified of grades every six weeks and invited to a conference if the student receives a grade less than seventy in any class or subject.<sup>132</sup> A student may not be exempted from a final examination that any other student is required to take.<sup>133</sup>

There are also measures to improve the academic environment. Class sizes are reduced, which promises to be the single most costly measure in the entire reform package. Classes are limited to twenty-two pupils in grades K-2 beginning in 1985-1986 and in grades 3-4 in 1988-1989.<sup>134</sup> Thus, if a school enrolls eighty-nine pupils in first grade, four teachers will not suffice. Because there is one pupil in excess of the maximum class size ( $4 \times 22 = 88$ ), five teachers must be employed. But, since state salary funds are now distributed on the basis of the number of pupils in average daily attendance rather than adjusted personnel units,<sup>135</sup> state funding will usually meet only 1/22 of the extra teacher's salary, leaving the balance to be raised locally. This illustration does not, of course, take account of the further complications likely to ensue under desegregation orders that preclude adjustment of attendance zones, require majority-to-minority transfers, or provide for open-enrollment magnet schools. Classes are not only to be smaller, but quieter: unnecessary interruptions of classes for non-academic activities, such as announcements and sales promotions, are restricted.<sup>136</sup>

An opportunity is provided for students to take advance placement examinations, which the State Board of Education is to develop for each primary school grade level and for secondary school academic subjects. Although each examination is "to thoroughly test comprehension," the score required for advanced placement is "the 90th per-

131. See TEX. EDUC. CODE ANN. § 21.721 (Vernon Supp. 1985); see also Tex. Educ. Agency, 9 Tex. Reg. 6410 (1984), *adopted*, 10 Tex. Reg. 628 (1985) (to be codified at 19 TEX. ADMIN. CODE §§ 75.191-.194).

132. See TEX. EDUC. CODE ANN. § 21.722 (Vernon Supp. 1985).

133. See *id.* § 21.723.

134. See *id.* § 16.054(b); see also Tex. Educ. Agency, 10 Tex. Reg. 986 (1985) (to be codified at 19 TEX. ADMIN. CODE § 105.392); Tex. Educ. Agency, 10 Tex. Reg. 1349 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE §§ 77.358-.359) (bilingual and ESL class size).

135. Salary funds are discussed *infra* at 843.

136. See TEX. EDUC. CODE ANN. § 21.923 (Vernon Supp. 1985). Such announcements are limited to no more than once a day. See *id.*

centile or above."<sup>137</sup> This is curious because percentile scores do not measure a student's comprehension of the subject, but merely rank the student's performance in comparison to others who took the test. Suppose that 100 dunces take an examination in which no one answers more than twenty-five percent of the questions correctly. Under the statute, the top ten students would nevertheless receive advance placement. The same would be true of 100 geniuses, all of whom answer at least ninety-five percent of the questions correctly. TEA regulations attempt to resolve this problem by prescribing a "State Board of Education-approved cutoff score, if permitted by legislation."<sup>138</sup> Also puzzling is the provision regarding tutorial services, which in its first subsection makes tutorials mandatory in each school district, but in the next subsection appears to leave to district discretion whether students will be required to take them.<sup>139</sup>

The statute also cracks down on extracurricular activities. The State Board is to prescribe rules preserving the school day for academic activities without interruption for extracurricular activities. With certain exceptions, a student who receives a grade lower than seventy in any academic class must be suspended from extracurricular activities during the next grade reporting period.<sup>140</sup> Also, the rules of the University Interscholastic League have been subjected to review and approval by the State Board of Education.<sup>141</sup>

One of the more debatable provisions forbids giving a student credit for a class if the student has more than five days of unexcused absence during a semester,<sup>142</sup> which seems at odds with the objective of stimulating academic performance. What positive incentive to do school-

137. *See id.* § 21.724.

138. *See* Tex. Educ. Agency, 10 Tex. Reg. 280, *adopted*, 10 Tex. Reg. 930, 931 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 75.172(e)).

139. *Compare* TEX. EDUC. CODE ANN. § 21.103(a) (Vernon Supp. 1985) ("[e]ach school district *shall* provide tutorial services") *with id.* § 21.103(b) ("[a] district *may* require a student . . . to attend") (emphasis added). The regulations apparently contemplate that tutorials may be "recommended or required" by the classroom teacher. *See* Tex. Educ. Agency, 10 Tex. Reg. 930 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 75.173(D); *see also* Tex. Educ. Agency, 10 Tex. Reg. 966 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 75.174) (remedial instruction).

140. *See* TEX. EDUC. CODE ANN. § 21.920 (Vernon Supp. 1985); Tex. Educ. Agency, 10 Tex. Reg. 982 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 97.113).

141. *See* TEX. EDUC. CODE ANN. § 21.921 (Vernon Supp. 1985); Tex. Educ. Agency, 10 Tex. Reg. 975 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 169.1).

