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The contracts and this explanatory information have been completely reviewed and slightly revised since the last full issuance of the package for use in the 2005-06 school year.

I. The Contracts Themselves

This set of materials contains nine documents that are contracts of one kind or another:

- Probationary Contract
- Multiple Assignment Probationary Contract
- Multiple Assignment Probationary Contract with Special Conditions
- One-Year Term Contract
- Multiple Assignment One-Year Term Contract
- Multiple Assignment One-year Term Contract with Special Conditions
- Multiple Year Term Contract
- Employment Agreement-Issued by Board of Trustees
- Employment Agreement-Issued by Superintendent

Education Code § 21.002(a) and (b) make it absolutely clear that only **five** classes of school employees are required to be employed by statutory probationary or term contracts: **classroom teachers, principals, counselors, librarians, school nurses.** Education Code § 21.002(c) requires a local policy to say who else will receive a term contract. Also, according to Education Code §§ 21.101(a) and 21. 201(a), probationary and term contracts are not required except as provided by § 21.002(a) or local policy. These understandings are central to the approach we will describe in Part III below.

Notice the following provisions in all the contracts and the Employment Agreements:

★ Paragraph 1 of the Chapter 21 contracts (the first seven documents listed above) establishes that the term of the contract is for a number of calendar months within the stated school year. The probationary contract states a 10-month term; the others leave a blank for the district to fill in 10, 10 ½, 11, or 12 months. The contract specifies that the term is **calendar months**. These contracts are **NOT** for a specific number of days.

- We strongly recommend against any contract or compensation system that ties compensation to a specific number of days of service; we have recommended against this for years. Professionals are not piece-meal laborers who are paid by the day; they are professionals who contracted to do a job for you for an annual salary (or at least a stated monthly salary). You reasonably expect them to work as many hours and as many days as necessary to complete the work you hired them to do. They are not generally required to work on holidays or other days designated in the school calendar for Fall, Spring, or Winter Break. If they do, that is either their own choice—and without compensation—or as a function of supplemental duties for which they receive a stipend that is intended to compensate them for additional time and work associated with that duty.

- The potential danger of contracting for a certain number of days or of communicating a specific number of days is illustrated by a Decision from the Commissioner of Education, where a teacher complained that he was required to attend high school graduation after he had already provided 187 days of service and that he was entitled to an additional day's pay. Even though his contract stated a 10-month term, it also referenced "hours and dates set by the District." The Commissioner relied on that language and other documents available on the district's website that appeared to link compensation with specific days of service to initially propose that the appeal should be granted and the teacher paid an additional day's pay. Although the Commissioner ultimately determined that she did not have jurisdiction over the appeal because there was no violation of the written contract and she could not grant any other relief, the decision determined that despite the contract language, the district had established a 187 day work year and could not increase that number after the school year began.[1]

- We realize that the recommendation to stop using days of service as a compensation benchmark may seem a startling departure from long-established practice. However, we note that both these model contracts and the TASB models have **always** been stated as months of service. Payroll systems can easily be adjusted to calculate months rather than days; the accrual method is likely much more amenable to months of

[1] *Kelley v. North East ISD*, Dkt. 026-R10-1101 (Comm'r of Educ. 2006). This case in on appeal to the state courts.

service than days. We are happy to discuss this with you individually at greater length.

- ★ At paragraph 2, we remove any reference to the state minimum salary schedule. The contract already states that it conforms to state law, which includes the minimum monthly salary based on years of experience. Referencing only the salary schedule approved by the Board makes the contract more flexible for the District. The last sentence calling for annualizing pay will protect district employees from additional tax penalties associated with implementation in 2009 of IRS rules regarding "annualized" compensation and when it must be treated as "deferred" compensation.
- ★ Paragraph 3 contains the language required under Tex. Educ. Code § 21.415 for Chapter 21 contracts. It is included also in the employment agreements in order to permit other employees to receive additional compensation under the state incentives or a local plan for performance incentives.
- ★ Paragraph 4 is a critical provision, which establishes the district's authority to change a person's particular assignment or duties. Those decisions generally should not result in any decrease in pay during the contract year. Under *Smith v. Nelson*,[2] the Commissioner of Education does not have jurisdiction to hear an appeal of a reassignment unless the compensation is reduced during the contract year.
- ★ Paragraph 5 conditions the contract on the person's having all required certifications or licenses. This paragraph also includes a reference to teachers' obligation to have "highly qualified" status under NCLB, as required by state and federal law.
- ★ Paragraph 6 pertains to the disclosure of relevant criminal history and establishes the district's authority to obtain a report of an employee's criminal history at any time during employment.
- ★ Paragraph 7 deals with the consequences of failure to present or maintain certification or highly qualified status and reflects both the statute at Texas Education Code section 21.003 and the 5th Circuit's decision in *Nunez v. Simms*,[3] both of which indicate that a contract is void if the employee loses his certification or her emergency/temporary permit expires. Since the contract is void, the employee is not entitled to any procedural requirements

