

Vantage Points

A Board Member's Guide to Update 73

Copy to J. Hardwick
E. Rodriguez
L. O'Connell

These are the 2 policy updates we haven't done yet. The access I have with mytasb does not allow me to see the full policy - only these. I think these need to be on the regular board agenda in February.

Nancy

2-2-05

**Your
Viewpoint?**

Vantage Points is an executive summary of the TASB Localized Update prepared for board members. The topic-by-topic outline and thumbnail descriptions survey the landscape, focusing attention on key issues of the update in preparation for the study of specific changes found in the policies. The description of policy changes in ***Vantage Points*** is highly summarized; local officials should thoroughly review the policies and Explanatory Notes for text and information that is presented here only in very generic form. The Explanatory Notes, found in the update packet, provide significantly greater detail and address every individual policy affected by this update.

PLEASE NOTE: This Update 73 ***Vantage Points*** and the Localized Update 73 packet may not be considered as legal advice and are not intended as a substitute for the advice of a board's own legal counsel.

We welcome your comments or suggestions for improving ***Vantage Points***. Please write to us at TASB Policy Service, P.O. Box 400, Austin, TX 78767-0400, or call us at 800-580-7529 or 512-467-0222.

For further information about Policy Service, check out our Web site at <http://www.tasb.org/policy>.

© 2004 Texas Association of School Boards, Inc. All rights reserved.

The Big Picture

A primary factor in the development of Update 73 was a recent **Attorney General's opinion** that reversed previous thinking about the applicability of **nepotism** statutes in regard to a superintendent and that prompted TASB Legal and Policy Services to take a closer look at the application of statutory definitions such as "public servant" and "public official" across various state statutes.

Another major element of the update was prompted by feedback from TASB's Council of School Attorneys, as well as local districts, regarding issues in the three main **complaint policies**. Those policies have been more closely coordinated through substantial restructuring and alignment of time lines.

Update 73 also addresses topics such as the new classroom supply reimbursement, copyright infringement, board meetings, Texas Department of Health immunization and screening requirements, and nonrenewal of term contracts.

Nepotism Who Is the Public Official?

Attorney General's opinion GA-123 supersedes a 1981 opinion relieving a superintendent, "merely an employee," of **nepotism** restrictions. The recent decision was based in part on the AG's finding that "the legislature has significantly revised relevant portions of the Education Code, providing a school district superintendent with increased authority" since the 1981 opinion. The new opinion pointed out that legislation since that time has also "expressly authorized a school board to **delegate 'final authority'** to select personnel to the superintendent."

This new opinion went on to explain that when a school board "has delegated to the superintendent final authority for personnel selection" a member of the board is no longer "a **public official** with appointment authority" for purposes of the nepotism statute. A superintendent would become, by this delegation, a public official and would not be permitted to hire relatives in a prohibited degree.

Accordingly, **DBE(LEGAL)** has been revised extensively to:

- Define the term "appoint."
- Change the terms "member of the Board" and "Trustee" to "public official," the actual language of the statute.
- Transfer the role of public official to a superintendent when final hiring authority has been delegated by the board.
- Include a long-standing nepotism provision regarding compensation.
- Indicate that a reemployed retiree cannot be an exception to the nepotism law.
- Qualify "change in status" as a reassignment whether or not a salary change is made.
- Require that an officer's action regarding a bona fide class of employees must be taken using "objective criteria," excluding personal preference or discretion.

What Does It Mean?

- Clarify the prohibition on “trading.”
- Include the penalty for violation of nepotism prohibitions.

So what is the statutory definition of “**public official**”? Well, it depends. The Government Code advances a definition, but if the question is really about the “**local public official**,” defined in the Local Government Code, there’s a different definition. Finally, there are the “**public servant**” definitions—one in the Government Code and a similar one in the Penal Code. In light of the AG’s opinion, it does indeed matter which definition is used.

As a point of reference, **BBFA(LEGAL)** now begins with all four **definitions**. In reading the ensuing provisions of this policy, the reader must keep in mind the source of the recited provision and apply the definition appropriate for that source. For a provision cited to the Penal Code, the reader should refer to the Penal Code definition; to the Government Code, the Government Code definition, etc. Throughout the policy, the word “Trustee” has been replaced with the term specific to the Code from which the provisions are recited. Where the word “Trustee” has been retained, delegation to a superintendent is not applicable.

