

Questions to Consider in Implementation of SB191

Below are questions commonly raised about implementing specific components of Senate Bill 191. This information is not intended as legal advice but instead is meant to encourage districts to discuss these issues with their own legal counsel and employee groups as districts move forward with implementation.

PORTABILITY – SB191 defines “portability” as the ability of a teacher to take his or her nonprobationary status from one school district to another. Portability is based on the assumption that statewide evaluation standards will create evaluations that are consistent across the state and that the status attained from those evaluations should be recognized across districts.

When does the portability of a nonprobationary status need to be recognized?

According to the statute, portability on nonprobationary status begins with the 2014-2015 school year.

The statute also says that nonprobationary status is not recognized unless the teacher can provide two consecutive evaluations of effectiveness in good standing (and two years of student academic growth data).

Nonprobationary teachers won't have two evaluations based on effectiveness until spring 2015.

Will a teacher who has been unemployed for a period of time be able to take advantage of portability?

The statute says portability applies to a teacher “who is employed by a school district and is subsequently hired by a different school district.” So the answer would appear to be no.

How are the “two year” and “two consecutive” references calculated in the statute?

According to the statute, the teacher must provide “two consecutive performance evaluations with an effectiveness rating in good standing” and also “provide evidence of his or her student academic growth data and performance evaluations for the prior two years.”

Can an applicant voluntarily waive portability?

Portability does not occur automatically. The statute says that a teacher “may” seek nonprobationary status and puts the burden on the teacher to request and to demonstrate eligibility for nonprobationary status. If he or she does not do so, then the status of the teacher in the new hiring district is probationary.

How long after hiring does a teacher have to request and demonstrate nonprobationary status?

The statute does not address this point. Districts are encouraged to address this through policy language. Districts should make it clear through such policies that a teacher seeking recognition of nonprobationary status do so either during the hiring process or within a short, defined period of time after hire.



What HR practices can be used to mitigate potentially negative consequences of portability?

Because an applicant was nonprobationary in a prior district and may be eligible for portability does not guarantee that applicant a position. The applicant is still subject to standard HR pre-hire processes, including reference and background checks.

Can a district require a teacher to waive the portability of his or her nonprobationary status as a condition of hire, or, alternatively, establish a local policy that teaching positions which are open to outside hires may only be probationary positions?

An attorney for the State of Colorado has issued an opinion that a school district cannot by policy or otherwise abrogate the eligibility for nonprobationary status by conditioning employment on an involuntary waiver of that status.

However, other legal experts have expressed concern that limiting the ability of a district to define the nature of its positions and the status of its employees repeals the constitutional and statutory nondelegable duties of local boards with respect to hiring.

Some educators believe that the assumption on which portability is based is flawed, that there are still challenges to obtain inter-rater reliability with respect to evaluations and that each district is implementing the 50 percent growth component of the evaluation differently.

In light of these concerns, some districts may be willing to take a strong position and not recognize portability, or, alternatively, list all positions open to outside applicants as probationary. Other districts may seek a middle ground and allow a nonprobationary teacher who brings the requisite proof of effective evaluations and student growth from his or her prior district to obtain nonprobationary status in the new district after one year if the teacher is effective in that first year.

DISTRICTS ARE STRONGLY ENCOURAGED TO CONSULT WITH LOCAL LEGAL COUNSEL ON THESE ISSUES.

ACQUISITION AND LOSS OF NONPROBATIONARY STATUS - SB191 changed the manner in which nonprobationary status is acquired and lost.

How is nonprobationary status acquired?

To acquire nonprobationary status, a probationary teacher must demonstrate three consecutive years of effectiveness.

Does an evaluation of partially effective count toward the acquisition of nonprobationary status?

No, an evaluation of partially effective is not an effective evaluation and will not count toward the acquisition of nonprobationary status.



What is the consequence of the failure to obtain three consecutive years of effective evaluations?

The teacher remains a probationary employee and subject to nonrenewal.

Must a district nonrenew a teacher who has failed to obtain nonprobationary status?

No, a district can retain a probationary teacher as long as it desires.

What if a district fails to give a teacher notice by June 1 that the board has acted to nonrenew his or her employment?

The teacher will be deemed to be re-employed for the succeeding year. This part of the Teacher Employment, Compensation and Dismissal Act (TECDA) did not change.

If a district fails to give notice of nonrenewal by June 1 to a probationary teacher who has completed three consecutive years of employment, what is the status of that teacher?

That teacher will be deemed to be re-employed for the succeeding school year. However, his or her status as a probationary or nonprobationary teacher will be based on whether the teacher has three consecutive years of effective evaluations. A teacher no longer automatically acquires nonprobationary status as a result of being retained for a fourth consecutive year.

If a probationary teacher receives an ineffective or partially effective performance evaluation, can he or she be nonrenewed without a period of remediation?

SB191 deleted the part of the statute that required a remediation period be provided to a teacher receiving an unsatisfactory evaluation rating. A probationary teacher with a less-than-effective evaluation rating need not be given a period of remediation prior to nonrenewal.