142. *See* TEX. EDUC. CODE ANN. § 21.041 (Vernon Supp. 1985); *see also id.* § 21.035 (Vernon 1972 & Supp. 1985) (defining unexcused absences).

work exists for such a student during the remainder of the semester? There is nevertheless a negative incentive, in that the board of trustees or its designee must recommend for disciplinary action any student who accrues more than five days of unexcused absence during a semester or more than ten days during the school year.<sup>143</sup> One may also query whether these provisions will fit with recent amendments to the Family Code, which include voluntary unexcused absences for different numbers of days within different periods of time as part of the definition of "conduct indicating a need for supervision" for juvenile court purposes.<sup>144</sup> However, in H.B. 72, "unexcused absence" is defined as an absence not excused under section 21.035 of the Texas Education Code, which in turn allows an absence to be excused for "any . . . unusual cause acceptable to the teacher, principal, or superintendent."<sup>145</sup> Thus, there would appear to be local discretion to alleviate the harshness of the unexcused absence rules.

The compulsory attendance law is amended to increase the required minimum days of attendance from 165 to 170.<sup>146</sup> The law has also been amended in other minor respects.<sup>147</sup>

The tests of minimum basic skills, originated in 1979, have been expanded to include the first, third, fifth, seventh, ninth, and twelfth grades.<sup>148</sup> A secondary exit level test has been added<sup>149</sup> and must be

143. See *id.* § 21.301(h) (Vernon Supp. 1985).

144. See TEX. FAM. CODE ANN. § 51.03(b)(2), (d) (Vernon Supp. 1985); see also Tex. Educ. Agency, 10 Tex. Reg. 1315 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 129.62) (court-related students).

145. See TEX. EDUC. CODE ANN. § 21.035(b) (Vernon 1972).

146. Compare Act of June 19, 1983, ch. 871, § 1, 1983 Tex. Gen. Laws 4908, 4908 (amended 1984) (must attend 165 days) with TEX. EDUC. CODE ANN. § 21.032 (Vernon Supp. 1985) (must attend 170 days).

147. Compare Act of June 19, 1983, ch. 871, § 1, 1983 Tex. Gen. Laws 4908, 4908 (amended 1984) (if not more than 17-years-old, compulsory attendance law applies; child enrolled in only kindergarten must attend 82 days) with TEX. EDUC. CODE ANN. § 21.032 (Vernon Supp. 1985) (child must comply with compulsory attendance law through academic year in which 16th birthday occurs; child enrolled in prekindergarten or kindergarten must attend 85 days). In addition, one of the exceptions to the compulsory attendance law has been deleted. Under the new law, a student who has completed the ninth grade may no longer be exempt from attending school upon proof that his services are needed to support his family. Compare Act of June 13, 1979, ch. 602, § 21, 1979 Tex. Gen. Laws 1300, 1322 (amended 1984) with TEX. EDUC. CODE ANN. § 21.033(a) (Vernon Supp. 1985).

148. Compare Act of June 13, 1979, ch. 602, § 9, 1979 Tex. Gen. Laws, 1300, 1311-12 (amended 1984) with TEX. EDUC. CODE ANN. § 21.551(a) (Vernon Supp. 1985). See Tex. Educ. Agency, 9 Tex. Reg. 6456 (1984), *adopted*, 10 Tex. Reg. 855 (1985) (to be codified at 19 TEX. ADMIN. CODE §§ 101.1-.4).

149. See TEX. EDUC. CODE ANN. § 21.551(b) (Vernon Supp. 1985).



passed in order for a student to receive a high school diploma.<sup>150</sup>

### B. *School Discipline: Alternative Education Programs*

By far the most controversial of the H.B. 72 reforms in regard to students are the school discipline provisions, which severely limit the heretofore common practice of suspending or expelling disruptive children. Under prior law, section 21.301 of the Texas Education Code authorized the board of trustees of a school district to suspend, for the remainder of the current school term, any student found guilty of "incurable conduct."<sup>151</sup> "Incurable" was construed *in pari materia* with other statutory language relating to juvenile court proceedings to mean a student who was "insubordinate, disorderly, vicious, or immoral in conduct, or who persistently violates the reasonable rules and regulations of the school . . . , or who otherwise persistently misbehaves in such a manner as to render himself an incurable."<sup>152</sup> Thus, it was arguable even before H.B. 72 that suspension of a student was ordinarily to be used as a last resort after other efforts to produce acceptable conduct had failed.

The new law leaves few doubts in that department. In every instance except assault, a student must first have been placed in an "alternative education program" before he or she can be expelled, which in turn requires that the student be found guilty of "incurable conduct."<sup>153</sup>

To find a student guilty of "incurable conduct" requires a hearing which complies with procedural due process and finds either: (1) that the pupil's continued presence presents a clear, present, and continuing danger of physical harm to the pupil or others; or (2) that the pupil has engaged in "serious or persistent misbehavior that threatens to impair the educational efficiency of the school," that such conduct violates specific, published standards, and that "all reasonable alterna-

150. *See id.* § 21.553. The State Board is to adopt assessment instruments no later than Sept. 1, 1985, and administer them not later than the 1985-1986 school year. *See id.* § 21.551 note.

151. *See* Act of June 11, 1979, ch. 541, § 1, 1979 Tex. Gen. Laws 1130, 1130 (amended 1984).

152. *See* TEX. EDUC. CODE ANN. § 21.302 (Vernon 1972); *see also* Pervis v. LaMarque Indep. School Dist., 466 F.2d 1054, 1057 (5th Cir. 1972); Southern v. Board of Trustees, 318 F. Supp. 355, 359 (N.D. Tex. 1970), *aff'd*, 461 F.2d 1267 (5th Cir. 1972); Schwartz v. Galveston Indep. School Dist., 309 F. Supp. 1034, 1035-36 n.10 (S.D. Tex. 1970).

