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The Illinois Public Employee Relations Report

Institute for Law and the Workplace

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Summer 2018

### Vol. 35, No. 3

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### Recommended Citation

Bloch, Robert; Himes, A. Lynn; Hodges, Terry L.; Roth, Mitch; Erickson, Barbara; and Vett, Jack, "Vol. 35, No. 3" (2018). *The Illinois Public Employee Relations Report*. 106.

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# ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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VOLUME 35

SUMMER 2018

ISSUE 3

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**The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.**

Published quarterly by the University of Illinois School of Labor and Employment Relations at Urbana Champaign and Chicago-Kent College of Law.

(ISSN 1559-9892) 565 West Adams Street, Chicago, Illinois 60661-3691

**EVIDENCE-BASED FUNDING:**

**A PRIMER ON THE ILLINOIS *EDUCATION-BASED FUNDING FOR STUDENT SUCCESS ACT***

**By Robert Bloch, A. Lynn Himes, Terry L. Hodges, and Mitch Roth**

\*Barbara Erickson and Jack Vrett - contributors

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## **RECENT DEVELOPMENTS**

**By Student Editorial Board:**

Johnny D. Derogene, Miranda L. Huber, Matt Soaper, and Nicholas M. Ustaski

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the first Amendments.

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**EVIDENCE-BASED FUNDING:****A PRIMER ON THE ILLINOIS EDUCATION-BASED FUNDING FOR STUDENT SUCCESS ACT****By Robert Bloch, A. Lynn Himes, Terry L. Hodges, and Mitch Roth****\*Barbara Erickson and Jack Vrett - contributors**

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Robert advises labor organizations on internal matters, has implemented and monitored union trusteeships, and supervises local and international union elections. He also advocates for unions on regulatory and legislative matters. Robert also represents individuals in the negotiation of employment and severance agreements, claims arising from employment discrimination and discharge, and recovery of underpaid wages.

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**Jack Vrett** is the former Chief Labor & Employment Counsel for the State of Illinois and Deputy General Counsel for Labor Relations for the Illinois Department of Central Management Services. He served as legal advisor for the State through some of the most challenging labor and employment matters in recent State history, including preparations for a statewide strike of nearly 30,000 state workers and a \$3 billion dispute between the State and its largest employee union.

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## I. INTRODUCTION

The Illinois Constitution provides that the “State has the primary responsibility for financing the system of public education.”[1] Despite this constitutional requirement for Illinois to adequately fund its public education system, however, many observers had

concluded that the state had one of the most inadequate and unequal methods for funding public education in the country. In the summer of 2017, following significant debate in the legislature, a Gubernatorial veto, a swift veto override by the General Assembly, and a corresponding temporary lapse in public education funding, the Illinois General Assembly enacted Public Act 100-0465, officially referred to as *Evidence-Based Funding for Student Success Act*, or simply “Evidence-Based Funding.”[2]

Evidence-Based Funding is a complete overhaul of the State’s public education funding system. In addition to adopting an evidence-based approach to education funding, the legislation includes other components intended to provide local property tax relief, mandated reforms, and charitable donation incentives to organizations that provide need-based scholarships to private and religious schools. The new law also includes provisions unique to Chicago Public Schools and reforms to the Chicago Teachers’ Pension Fund.

The impact of these changes will likely have a cumulative effect on labor relations in Illinois, with educational employers and labor organizations witnessing sweeping changes to education funding, including the opportunity for new resources in cash-strapped school districts. Moreover, the creation of voter-initiated referenda to reduce educational expenses to provide for local tax relief adds a new dynamic to the already challenging relationship between school boards and unions as they negotiate over wages and benefits.

This article provides a brief overview of the new funding law, including the basic mechanics of the Evidence-Based Funding model. Further, the article will also explore other features of the law, including its impact on Chicago Public Schools, the potential for voter initiated referenda to lower education expenses, and the controversial program that provides up to \$75 million in tax credits for charitable donations that help needy students attend private and religious schools.

## **II. OUT WITH THE OLD**

Initially, one needs a basic understanding of the State’s historical method of funding its public schools to appreciate how Evidence-Based Funding changes the landscape of funding education in Illinois. Under the old formula, two main State revenue grants funded public K-12 schools in Illinois - the Foundation Level Grant and the Low-Income Grant.[3] Both of these streams together made up what was commonly known as General State Aid or GSA.[4] The Foundation Level, which was set by the legislature each year, referred to an equalization grant whereby State funding was provided to school districts in an amount that, when combined with local resources, would bring total State and local resources per pupil to the amount of the Foundation Level.[5] The second historical revenue source, the Low-Income Grant, was not equalized and was based on the proportion of low-income students in a school district.[6] The amount paid through this grant increased as the proportion of low-income students in a school district increased.[7]



The Foundation Level has been set at \$6,119 per pupil since Fiscal Year 2010.[8] However, whether the State would actually meet the Foundation Level depended upon the legislature and the Governor annually appropriating the necessary funds. When that did not happen, payments to school districts were prorated and paid at the maximum percentage possible, given appropriation amounts.[9] Payments were prorated in seven of the last nine years.[10] The chart found in Appendix A depicts the foundational level, total legislative appropriations, percent of change in appropriations, the amount of any funding shortfall, and the percentage of corresponding proration for Fiscal Years 2008 to 2017.[11]

Inadequate funding from the State led directly to local property taxes becoming a significant portion of the total cost of public education in Illinois. According to the most recent data, local property taxes accounted for 63.2% of total education revenue.[12] The chart found in Appendix B depicts the historical percentage of funding from local property taxes and other funding sources, based on data compiled from the annual Illinois State Report Cards from 2008 to 2017.[13]

Because wealthier school districts typically have higher property tax values and can garner more resources from local property taxes, the inequity in education funding became more pronounced across the State. A 2015 study found that lower-income school districts in Illinois spent 19% less per pupil than high-income school districts.[14] The study also revealed that Illinois ranked worst in the nation with regard to funding education equally for high-income and low-income students.[15] Its authors concluded that while school districts with the lowest percentage of students in poverty spent an average of \$13,415 per pupil, school districts with the highest percentage of students in poverty spent an average of only \$10,874 per pupil.[16]

### **III. IN WITH THE NEW**

The Evidence-Based Funding model has effectively eliminated the inequity of the old model by directly associating school funding with the cost of education and available local resources. It eliminates five grant programs: General State Aid, Special Education Personnel, Special Education Funding for Children Requiring Services, Special Education Summer School, and English Learner Education by consolidating them into a single grant, called the Base Funding Minimum (“BFM”).[17] In Fiscal Year 2018, the Base Funding Minimum amount was the total of the gross payments, excluding adjustments applied in Fiscal Year 2017, for each of the five grants, with the exception of Special Education Summer School. School districts were to receive 100% of Fiscal Year 2017 Special Education Summer School claims, rather than the prorated amount school districts received in Fiscal Year 2017.[18]

Evidence-Based Funding also provides for additional State Aid over and above the BFM using a calculation aimed at moving school districts toward “adequate” funding. The Evidence-Based Funding model consists of four components. First, the model measures the level of funding necessary so that every public school district in Illinois can achieve

the specific statutory purpose that, “by June 30, 2027 and beyond, [Illinois] has a kindergarten through grade 12 public education system with the capacity to ensure the educational development of all persons to the limits of their capacities in accordance with Section 1 of Article X of the Constitution of the State of Illinois.”[19] This level of funding is called the school district’s “Adequacy Target.” Second, the model calculates each school district’s local capacity, which is the amount of funding each school district is assumed to contribute towards its Adequacy Target from local resources, such as property taxes.[20] This level of funding is called the school district’s Local Capacity Target (LCT). Third, the model calculates how much funding the State currently contributes to each school district – its BFM, and adds that to the school district’s LCT to determine the school district’s overall adequacy of funding.[21] The model measures each school district’s complete package of financial resources from all sources and compares that to the school district’s Adequacy Target.[22] Where the school district’s overall financial resources fall short of the Adequacy Target for the school district, the Evidence-Based Funding model designates this discrepancy as the Funding Gap.[23]

In the fourth step, the model distributes State education funding in a manner that targets the Funding Gap, with the goal of closing and eventually eliminating the gap altogether. Under Evidence-Based Funding, State dollars are allocated to those school districts that are the least well-funded (i.e., those school districts with the largest Funding Gap).[24] These four steps, and all of their underlying calculations, are designed to ensure that State funds are directed toward the school districts which, according to the model, are most in need of State aid.

