

Legal Issues in Update 116

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To the District's Policy Contact:

Each time TASB Policy Service updates the model policies, your district has a new opportunity to review TASB's recommendations and consider, or revisit, your local policy choices. The purpose of this memorandum is to identify to the board potential legal problems and best practices that may arise as a result of the district's unique local choices in the policy codes affected by Update 116.

Please note that your district may not have locally developed provisions in a policy code affected by Update 116 as addressed by this memo. For each policy code in which your district does have locally developed provisions or is considering adopting local changes to the TASB model policy, we suggest you review the recommendations below. You can identify a policy with locally developed provisions by looking at the bottom of the policy. A policy that is unique to the district will be indicated with an "X" by the policy code in the footer ("__(LOCAL)-X," for example). A TASB-recommended policy will be indicated by any letter other than an "X" ("__(LOCAL)-A," for example).

In addition, the last paragraphs of this memorandum address general policy writing tips to keep in mind when making any policy revisions.

If you have any questions or concerns about the guidance in this memo, please contact TASB Legal Services at legal@tasb.org or 800.580.5345.

I. Common Legal Issues in Revising Update 116 Local Policies

DCD(LOCAL)—Employment Practices: At-Will Employment

Due process for at-will employees

- **COMMON ISSUE:** Local policy indicates that a district will follow procedures before dismissing an at-will employee.

This policy provides a process that the superintendent or administration must follow before dismissing an at-will employee. This policy is not legally required; at-will employees are not entitled to due process. Moreover, this policy interferes with the administration's ability to act quickly in terminating at-will employees, including when a staff member's conduct raises safety issues. Finally, at-will employees may seek review of their terminations through the grievance process.

- **LEGAL TIP:** Local policy should not reference due process in the at-will employment context.

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Progressive discipline in board policy

- **COMMON ISSUE:** Local policy indicates that a district will deal with misconduct through progressive discipline.

Local policy should not set out a system of progressive discipline for employee misconduct. This system could create a perception that an employee cannot be terminated for a single violation. Moreover, including progressive discipline in policy is not necessary since the different discipline options are available even if not listed in policy. Progressive discipline is better addressed in the employee handbook or other administrative regulations. If the district chooses to retain this policy, we recommend that the policy be amended to specify that the progressive system is optional and that the district reserves the right to terminate based on a single incident.

- **LEGAL TIP:** Do not reference a progressive discipline system in board policy.

DCE(LOCAL)—Employment Practices: Other Types of Contracts

No Chapter 21 contract for full-time LVNs

- **COMMON ISSUE:** Local policy provides non-Chapter 21 contracts to full-time licensed vocational nurses (LVNs).

Texas law is unclear regarding whether only registered nurses (RNs) are entitled to Chapter 21 contracts or whether the term "nurse" in Chapter 21 also includes LVNs.

The commissioner of education has concluded that, for purposes of the state minimum salary schedule, only an RN who is hired to provide full-time nursing and health-care services is a "school nurse." Tex. Educ. Code § 21.402(a); *Watkins v. Longview Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 073-R10-200 (Sept. 6, 2000); 19 Tex. Admin. Code § 153.1022(a)(1)(D). The Texas Education Code provisions governing Chapter 21 contracts use the term "nurse" not "school nurse."

Districts must employ by Chapter 21 contract all full-time professional employees whose positions require certification by the State Board for Educator Certification (SBEC). Tex. Educ. Code §§ 21.101, .151, .201. On the one hand, LVNs are not typically considered "professional" employees. On the other hand, LVNs are required to hold a certification. If your district does not issue Chapter 21 contracts to LVNs, we suggest that you confirm this choice with your school attorney.

- **LEGAL TIP:** Consult your school attorney if the district wishes to employ LVNs at-will or under non-Chapter 21 contracts.

No Chapter 21 contract for persons in positions requiring certification

- **COMMON ISSUE:** Local policy provides for noncertified contracts for employees in positions requiring certification.

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If employees are employed in positions requiring certification, local policy should not authorize employment under non-Chapter 21, or noncertified, contracts. The Texas Education Code requires districts to employ by probationary, term, or continuing contracts (Chapter 21 contracts) all full-time professional employees whose positions require certification. Tex. Educ. Code §§ 21.101, .151, .201; *see also Landers v. Round Rock Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 032-R1-1101 (Jan. 9, 2002) (defining administrator as “teacher” because contract required certification); *Smith v. Zapata Cnty. Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 088-R2-498 (Aug. 12, 1999), *upheld on other grounds, Smith v. Nelson*, 53 S.W.3d 792 (Tex. App.—Austin 2001, pet. denied) (finding athletic director entitled to probationary contract because job posting required certification). This may include administrators, educational diagnosticians, and persons required by local policy to hold certificates.

- **LEGAL TIP:** Consult your school attorney if the district wishes to employ full-time professional employees whose positions require certification under non-Chapter 21 contracts.

FFAC(LOCAL)—Wellness and Health Services: Medical Treatment

Policy includes provisions regarding administration of medication provided by district

- **COMMON ISSUE:** Local policy includes provisions on district-provided medicine that do not reflect best practices.