153. *See* TEX. EDUC. CODE ANN. § 21.3011 (Vernon Supp. 1985).

tives to the pupil's regular classroom program, including a variety of discipline management techniques, have been exhausted." The pupil's parent or representative must be notified and is entitled to participate. The hearing may be conducted and a removal imposed by either the board of trustees "or its designate [sic]."<sup>154</sup> If the latter, the removal decision may be appealed to the board of trustees, pending which the pupil may not be denied the privileges of his or her home campus unless the board or its designee determines that the pupil's continued presence at the home campus would be dangerous to the pupil or others.<sup>155</sup>

The requirements for the alternative education program itself are contradictory. In one place, the statute requires only "reasonable efforts to provide for the continuing education" of a removed pupil and allows both supervised and unsupervised educational settings.<sup>156</sup> Elsewhere in the same section, the statute requires development of alternative education programs that "provide for keeping the pupils in an educational environment with the school district's supervision."<sup>157</sup> Since each school district is to submit an outline of its program to the State Board of Education for approval,<sup>158</sup> it may be that the State Board will resolve this conflict by rule. In either event, however, except for assaults on school property, removal to an alternative education program is a necessary prerequisite to expulsion, even including, in the words of one critic, "the drug pusher, the student who comes to school armed to the teeth (assuming no assault, just artillery), the exhibitionist, the stoned, and the stewed."<sup>159</sup>

Even further determinations and procedures are necessary to impose expulsion. Pupils can be suspended or expelled<sup>160</sup> in only two

154. The correct noun form is "designee." See WEBSTER'S THIRD NEW INT'L DICTIONARY 612 (1966).

155. See TEX. EDUC. CODE ANN. § 21.301 (Vernon Supp. 1985).

156. See *id.* § 21.301(e).

157. See *id.* § 21.301(k).

158. See *id.* § 21.301(k). The statute does not specify a deadline for such submissions. See *id.* § 21.301(k).

159. See Hairston, *Student Discipline After House Bill 72*, TEX. SCH. ADM'RS' LEGAL DIG., Nov. 1984, at 1, 3.

160. The term "expulsion" is synonymous with "suspension" and had nearly disappeared from common usage until H.B. 72 resurrected it. Both terms mean the complete cessation of educational services to the student.

instances: (1) where a pupil has committed an assault<sup>161</sup> on school property and presents a "clear, present, and continuing danger of physical harm"; or (2) where the pupil, having been placed in an alternate education program, has been guilty of continued "incurable conduct" to the extent that keeping the pupil in school would seriously impair education of other students and that "no further reasonable efforts to provide for the continuing education of the pupil can be made."<sup>162</sup> If the board's designee makes the decision to expel, an appeal to the board of trustees must be provided.<sup>163</sup>

Several aspects of the expulsion process are not at all clear. For example, there is no specific requirement for a due process hearing, even though the opportunity for one is clearly required by the due process clause,<sup>164</sup> and H.B. 72 itself requires one in the less severe case of removal to an alternative education program.<sup>165</sup> Another major question is whether the expulsion provisions of H.B. 72, which amend and augment section 21.301 of the Texas Education Code, are now the exclusive method for expelling a student. Under prior law, section 21.301 was merely cumulative of the trustees' general power to man-

161. Presumably the meaning of "assault" is the same as that provided in the Texas Penal Code:

(a) A person commits an offense if the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another . . . ; or
- (2) intentionally or knowingly threatens another with imminent bodily harm . . . ; or
- (3) intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative.

TEX. PENAL CODE ANN. § 22.01(a) (Vernon Supp. 1985).

162. See TEX. EDUC. CODE ANN. § 21.3011(a), (b) (Vernon Supp. 1985).

163. See *id.* § 21.3011(c).

164. See U.S. CONST. amend. IV; see also *Goss v. Lopez*, 419 U.S. 565, 576 n.8 (1975); *Dunn v. Tyler Indep. School Dist.*, 460 F.2d 137 (5th Cir. 1972); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 158 (5th Cir. 1961); *Texarkana Indep. School Dist. v. Lewis*, 470 S.W.2d 727, 737 (Tex. Civ. App.—Texarkana 1971, no writ). Arguably, since the new § 21.3011(b) seems to call for a determination of "continued . . . incurable conduct," a hearing would be required by a logical extension of new § 21.301(b). But even this construction would not reach an expulsion for assault under new § 21.3011(a), where there is nothing to suggest that a hearing is required. See TEX. EDUC. CODE ANN. §§ 21.301, .3011(a), (b) (Vernon Supp. 1985).