The application of the above components involves additional criteria. As described, the Evidence-Based Funding model begins by calculating each school district’s Adequacy Target – the minimum funding necessary to provide adequate funding. To determine the Adequacy Target, the model requires consideration of 26 factors related to education funding.[25] These factors range from class size and number of nurses and library aides to gifted programs, computer technology, summer school programs, and special education teachers.[26] The entire list of factors considered in the Adequacy Target determination for each school district is included in Appendix C.

The Illinois State Board of Education (“ISBE”), responsible for implementing Evidence-Based Funding, has divided these factors into three categories: (1) Core Investments, (2) Per Student Investments, and (3) Additional Investments. Core Investments include: core teachers, specialist teachers, instructional facilitators, core intervention teachers, guidance counselors, school site staff, nurses, supervisory aides, librarians and librarian aides, principals and assistant principals, and substitute teachers. These factors are calculated as a ratio of the specific factor to the number of students. For example, under the model, adequate funding would provide one nurse for every 750 students.[27]

Per Student Investments are structured differently than Core Investments. These factors are structured as local funding allocations per student. Per Student Investments include gifted, professional development, instructional material, assessments, computer

and technology equipment, student activities, operations and maintenance, central office, and employee benefits. For example, under the model, school districts calculate funding for gifted programs at \$40 per student in the school district. Computer technology is calculated at the rate of \$285.50 per student.[28]

The final category, Additional Investments, includes special funding for low-income programs, English learners, and special education.[29] The calculations for these three subcategories are program-specific and set forth more specifically in Appendix C.

After all of the calculations described above for each individual school district are completed, including the comparison of the BFM and LCT with the Adequacy Target to calculate a district's Funding Gap, the Evidence-Based Funding model then categorizes each school district into one of four tiers based on the size of a school district's Funding Gap.[30] Those schools with the largest gap are categorized as Tier 1, and those with little to no gap are categorized as Tier 4, with the others in between.[31] Evidence-Based Funding prioritizes State education funds toward those school districts in Tiers 1 and 2, which will receive 99% of Evidence-Based Funding, with Tier 3 receiving only .9% of State funding and Tier 4 receiving only .1% of State funding.[32]

### **TIER FUNDING[33]**

| Tier   | Percent of New Funding                     | Adequacy Target               | Funding Allocation |
|--------|--|-------------------------------|--------------------|
| Tier 1 | Receives 50% of new funding distributions  | To be determined              | Fixed at 30%       |
| Tier 2 | Receives 49% of new funding distributions  | 90% of adequacy               | To be determined   |
| Tier 3 | Receives 0.9% of new funding distributions | 100% of adequacy              | To be determined   |
| Tier 4 | Receives 0.1% of new funding distributions | Greater than 100% of adequacy | To be determined   |

Importantly, while the amount of State funds each school district received in the fiscal year preceding the implementation of the Evidence-Based Funding model is referred to as the BFM, any new funds distributed to the school district each subsequent year pursuant to the new Evidence-Based Funding model (to close the Funding Gap) are referred to as "New State Funds." [34] The model guarantees that each school district

receives at least the amount equal to the previous year's BFM.[35] For each subsequent fiscal year, however, the New State Funds from the prior fiscal year will be rolled into the calculation for the BFM for that subsequent fiscal year.[36] This has a cumulative effect of increasing the amount of State funding each school district receives each year. The cumulative effect is designed to slowly close the Funding Gap for each school district and, hence, inch them closer to adequate funding year-by-year.[37]

The model assumes that the State will not only be able to fully fund education each year but also to increase education funding each year. Accordingly, the new law sets a target funding level for New State Funds of \$350 million for Fiscal Year 2019 and beyond. [38] If State funding falls short of this target, then the Evidence-Based Funding model is structured to reduce funding from Tier 4 school districts before Tier 3, and so on. This approach to funding reduction is designed to protect Tier 1 school districts, which are those most in need of additional resources, to the greatest extent feasible.[39]

On May 31, 2018 the legislature passed an eleventh-hour appropriations bill and budget implementation bill which included the \$350 million toward education. The Governor signed the legislation on June 4, 2018 so, for Fiscal Year 2019,[40] no pro-ration will occur.

#### **IV. SPENDING ACCOUNTABILITY**

Although the Evidence-Based Funding model distributes State education funds based on the 26 statutory factors, as of yet, no requirement in the law or regulations exist to require school districts to use the New State Funds in a manner consistent with the 26 factors. For example, according to the funding factors, each school district would receive funds sufficient to provide one librarian for every 450 elementary students or 600 high school students. Once the school district receives its New State Funds, however, it is free to operate with fewer librarians than the factors suggest is adequate. Alternatively, the school district is also free to use its New State Funds to hire more librarians than suggested.

The lack of accountability controls means, as a practical matter, that although many school districts will receive additional funds which the model suggests should be directed toward instructional coaches, or technology in the classroom, or any number of any other factors, nothing in the law prevents the school district from using those New State Funds as it deems appropriate. Accordingly, the Evidence-Based Funding model could see the injection of additional money into discussions at the collective bargaining table, with no requirement in the law that the additional money not be directed toward employees' salaries and benefits (with the exception of the New State Funds specifically directed toward low-income programs, English learners, and special education).

#### **V. PROPERTY TAX RELIEF FUND**

Evidence-Based Funding also creates a new program of Property Tax Relief Pool Grants.[41] This program is intended to help high-taxing school districts lower their

property taxes through the receipt of State grant money.[42] School Districts will apply for the program and, If ISBE approves the application, the school district will be able to lower its tax levy.[43] The grants are intended for those school districts with high property taxes but low property values.[44] These grants awarded by the ISBE will be subject to legislative appropriation.[45]

Each year, ISBE will set a threshold above which any Illinois school district may apply for property tax relief, with a school district applying concurrently with setting its levy for the fiscal year.[46] The tax relief is capped at no greater than 1% of a district's equalized assessed valuation ("EAV") for a unit school district, 0.69% of the EAV for an elementary school district, or 0.31% of the EAV for a high school district.[47] The State Board will provide grants to school districts in order of priority, with school districts having the highest unit equivalent tax rate first, until the property tax relief pool is exhausted.[48] Unit equivalent tax rate is a statutory term that is equal to the school district's Adjusted Operating Tax Rate multiplied by a factor of 1 for unit school districts, 13/9 for elementary school districts, and 13/4 for high school districts.[49]

If a school district receives ISBE's approval of a Property Tax Relief Pool grant by March 1 of the fiscal year, the district is required to present a tax abatement resolution to the county clerk by March 30 of the same fiscal year authorizing the county clerk to lower the school district's levy by the amount approved by ISBE.[50]