Other revisions include:

- Addition of the definition of “**misuse**” by a public servant in regard to district property.
- Clarification, from Attorney General’s Opinion GA–177, of nepotism implications when
 - an employee who is related to a board member in a prohibited degree is hired by a superintendent, and
 - the board member acts on the **employment status**—e.g., contract renewal or nonrenewal—of the employee.
- Inclusion of the prohibition against accepting an **honorarium** or **expense reimbursement** for services that a public servant “would not have been requested to provide but for his or her official position or duties.”

Another effect of GA–123 is reflected at **BJA(LEGAL)**—a superintendent’s job description. We have listed as a separate item a superintendent’s role in making recommendations regarding the selection of personnel. The Attorney General’s opinion is also recited at **DC(LEGAL)** and **DCD(LEGAL)**.

(LOCAL) POLICY CONSIDERATIONS:

BJA

For districts using the TASB-developed method of superintendent evaluation, a job description policy has been drafted to provide greater consistency with the evaluation instrument. The new version views a superintendent as a **CEO** managing the **three major systems** through which a school district functions—education, operations, and communication—rather than simply presenting an activity-specific list of superintendent duties. This alternate text is available from your Policy Consultant/Analyst.

Other hiring issues new to **DC(LEGAL)** include:

- A district's obligation to provide information regarding certain employees of **third-party entities** in the district's monthly report to TRS.
- District verification of employment eligibility related to **immigration** for all new hires and rehires.
- Disclosure requirements that must be met when a district requests a prospective employee's **Social Security number**.
- The statutory definition of "**classroom teacher**."
- A frequency limit of twice a year for checking the **criminal history record** of a volunteer or employee.
- State **reporting** requirements for **new hires**, replacing the less rigorous federal requirements.

Complaints

Both (LEGAL) and (LOCAL) policies pertaining to **complaints** have been extensively revised. The (LEGAL) policies at **DGBA** (employees), **FNG** (students and parents), and **GF** (members of the public) now include:

- A board's right to control its agenda.
- Federal laws that require adoption of grievance procedures specific to Section 504, ADA, and Title IX.
- The three (LEGAL) complaint policies, as well as **BED(LEGAL)**, also include:
 - The United States Constitution First Amendment right to petition a board for redress of grievances.
 - The duty of a board to refrain from discrimination among public speakers on the basis of speech content or the message it conveys.
 - Case law affirming that a board is not required to respond to complaints other than to "stop, look, listen, and consider."

In addition, **DGBA(LEGAL)** amends the definition of "**conditions of work**," and **FNG(LEGAL)** restates parental rights regarding objections to school

assignment, challenge to education records, and denial of class credit. FNG also replaces text redundant with other codes by creating a list of parental rights with references to the codes where the specific provisions can be found.

**(LOCAL) POLICY CONSIDERATIONS:
DGBA, FNG, and GF**

All these policies have been substantially reworked as well. All are now more closely aligned with each other and share the following key provisions:

- **Informal resolution** is encouraged at the lowest possible administrative level and in a timely manner.
- The employee, parent, student, or member of the public has **15 days** to decide whether to initiate the formal complaint process, during which efforts at informal resolution may continue; the formal complaint, once initiated, may be withdrawn at any time.
- To avoid the complications created by school holidays, “calendar days” have been changed to “**District business days**,” and the time lines have been extended.
- Complaints and appeals filed after the **deadline** may be **dismissed**. The dismissal may be appealed, however, as a separate complaint, addressing only the timeliness issue and following the same time lines and methods as any other complaint.
- Complainants are given guidance in identifying the **appropriate administrator** with whom to lodge a complaint.
- An **appeal** of a Level One result must also be in writing and must include the information specified; **no new information** may be added at any appeal level.
- A significant change for Level Three proceedings involves determining whether the meeting will be **open or closed**, no longer defaulting to a closed meeting unless the person who is the subject of the complaint requests that the complaint be heard in an open meeting. While the previous policy text reflected a valid exception to the Texas Open Meetings Act, there are other equally valid, sometimes competing, exceptions that add complexity and prompt **case-by-case decisions** that should be made with the help of a district’s own legal counsel.

(continued)

(LOCAL) POLICY CONSIDERATIONS:

DGBA, FNG, and GF continued

- The policies make clear that a **separate record**—by audio or video/audio recording, or by court reporter—must be made of **Level Three proceedings**, which, at a minimum, must include “oral testimony or argument.” A board’s deliberation, however, need not be recorded.
- Finally, if a board fails to announce a decision orally or in writing by the end of the next regularly scheduled meeting, the **Level Two decision** is automatically upheld.