165. See TEX. EDUC. CODE ANN. § 21.301(b) (Vernon Supp. 1985). As a matter of federal constitutional right, the more informal procedures required in *Goss* generally suffice in situations involving disciplinary transfers or assignments. See *Jordan v. School Dist.*, 583 F.2d 91, 97 (3d Cir. 1978); *Betts v. Board of Educ.*, 466 F.2d 629, 633 (7th Cir. 1972); *Everett v. Marcuse*, 426 F. Supp. 397, 401 (E.D. Pa. 1977). Cf. *Hoffmann, Involuntary Disciplinary Transfers—Are Schools Circumventing Procedural Due Process?*, 11 J.L. EDUC. 539 (1982).

age and govern under section 23.26 of the Texas Education Code, pursuant to which a child could be expelled without regard to "incorrigibility" if in violation of a reasonable local rule or regulation.<sup>166</sup> There is confusion over the maximum term of expulsion that may be imposed and for what offenses.<sup>167</sup> It is also unclear how an expulsion is to be handled in juvenile court.<sup>168</sup>

## V. PROGRAMS

H.B. 72 mandates new programs in the areas of early childhood education and discipline management. It also relocates and amends existing programs relating to vocational education, special education, compensatory education, driver education, transportation, and gifted and talented students.

### A. *New Programs: Early Childhood and Discipline Management*

The most innovative and unprecedented new programs in H.B. 72 are those mandating prekindergarten and summer preschool in certain districts.<sup>169</sup> Beginning in 1985-1986, any school district may offer prekindergarten classes, but must do so on a half-day basis if it has

166. Compare Act of June 11, 1979, ch. 541, § 1, 1979 Tex. Gen. Laws 1130, 1130 (amended 1984) with TEX. EDUC. CODE ANN. § 21.301 (Vernon Supp. 1985).

167. Section 21.3011(b) states that the district "[s]hall set a term for the expulsion, which may not extend beyond the current term of the school year except as provided by Section 21.301(d) of this code." See TEX. EDUC. CODE ANN. § 21.3011(b) (Vernon Supp. 1985). Under prior law, "current term" meant the end of the school year. See Op. Tex. Att'y Gen. No. MW-239 (1980). New § 21.301(d), referring to removal to an alternative education program, however, speaks in terms of semesters, and proposed TEA disciplinary guidelines would forbid expelling a student for a period longer than that authorized for removal to an alternate education program. See TEX. EDUC. CODE ANN. § 21.301(d) (Vernon Supp. 1985); letter from Richard L. Arnett, Deputy Commissioner for Legal Services, TEA, to school administrators (Aug. 23, 1984). The time limit for expulsion appears only in subsection (b), relating to continued incorrigible conduct, leaving open the question of whether any limit is imposed for expulsion under subsection (a). See *id.* § 21.3011(a), (b) (Vernon Supp. 1985).

168. Section 21.3011(d) requires copies of an expulsion order to be delivered not only to pupil and parent, but also to the authorized officer of the juvenile court, who is to determine "[w]hether a petition should be: (1) filed alleging that the pupil is in need of supervision; or (2) referred to an appropriate state agency." See TEX. EDUC. CODE ANN. § 21.3011(d) (Vernon Supp. 1985). The Family Code authorizes only a preliminary investigation to determine whether there is probable cause to believe the child engaged in conduct indicating a need for supervision. If there is no probable cause, the child must immediately be released and the proceedings terminated. See TEX. FAM. CODE ANN. § 53.01(a), (b) (Vernon 1975).

169. See TEX. EDUC. CODE ANN. § 21.136 (prekindergarten), § 21.458 (summer preschool) (Vernon Supp. 1985).

fifteen or more children over four years of age who are unable to speak and comprehend English or who come from low income families. Transportation is not mandatory, but if provided it is included in the regular transportation system. A district may be exempted from the prekindergarten requirements if it would be required to construct classroom facilities. The cost of the program is shared by the state and district in the same percentages used under the Foundation School Program, provided that the state share may not exceed \$50 million per year.<sup>170</sup> Kindergarten, formerly optional with districts, is made mandatory for all children who are at least five years of age at the beginning of the scholastic year.<sup>171</sup> In addition to prekindergarten and kindergarten, each district that is required to offer a bilingual education or special language program must offer an intensive half-day program during the eight weeks preceding the opening of school for children of limited English proficiency who will be eligible for kindergarten or first grade, to be funded from the Foundation School Program.<sup>172</sup>

The other area of innovation is in "discipline management programs,"<sup>173</sup> which districts are required to submit to TEA for approval and then adopt and implement no later than September 1, 1986.<sup>174</sup> Among the mandatory elements are development of a student code of conduct and delineation of the responsibilities of teachers, administrators, parents, and students, along with parent-teacher conferences, parent training workshops, parental consent statements,<sup>175</sup> and teacher training in discipline management, which must be completed not later than December 31, 1986.<sup>176</sup> TEA is to recommend specific training programs to districts in developing their programs and monitor discipline management programs through the accreditation process.<sup>177</sup> Additionally, TEA is authorized to develop a dropout

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170. *See id.* § 21.136.

171. *See id.* § 21.131.

172. *See id.* § 21.458; Tex. Educ. Agency, 10 Tex. Reg. 1325 (1985) (to be codified at 19 TEX. ADMIN. CODE § 75.1687).

173. *See* TEX. EDUC. CODE ANN. § 21.701-.706 (Vernon Supp. 1985).

174. *See id.* § 21.701 & note.

175. *See id.* § 21.702.

176. *See id.* § 21.705; *see also id.* § 21.701 note (school district must verify to Central Educ. Agency no later than Dec. 31, 1986, that each teacher received training required by § 21.705).