## **VI. VOTER INITIATED REFERENDUM**

Although the new Evidence-Based Funding model focuses on increasing education spending in school districts with inadequate funding, Evidence-Based Funding also recognizes that some school districts are extremely well-funded and have voters who prefer tax relief. To offer possible relief to these school districts, the new law includes a provision that permits voters in school districts that are funded at or above 110% of the Adequacy Target to petition for a referendum to reduce educational expenses in the school district by up to 10%.[51] The ballot proposition to reduce education expenses will be in substantially the following form:

Shall the amount extended for educational purposes by (school district) be reduced from (previous year's extension) to (proposed extension) for (levy year), but in no event lower than the amount required to maintain an adequacy target of 110%?[52]

Ten percent of the voters in the school district must petition for the referendum. Because the referendum is limited to consolidated elections in odd numbered years and may not be repeated for the next two consolidated elections, the referendum option is effectively limited to only once every six years.[53] If the majority of votes cast on the proposition are in favor, then for the levy year in which the election is held, the amount extended by the school district for educational purposes will be reduced as provided in the referendum.[54]

## **VII. OTHER COST CONTROLS**

Evidence-Based Funding includes other features designed to reduce costs for school districts; however, these controls may be modified by recent legislation. First, as originally enacted, the model reduced the required minimum number of physical education classes from five to three days per week.[55]

Under the Evidence-Based Funding model, school districts have the ability to exempt students in grades 7 through 12 who participate in interscholastic or extracurricular athletic programs from physical education altogether.[56] Legislation regarding physical education waivers was also proposed during the 2018 spring legislative session, but did not move out of committee before the end of the regular session.[57] If enacted, House Bill 2540 would have provided that an approved waiver from or modification to a physical education mandate may remain in effect for a period not to exceed two school years rather than five school years like other mandate waivers.[58] The bill would have further provided that physical education waivers could not be renewed more than two times upon application by an eligible district.[59] Evidence-Based Funding also authorizes school districts to contract out driver's education to commercial driving schools.[60]

## **VIII. FUNDING CHARTER SCHOOLS AND SPECIAL EDUCATION COOPERATIVES**

Under Evidence-Based Funding, local school districts continue to fund charters schools from their State aid. Charter school funding, however, is not tied to the new Evidence-Based Funding, but instead remains based on the local school district's per capita tuition charge (PCTC"). Nevertheless, the minimum and maximum funding rates for charters schools were modified from 75% and 125% to 97% and 103%, respectively, of the school district's per capita student tuition multiplied by the number of students residing in the school district who are enrolled in the charter school.[61] Because the Evidence-Based Funding law did not include a grandfather provision to protect current charter agreements, districts were uncertain initially about the law's retroactive effect to Fiscal Year 2018.[62] However, the Illinois State Board of Education advised that school districts should work with their charter schools to adjust the per capita tuition rate to fit within that range.

In Chicago, the Board of Education has in recent years funded district schools based primarily on its Student Based Budgeting ("SBB") model of allocating funds per student. This funding method often yields less per student than the charters' PCTC method. However, before passage of Public Act 100-0465, when charter funding under the PCTC method was permitted to be as low as 75% or as high as 125% of district funding, SBB funding for both district and charter schools complied with state law. Because the new law raises the minimum bar on charter funding, this resulted in an additional \$37 million of funding for charter students above the district students in SY2018,[63] which equates to approximately \$688 more per charter student than for

district students. But charter funding remains subject to annual swings, and it may exceed or lag behind district SBB funding in any year.

Special education cooperatives will also continue to receive their funding directly from the school districts pursuant to their joint agreements. No new state funding is available to them under Evidence-Based Funding. However, additional funding may be provided to the school districts for special education and, thus, some of that money may funnel to the special education cooperatives from their participating districts under the terms of those agreements.

## **IX. PRIVATE SCHOOL TAX CREDITS**

In addition to the other changes to education funding, the Evidence-Based Funding law also contains a much-debated new program referred to as the “*Invest in Kids Act*.” Following the passage of Evidence-Based Funding, the General Assembly approved a trailer bill that further implemented some of the new law’s provisions. Once passed, however, Governor Rauner exercised his constitutional authority to execute an amendatory veto of the trailer bill that sought to expand the scope of private schools eligible to receive scholarships under the *Invest in Kids Act* to an additional 36 schools who were then in the process of applying for ISBE recognition.[64] As originally drafted, only schools “recognized” by ISBE were eligible for the scholarships, and Governor Rauner wanted to expand the list of eligible schools to include those who were registered with ISBE and, thus, in the recognition process.[65] Both houses of the General Assembly overrode the Governor’s amendatory veto, and the list of qualified schools did not expand.[66]

The *Invest in Kids Act* is a five-year pilot program, running from calendar years 2018 through 2022, by which individuals and corporations that make charitable donations to qualified private school scholarship-granting organizations will be eligible for a tax credit of 75% of their donation, capped at \$1 million.[67] The maximum state-wide tax credit is \$75 million per year and will be allocated to donors under guidelines administered by the Illinois Department of Revenue.[68] Scholarships to attend private schools under the program must be limited to students with a household adjusted gross income less than 300% of the federal poverty level, with a few exceptions.[69]

The *Invest in Kids Act* is controversial, with some claiming that the program violates Article I, Section 3 of the Illinois Constitution by effectively providing tax credits to religious schools. Article I, Section 3 of the Illinois Constitution reads:

No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.[70]

Furthermore, Article X, Education, Section 3, forbids the use of public funds for sectarian purposes:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.[71]

Despite these constitutional misgivings, the legislators who drafted the Evidence-Based Funding model included a reverse severability clause in the legislation so that, if any provision of the *Invest in Kids Act* is held to be unconstitutional, the entire Act is null and void. Section 995, *Inseverability*, provides, “The provisions of this Act are mutually dependent and inseverable. If any provision is held invalid other than as applied to a particular person or circumstance, then this entire Act is invalid.”[72]

## **X. CHICAGO PUBLIC SCHOOLS PROVISIONS**

Evidence-Based Funding also increases funding for Chicago Public Schools (CPS). The biggest change from the current funding structure for CPS made by the Evidence-Based Funding model relates to the source of the employer contributions to the Chicago Teachers’ Pension Fund (CTPF). Historically, unlike the rest of the public school districts in Illinois, the employer contribution for CTPF has been paid by the CPS district. All other Illinois school districts fall under the Teachers’ Retirement System of Illinois (TRS), in which the majority of the liability to make employer contributions for TRS pensions has been historically borne by the State. CPS has fallen behind on its contributions to CTPF, causing that pension system to be underfunded. Further, because the TRS contributions were predominantly made by the entire State and the CTPF contributions were made predominantly by CPS, taxpayers in Chicago were supporting not only CPS pensions but also TRS pensions.[73]

Evidence-Based Funding aims to eliminate this inequity by treating CPS more like every other school district in Illinois; it shifts the normal cost of the CTPF pension from CPS to the State of Illinois – in the approximate amount of \$215 million for Fiscal Year 2018.[74] But the current liability from the years of underfunding CTPF remains with CPS.[75] Interestingly, because CPS is still required to remediate the underfunding to CTPF, the Evidence-Based Funding provisions include a correction for CPS with regard to determining how much money it can contribute from its own local sources.[76] Because CPS is required to make up its unfunded liability to CTPF from its local resources, the amount that it pays towards that underfunded liability is not calculated into its Local Capacity Target for purposes of determining how much New State Funds it will receive to meet its Adequacy Target.[77]



The Evidence-Based Funding model also allows Chicago to raise its property tax levy for contributions to the CTPF. It is estimated that this authorization will equal about \$130 million in Fiscal Year 2018.[78]