**Other Board Issues
Meetings**

BE(LEGAL) now includes two Government Code **exceptions** to the definition of board **meeting**—(1) social functions not related to the public business of a board, and (2) attendance at workshops or conventions where such business is not discussed nor formal action taken. Item 1 is reflected at **BED(LEGAL)** as well.

(LOCAL) POLICY CONSIDERATIONS:

BED

This policy has been revised to clarify that when the presiding officer determines that persons seeking **board resolution** to their complaints have not attempted to solve a matter administratively, they must be directed to follow the process specified at DGBA (complaints from employees), FNG (complaints from students or parents), or GF (complaints from members of the public).

Elections

With the temporary shift in the May election date behind us, **BBB(LEGAL)** reflects the return to the **first Saturday in May**. The Election Code definition of **plurality** has been added to the policy as well.

**Other Employee
Issues**

**Classroom Supply
Reimbursement**

The state’s new **classroom supply reimbursement** will be provided through district-requested grants only **when funds are available** through state appropriations or through funds identified for that purpose by TEA. For the coming school year, \$2 million dollars have been earmarked for distribution in the order in which applications are received from districts.

Districts must apply annually for available funds, in compliance with Commissioner’s rules cited at **DEE(LEGAL)**. A district must **match any funds** received and must limit reimbursements to **\$200 per teacher**. **Durable goods** for which the teachers receive reimbursement will remain the property of the district.

(LOCAL) POLICY CONSIDERATIONS:

DEE

Commissioner's rules require participating districts to specify in local policy that **teacher discretion** will be permitted as long as the purchases are for the **benefit of students**. A district that permits teachers to retain ownership of nominally valued goods must include that provision as well. If your District participates in this program, please contact your Policy Consultant/Analyst for assistance with a policy.

Nonrenewal

(LOCAL) POLICY CONSIDERATIONS:

BJCF and DFBB

TASB periodically reviews the **nonrenewal** policies in light of Commissioner decisions, an ever-changing statutory framework, and feedback from the TASB Council of School Attorneys.

Several revisions offered in this update merely clarify the existing provisions. Changes of substance that affect both BJCF(LOCAL) for a **superintendent** and DFBB(LOCAL) for **other Chapter 21** term contract employees include:

- More specific prohibitions in regard to drug and alcohol use. The exceptions to the drug provisions have been expanded at **DH(LOCAL)** as well.
- More specific language concerning disabilities not otherwise protected by law.
- Broadened text related to assault.
- Clarification of the application of "good cause."
- Deletion of immorality as a reason—it is a difficult term to define, and would most likely fall under one of the other reasons.

New reasons for nonrenewal found in both policies are:

- Breach of contract.
- Use of profanity.
- Coercion of a child to withhold information from the parent or another employee. Although this item is not new to DFBB, it was expanded to include other employees.
- Omission of required information on an employment application.

(continued)

Nonrenewal

(LOCAL) POLICY CONSIDERATIONS:

BJCF and DFBB continued

Reasons for proposed nonrenewal at **DFBB(LOCAL)** also include:

- Excessive absences.
- Endangerment of students or others.
- Failure to achieve the "highly qualified" status required by the NCLBA.
- Any reason voiding the employment relationship.

Exempt/
Nonexempt
Status

(LOCAL) POLICY CONSIDERATIONS:

DEA

Under previous provisions of the Fair Labor Standards Act (FLSA), an employer would lose the exemption from overtime pay for an employee if it made an **improper deduction** from the salary of that employee. As reflected in the recommendations for this policy, the FLSA has recently been amended to provide a "**safe harbor**" for an employer who makes an unauthorized deduction, but only under the following circumstances:

- The district has a "clearly communicated policy that prohibits improper deductions and that provides a complaint process."
- The district ceases to make improper deductions.

It is becoming the norm for districts to pay paraprofessional employees and some other **hourly wage earners** on a **salary** basis; receiving a salary, however, does not in itself bestow exempt status. Such employees are being paid a salary that equals the wages for **40 hours** per week, and any hours worked over that number trigger **time-and-a-half** compensation in the form of **pay or time**. Although the policy now clarifies that the method of compensation is a district choice, the nonexempt employee must be informed in advance whether overtime compensation will be in the form of pay or time. At the **end of the fiscal year**, any remaining compensatory time will be converted to overtime pay to the employee.