177. *See id.* § 21.703 (recommending training programs), § 21.704 (monitoring requirements).

reduction program,<sup>178</sup> and the Texas Department of Community Affairs is to contract for educational services to dropouts under the Texas Job-Training Partnership Act.<sup>179</sup>

### B. *Relocation and Revision of Existing Programs*

Several existing programs are amended, and some are relocated from chapter 16 to chapter 21 of the Texas Education Code because of changes in their financing. The State Board of Education is to approve each district's vocational education program every five years under new criteria<sup>180</sup> and must prepare and annually update a master plan for vocational education designed to meet the needs of the State of Texas, rather than simply complying with federal laws and regulations.<sup>181</sup> The financing scheme for special education is changed,<sup>182</sup> and provisions for rehabilitation districts are amended to conform more closely to special education definitions and requirements.<sup>183</sup> The categorical program aid component of the Foundation School Program has been eliminated by relocating the school lunch allotment<sup>184</sup> and ending state funding for driver education.<sup>185</sup> Minor changes are made to the transportation provisions,<sup>186</sup> and the provisions for gifted and talented students remain essentially the same, except for transfer of rulemaking authority to the State Board of Education and a new requirement that participating districts share in the cost of the program.<sup>187</sup>

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178. *See id.* § 11.205.

179. *See* TEX. REV. CIV. STAT. ANN. art. 4413(52), § 9A (Vernon Supp. 1985) (also charging Tex. Dep't of Community Affairs with researching and reporting responsibilities under program).

180. *See* TEX. EDUC. CODE ANN. § 21.112 (Vernon Supp. 1985).

181. *See id.* § 21.113.

182. *See id.* §§ 21.501-.506 (transferring, renumbering, and amending § 16.104). Special education financing is discussed *infra* at 844.

183. *See id.* §§ 26.01, .63, .64, .68, .70 (amending these sections and repealing § 26.16).

184. *See id.* § 16.176 (deleting § 16.176(a) & (b) and renumbering competency testing provisions as new §§ 21.551-.559). The school lunch provisions reappear as a compensatory education allotment. *See id.* § 16.152.

185. *See id.* §§ 16.177, 21.102 (transferring, renumbering, and amending § 16.177 as new § 21.102).

186. *See id.* §§ 21.173(a), .174-.181 (transferring, renumbering, and amending §§ 16.201-.205, .207-.212 as new §§ 21.174-.181, and amending § 21.173(a)).

187. *See id.* §§ 21.651-.656 (transferring, renumbering, and amending §§ 16.501-.502 as new § 21.651-.656).

## VI. SCHOOL FINANCE

The basic structure of Texas school finance in each school district<sup>188</sup> has long been based on both state and local contributions. Historically, schools were supported by local property taxes augmented by per capita allotments from the Available School Fund. As the value of taxable property became more unevenly distributed among districts statewide because of mineral exploration, urban growth, industrial development, and other factors, the need for equalization of state school aid between property-rich and property-poor districts became increasingly apparent. Since 1949, successive school finance reform measures have addressed this problem by creating what came to be known as the Foundation School Program, under which state financial aid proportionate to local taxing ability was provided for minimum personal salaries, current operating expenses, categorical program aid, and transportation services. Each of these components was calculated for each district by means of complex distribution formulas. The sum of these costs for each district constituted the total cost of the program, which was financed by local tax revenue, per-capita apportionment of the Available School Fund, and distributions from a statutory Foundation School Fund. The portion of its cost each district had to raise through local taxation, called the "local fund assignment," was determined by reference to an index value based on the market value of taxable property in the district.

The Commissioner of Education annually determined the cost of the Foundation School Program in each district, subtracted the local fund assignment and state Available School Fund apportionment, and paid the district the remainder, if any, from the Foundation School Fund. Thus, the higher a district's property values, the higher its local fund assignment and the lower its state aid, and vice versa.

It will readily be seen that amendments to various parts of the Foundation School Program could affect a district's entitlement in three basic ways. Changes in the distribution formulas might raise or

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188. The introductory material within this section is drawn from TEX. EDUC. CODE ANN. ch. 16 (Vernon) as it existed prior to H.B. 72. It also draws upon the historical overview and detailed explanation of the Texas school finance system contained in B. WALKER & W. KIRBY, *THE BASICS OF TEXAS SCHOOL FINANCE* (Tex. Ass'n of School Bds. 3d ed. 1984), and R. HOOKER, *ISSUES IN SCHOOL FINANCE: A TEXAS PRIMER* (Tex. Ass'n of School Bds. 1972); see also, Walker, *The Local Property Tax for Public Schools: Some Historical Perspectives*, 9 J. EDUC. FINANCE 265 (1984); Thomas & Walker, *Texas School Finance*, 8 J. EDUC. FINANCE 265 (1982).

lower the total cost of the program in a district. Changes in the method for calculating the local fund assignment, its offset against the Available School Fund apportionment, or the ability of districts to levy local taxes would affect the amount subtracted from the cost to determine what a district would receive from state sources. And the overall amounts available for distribution from the Available School Fund and Foundation School Fund could be affected by adjusting their state tax revenue sources or by limiting appropriations to the funds.

H.B. 72 leaves this basic structure intact, but contains many significant changes of all three types. Most of them are very complex, and it would be beyond the scope of this article to discuss them in detail. Those changes that have not already been discussed in connection with teacher salaries, retirement, or program changes will be grouped according to type and described briefly.