Finally, CPS also has historically been the recipient of the “Chicago Block Grant” from the State. The Chicago Block Grant provided CPS with additional funding for several different programs including the General Education Block Grant, which provides funds for Agriculture Education, the Early Childhood Block Grant, and the Truants Alternative Optional Education Program.[79] The Chicago Block Grant also provided CPS with additional funding for the Educational Services Block Grant, which includes reimbursements for programs including the Illinois free/reduced lunch program, ROE/ISC Services, Special Education - Funding for Children Requiring Special Education Services, Special Education Orphanage, Special Education - Personnel, Special Education - Private Facility Tuition, Special Education - Summer School, Special Education - Transportation, and Regular/Vocational Transportation.[80]

Evidence-Based Funding eliminates the majority of the Chicago Block Grant. However, the dollar value provided CPS by the Chicago Block Grant was included in the Base Funding Minimum for CPS. Thus, CPS will continue to receive the majority of the money year after year without it depleting the total dollars available to all school districts in New State Funds.[81]

## **XI. OTHER SCHOOL FUNDING-RELATED LEGISLATION**

As nearly everyone who lives in Illinois knows, the State has struggled to properly fund its schools. While Evidence-Based Funding lands an effective strike in that battle, it will need money to succeed. There are several potential hurdles to maintaining the flow of money required for success. For example, property tax freeze legislation has historically been introduced in the General Assembly. More recently, legislation that would freeze taxes in Cook and the collar counties for 2 years was introduced.[82] Other legislation that was introduced as recently as last year provided for a statewide freeze on property tax increases from 2017 through 2020 outside of Chicago, Cook County, and certain school districts.[83] While both of these bills were defeated, the efforts to freeze property taxes will likely continue. Illinois has the second highest property tax burden in the United States.[84] That, coupled with the increased income tax rate, will likely drive continued efforts to control tax increases.

What that could mean to school funding is anyone’s guess. But any form of freeze or increased property tax exemption options could further deplete resources needed to fund education – especially the Evidence-Based Funding, which includes an automatic escalator in its efforts to have all school districts achieve adequate funding. Further, as discussed earlier in this article, the Evidence-Based Funding law itself includes a referendum method for tax payers to reduce their current property taxes. This remains an area to watch closely.

Moreover, the legislature on May 30, 2018, passed Senate Bill 2892, which increases the minimum salary for teachers from \$9,000[85] to \$32,076 for the 2019-2020 school year, \$34,576 for the 2020-2021 school year, \$37,076 for the 2021-2022 school year, and \$40,000 for the 2022-2023 school year.[86] Furthermore, the bill would have provided that after the 2022-2023 school year, the minimum salary would continue to increase by the percentage of increase to the Consumer Price Index for urban consumers (CPI-U) published by the U.S. Department of Labor during the preceding year.[87] The Governor vetoed the bill on August 26, 2018.[88]

In addition to limiting financial resources to fund education, legislation could also be enacted that will increase the cost on school districts to provide education. For example, Public Act 100-0023, which was effective July 6, 2017, introduced a new “hybrid” Tier III to the Teachers’ Retirement System, which will cost school districts more money than the current TRS Tier I and Tier II plans. This hybrid plan consists of two parts: (1) “a small life-long ‘defined benefit’ . . . pension similar in structure to the current Tier II TRS plan”; and (2) “a ‘defined contribution’ . . . plan similar to a 403(b) savings plan.”[89] According to TRS, once the Tier III plan is in operation, all new TRS members will be placed in Tier III, but they will have a one-time opportunity to elect to participate in Tier II.[90] And all Tier II members will have the option of permanently joining Tier III.[91] TRS has advised that its “progress [in implementing Tier 3] has been restrained due to inconsistencies that exist between the law creating Tier 3 and the current Pension Code. These differences must be resolved by the General Assembly before Tier 3 can be fully implemented.”[92]

Why will Tier III cost school districts more money? Because school districts, rather than the State, will bear the primary burden of making the “employer contributions” to both the defined benefit portion and the defined contribution portion of the plan. Currently, the State pays the lion’s share of the employer contribution; however, beginning in 2021, school districts annually will pay 2.58% of their Tier III TRS member salaries to TRS for the defined benefit plan and between 2% and 6% of each of those member’s salary to TRS for the defined contribution plan portion.[93] Tier III members also have a contribution rate of no more than 6.2% of salary for the defined benefit portion and a minimum of 4% to the defined contribution portion of the plan.[94] The normal retirement age is also extended under Tier III and will be determined by Social Security rules; however, it will be no earlier than age 67.[95] This will cause teachers to work longer than they currently work and likely be paid higher salaries for longer periods.

Finally, how to pay for teacher pensions remains a hot topic for the State. New legislation continues to be introduced each legislative session aimed at managing pension costs both for the State as well as the taxpayers. For example, a full “pension shift” has been commonly introduced in past sessions and remains a viable option. Currently, the cost of what is owed each year to retired TRS members, as well as the cost of benefits for future retirees is split between contributions made by active teachers, school districts and the State.[96] TRS investment income supplements these contributions. A pension shift would require school districts to pay a greater share of

the pension cost due each year by “shifting” what is called the “employer’s normal cost” of the pension to the districts.

School districts assuming a portion or all of the employer’s normal cost of TRS pensions would alleviate the State from paying the amount called for in the “shift.” Under most proposals, the State would still be responsible only for paying down the TRS unfunded liability. Estimates indicate that in fiscal year 2016, annual school district contributions would have risen from a total of \$148 million to more than \$1.47 billion if the entire employer’s normal cost had been shifted to local districts.[97] The State’s annual contribution would have dropped from \$3.99 billion to \$2.9 billion. In this model, the State would shift the burden of the employer contribution for Tier I and Tier II members from the State to the local school districts.[98]

Providing options to teachers to choose between different pension structures and reducing the amount of earnings considered by TRS for pensions has also been explored. However, that reduction would likely increase the demand by employees on local school districts to make up those “lost” pension benefits using a different vehicle – such as employer contributions to a 403(b) or higher salaries.

The State did implement a partial pension shift beginning with the 2017-2018 school year. Now, school districts must pay to TRS the actuarial difference (as calculated by TRS) for salaries of all TRS members (including Tier I) that exceed the Illinois Governor’s salary, currently set at \$ 177,412.[99] This represents a partial shift in the state’s obligation to pay for the normal cost of pensions for TRS members to the school districts and ultimately increases the cost of doing business to the affected districts.

On May 31, 2018, the budget implementation bill (House Bill 3342) for Fiscal Year 2019 passed both houses of the General Assembly and on June 4, 2018, the Governor signed it into law (Public Act 100-0587) (“BIMP ACT”).[100] Among its many implications for school districts, BIMP ACT modifies the current 6% salary threshold on final average salary for TRS reportable earnings by reducing it to a lower threshold of 3% for school years commencing July 1, 2018.[101] Creditable earnings paid to TRS members above the threshold “will result in significant additional employer payments to TRS if such earnings are used to determine the TRS member’s final average salary upon retirement.”[102] “It appears that prospective salaries will be subject to this bill unless they were paid under a contract or collective bargaining agreement entered into prior to the bill’s effective date” (i.e., June 4, the date on which the Governor signed the bill into law).[103]

BIMP ACT makes two additional TRS-related changes aimed at reducing the financial load on TRS. First, it offers a buyout for vested inactive members.[104] Beginning July 1, 2018, through June 30, 2021, TRS inactive members will be provided with an opportunity to receive “a one-time, irrevocable cash payment” equal to 60% of the present value of the member’s anticipated pension benefit.[105] Second, it offers all retiring Tier I members an opportunity to receive “a one-time, irrevocable change in the

cost of living adjustment (COLA) to their TRS pensions” by giving up the current 3% compounding COLA in exchange for receiving an accelerated lump sum payment from TRS equal to 70% of the estimated value of the member’s future 3% COLAs.[106] “The member then would accept a lower 1.5% non-compounding COLA calculated from the amount of his/her original pension.”[107]

What happens in the future with pension costs is anyone’s guess, but the potential for increased costs to school districts remains high as the State continues to explore ways to lessen its unfunded liability.

