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CONGRESS PROVIDES \$830 MILLION FOR TEXAS SCHOOLS, BUT GOVERNOR MUST ACT

On August 10, Congress set aside approximately \$10 billion for states to spend to save public school teachers' jobs.¹ Saving jobs helps today's economy and protecting education helps tomorrow's economy. Texas' share of the total is about \$830 million. The U.S. Department of Education estimates that this will pay for about 14,500 Texas teachers and other personnel. As this paper explains, both technical and legal questions must be answered before Texas can draw down its share. But Texas should be able to access these funds to help our schools and economy.

Why is Congress offering Texas this money?

Congress offers money to states to achieve important national goals. In this instance, Congress is helping our nation's economy recover from a severe economic recession and protecting our nation's schools from devastating teacher layoffs.

What must Texas do?

When Congress offers money to help states, Congress often conditions the money on the state doing its fair share. Like when your Uncle Sam offers to pay part of your college tuition, but only if you get a job to pay the other part.

Here Congress is merely asking Texas to spend what it has historically spent on public education. A provision of this sort is called a Maintenance of Effort (MOE) requirement. Congress set out two MOE provisions, a national MOE and a Texas-Only MOE, both of which apply to Texas.

The national MOE asks the states to do one of three things for state fiscal year 2011:

1. Keep state support for public education and higher education at least at the *level* of fiscal 2009. Public and higher education are calculated separately. Support for public education may be calculated either in total dollars or expenditures per pupil. Support for higher education does not include support for capital projects, research and development, or tuition and fees paid by students;
2. Keep state support for public education and higher education at least at the percentage of "total revenues available to the state" as the *percentage* provided in fiscal 2010. Again, public and higher education are calculated separately.
3. Or, a third option available only to states that collected less taxes in 2009 than 2006, which we do not discuss because this group does not include Texas.²

Texas fiscal year 2011 begins on September 1, 2010. To qualify for the federal dollars, Texas must project today that when the state looks back on fiscal year 2011, the state will have either held spending level compared to 2009 or kept spending at the same percentage of state revenue as in 2010.

The Texas-Only MOE requires a separate calculation from the national MOE. The target in the Texas-Only MOE is for Texas to maintain state support in state fiscal years 2011, 2012, and 2013 at the same percentage of total revenues available to the state as were provided for fiscal year 2011 before the federal legislation was enacted.

Congress imposed a Texas-Only MOE because of congressional dissatisfaction with how Texas used the Recovery Act funding in 2009 to protect the state's Rainy Day Fund rather than increase spending on education. Whatever you think about the appropriateness of the Texas-Only MOE, it isn't a hard target to hit. Texas faces a budget shortfall for both 2011 and 2012-13. Congress is merely asking that in exchange for \$830 million, if cuts are necessary, the state not cut education more than its proportionate share.

Before Texas can draw down these federal dollars, the state must resolve any questions about the calculations for the national MOE and the Texas-Only MOE. Texas will need reasonable guidance from the Obama Administration about what counts as "state support" for public and higher education and what counts as "total revenue available to the state." With reasonable guidance, Texas ought to be able to make the numbers work.

Is the MOE a target or a contract?

Assuming the numbers work, however, before Texas can get its share of the money, Congress requires the Governor to make certain assurances. This requirement has sparked a controversy in Texas. The Governor has suggested that the legislation is unconstitutional or would require him to do something unconstitutional because he has no authority to bind the Texas Legislature. In other words, the Governor cannot promise what the Legislature will spend for education in 2011, 2012, or 2013. If that were what Congress required, the Governor would be correct. But Congress isn't asking the Governor to bind Texas. The national MOE and the Texas-Only MOE are targets, not contracts.

Under the national MOE, if a governor fails to make an application for funding, the U.S. Secretary of Education can nevertheless send a state its money as long as the Secretary determines that the MOE is "likely to be met." Thus, the only "assurance" Congress seeks is the assurance that a state is likely to meet the MOE.

The Texas-Only MOE is different from the national MOE in an important way. Under the Texas-Only MOE, if the Texas governor fails to make an application for funding, the Secretary cannot send Texas its money. *Congress is requiring that the Texas governor apply for the money for Texas to receive its share.*

But the Texas-Only MOE is the same as the national MOE with regard to what the Governor must "assure." The Governor need only assure that Texas is likely to hit the target. The legislation does not require the Governor to bind the state, and the legislation does not require that Texas return any money if the state misses the target, nor does the legislation penalize Texas in any other way. Any other interpretation of the legislation would make it unconstitutional and would therefore be a disfavored reading.

When the federal Recovery Act was passed in 2009, similar constitutional questions arose and were resolved without difficulty.³ Indeed, the Governor made a similar assurance then to draw down the federal dollars used to balance the Texas budget in 2009 as he is being asked to make now to draw down education dollars. Given the high priority that Texans place on public education and the strength of our economy, the Governor ought to be able to assure the federal government that Texas is likely to hit this target.

How must local school districts spend the money?

Local school districts must spend the money "only for compensation and benefits and other expenses, such as support services, necessary to retain existing employees, to recall or rehire former employees, and to hire new employees in order to provide early

childhood, elementary, or secondary educational or related services.” The money can be spent to keep employees, to rehire employees, or for new employees or for support services to accomplish any of those job goals. These federal dollars would be enormously helpful to public education.

Conclusion

Both public education and the state economy stand to gain from an infusion of \$830 million federal dollars into Texas schools. But the Obama Administration must provide reasonable guidance on the MOE calculations and must construe the MOE as a target, not a contract. Under those conditions, it would be unconscionable for the Governor not to provide the assurances necessary for Texas to get its share of these federal dollars.

¹ The legislation is contained in Senate Amendment 4575 to House Resolution 1586, which is available on the Library of Congress’s website Thomas, <http://thomas.loc.gov/>. The President has signed it.

² Subdivision (10) Maintenance of Effort, part (A) lists “(i); (ii); or (iii). The use of “or” is inclusive, meaning “any one of the following,” as in Uncle Sam saying to his nephew, you may mow the lawn, carry out the trash, or, if you are too tired, set the table. The nephew must choose only one chore.

³ See Congressional Research Service Memo (March 17, 2009) at: <http://lgraham.senate.gov/public/files/pdfs/CRSReport.pdf>.