#### A. *The Cost of the Program: Changes in Distribution Formulas*

The most fundamental change is the shift from an adjusted personnel unit method to a weighted pupil method of calculating distribution units. Formerly, a school district's entitlement for personnel support was determined according to the aggregate minimum salaries for personnel units allotted to the district on the basis of average daily attendance (ADA), subject to various adjustments.<sup>189</sup> Under the new system, there is a "basic allotment" of \$1290 per regular ADA for 1984-1985 and \$1350 per regular ADA for 1985-1986 and thereafter. "Regular ADA" is calculated by subtracting from total ADA the number of full-time equivalent students in special education and vocational education.<sup>190</sup> ADA itself is determined by the best four weeks of eight weeks of attendance designated by rule of the State Board of Education, which affords considerably less planning room than the best five six-week reporting periods (30 weeks) previously utilized.<sup>191</sup>

The basic allotment is subject to four adjustments designed to re-

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189. See Act of June 13, 1979, ch. 602, §§ 3, 5, 1979 Tex. Gen. Laws 1300, 1301, 1304 (amended 1984).

190. See TEX. EDUC. CODE ANN. § 16.101 (Vernon Supp. 1985).

191. Compare *id.* § 16.006 with Act of July 22, 1977, ch. 1, § 5, 1977 Tex. Laws, 1st Spec. Sess. 11, 17 (amended 1984). There are new emergency rules for student attendance accounting. See Tex. Educ. Agency, 10 Tex. Reg. 770 (1985) (emergency rule to be codified at 19 TEX. ADMIN. CODE § 129.61); see also Tex. Educ. Agency, 9 Tex. Reg. 4055 (1984) (emergency rule amending 19 TEX. ADMIN. CODE § 117.1), amended, 9 Tex. Reg. 4917 (1984).



duce disparities between districts in resource costs, geographical size, population density, and pupil enrollment. There is a price differential adjustment intended to reflect "the geographic variation in resource costs due to factors beyond the control of the school district."<sup>192</sup> A "small district" adjustment increases the basic allotment for districts of less than 300 square miles with less than 1600 students in ADA.<sup>193</sup> Two sparsity adjustments are available, one for districts of at least 300 square miles with not more than 1600 in ADA, and the other for districts with less than 130 ADA that meet a necessity formula.<sup>194</sup>

The basic allotment is also subjected to several multipliers ("weights") intended to reflect the additional costs of educating students in special education and in compensatory, bilingual, and vocational programs. Special education funding remains on the personnel unit system for 1984-1985,<sup>195</sup> but thereafter will be based on full-time equivalent (FTE) student attendance, with different multipliers according to various instructional arrangements.<sup>196</sup> The compensatory education allotment provides another multiplier for educationally disadvantaged students based on enrollment in the national school lunch program.<sup>197</sup> The allotment for bilingual education is based on ADA in the district's bilingual or special language program.<sup>198</sup> The allotment for vocational education is also based on FTE students in ADA, with a multiplier of 1.45 for 1984-1985.<sup>199</sup> Thereafter, vocational stu-

192. See TEX. EDUC. CODE ANN. §§ 16.102, .176-.179 (Vernon Supp. 1985). TEA has published rules regarding the price differential index. See Tex. Educ. Agency, 9 Tex. Reg. 6362 (1984), *adopted*, 10 Tex. Reg. 630 (1985) (to be codified at 19 TEX. ADMIN. CODE §§ 105,461-465).

193. See TEX. EDUC. CODE ANN. § 16.03(c) (Vernon Supp. 1985). The previous adjustment was limited to districts with less than 1000 in ADA. See Act of June 13, 1979, ch. 602, § 5, 1979 Tex. Gen. Laws 1300, 1304 (amended 1984). Special education and vocational education have subsequently been removed from the definition of ADA for the purposes of § 16.103(c) and the sparsity allotment in § 16.103(b) (*infra* note 194). See Act of Mar. 13, 1985, ch. 4, §§ 1-3, 1985 Tex. Sess. Law Serv. 7, 7-8 (Vernon).

194. See TEX. EDUC. CODE ANN. § 16.103(b) (district of at least 300 square miles with not more than 1600 students), § 16.104 (minimum ADA computation for districts with less than 130 ADA) (Vernon Supp. 1985).

195. See *id.* § 16.151(e-1); Tex. Educ. Agency, 9 Tex. Reg. 4916 (1984) (amending 19 TEX. ADMIN. CODE § 89.250).

196. See TEX. EDUC. CODE ANN. § 16.151 (Vernon Supp. 1985).

197. See *id.* § 16.152; Tex. Educ. Agency, 10 Tex. Reg. 1287 (1985) (prop. to be codified at 19 TEX. ADMIN. CODE § 89.191).