The Governor also signed House Bill 109 on June 4, 2018 (Public Act 100-0586), which appropriates \$700 million more/year when compared with Fiscal Year 2017.[108]

## **XII. SCHOOL FUNDING LITIGATION**

The new funding structure may also be met with litigation. Even with Evidence-Based Funding in the mix, equity and adequacy of education continue to be areas ripe for legal challenge. Further, the adverse impact of charter school vouchers on public school finances is yet to be fully recognized. Finally, whether Illinois will actually continue to fund this law remains to be seen. That Illinois has now recognized that education funding provided to certain school districts is inadequate (those identified as less than 100% adequately funded by the Evidence-Based Funding Model) could open those school districts to litigation by concerned parents and groups demanding an adequate education for their children.

On May 21, 2018, twenty-two school districts filed an amended complaint to a complaint originally filed in April, 2017, in the 20th Judicial Circuit, St. Clair County.[109] In Case No. 2017-CH-301, the school districts seek a judgment from the court to receive, in the current fiscal year, the full amount necessary for those districts to meet or achieve the adequacy targets set forth by the Evidence-Based Funding model and to ensure as soon as possible the necessary additional funding to achieve their constitutional rights under Article X, Section 1 and Article I, Section 2 of the Illinois Constitution.[110]

## **XIII. POTENTIAL EFFECT ON LABOR RELATIONS IN SCHOOLS**

Currently, Evidence-Based Funding is not causing a substantial impact at the bargaining table. At a certain level of abstraction, it is no different than any other change in financial circumstances for an employer. Some school districts will receive significantly more State funds while others will see reductions. Where there are increases in funding, it is reasonable to expect that unions will seek to prioritize the use of those funds in wages and benefits for current staff. However, because Evidence-Based Funding includes so many metrics that are based on faculty or staff to student ratio, management may prioritize increasing headcount, introducing job coaches, or other programs directed at the Evidence-Based factors. It is too soon to tell what the full scale of the new law will be beyond changes to the financial resources available.

However, that does not mean that there will not be additional impacts in the future. The law currently does not mandate that school districts utilize the Evidence-Based Funding model for any particular education service. While explanations of the law demonstrate that certain services provided by school districts, including full-day kindergarten and job coaches, provide the most “bang for the buck” in improving overall student performance, districts are left to their own devices to determine where to use their additional funds. And it is likely that current staffing needs in terms of benefits and salaries may seek claim to the additional funds at the table. Further, it is also possible that future legislation and/or implementation of the law by the Illinois State Board of Education could introduce performance requirements associated with the additional funding, which could impact teacher evaluation. Finally, school employers expect significant and immediate negotiations impact from the lowered TRS salary threshold on creditable earnings.

#### **XIV. CONCLUSION**

The passage of Evidence-Based Funding was heralded as a giant leap forward for public education funding reform in Illinois. Although some of its features were controversial to various constituencies, generally speaking, the new law was well received. Nevertheless, implementation has appeared more challenging. The Evidence-Based Funding model is premised on adequate funding of education with appropriations from the legislature, and assumes that the legislature will increase education funding each year, which slowly over time will shrink the gap in funding adequacy for the neediest districts. Given Illinois’ recent track record regarding budgetary stalemates, it remains to be seen whether the legislature will be able to meet its funding commitments each year.

### Appendix A

Foundational level, total legislative appropriations, percent of change in appropriations, the amount of any funding shortfall, and the percentage of corresponding proration for Fiscal Years 2008 to 2017.

| <b>Fiscal Year<sup>[111]</sup></b> | <b>Foundation Level</b> | <b>Total Appropriation</b> | <b>Change in Appropriation</b> | <b>Shortfall</b> | <b>Proration</b> |
|------------------------------------|-------------------------|----------------------------|--------------------------------|------------------|------------------|
| FY 2008                            | \$5,734                 | \$4,454,500,000            | + 7%                           | No shortfall     | 100.0%           |
| FY 2009                            | \$5,959                 | \$4,581,561,600            | + 3%                           | No shortfall     | 100.0%           |
| FY 2010                            | \$6,119                 | \$4,600,305,100            | 0%                             | \$18,899,097     | 98.3%            |
| FY 2011                            | \$6,119                 | \$4,600,305,100            | 0%                             | \$260,405        | 99.9%            |
| FY 2012                            | \$6,119                 | \$4,448,104,514            | - 3%                           | \$231,057,534    | 95.0%            |
| FY 2013                            | \$6,119                 | \$4,286,752,500            | - 4%                           | \$518,176,370    | 89.2%            |
| FY 2014                            | \$6,119                 | \$4,442,198,260            | + 4%                           | \$562,116,047    | 88.7%            |
| FY 2015                            | \$6,119                 | \$4,425,273,600            | 0%                             | \$648,085,500    | 87.1%            |
| FY 2016                            | \$6,119                 | \$4,717,188,200            | + 7%                           | \$398,327,016    | 92.1%            |
| FY 2017                            | \$6,119                 | \$5,078,585,900            | + 8%                           | No shortfall     | 100.0%           |

**Appendix B**

Historical percentage funding from local property taxes and other funding sources, based on data compiled from the annual Illinois State Report Cards from 2008 to 2017.

| <b>State Report Card</b> | <b>Local Property Taxes</b> | <b>Other Local Funding</b> | <b>General State Aid</b> | <b>Other State Funding</b> | <b>Federal Funding</b> |
|--------------------------|-----------------------------|----------------------------|--------------------------|----------------------------|------------------------|
| 2008[112]                | 57.6%                       | 7.3%                       | 18.1%                    | 9.7%                       | 7.3%                   |
| 2009[113]                | 58.7%                       | 6.3%                       | 18.6%                    | 9.0%                       | 7.4%                   |
| 2010[114]                | 58.4%                       | 6.9%                       | 14.5%                    | 8.3%                       | 11.9%                  |
| 2011[115]                | 58.9%                       | 6.4%                       | 14.9%                    | 7.5%                       | 12.4%                  |
| 2012[116]                | 58.2%                       | 5.1%                       | 17.1%                    | 9.5%                       | 10.1%                  |
| 2013[117]                | 61.1%                       | 4.8%                       | 16.4%                    | 9.7%                       | 8.1%                   |
| 2014[118]                | 61.3%                       | 4.7%                       | 16.1%                    | 10.0%                      | 7.9%                   |
| 2015[119]                | 61.7%                       | 4.4%                       | 16.4%                    | 9.6%                       | 7.8%                   |
| 2016[120]                | 62.8%                       | 4.6%                       | 16.3%                    | 8.6%                       | 7.7%                   |
| 2017[121]                | 63.2%                       | 4.8%                       | 17.1%                    | 7.1%                       | 7.8%                   |

### Appendix C[122]

List of factors and calculations in the Adequacy Target determination for each school district.