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[2] *Smith v. Nelson*, 53 S.W.3d 792 (Tex. App.—Austin 2001).

[3] *Nunez v. Simms*, 341 F.3d 385 (5th Cir. 2003).

before the Board can end the employment relationship by taking action in a board meeting.

- ★ Paragraph 9 explicitly allows the district to recover the cost of missing equipment and overpayments of compensation or other amounts owed to the district (such as charges for lunches). Note, however, that this provision will not allow the district to use "self-help" to recoup the cost of lost computers, laptops, PDAs, and so on. Under Tex. Educ. Code § 31.104 (e), issuance and responsibility for that equipment is covered by a "side agreement" between the district and the employee.
- ★ These contracts contain no references to a particular assignment and are not labeled for "administrator," "classroom teacher," "counselor," and so on. To give the greatest effect the paragraph 4, regarding assignment and reassignment, a contract should not contain an indication of the employee's position or assignment. Individuals are hired as professional employees, subject to assignment, for the stated term, at an annual salary approved by the Board of trustees. This approach does not guarantee that an administrator who is reassigned to some other position, even though the pay remains the same, will not attempt to claim that he or she has had a contract right affected somehow. However, *Smith v. Nelson*, cited earlier provides an argument that the Commissioner could not hear such an appeal.
- ★ The Multiple Assignment Contracts provide clearly defined authority for the District to assign and reassign coaching or other duties under the contract and make clear that when the District terminates or non-renews the contract based on performance or misconduct in any portion of the assignment, that action applies to the entire employment relationship.
- ★ These contracts contain no references to supplemental duties. See Part II below for a fuller explanation of the issues surrounding supplemental duties.
- ★ A final **NOTE** in each contract below the signature lines makes clear that no binding agreement exists until the employee has signed the contract and the Board has approved the Superintendent's recommendation for employment. Note also that the Board President signs on behalf of the district, <u>not the Superintendent</u>.

We call your attention to the following specific provisions of the various contracts:

- ★ Paragraph 1 of the Probationary Contract and the Multiple Assignment Probationary Contract states that when the contract begins after the first day of instruction, "no part of service under this contract shall fulfill any portion of the probationary period" required by Education Code 21.102(b).

- ★ This language is consistent with the Commissioner of Education's decision in *Young v. Lipan ISD*[4] that teachers must be employed for an entire school year to satisfy one year of probationary status, that is, "the number of days school is in session during the normal time period a student remains at a particular grade level."[5]

- ★ Therefore, in order to fulfill the general requirement[6] of serving at least a one-year probationary contract before being eligible to receive a term contract, under the Commissioner's current interpretation, a second probationary contract is required for any one who begins employment after the first day of instruction, *even if the person was employed in public instruction five of the last eight years.*

- ★ An alternative approach is to use Education Code § 21.401, which requires a contract between a school district and an educator (other than a diagnostician) to be for a minimum of 10 months' service, to support a policy that requires many late hires to be employed under an Employment Agreement. It is true that an employee hired even one day after the beginning of the school year cannot possibly fulfill 10 months of service. But it may be argued that the legislature intended teachers to have a contract with certain statutory protections—protections beyond those found in the Employment Agreement we are recommending.

- ★ A reasonable policy approach would be to permit those late hires who begin service during the first month of school to receive the probationary contract (even though it won't count as a year of probation), but require all late hires after the date set in policy to receive an Employment Agreement for the first period of employment. A probationary contract should then be offered for the first full year of service if the person is re-employed the following year.