198. See TEX. EDUC. CODE ANN. § 16.153 (Vernon Supp. 1985).

199. See *id.* § 16.155(a); Tex. Educ. Agency, 9 Tex. Reg. 4524 (1984) (emergency rules amending 19 TEX. ADMIN. CODE §§ 78.1, .5, .21, .61-.69, .81-.82, .102-.103, .121-.122, .124-

dents will be weighted by program as recommended by the State Board of Education.<sup>200</sup>

Under previous law, the allotment for transportation costs was calculated by means of a linear density formula reflecting the average number of pupils transported daily divided by the daily route miles traveled.<sup>201</sup> This scheme is retained in H.B. 72 with increases in reimbursement rates for regular and special education students.<sup>202</sup>

The new provisions for basic pay and career ladder supplements have already been discussed.<sup>203</sup> To assist districts in supporting education improvement and support of the career ladder, there is an allotment ranging from \$100 per ADA for 1984-1985 to \$140 per ADA for 1986-1987 and beyond.<sup>204</sup> There is also an allotment designed to encourage districts to employ and retain experienced teachers.<sup>205</sup>

H.B. 72 continues the state policy of distributing equalization aid to property-poor districts.<sup>206</sup> The enrichment equalization allotment is based on a revised formula that increases the amount of equalization aid and rewards local tax efforts.<sup>207</sup> There are also equalization transition provisions for the next three years.<sup>208</sup>

### B. *The Local Share*

Since 1975, a district's local fund assignment had been calculated by multiplying a fixed index rate by an index value of the district's property, as determined by the State Property Tax Board.<sup>209</sup> H.B. 72 changes computation of the local share to a formula expressing the district's taxable value as a proportionate share of the total state taxable value, multiplied by a percentage of the statewide cost of the

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.131, .133-.134), *adopted*, 9 Tex. Reg. 6072 (1984), *amended*, 10 Tex. Reg. 959 (1985) (amending 19 TEX. ADMIN. CODE §§ 78.63, .78, .122).

200. See TEX. EDUC. CODE ANN. § 16.155(b) (Vernon Supp. 1985).

201. See Act of June 13, 1979, ch. 602, § 12, 1979 Tex. Gen. Laws 1300, 1315-17 (amended 1984).

202. See TEX. EDUC. CODE ANN. § 16.156 (Vernon Supp. 1985) (transferring, renumbering and amending old § 16.206).

203. See discussion *supra* at 825.

204. See TEX. EDUC. CODE ANN. § 16.158(a) (Vernon Supp. 1985).

205. See *id.* § 16.154.

206. See *id.* § 16.157 (transferring, renumbering, and amending old §§ 16.301-.302).

207. See *id.* § 16.157.

208. See *id.* § 16.157 note.

209. See Act of June 6, 1975, ch. 334, § 1, 1975 Tex. Gen. Laws 877, 892-93 (amended 1984).

Foundation School Program.<sup>210</sup> Unlike the former fixed rate, which enabled school officials to calculate the local share before adopting a budget or setting a tax rate, the new rate varies with the annual state-wide cost of the Foundation School Program, which will not be known until the end of each academic year.<sup>211</sup> Thus, at budget time the local share can only be estimated, which will probably require districts to carry larger local surpluses from year to year.

Until 1987, districts that receive less state aid under the new finance system, or increase their local tax rate in order to increase the enrichment equalization allotment, are excepted from the tax rollback provisions of the Property Tax Code to the extent of the necessary percentage increases.<sup>212</sup> To further assist districts in raising their local share, the State Property Tax Board is directed to conduct annual ratio studies to determine the total value of all taxable property in each school district.<sup>213</sup>

### C. *Adjustments to Revenue Sources*

Prior to H.B. 72 the per-capita grant to districts from the Available School Fund had included not only the constitutionally-mandated income from the Permanent School Fund,<sup>214</sup> but also certain state tax revenues dedicated by statute.<sup>215</sup> The effect was to increase unnecessarily the state aid granted to "budget balanced" school districts.<sup>216</sup> H.B. 72 achieves a substantial equalizing effect by removing the statutorily-dedicated revenue from the Available School Fund and transferring it to the Foundation School Fund,<sup>217</sup> thereby redistributing

210. See TEX. EDUC. CODE ANN. § 16.252 (Vernon Supp. 1985).

211. Compare Act of June 6, 1975, ch. 334, § 1, 1975 Tex. Gen. Laws 877, 892-93 (amended 1984) with TEX. EDUC. CODE ANN. § 16.252 (Vernon Supp. 1985).

212. See TEX. TAX CODE ANN. § 26.08 (Vernon Supp. 1985).

213. See TEX. EDUC. CODE ANN. § 11.86 (Vernon Supp. 1985).

214. See TEX. CONST. art. VII, § 5.

215. See TEX. EDUC. CODE ANN. § 15.01 (Vernon 1972 & Supp. 1985).

216. A "budget balanced" district possesses enough local tax wealth that it receives only its per-capita apportionment from the Available School Fund and nothing from the Foundation School Fund. This is because its local fund assignment, when added to its per-capita grant, exceeds the local cost of the Foundation School Program. See B. WALKER & W. KIRBY, *THE BASICS OF TEXAS SCHOOL FINANCE* 20-21 (Tex. Ass'n of School Bds. 3d ed. 1984).

217. See Act of July 13, 1984, ch. 28, art. II, pt. B, §§ 1-16, 1984 Tex. Sess. Law Serv. 269, 347-52 (Vernon) (amending TEX. TAX CODE ANN. §§ 101.009(a), 152.122, 154.603(a), 181.202, 182.122, 191.122, 201.404, 202.353, 203.152 (Vernon Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 8814 (Vernon Supp. 1985); TEX. INS. CODE ANN. art. 412 (Vernon Supp.

this revenue to less affluent school districts.