E = Elementary, M = Middle School, H = High School

| Factor                                  |  | Calculation   |
|---|--|---|
| <b>Core Investment Factors (by FTE)</b> |  |   |
| 1                                       | Core Teachers K-3                      | Low Income 15:1, Non-Low Income 20:1  |
| 2                                       | Core Teachers 4-12                     | Low Income 20:1, Non-Low Income 25:1  |
| 3                                       | Specialist Teachers                    | % of Core FTE = E 20%, M 20%, HS 33%  |
| 4                                       | Instructional Facilitators             | E/M/HS = 200:1  |
| 5                                       | Core Intervention Teachers             | E/M = 450:1, HS = 600:1   |
| 6                                       | Substitutes                            | Average Daily Salary x 5.7% of 176 school days x FTE                                |
| 7                                       | Guidance Counselors & Nurses           | Guidance Counselors E = 450:1, M/HS = 250:1<br>Nurses E/M/HS = 300:1                |
| 8                                       | Supervisory Aides                      | E/M = 225:1, HS = 200:1   |
| 9                                       | Librarians, Library Aides, Media Techs | Librarians E/M = 450:1, HS = 600:1;<br>Library Aides and Media Techs E/M/HS = 300:1 |
| 10                                      | Principals / Assistant Principals      | E/M = 450:1, HS = 600:1   |
| 11                                      | School Site Staff                      | E/M = 225:1, HS = 200:1   |



| Per Student Investment Cost Factors                   |  |  |
|---|--|--|
| 12  | Gifted   | E/M/HS = \$40/student                                      |
| 13  | Professional Development                             | E/M/HS = \$125/student                                     |
| 14  | Instructional Materials                              | E/M/HS = \$190/student                                     |
| 15  | Assessment   | E/M/HS = \$25/student                                      |
| 16  | Computer Technology                                  | E/M/HS = \$285.5/student                                   |
| 17  | Student Activities                                   | E = \$100, M = \$200, HS = \$675/student                   |
| 18  | Maintenance and Operations                           | E/M/HS = \$1038/student                                    |
| 19  | Central Office                                       | E/M/HS = \$742/student                                     |
| 20  | Employee Benefits (% of Salary)                      | E/M/HS = 30%   |
| Additional Investment Cost Factors / Diverse Learners |  |  |
| 21  | Intervention (Poverty/EL)                            | 125:1  |
| 22  | Pupil Support (Poverty/EL)                           | 125:1  |
| 23  | Extended Day (Poverty/EL)                            | 120:1  |
| 24  | Summer School (Poverty/EL)                           | 120:1  |
| 25  | English Learners (EL)                                | 100:1  |
| 26  | Special Ed Teachers, Special Ed Aides, Psychologists | Spec. Ed Teachers 141:1, Aides 141:1, Psychologists 1000:1 |

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1. Ill. Const. 1970 Art. X, Sec. 1.

2. See Public Act 100-0465 (eff. Aug. 31, 2017), available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=100-0465>. The Act's short title is the Invest in Kids Act. *Id.* § 1.

3. CENTER FOR TAX AND BUDGET ACCOUNTABILITY, ANALYSIS OF SB 1947 (PUBLIC ACT 100-0465): THE EVIDENCE-BASED FUNDING FOR STUDENT SUCCESS ACT 2 (Oct. 10, 2017),

available at <<https://www.ctbaonline.org/reports/analysis-sb-1947-public-act-100-04-65-evidence-based-funding-student-success-act>>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. See ILL. ST. BD. OF EDUC., GENERAL STATE AID HISTORICAL FUNDING RECORDS (Oct. 2016), <<https://www.isbe.net/Documents/gsa-historical.pdf>>.

11. See *id.*

12. ILL. ST. BD. OF EDUC., 2017 ILLINOIS STARE REPORT CARD 3, tbl. Revenue by Source 2015-16, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=2017StateReport\\_e.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=2017StateReport_e.pdf)>.

13. Illinois State Report Cards are accessible through the ISBE website. <<http://webprod.isbe.net/ereportcard/publicsite/getSearchCriteria.aspx>>.

14. See NATASHA USHOMIRSKY & DAVID WILLIAMS, THE EDUCATION TRUST, FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED THE MOST, 4 & fig. 1, 6 (2015), <<http://edtrust.org/resource/funding-gaps-2015/>>; see also Joshua J. Cauhorn, *The Search For The Magic Formula: History Of Illinois School Funding Reform*, 18 UNIV. PENN. J. L. & SOCIAL CHANGE, 3 (2015).

15. USHOMIRSKY & WILLIAMS, *supra* note 14, at 4.

16. *Id.* at 7, fig 5.

17. ILL. ST. BD. OF EDUC., EVIDENCE-BASED FUNDING FREQUENTLY ASKED QUESTIONS (Apr. 13, 2018), <<https://www.isbe.net/Pages/state-funding-and-forecasting-faqs.aspx#>> (click on Which grant programs are included in the Base Funding Minimum or hold harmless?).

18. *Id.*

19. 105 ILCS 5/18-8.15(a)(1).

20. 105 ILCS 5/18-8.15(a)(2)(B).

21. 105 ILCS 5/18-8.15(a)(2)(C).
22. See 105 ILCS 5/18-8.15 (a)(2)(D).
23. 105 ILCS 5/18-8.15(g)(1).
24. 105 ILCS 5/18-8.15(a)(2)(D).
25. *See generally* 105 ILCS 5/18-8.15(b).
26. *Id.*
27. *See* ILL. ST. BD. OF EDUC. AN OVERVIEW OF THE EVIDENCE BASED FUNDING FORMULA 5 (Fall 2017), <[https://www.isbe.net/Documents/EBF\\_Presentation\\_Overview.pdf](https://www.isbe.net/Documents/EBF_Presentation_Overview.pdf)>.
28. *Id.* at 6.
29. *Id.* at 7.
30. 105 ILCS 5/18-8.15(g)(3).
31. *Id.*
32. 105 ILCS 5/18-8.15(g)(1).
33. Ill. ST. BD. OF EDUC. AN OVERVIEW OF THE EVIDENCE BASED FUNDING FORMULA, *supra* note 28, at 10.
34. 105 ILCS 5/18-8.15(a)(4); *see also* 105 ILCS 5/18-8.15(e).
35. *Id.*
36. 105 ILCS 5/18-8.15(g).
37. *See id.*
38. 105 ILCS 5/18-8.15(g)(9) (“The Minimum Funding Level is intended to establish a target for State funding that will keep pace with inflation and continue to advance equity through the Evidence-Based Funding formula. The target for State funding of New Property Tax Relief Pool Funds is \$50,000,000 for State fiscal year 2019 and subsequent State fiscal years. The Minimum Funding Level is equal to \$350,000,000. In addition to any New State Funds, no more than \$50,000,000 New Property Tax Relief Pool Funds may be counted towards the Minimum Funding Level.”)
39. 105 ILCS 5/18-8.15(g)(9)(A)-(D).
40. Pub. Act. 100-0586 (May 31, 2018).

41. 105 ILCS 5/2-3.170.
42. 105 ILCS 5/2-3.170(c).
43. 105 ILCS 5/2-3.170(b-5).
44. *Id.*; see also 105 ILCS 5/2-3.170(e).
45. 105 ILCS 5/2-3.170(b).
46. 105 ILCS 5/2-3.170(b-5).
47. 105 ILCS 5/2-3.170(b).
48. 105 ILCS 5/2-3.170(b-5).
49. 105 ILCS 5/2-3.170(a).
50. 105 ILCS 5/2-3.170(b-5).
51. 35 ILCS 200/18-206(a).
52. 35 ILCS 200/18-206(c).
53. 35 ILCS 200/18-206(a).
54. 35 ILCS 200/18-206(c).
55. 105 ILCS 5/27-6(a).
56. 105 ILCS 5/27-6(b); ISBE has indicated that these athletic programs must be sponsored by the school district in order to exempt the students from physical education.
57. See Bill Status of HB2540 <<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=5820&GAID=14&DocTypeID=HB&LegId=111913&SessionID=91>>.
58. See HB2540, 100th Ill. Gen. Assembly (2018).
59. *Id.*
60. 105 ILCS 5/27-24.2.
61. 105 ILCS 5/27A-11(a).