Can a probationary teacher who has received an effective evaluation be nonrenewed?

SB191 did not change that part of the law which says a probationary teacher can be nonrenewed for any reason deemed sufficient by the superintendent. However, if that effective evaluation is the third such evaluation in three consecutive years, that teacher has obtained nonprobationary status and cannot be nonrenewed.

Can a probationary teacher appeal a less-than-effective evaluation?

There is no statutory or regulatory provision for a probationary teacher to appeal a less-than-effective evaluation. However local policies or negotiated agreements may address the issue.

How does a teacher lose nonprobationary status?

A teacher loses nonprobationary status after two consecutive years of demonstrated ineffectiveness.

Can a teacher lose nonprobationary status based on ratings of partially effective?

The statute and regulation recognize that a partially effective rating is less than effective and a teacher can therefore lose nonprobationary status based on two consecutive years of partially effective or ineffective ratings.

Can a nonprobationary teacher appeal an evaluation rating of partially effective or ineffective?

The statute and regulations provide that a nonprobationary teacher who objects to a second consecutive evaluation rating of partially effective or ineffective has a right to appeal that rating.

Local policies and or bargaining agreements may address the ability to appeal or grieve the first such evaluation.

What are the requirements of the appeal process?

Colorado regulations provide detailed requirements about the appeal process. [ADD LINK] Section 5.04 of the rule requires the following, at a minimum: (1) the teacher is permitted one appeal; (2) the appeal is to the superintendent; (3) the teacher must file the appeal within 15 days of receiving the evaluation rating at issue; (4) the appeal must be concluded no later than 45 days following the teacher's receipt of that rating; and (5) the superintendent's determination and rationale (which shall be in writing) constitute the final determination regarding the performance rating and loss or retention of nonprobationary status.

On what grounds may a teacher appeal a second consecutive rating of partially effective or ineffective?

The grounds for the appeal are limited to the following: (1) the evaluator did not adhere to the requirements of statute and rule, and the failure had a material impact on the final performance rating; or (2) the data relied upon were inaccurately attributed to the teacher. The burden is on the teacher to demonstrate one or both of these grounds, and the grounds for the appeal must be provided in a written document at the time of the appeal.

Additional grounds for appeal may be provided by local policies or bargaining agreements.

Is a district required to use the state model appeal process that incorporates the use of a review panel?

Districts are permitted to develop an appeal process that is appropriate to the size and location of the school district. Each school district that adopts the State Model Evaluation System may choose either of the following two options: (1) to use the model appeal process that incorporates the use of a review panel; or (2) to develop its own distinctive process that adheres to the requirements of section 5.04 of the rules.

What is the consequence of the loss of nonprobationary status?

A teacher who loses nonprobationary status becomes a probationary teacher and is subject to nonrenewal.

Must a teacher who loses nonprobationary status be nonrenewed?

The statute does not require the nonrenewal of a teacher who loses nonprobationary status.

Are there timing issues related to the nonrenewal of a teacher who has lost nonprobationary status?

Because a teacher must receive notice by June 1 that the board has acted to nonrenew his or her employment, there are challenges related to the timely completion of the process. For example, student growth data may not be available until the following fall. Also, it is unclear whether the appeal process must be completed before a board can act to nonrenew the teacher. **DISTRICTS ARE STRONGLY ENCOURAGED TO WORK CLOSELY WITH THEIR LEGAL COUNSEL IN ADDRESSING THESE ISSUES and develop strategies that would avoid the need to retain a teacher who has obtained two consecutive less-than-effective evaluations for a third year.**

MUTUAL CONSENT AND SB191 - SB191 requires that each teacher employment contract contain a provision stating that a teacher may be assigned to a particular school only with the consent of the hiring principal and with input from a least two teachers employed at the school who were chosen by the faculty of teachers at the school to represent them in the hiring process. Teachers who fail to obtain a mutual consent placement within two months or two hiring cycles (whichever is longer) will be placed on unpaid leave.

(See The Colorado Education Initiative's publication "[Implementing Colorado Senate Bill 10-191: School District Guidance on Mutual Consent Hiring for Teachers.](#)")

To whom does mutual consent apply?

Mutual consent applies to the transfer of existing teachers. It does not apply to new hires or reductions in force (RIFs).

Does mutual consent apply to only displaced teachers?

A provision in the law makes it clear that mutual consent applies to displaced teachers. The extent to which it applies to teachers who are not displaced has been subject to interpretation. Some districts have interpreted the law narrowly to apply only to displaced teachers because they believe the selective use of administrative transfers remains a viable administrative tool. Others have interpreted the law more broadly to prohibit all transfers, including administrative transfers, without mutual consent.



What is the definition of “displaced” teacher?

A displaced teacher is a nonprobationary teacher who has lost his or her position due to a drop in enrollment; turnaround; phase-out; reduction in program; or reduction in building, including closure, consolidation or reconstitution.