The work week, for FLSA purposes, has also been defined.

Calendar and Schedules

(LOCAL) POLICY CONSIDERATIONS:

DK

Recommended revisions clarify that a work calendar developed by a superintendent is subject to the board-adopted budget and compensation plan and must be in harmony with employment contracts.

Instructional Issues

Graduation

State Board rules **require** students who enter the ninth grade beginning with the 2004–05 school year to graduate under the **Recommended** or **Distinguished Achievement** Program with a narrow exception permitting graduation under the Minimum High School Program. [See **EIF(LEGAL)**]

At **EIF(EXHIBIT)**, we have deleted all program requirements applicable to students entering the ninth grade before the 2001–02 school year. In the remaining programs, new requirements for students entering the ninth grade in the school year 2004–05 and thereafter are noted.

(LOCAL) POLICY CONSIDERATIONS:

EIF

We suggest that you review your policy for agreement with **EIF(LEGAL)** and current practice in regard to:

- Any local program requirements beyond those required by the state.
- Physical education substitutions or waivers.
- Graduation credit for reading.

HSEP

Students enrolled in a **High School Equivalency Program (HSEP)** may no longer take a GED test unless they have met certain **assessment** requirements. **EK(LEGAL)** has been substantially revised to reflect the current operating requirements for an HSEP.

Copyright

EFE(LEGAL) has been expanded to encompass more of the **copyright statute**. Among other provisions, the Teach Amendments to the Copyright Act of 2002 have been added, giving instructors and students in nonprofit educational institutions the right to perform or display works during teaching activities. Some exceptions do apply.

Limitations on liability for copyright violations are available to districts, but to qualify a district must:

- Adopt and “reasonably implement” a policy that calls for termination of user privileges following repeat infringement.
- Not interfere with technical measures intended to protect copyrighted materials;
- Designate an agent to receive complaints;

- File the designation with the U.S. Copyright Office; and
- Post notice of the designation on the district's Web site;

(LOCAL) POLICY CONSIDERATIONS:

EFE

To assist a district in limiting liability for **copyright** infringement as noted above, suggested text is offered in a new section of this policy. The terminology has also been updated to encompass all electronic media, and obsolete definitions have been deleted.

**Celebrate
Freedom Week**

As cited in **EHBK(LEGAL)**, the 78th Legislature moved Celebrate Freedom Week to the week of Veteran's Day, and State Board rules provided guidelines for implementing the program.

Accreditation

Consideration of the effectiveness of a district's career and technology program has been dropped from the list of **primary** components of **accreditation requirements** previously found in State Board rules and at **GND(LEGAL)**. Although not considered primary criteria, several new items have been added, as have the State Board rules that replaced previous statutory requirements for accreditation ratings. Campus ratings, no longer addressed in the rules, have been deleted.

**Student Issues
Conduct**

More details from the Education Code and Penal Code have been added to **FNCG(LEGAL)** to address **legally prohibited weapons** and to classify as a **third degree felony** the act of "intentionally, knowingly, or recklessly" possessing or carrying such weapons.

FO(LEGAL) cites a legislated roadblock for students who would seek to sidestep serving the full term of a disciplinary consequence by transferring to another district. The sending district is to provide a copy of the **disciplinary action order** at the same time it sends the student's other records to the **receiving district**.

The 78th Legislature added several new felony offenses to the list in Title 5 of the Penal Code, and they are now reflected in **FOC(EXHIBIT)**:

- "Trafficking of persons."
- "Improper relationship between an educator and a student."
- Additions to an assault against a public servant or security officer. New to this provision is an assault against a person with whom the government contracts to perform a service at a correctional facility or a secure correctional or detention facility for juveniles.
- Expansion of "Terroristic Threat."
- Revisions to "Harassment by Persons in Certain Correctional Facilities."

Health

Immunization

FFAB(LLEGAL) has been restructured to accommodate changes in law and extensively revised Texas Department of Health (TDH) rules.