- ★ The use of the Employment Agreement is especially appropriate when someone is hired at mid-term because the district is not required to give 45 days notice of termination or re-hiring. Thus, administrators have the full

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[4] Dkt. 102-R1-496 (June 1996). Although *Lipan* was decided under the former TCNA, the pertinent statutory language regarding a probationary contract and probationary period is identical.

[5] Dkt. 102-R1-496 at 11.

[6] Tex. Educ. Code § 21.202. The 2003 Legislature amended Education Code § 21.202 to **permit** boards to employ "experienced classroom teachers and principals" directly to term contracts, without the necessity of any probationary contracts. Our recommendation remains that **all** new professionals serve at least one year of probation. Any deviation from this requirement should be policy based and well thought-through before implementation.

semester to appraise the teacher and decide whether to offer employment under a probationary contract for the following year.

- ★ The package contains two versions of the Probationary Multiple Assignment Contract and the Term Multiple Assignment Contract. The first one is the traditional dual assignment or multi-assignment contract, which ties two positions—often teacher-coach or teacher-band director—together, so that resigning one means resigning both (see paragraph 10), unless the Superintendent or the Board allows the person to stay in one assignment. The second one contains a new provision (paragraph 11) in ALL CAPS that makes clear that the person was hired on the specific request of a head coach or athletic director and that the ending of that head coach's or AD's employment can provide a basis for ending that person's employment, also. Such a provision is a "special condition of employment" as contemplated by a nonrenewal reason in the DFBB (LOCAL) policy. Thus, the district can decide on an individual basis whether to offer the standard multiple assignment contract or one with special conditions.

- ★ The package contains two versions of our Employment Agreement. One is an agreement between the **Board** and the employee; the other is between the **district** and the employee and is issued by the Superintendent. Generally, an Employment Agreement should be used to employ any one who is not otherwise eligible to receive a probationary or term contract by law or policy and with whom the district wishes to make a mutually binding employment relationship for a definite period of time, for instance a late-hired teacher or counselor or a part-time, i.e., less than full-time and full-year, teacher. Which version a district uses is a matter of preference between the Superintendent and Board and may depend in part on the positions enumerated in the policy.

- ★ An Employment Agreement is a common law contract—the same contract under which virtually all professional school employees were employed prior to 1981 when the Term Contract Nonrenewal Act was originally enacted. As explained more fully below, the law permits the employment of **any one who is not a classroom teacher, principal, librarian, counselor, or nurse** under an Employment Agreement**.**

- ★ The critical provisions are paragraphs 10-12: Either party may end the employment relationship without any procedure or penalty whatsoever by giving the other party the specified days' written notice. We have suggested 60 days in the Board's Agreement and 45 days in the Superintendent's Agreement. However, the days' notice are at the district's discretion and can

be lengthened or shortened to meet the district's needs. The employee may be dismissed with less than the specified days' notice for good cause, after a due process hearing before the Board or the Superintendent (depending on who did the initial hiring). The Agreement expires at the end of the stated term, unless the Board takes specific action to renew and notifies the employee of the action. No further process or hearing is required.

Regardless of the district's decisions on the issues raised in Parts II and III of these materials, these contract forms will benefit the district and provide greater flexibility in employment decisions. The contracts stand independent of the district's approach to supplemental duties or a decision to give statutory contracts only to those categories of employees who are entitled to receive them by statute.

II. Supplemental Duties: The Perennial Issues

One of the thorniest contract issues for public schools arises from the questions of how best to deal with the reality that school districts often need their teachers to perform other duties related to extracurricular activities, most significantly in the athletic program. In December 1997, the Commissioner of Education issued a decision, *Salinas v. Roma ISD*, in which he indicated that there are only two ways to deal with supplemental duties:

- ★ Districts may issue a multiple-assignment contract that links the primary and secondary duties (teacher-coach, teacher-band director, etc.), or
- ★ Districts may use the probationary or term contract and assign the supplemental duties on a purely at-will basis.