Who is entitled to be part of a priority hiring pool?

SB191 provides that “any active nonprobationary teacher who was deemed effective during the prior school year and has not secured a mutual consent placement shall be a member of a priority hiring pool, which pool shall ensure the nonprobationary teacher a first opportunity to interview for a reasonable number of available positions for which he or she is qualified in the school district.”

Is a displaced teacher entitled to participate in a priority hiring pool solely as a result of that displacement?

Based on the language above, it appears that the right to participate in a priority hiring pool is only triggered when an effective nonprobationary teacher has failed to obtain a mutual consent position. Even though a displaced teacher is not entitled to participate in a priority hiring pool until after he or she has failed to obtain a mutual consent position, some districts have elected to create priority hiring for their displaced nonprobationary teachers.

What does a priority hiring pool look like?

The statute requires that active nonprobationary teachers with effective evaluations who do not secure new positions through school-based hiring (mutual consent) be placed in a priority hiring pool and given “a first opportunity to interview for available positions for which he or she is qualified in a school district.” No further requirements are given in the statute.

What protections does SB191 provide to displaced teachers?

Districts are required to work with their local teachers association or a committee that is composed of teachers and district staff to develop policies concerning displaced nonprobationary teachers. At a minimum, SB191 requires that when a teacher receives notice of displacement, the district shall immediately provide the teacher with a list of all vacant positions for which he or she is qualified as well as a list of vacancies in any area identified by the district to be of critical need. A displaced teacher shall make his or her application for a vacancy to the school principal.

SB191 also provides that when a principal recommends appointment of a nonprobationary teacher applicant to a vacant position, “the nonprobationary teacher shall be transferred to that position.”



Does a principal have the legal authority to make a hiring decision?

The mutual consent provision of SB191 appears to imply that a building principal has the authority to make a final hiring decision relating to the transfer of a teacher. However, some believe that this is inconsistent with another Colorado statute and a line of cases that provide that school boards, not principals, have exclusive hiring power and that such power cannot otherwise be delegated.

If the principal and the teachers providing input disagree, how is the hiring decision made?

The teachers provide input; the principal makes the decision.

Can a displacement create a RIF, and if so, what process should be followed?

This situation is particularly relevant in small school districts where there may be only one section of a grade and there is nowhere to place a teacher for a year. In this case it may be possible to treat the situation as a RIF and to follow the district's RIF procedures instead.

What happens if a displaced nonprobationary teacher fails to obtain a mutual consent position?

According to the relevant section of SB191, "If a nonprobationary teacher is unable to secure a mutual consent assignment at a school of the school district after 12 months or two hiring cycles, whichever is longer, the school district shall place the teacher on unpaid leave until such time as the teacher is able to secure an assignment."

What is the definition of a hiring cycle?

The statute does not define "hiring cycle." Some districts have identified two hiring cycles in a year; other districts have identified only one. This is a matter of local interpretation and HR practice.

What kind of position can a person be placed into if he or she fails to obtain a mutual consent position during the first hiring season?

According to the relevant section of SB191, "Nothing in this section shall limit the ability of a school district to place a teacher in a 12-month or other limited-term assignment, substitute assignment or instructional support role during the period in which the teacher is attempting to secure an assignment through school-based hiring." The statute does not address the rate of pay the teacher would be entitled to under such circumstances.

What statutory process is required before a teacher is placed on unpaid administrative leave?

The prevailing interpretation currently is that the TECDA hearing procedures do not apply when a teacher is placed on unpaid administrative leave after failing to obtain a mutual consent assignment. However, a lawsuit was filed in January 2014 asserting that placing a teacher on unpaid leave constitutes constructive discharge and that



the discharge of a nonprobationary teacher without due process violates the law. A bill was also filed seeking to prevent placing a teacher on unpaid leave without due process if he or she obtained nonprobationary status before 2010.

How long can a district maintain a person on unpaid administrative leave?

The statute does not expressly limit the period of time or provide for any circumstance other than obtaining a mutual consent position in that district which would end the unpaid leave. This condition has raised as yet unresolved questions about what should happen if the teacher obtains teacher employment elsewhere.

How are benefits handled for a person who is on unpaid leave?

The relevant section of SB191 provides when “the teacher secures an assignment at a school of the school district while place on unpaid leave, the school district shall reinstate the teacher’s salary and benefits at the level they would have been if the teacher had not been placed on unpaid leave.” This language seems to imply that the person is not entitled to continue to receive benefits during the period of unpaid leave. The issue of whether the unpaid leave constitutes a COBRA-qualifying event should be addressed with legal counsel.

Does the preceding mean that a teacher who returns from unpaid leave is entitled to be placed on the same step of the salary schedule he or she occupied when the teacher left or at a level that would include the period of leave?

Some believe the language is ambiguous in this regard. Bringing someone back who has not worked for the district for several years at a rate of pay that gives credit for that absence raises some equity issues and may conflict with other district leave policies. This issue has not yet been clarified legislatively or through the courts.