

**CONFIDENTIAL**  
**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

TO: Beeville Independent School District Board of Trustees  
Dr. Marc Puig, Superintendent

FROM: Joey Moore

DATE: August 21, 2019

RE: Considerations When Establishing an Education Foundation

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I am writing in response to your request for information regarding possible District involvement in the creation of a nonprofit Education Foundation benefitting Beeville ISD. As you consider how to proceed, the following are the general issues and considerations to keep in mind regarding Education Foundations:

1. **Determine who will create the Education Foundation.** As an initial matter, a decision must be made as to who will create the Education Foundation. Many school districts have played an integral role in starting Education Foundations, even to the extent of having the superintendent and school board members serve on the foundation's Board of Directors. In other school districts, community members have been the driving force behind the creation of a foundation, thereby limiting school district involvement.

While it is the District's discretion to decide the extent of its involvement, as a practical matter you may wish to have outside individuals be responsible for the start-up of the Foundation. Even though the Foundation is technically a separate legal entity from the District, community members may not understand the difference if key District officials are also the key members of the Foundation.

2. **Determine who will serve as members of the board of directors of the Education Foundation.** According to Texas Government Code §171.009, "[i]t shall be lawful for a local public official to serve as a member of the board of directors of private, nonprofit corporations when such officials receive no compensation or other remuneration from the nonprofit corporation or other nonprofit entity." Section 171.009 also prohibits a local official from participating in transactions with a "business entity" in which the official has a "substantial interest."

The Attorney's General Office has cautioned that Section 171.009 "does not necessarily insulate the trustee from possible legal consequences of a conflict of interest which might arise with

respect to a particular matter in which the interests of the independent school district and the foundation are at odds."

Therefore, although state law permits a school district trustee to serve on the board of the Education Foundation, any trustee should be cautious to avoid an actual conflict of interest, or the impression of a conflict of interest.

**3. Decide whether the District will make any financial contribution to the Foundation.**

It is not unusual for school districts to provide some financial support to newly created Education Foundations. That support may take many forms, such as paying for accounting services for the filing of tax forms, paying for filing fees for Certificate of Formation, providing seed money, or offering the assistance of school district staff. If Beeville ISD intends to make any financial contribution to the foundation, the Board of Trustees will have to consider and take action regarding: (1) whether the expenditure is for a public purpose, (2) whether the Board believes the District will receive some public benefit in exchange for the expenditure, and (3) whether reasonably adequate controls are in place to ensure that the benefit will be received.

We generally recommend that a formal Resolution be adopted by the Board documenting the public purposes, documenting that the District's students will receive value in the future from the Foundation in return for the District's support, and confirming that adequate controls are in place at the District to ensure that such benefits will be received by the District. This Resolution can also authorize the payment by the District of the necessary attorney's fees and costs to set up the Non-Profit Corporation, so long as the public purpose is documented. We can provide a form of Resolution adapted to the District's specific situation. The item will need to be properly posted on a Board Agenda in accordance with the Open Meetings Act.

**4. Compensation.** A school district is statutorily precluded from compensating an employee who is working for or serving the District's Education Foundation. TEX. ATTY. GEN. OP. MW-373 (1981). A school district's funds are specifically appropriated for district employees and operational expenses and may not be used to compensate the employees of a private Education Foundation. *Id.* Compensation includes, but is not limited to, financial compensation of any kind, entitlement to vacation or sick leave benefits, membership in the Texas Retirement System (TRS), and/or participation in the District's group insurance plan. *Id.* As such, an analysis into the constitutionality of compensation is unnecessary as it is precluded by statute. *Id.*

If the District would like to assist the Foundation with funds to assist in the start-up of the Foundation, it is recommended that rather than offer a District employee to work part-time for the Foundation, the District should pass a financial contribution through to the Foundation

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which the Foundation can use to pay its own employee(s).

**5. Provision of Office Space and Incidental Office Items.** Whether office space and incidental office items, such as utilities and telephone service, may be provided to an Education Foundation was addressed in Attorney General Opinion No. MW-373 (1981). Statutorily, the District may supply its Education Foundation with office space and incidental office items, such as utilities and telephone service, as a term and condition of accepting donations and other gifts from the Education Foundation if the Board determines a school purpose is served.

Consequently, the District may provide its Education Foundation with office space and incidental office items as long as the Board determines the following: (1) the benefit serves a public purpose appropriate to the function of the District; (2) adequate consideration for the benefit will flow to the public, and (3) the Board will maintain sufficient controls over the Education Foundation's activities to ensure the public purpose is achieved.

Please note that the use of the office space and incidental office items will be subject to public scrutiny as the District is required to audit of the use of public funds and most documentation regarding the formation, support and operation of the Foundation will be subject to the Texas Public Information Act.

**6. Public Entity Restrictions on "Gifts of Public Funds."** Under the Texas Constitution, Article III, Sec. 52(a), 53, no law may be passed allowing "the grant of public money or thing of value in aid of, or to any individual, association or corporation ...". This prohibition has been construed by the courts to apply to school districts. The Attorney General of Texas has written many opinions underscoring that school districts (and other governmental entities) may not "grant public money", give charity or make gratuitous payments of taxpayer dollars. Adequate consideration must pass to the governmental entity for any expenditure to be considered lawful. Furthermore, under the Texas Education Code, school districts are required to expend funds only for "educational purposes", or as the Attorney General has stated: "The expenditure must be specifically tailored to the accomplishment of school-related purposes." OP. TEX. TAT'S GEN. MW- 89 (1979). Accordingly, any contribution from the District to the Foundation must be scrutinized to ensure it does not run afoul of these constitutional prohibitions.

Because the Foundation is not considered a public entity, though, it is not controlled by the Constitutional and statutory prohibitions on gifts. Foundations may raise and expend funds as provided by their own bylaws and the laws of Texas as they apply to non-profit entities.

**7. Purchasing Issues.** The District is required by Texas law to follow certain methods for purchasing goods, equipment and services. For example, under certain circumstances, competitive procurement may be required for the school district to make an expenditure of

funds. A separate Foundation will, on the other hand, be treated as a private entity under the law and, therefore, will not be constrained by such requirements. To maintain this flexibility for the Foundation, it must be treated in all respects as an entity that is separate from the District.

8. **Liability Issues.** As a governmental body, the District enjoys what is known as "governmental immunity," a doctrine which protects the District from legal liability for most negligence claims. Generally speaking, school district employees, when operating within the course and scope of their employment, are also shielded from liability for negligence. Exceptions to governmental immunity for negligence claims do exist, in cases involving the operation and use of school district vehicles. This shield from liability is not shared, however, by non-governmental entities, such as the Foundation. The Foundation will stand in the position of a private person concerning their exposure to liability, whether civil or criminal, and the District must not jeopardize its own immunity by failure to separate itself from the Foundation.

It is imperative that the District and the Foundation maintain separate identities and that all dealings between the two organizations be documented to assure this division. It is often difficult to maintain this separate nature when you feel like the District and the Foundation should be "pulling on the same oar" and Board Members cross between the two, but each entity brings with its special status specific advantages to the table because of its unique status. If the entities are not kept separate, these advantages can be waived.

### **Conclusion**

Attached to this Memo for informational purposes is an outline of the suggested process for initial formation of an Education Foundation.

Please let me know if you have any questions, or if you would like our assistance as you move forward in the process.