If a district includes policy provisions related to distribution of nonprescription medicine, such language should reflect Texas Department of State Health Services (TDSHS) guidance and provisions in the Texas Education Code. Texas Education Code section 22.052 provides immunity from damages or injuries resulting from the administration of medication, but only in limited circumstances. If the district intends to provide over-the-counter medication, it should consider using language available from TASB Policy Service.

- **LEGAL TIP:** If the district intends to administer medication provided by the district, check with your policy consultant.

Policy deletes 504 plan and IEP language or allows nurse to refuse

- **COMMON ISSUE:** Local policy does not include language requiring district personnel to follow a student’s individualized education program (IEP) or Section 504 plan and/or adds language about a nurse refusing to comply with a plan.

A district should not remove TASB-recommended language providing that district personnel will administer herbal substances or dietary substances required by an IEP or Section 504 plan for a student. The district is still obligated to comply with any requirements of these plans, including the administration of plan-recommended medication. *Cedar Rapids Cmty. Sch. Dist. v. Garret ex rel. Charlene F.*, 526 U.S. 66 (1999). TASB Legal Services recommends that the district include this language in its policy.

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For similar reasons, TASB Legal Services does not recommend establishing policy procedures for when a school nurse declines to administer medication based on his or her determination that it is not in the best interest of the student. Because the district is obligated to comply with requirements in a student’s IEP or Section 504 plan, including the administration of plan-recommended medication, we recommend that the district appoint another employee to administer the medication if a nurse declines. The district may also wish to convene an admission, review, and dismissal (ARD) committee meeting to discuss the medication issue.

- **LEGAL TIP:** Include TASB-recommended language that personnel will follow an IEP or Section 504 plan without exception.

Herbal substance administration without 504 plan or IEP language

- **COMMON ISSUE:** Local policy allows district personnel to administer herbal substances or dietary supplements not covered by an IEP or Section 504 plan.

Local policy should not allow employees to administer herbal substances or dietary supplements to students upon a parent’s written request, regardless of whether the substance is properly labeled and in the original container. The Texas Education Code gives district employees immunity from civil liability for administering medication to students under certain conditions. Tex. Educ. Code § 22.052. Because herbal medicines and dietary supplements are not regulated by the federal Food and Drug Administration (FDA), they may not be considered “medication” under the statute and, therefore, district employees may not have immunity for administering them. We recommend that these substances be administered by district personnel only if required by a student’s IEP or Section 504 plan.

- **LEGAL TIP:** Local policy should not authorize administration of herbal substances or dietary supplements if not required by a student’s IEP or Section 504 plan.

GKA(LOCAL)—Community Relations: Conduct on School Premises

TASB Policy GKA concerns the conduct of visitors to school property. The policy addresses what items are prohibited on school property and provides the authority to exclude individuals from school property under certain circumstances. If you are considering adding local language to this code not covered in the TASB model policy, you may want to look at our TASB School Law eSource guidance on:

- [Firearms](#) and [knives](#)
- [Visitors](#) to school property
- [Distribution of literature](#) on school property

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II. General Policy Development Tips

Creating local policies for school district operations is one of the board's most important roles. Through developing strong board policies, a district can communicate a coherent educational mission and provide clear guidance to help employees implement their duties lawfully and consistently. Good local policies can also reduce the risk of legal challenges. In order to be effective, a board policy must be written as clearly as possible. TASB Legal Services offers the following suggestions as general guidance when a board is considering local policy language.

Locally Defined Terms

As a general matter, school boards should avoid creating local definitions of terms that are defined differently in statute or through case law. For example, policies sometimes attempt to define the circumstances that can lead to a contract employee's termination for good cause. When a contract employee requests a hearing under Chapter 21, however, "good cause" is determined first by an independent hearing examiner based on previous termination cases and legal precedent. Other terms like "fraud" are defined in the Texas Penal Code. In the context of student and employee searches, the term "reasonable suspicion" means something very different from "probable cause." Creating local definitions that conflict even slightly with legally defined terms can inject confusion into local decision-making.

Mixing the (LEGAL) with the (LOCAL)

The district's policy manual contains both "legal" and "local" policies. Legal policies are restatements of the current law as it relates to Texas school districts generally. Occasionally, a district chooses to incorporate language from a legal policy into its local policy. Unique local policy provisions may not be automatically updated when the law changes. Absent diligent administrative review by the district, any change in state or federal law could cause the district's local policy to be out of date and conflict with governing law. TASB Legal Services recommends that school districts avoid reciting or summarizing legal policy language in local policy.

It is vital that boards not adopt legal policies. Legal policies contain citations to the statutes, rules, and case law governing a particular topic. They are compiled by TASB Legal Services and Policy Service to provide the legal framework for key areas of district operations. Legal policies reflect current law and are updated by TASB as the laws change. Legal and local policies function differently, and it is imperative that only local policies should be acted upon when a board updates policy.

Want More?

You can find TASB Legal Services' [Policy Development Tips](#) for other parts of your district's policy manual in the TASB Policy Service Resource Library. Policy Development Tips are a work in progress, and new topics will be added over time.