The *Salinas* decision interpreted a contract that authorized the district to assign supplemental duties and concluded that because the supplemental duties were contemplated by the contract, those duties could be removed only through the Chapter 21 nonrenewal or termination processes. Our solution to this problem is to remove any mention of supplemental duties from the contracts altogether. If there is no mention of supplemental duties in the contract, there is no basis to conclude that some process is necessary to assign or remove those duties.

The multiple-assignment approach: In this approach, there are not really supplemental duties at all. All the assigned responsibilities—teaching and coaching or other assignments—are contractual. The contract forms in this package do not specify what any of the assignments are, so the district should be able to avoid the argument that the person is entitled to some (usually) coaching assignment. However, regardless of the assignments, any dollar amount associated with the non-teaching assignment is part of the contracted compensation. Thus, if for some reason

the district removes coaching duties during a contract term under a multiple assignment contract, it should continue to pay the additional money associated with the coaching duties in order to avoid a valid appeal to the commissioner.

Many small districts choose this option because they do not have any excess slots for a teacher-coach who wants to stop coaching, but keep teaching. If the district continues to state that the contract is for "teacher-coach," then the obvious drawback is that if a district wants to remove that teacher from the non-teaching duties, it arguably must follow the statutory process for suspension without pay, termination, or nonrenewal of employment.[7] The language of paragraph 10 in the Multiple Assignment contracts should allow the District to reassign someone out of coaching or other duties during the contract term so long as the District continues to pay any portion of the salary that was related to the coaching duties. On the other hand, if the employee wants to resign from the coaching, he or she generally must resign from employment completely.

Using a multiple assignment contract is not a significant hardship on the district **provided it establishes and uses** an evaluation process to deal with performance in the non-teaching duties. Furthermore, deficiencies in the coaching assignment must be documented and shared with the employee just as teaching deficiencies are documented and shared so that if the district wishes to nonrenew based on problems in the non-teaching duties, it will have a case to present.

The Special Conditions versions of the multiple assignment contracts provide greater flexibility to the district and recognize the reality of Texas high school athletics in that Athletic Directors or Head Coaches often expect to be able to bring in their choice of assistant coaches. The Special Conditions contracts should be used for those employees who are hired under such circumstances because paragraph 11 provides a built-in easy nonrenewal (we would caution against using it for termination).

If you choose the multiple assignment approach, you will use two documents from this package: (1) the appropriate multiple-assignment contract (probationary or term, with or without Special Conditions) and (2) the Notice of Assignment and Salary. **Do not use the Notice of Supplemental Duty and Stipend** because the employee has no supplemental duties and no "stipend." All compensation is contractual and binding on both the district and the employee. The "annual salary rate" line on the Notice of Assignment and Salary will include the amount for teaching and the amount for coaching.

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[7] *Hester v. Canadian ISD*, Dkt. 106-R1-585 (Oct. 1985); *Salinas v. Roma ISD*, Dkt. 058-R3-1196 (Dec. 1997).

The contract plus at-will assignment approach: The probationary or term contract covers the teaching responsibilities only. Any supplemental duties are assigned by the Superintendent and are not part of the contract. The assignment is a purely at-will arrangement that provides no entitlement to the employee for any particular supplemental duty or supplemental pay. **Either party** may set aside the supplemental duty without affecting the person's right to employment in the district under the contract. This approach has the advantage of easy, low-risk termination of the supplemental duty but has the disadvantage that the employee can "walk out" on the duties at any time.

This approach is often used with supplemental duties, such as class sponsors, newspaper or yearbook sponsor, UIL academic sponsor, department chair, etc. It can, of course, be used for coaching assignments, as well, when there is no downside to the school district if a coach decides he or she does not want to coach anymore.

This approach requires using three documents from this package: (1) the appropriate contract (probationary or term), (2) the Notice of Assignment and Salary, and (3) the Notice of Supplemental Duty and Stipend.