62. ILLINOIS STATE BOARD OF EDUCATION EVIDENCE-BASED FUNDING FREQUENTLY ASKED QUESTIONS (April 13, 2018), <<https://www.isbe.net/Pages/state-funding-and-forecasting-faqs.aspx>>.

63. *See* Chicago Public Schools, *CPS Proposes Revised FY18 Budget Thanks to Lawmakers' Support for Historic Education Funding Reform*, (Oct. 5, 2017), <[https://cps.edu/News/Press\\_releases/Pages/PR1\\_10\\_5\\_17.aspx](https://cps.edu/News/Press_releases/Pages/PR1_10_5_17.aspx)>. This new disparity in student funding exists notwithstanding changes to Chicago pension funding, discussed below.

64. *See* Ill. Gen. Assembly, Governor's Amendatory Veto Message, Senate Bill 444 (Jan. 8, 2018), <<http://www.ilga.gov/legislation/fulltext.asp?DocName=10000SB0444gms&GA=100&LegID=100385&SessionId=91&SpecSess=0&DocTypeId=SB&DocNum=0444&GAID=14&Session=>>>.

65. *Id.*

66. *See* Ill. Gen'l Assembly, Bill Status of SB 044, <<http://www.ilga.gov/legislation/billstatus.asp?DocNum=0444&GAID=14&GA=100&DocTypeID=SB&LegID=100385&SessionID=91&SpecSess=>>>.

67. 35 ILCS 40/10; *see also* 35 ILCS 5/224.

68. *Id.*; *see also* *Emergency Regulations for Invest in Kids Act*, Ill. Admin. Code Part 1000.

69. 35 ILCS 40/5.

70. Ill. Const. Art. I, Sec. 3.

71. Ill. Const. Art. X, Sec. 3 (emphasis added).

72. 35 ILCS 40/995.

73. CENTER FOR TAX AND BUDGET ACCOUNTABILITY, ANALYSIS OF SB 1947 (PUBLIC ACT 100-0465): THE EVIDENCE-BASED FUNDING FOR STUDENT SUCCESS ACT 8 (Oct. 10, 2017), *available at* <<https://www.ctbaonline.org/reports/analysis-sb-1947-public-act-100-0465-evidence-based-funding-student-success-act>>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 9.

82. Senate Bill 851, House Floor Amendment 1, <<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=851&GAID=14&DocTypeID=SB&LegId=102353&SessionID=91&GA=100>>.

83. Senate Bill 484, <<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=484&GAID=14&DocTypeID=SB&LegId=100425&SessionID=91&GA=100>>.

84. *See* VINCENT CARUSO, ILLINOIS POLICY INSTITUTE, STUDY: ILLINOIS HAS THE PROPERTY TAX BURDEN SECOND HIGHEST IN THE NATION (Mar. 2, 2018), <<https://www.illinoispolicy.org/study-illinoisans-property-tax-burden-second-highest-in-the-nation/>>.

85. 105 ILCS 5/24-8.

86. *See* Senate Bill 2892, Senate Amendment 2 (passed May 30, 2018), <<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2892&GAID=14&DocTypeID=SB&LegId=110120&SessionID=91&GA=100>>.

87. *Id.*

88. *See* Status of SB 2292, <<http://www.ilga.gov/legislation/BillStatus.asp?DocNum=2292&GAID=14&DocTypeID=SB&LegId=110120&SessionID=91&GA=100>>.

89. Ill. TEACHERS' RET. SYS., NEW TIER III BENEFIT STRUCTURE, <<https://www.trsil.org/news-and-events/New-Tier3-Benefit-Structure>> (last updated Aug. 1, 2018).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. ILL. TEACHERS' RET. SYS., THE "COST SHIFT": PUBLIC SCHOOLS PAYING MORE OF THE "NORMAL COST" OF TEACHER PENSIONS, <<https://www.trsil.org/news-and-events/pension-issues/the-cost-shift>> (last updated Aug. 1, 2018).

97. *Id.*

98. *Id.*

99. *Id.*

100. HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN, LLP, LEGISLATURE PASSES 3% SALARY CAP (June 6, 2018), <<https://hlerk.com/legislature-passes-3-trs-salary-cap/>>. Readers should also note that although school administrators commonly refer to the threshold as a salary "cap," the threshold is merely a trigger for when a school district must contribute funds sufficient to account for the actuarial value of the increased salaries.

101. *Id.*

102. *Id.*

103. *Id.*

104. ILL. ALLIANCE OF SCH. BOARDS, ALLIANCE LEGISLATIVE REPORT 100-71: *Legislature Adjourned for the Summer*, (June 1, 2018).

105. *Id.*

106. *Id.*

107. *Id.*

108. Public Act 100-0586 (June 4, 2018), <<http://www.ilga.gov/legislation/publicacts/100/PDF/100-0586.pdf>>.

109. Valerie Wells & Claire Hettinger, *22 Illinois School Districts Sue State, Governor Over Funding Shortfall*, HERALD & REV. (May 24, 2018), <[https://herald-review.com/news/local/education/illinois-school-districts-sue-state-governor-over-funding-short-fall/article\\_deoc4cfc-2cc7-506f-b49e-2doee850e559.html](https://herald-review.com/news/local/education/illinois-school-districts-sue-state-governor-over-funding-short-fall/article_deoc4cfc-2cc7-506f-b49e-2doee850e559.html)>.

110. *Id.*

111. See ISBE, General State Aid Historical Funding Records (Oct. 2016) <<https://www.isbe.net/Documents/gsa-historical.pdf>>.

112. See 2008 Illinois State Report Card depicting revenue sources for the 2006-2007 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2008&code=2008StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2008&code=2008StateReport_E.pdf)>.

113. See 2009 Illinois State Report Card depicting revenue sources for the 2007-2008 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2009&code=2009StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2009&code=2009StateReport_E.pdf)>.

114. See 2010 Illinois State Report Card depicting revenue sources for the 2008-2009 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2010&code=2010StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2010&code=2010StateReport_E.pdf)>.

115. See 2011 Illinois State Report Card depicting revenue sources for the 2009-2010 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2011&code=2011StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2011&code=2011StateReport_E.pdf)>.

116. See 2012 Illinois State Report Card depicting revenue sources for the 2010-2011 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2012&code=2012StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2012&code=2012StateReport_E.pdf)>.

117. See 2013 Illinois State Report Card depicting revenue sources for the 2011-2012 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2013&code=2013StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2013&code=2013StateReport_E.pdf)>.

118. See 2014 Illinois State Report Card depicting revenue sources for the 2012-2013 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2014&code=2014StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2014&code=2014StateReport_E.pdf)>.

119. See 2015 Illinois State Report Card depicting revenue sources for the 2013-2014 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2015&code=2015StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2015&code=2015StateReport_E.pdf)>.

120. See 2016 Illinois State Report Card depicting revenue sources for the 2014-2015 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2016&code=2016StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2016&code=2016StateReport_E.pdf)>.

121. See 2017 Illinois State Report Card depicting revenue sources for the 2015-2016 school year, <[http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=2017StateReport\\_E.pdf](http://webprod.isbe.net/ereportcard/publicsite/getReport.aspx?year=2017&code=2017StateReport_E.pdf)>.

122. Chart derived from Illinois State Board of Education, *An Overview of the Evidence Based Funding Formula*, dated Fall 2017, accessible at, <[https://www.isbe.net/Documents/EBF\\_Presentation\\_Overview.pdf](https://www.isbe.net/Documents/EBF_Presentation_Overview.pdf)>.