In another unprecedented step, the legislature has placed a ceiling on the annual statewide cost of the Foundation School Program. Previously, the Foundation School Fund was always funded to the full extent of the statewide program cost because of its priority allocation from the general revenue fund of the state treasury.<sup>218</sup> That allocation remains unchanged, but under H.B. 72, the Commissioner of Education is to reduce proportionately each district's allocation in the event that the state's share of the Foundation School Program exceeds the amount appropriated for that year.<sup>219</sup> This provides yet another reason for districts to carry substantially larger operating reserves than they have in the past.

#### D. Appropriations

For the 1984-1985 school year, H.B. 72 appropriates approximately \$4.65 billion to the Foundation School Program, of which about \$4.12 billion is appropriated from the Foundation School Fund.<sup>220</sup> Approximately \$5 million is appropriated to the Texas Education Agency.<sup>221</sup> The total appropriation for the fiscal year ending August 31, 1985, is just over \$4.7 billion.<sup>222</sup>

### VII. CONCLUSION

Considering the haste and pressure under which it was drawn, H.B. 72 is a remarkable piece of legislative work. In its major features, it strongly echoes an emerging national consensus on the need for a more effective public school system. While the underpinnings of that consensus may be more intuitive than empirical,<sup>223</sup> it is obvious that

1985); TEX. ALCO. BEV. CODE ANN. § 205.02(a) (Vernon Supp. 1985); TEX. PROP. CODE ANN. §§ 71.202, 73.401(c) (Vernon Supp. 1985); TEX. EDUC. CODE ANN. § 30.83 (Vernon Supp. 1985); and adding *id.* § 11.031).

218. See TEX. REV. CIV. STAT. ANN. art. 4364a, § 3 (Vernon Supp. 1985) "The comptroller shall transfer from the general revenue fund to the foundation school fund an amount of money necessary to fund the foundation school program . . ." *Id.*

219. See TEX. EDUC. CODE ANN. § 16.254(d) (Vernon Supp. 1985).

220. See Act of July 13, 1984, ch. 28, art. VIII, § 1, 1984 Tex. Sess. Law Serv. 269, 456-57.

221. See *id.* § 3 at 457.

222. See *id.* § 5 at 458.

223. See M. KIRST, WHO CONTROLS OUR SCHOOLS? AMERICAN VALUES IN CONFLICT 7-21 (Stanford Alumni Ass'n 1984); Yudof, *Educational Policy Research and the New Consensus of the 1980's*, PHI DELTA KAPPAN, Mar. 1984, at 456, 458-59.

the movement for reform has gained great force in Texas.

At this writing, few major changes to H.B. 72 seem likely to emerge from the current regular session of the Texas Legislature. Although a multitude of bills have been filed in the House, relatively few carry the endorsement of the new State Board of Education.<sup>224</sup> In the Senate, most of the proposed changes have been incorporated into a single omnibus bill, some parts of which have also been supported by the State Board.<sup>225</sup> These measures would refine, but not fundamentally alter, the basic structure of H.B. 72.

Nevertheless, H.B. 72 has many rough edges that need to be sanded. An educational malaise of sorts appears to have pervaded the legislature itself, judging by the abundant errors in grammar and usage H.B. 72 contains, especially in the appraisal and career ladder provisions. Questions of interpretation abound, and it is too early to tell what success the State Board of Education, the Texas Attorney General, or the courts will have in resolving them. Some parts of the statute need fixing right away, such as the unrealistic penalty for unexcused absences, the meaningless percentile score requirement for advanced placement, and the greatly overburdened student discipline provisions. The minimum class size requirements are apt to be more costly than envisioned. And, the school finance provisions raise the perennial question of disparity in per pupil expenditures between rich districts and poor districts because of variations in local tax bases.<sup>226</sup>

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224. The recommendations of the State Board of Education for the current legislative session appear in the minutes of the State Board for Feb. 9, 1985. See Tex. Educ. Agency, State Board of Education Agenda, app. B, at 6-8, 144-164 (Mar. 9, 1985). The House bills incorporating the State Board recommendations and affecting H.B. 72 are: Tex. C.S.H.B. 408 (expanding and clarifying student discipline provisions), 69th Leg. (1985); Tex. H.B. 1523 (eliminating 90th percentile requirement from advance placement examinations), 1731 (modifying extracurricular rules for handicapped students), 2307 (relaxing testing requirements for currently certified teachers and administrators), 2309 (price differential index), 2165 (speech/audiology professionals), 69th Leg. (1985).

225. See Tex. C.S.S.B. 525, 69th Leg. (1985). State Board recommendations related to H.B. 72 are incorporated in part A, § 1 (testing currently certified teachers and administrators), part B, § 2 (appraisal process), part C, § 1 (advance placement examinations), part E, § 1 (extracurricular activities, handicapped students), and part F, § 1 (expulsion of students). See Tex. Educ. Agency, State Board of Education Agenda, app. B, at 152, 158, 159-160, 162-164 (Mar. 9, 1985).

226. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (upholding constitutionality of Texas school financing system against claim of discrimination by students in "poor" school districts); see also *Edgewood Indep. School Dist. v. Bynum*, No. 362,516 (Dist. Ct. of Travis County, 250th Judicial Dist. of Texas, May 3, 1984) (pending Texas case).

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Even so, H.B. 72 promises tangible improvement in the Texas public school system and deserves the best efforts of Texas lawyers, judges, school officials, teachers, parents, and students.