III. Contract Policy Considerations

From a legal perspective, the best contract policy is one that awards the statutory contracts—probationary and term (and their permutations: multiple assignment, multi-year)—only to those classes of employees that are mandated by statute to receive them: classroom teachers, principals, librarians, counselors, and nurses. It is always in the Board's best *legal interest* not to give someone more rights than she is entitled to by law. Furthermore, the Commissioner of Education has recognized that this is a legitimate approach to contracting.[8]

We call particular attention to the fact that an employee who is not engaged in instruction for credit an average of at least 4 hours each school day is **not a classroom teacher and not eligible by law for a Chapter 21 contract**. Thus, head coaches or athletic directors who do not meet the definition of classroom teacher may be employed under an Employment Agreement rather than a Chapter 21 contract. An Employment Agreement allows hiring a Head Football Coach who is directly responsible for instruction only one or two classes each day on a two- or three-year Employment Agreement under whatever terms are mutually acceptable.

The policy suggestions in this package use the policy code designations promulgated by the TASB Policy Service in its Localized Policy Manual system. The

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[8] *Dibble v. Keller ISD*, Dkt. 148-R10-798 (Feb. 2000); *Robinson v. Memphis ISD*, Dkt. 024-R2-1001 (July 2003); *Bollinger v. Memphis ISD*, 025-R2-1001 (July 2003).

recommendations labeled DCA (LOCAL), DCB (LOCAL), and DCE (LOCAL) establish the foundation for limiting the award of statutory contracts only to those who must receive them. The policies follow the approach taken by many districts in the 1980s to revoke the probationary/continuing contract scheme of former Chapter 13, Subchapter C, in favor of term contracts. The effective date of the policies becomes the dividing line.

Restricting probationary and term contracts to the statutory categories of employees creates two issues: (1) what is procedure for employees currently employed under a probationary or term contract who do not qualify for the contract under the new policy? (2) what is the procedure for new hires who may be certified professionals but do not qualify for a probationary or term contract under the new policy?

Procedure for Current Employees

Policies DCA (LOCAL) and DCB (LOCAL) in these materials contain transition clauses for current employees who would not be eligible for a probationary or term contract under the new policy. Not only does this make political sense, we also believe it is legally required.[9]

- ★ **Probationary Contracts** Employees under probationary contracts have significantly fewer rights than term contract employees, and the transition provisions reflect that difference. Any probationary contract employee who has earned an entitlement to a term contract will receive one, but the district will use the required statutory process to terminate the employment at year end of any one who is not entitled to a term contract under local policy. Employees who are terminated under this process are offered immediate re-employment under a non-Chapter 21 Employment Agreement if they are otherwise recommended for employment.
- ★ **Term Contracts** Current term contract employees are "grandfathered" under the new policy and will be eligible for a term contract so long as they continue to be recommended for employment and otherwise meet the requirements for term contract status. Thus, the change in policy will not have the effect of "substituting something entirely different" for the statutory term contract and its procedural requirements.[10] The policy also includes a provision to permit employees in affected positions to resign the statutory term contract and accept employment under an Employment Agreement.

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[9] *Central Educ. Agency v. George West Indep. Sch. Dist.*, 783 S.W.2d 200, 202 (Tex. 1989).

[10] *Id.*

Procedure for New Hires

As of the effective date of the new policies DCA (LOCAL) and DCB (LOCAL), new hires will receive a probationary contract and eventually be eligible to receive a term contract only if they fall within one of the statutory categories: classroom teacher, principal, counselor, nurse, or librarian. Policy DCE (LOCAL) in these materials provides a suggested list of those positions for which the Board might want to issue a non-Chapter 21 Employment Agreement.

In effect, policy DCE (LOCAL) establishes the default employment relationship for those positions where the Board needs the stability of a mutually binding agreement for a specific period of time, often a school year, without the rigorous statutory procedures imposed by Chapter 21 probationary and term contracts. The covered positions listed in the policy are our recommendation, but the list can be modified as the Board deems appropriate for the District. The remainder of the policy reflects the key provisions of the agreement pertaining to resignation, dismissal, and suspension and sets out the procedural requirements for any hearing that is requested. We provide two versions of DCE (LOCAL) to match the two versions of the Employment Agreement: one retains the authority to the Board for hiring and termination, the other delegates that authority to the Superintendent.

Although we believe it is in the Board's best interest to act as quickly as is prudent to implement these policies, we also recognize that an orderly transition requires time to discuss, plan, and communicate. Remember that **no one currently employed by a statutory term contract will be forced to give up that status by implementing these policies**.