## RECENT DEVELOPMENTS

### By Student Editorial Board:

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Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes and the first Amendments.

#### I. IELRA Developments

##### A. *Bargaining Unit Clarification*

In *East St. Louis Federation of Teachers Local 1220 and East St. Louis School District No. 189*, 35 PERI ¶ 24 (IELRB 2018), the IELRB dismissed the union's unit clarification petition as untimely and held that on the merits the petition also had to be dismissed because it sought to add a confidential employee to the bargaining unit. The union's petition sought to add the position of human resources receptionist to a unit of clerical employees. The human resources receptionist position was created in June 2016 and the employee hired for the position began working on July 1, 2016. The position's job description was revised on August 9, 2016.

The union filed its unit clarification petition on January 17, 2017. The Board agent assigned to the case called the union's attorney inquiring whether the parties would stipulate to the clarification. There was no apparent further activity until August 2017 when another Board agent to whom the case had been reassigned contacted the parties and was advised by the school district's attorney that he thought the union was going to file an amended petition. On September 6, 2017, the Board agent emailed the union's attorney stating, "I'm not sure what the delay in amending the petition is – I'm wondering if it would be better to withdraw the current unit clarification petition and file a new petition. This petition has been pending for almost 9 months which is way beyond the statutory time lines." The union withdrew the petition that day and filed a new one on November 9, 2017.

The IELRB reasoned that the only basis on which the union's unit clarification petition could be appropriate was to "resolve ambiguities concerning the unit placement of individuals who come within a newly established job classification or who fall within an existing job classification that has undergone recent, substantial changes." But, the IELRB opined, the petition was filed 16 months after the human resources receptionist was given her new duties and, therefore, the petition could not be for the purpose of resolving the placement of a new position or one which had undergone recent

substantial changes as the changes were no longer recent. The IELRB observed that the original petition was timely but it was withdrawn and the statement by the Board agent wondering about it being better to withdraw the original petition and file a new one did not provide a basis for giving the union relief because a party acts at its own risk in relying on advice from a Board agent. Consequently, the new petition was not timely.

Alternatively, the IELRB held, the human resources receptionist had unfettered access to collective bargaining information. Accordingly, she was a confidential employee who could not be added to the bargaining unit.

## II. IPLRA Developments

### B. *Managerial Employees*

In *AFSCME Council 31 and City of Chicago*, 35 PERI ¶ 12 (ILRB Local Panel 2018), the ILRB Local Panel dismissed a majority interest petition and held that 16 city employees, all with the title of senior procurement specialist (SPS), fell under the managerial exclusion of the IPLRA.

These senior procurement specialists worked in the Department of Procurement Services. The Department's overarching goals included cost efficiency and enabling the public to participate in the business of government. Therefore, the Department of Procurement Services had to ensure that the City's procurement process complied with the law and that it was open, non-discriminatory, and timely. As part of its functions, the Department also complied with the requirements of the Illinois Municipal Purchasing Act, 65 ILCS 5/8-10-16 *et seq.* The union brought its majority interest petition in an attempt to bring the 16 employees into the union's pre-existing bargaining unit.

The employer contended that the specialists were managers because they "direct[ed] the effectuation of management policies." In contrast, the union argued that those in the SPS position lacked the substantial discretion required to determine how Department policies would be implemented. According to the union, SPS employees worked from template forms drafted by the employer's legal department and were greatly restricted by statute and guidelines in their work, thus limiting the discretion they had to "broadly affect[ ] the Department's goals." SPS employees also played a mainly administrative role in some of their duties. The Local Panel, in holding that the SPS positions were managerial, noted that the Department accomplished its mission through SPS employees who administered procurement processes from beginning to end.

The ILRB looked to Section 3(j) of the IPLRA, which provides that managerial employees are: 1) predominantly involved with "executive and management functions"; and 2) are responsible for effectuating "management policies and practices." The latter prong was easily satisfied through testimony that the Chief Procurement Officer almost always accepted what an SPS recommended.

In assessing the SPS employees' involvement with "executive and management functions," the ILRB downplayed the SPS administrative duties in processes other than competitive bidding. The Board emphasized that even though the SPS employees had certain administrative roles, their responsibilities encompassed the entire reason for the employer's existence. As such, they were considered managers of the department.

### **C. *Weingarten Rights***

In *Annie Burton and Chicago Transit Authority*, Case No. L-CA-16-056 (ILRB Local Panel 2018), the Local Panel remanded the Executive Director's decision dismissing a case regarding the employee's *Weingarten* rights. The employee alleged in her charge that the employer had violated her right to have a union representative present at a meeting between the employee and her supervisor; in that meeting she was suspended for one day, purportedly because of three unexcused absences.

The Executive Director dismissed the charge. The Executive Director found that the meeting's purpose was to issue pre-determined discipline. In reaching that conclusion, she noted that the employee told the Board agent that her supervisor had said the discipline had already been reviewed and approved. The dismissal specifically noted that the employer asserted the entire reason for this meeting was solely to issue the one-day suspension. The Executive Director further noted that the supervisor stated she did not recall whether the employee had requested a union representative at the meeting. The supervisor additionally noted that, if the employee had made such a request, the supervisor would have rescheduled the meeting or located a representative to phone in to the meeting.

In her appeal to the ILRB, the employee stated that her meeting with the supervisor was investigatory. To support her allegations, the employee attached a record of the meeting at issue as an exhibit. In that record, the section for "Manager Comments" specifically noted that "the operator was *interviewed* and *found to be in violation* of CTA policies and procedures" (emphasis in original). The Board found that language highly persuasive in deciding to remand the case since it directly contradicted the employer's assertions that the meeting was not an investigatory interview. The exhibit's persuasive power was heightened since the Board did not see any indication from the Executive Director that the exhibit had been considered before dismissing the case.

The Board also considered other factors in making its final determination. For example, the supervisor claimed that she could not recall whether the employee had requested a union representative's presence, while the employee stated she had. The Board noted that that raised an issue of fact. Moreover, the Board noted that the employee was *pro se* and may not have fully understood the significance of whether the discipline was pre-approved until she read the Executive Director's rationale for dismissing the case.

### III. First Amendment Developments

#### D. Fair Share Fees

In *Janus v. AFSCME Council 31*, 138 S.Ct. 2448 (2018), the United States Supreme Court, by a vote of five to four, overruled *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and held that fair share fees assessed non-members of the exclusive bargaining representative violated the non-members' rights of free speech and free association. The Court reasoned that compelling non-members to pay a pro rate share of the costs of collective bargaining was compelling them to speak by subsidizing views on issues of public concern with which they disagreed. The Court considered collective bargaining with a public employer akin to lobbying. The Court rejected *Abood's* holding that any infringement on fee payers' First Amendment rights was justified by the government's interest in promoting labor peace by enabling unions and employers to prevent free riders, i.e. employees who accepted the benefits of union representation without contributing to their costs. The Court pointed to labor relations in the federal government, the Postal Service and states which prohibit fair share fees as demonstrating that the system of exclusive representation was not dependent on fair share fees and, therefore, fair share fees were not a narrowly tailored method of achieving the promotion of labor peace.

Justice Kagan dissented arguing that *Abood* was constitutional and there was no basis for overruling it. She stated the *Abood* decision "struck a stable balance between public employees' First Amendment rights and government entities' interests in running their workforces as they thought proper." The dissent also observed that there "is no sugarcoating today's opinion. The majority overthrows a decision entrenched in this Nation's law—and in its economic life—for over 40 years. As a result, it prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."