- The **immunization** requirements previously issued remain the same, except for Haemophilus influenzae type B. There are, however, a few new vaccine requirements.
- The expiration for a **medical exemption** has changed. It may be granted for more than a year if the written physician's statement notes that the student has a lifelong condition.
- Exemptions for newly filed **reasons of conscience** are limited to two years.
- The **30-day grace period** for students who have not begun immunizations is **gone**. A student must have had at least one dose of each required vaccine before being admitted to school. To remain enrolled, students must receive the doses as rapidly as medically feasible. Nurses or administrators are charged with monitoring for compliance.
- An exception permits **homeless** and **transfer** students to be granted the 30-day grace period for the purpose of securing records.

A district's consent to immunize a child, the form that must be used, and the limitation on liability for damages that might result from the immunization have also been included.

Screening

Changes in statute and TDH rules have prompted the redevelopment of FFAA(LLEGAL), reorganized around the three categories of screening.

- **Vision and hearing** screening: The grade levels for screening have been modified slightly, and include any student who is four years of age or older and who is enrolling for the first time in a district. Also revised are the provisions for outside screening and provisional admission.

The new rules permit transfers of screening records between districts without parental consent and authorize a receiving district to honor "an original or true copy of the proofs of screening" if the screening results have been entered.

- **Acanthosis Nigricans** screening: The screening requirement has been expanded to include students in three more ESC regions, now encompassing regions 1, 2, 3, 4, 10, 11, 13, 15, 18, 19, and 20.
- **Spinal** screening: If there is no record of screening, districts are to screen students new to the district in grades scheduled for screening and are to consider screening students new to the district in grades 10, 11, and 12. As with vision and hearing screening, a receiving district is authorized to honor "an original or true copy of the proofs of screening" if the results of the screening have been entered.

Nutrition

The Texas Department of Agriculture's Foods of Minimal Nutritional Value Policy went into effect August 1, 2004. Because the rules are quite lengthy,

CO(LEGAL) includes only the introductory statement and a pointer to the Web site for that agency.

Child Abuse and Neglect

In response to recent state legislation, a new question has been added to the **FFG(EXHIBIT)**: "Are there any restrictions on reporting?" The answer is "yes." An employee may not use or threaten to use a parent's refusal to consent to the administration of a psychotropic drug or to any other psychiatric or psychological testing or treatment of a child as the sole basis for making a report of neglect. An exception permits such a report if the employee believes there is a serious risk to the child.

(LOCAL) POLICY CONSIDERATIONS:

DGA, FM, and GE

The recently issued *Starting Points* addressing *Nonschool Use of School Facilities and Distribution of Nonschool Literature* for development of **GKD(LOCAL)** and **GKDA(LOCAL)** concerns use by groups that are not associated with the school. The recommended additions and revisions in the following policies govern use by employee, student, and parent groups and require prior administrative approval.

- **DGA(LOCAL)** addresses use by organizations representing professional, paraprofessional, or support employees.
- **FM(LOCAL)** permits school-sponsored student groups to use district facilities. **Note:** See FNAB for use by nonschool student groups.
- **GE(LOCAL)**, revised for clarity, allows use by district-affiliated school-support or booster organizations.

Business Issues

A number of policies related to the business operations of districts are included in this update:

- **CHF(LEGAL)**: An adjustment was made to the time period required for a vendor to suspend performance for nonpayment of contract services.
- **CMD(LEGAL)**: Employees may not be required to pay for a textbook or instructional technology that is stolen, misplaced, or not returned by a student.
- **CNB(LEGAL)**: Exempt license plates will not be issued for a vehicle unless a district's name is on each side in letters or in an emblem of a minimum size in a color that is "significantly different" from the vehicle and can be read from 100 feet away.
- **CPAB(LEGAL)**: The internal mail system may not be used for political advertising related to an official proceeding of a district. For clarification, the Election Code definition of "political advertising" has been added.
- **CVA(LEGAL)**: Prior to selecting a contractor through competitive bidding, a district must now select an engineer or architect to prepare the construction document.

- **CVE(LEGAL):** Legislation bringing the Education Code in line with the Government Code permits a district's engineer, architect, or construction manager-agent to serve alone or in combination with another as CMRs under a "separate or concurrent procurement." A district's engineer or architect may also provide "customary construction phase services under the engineer's or architect's original professional service agreement in accordance with applicable licensing laws."

Community Relations

Penal Code provisions that prohibit a concealed handgun license holder from carrying weapons onto school property have been added to **GKA(LEGAL)**. The narrow exceptions and the consequences for violating the ban have also been included.

(LOCAL) POLICY CONSIDERATIONS:

GKA

A general prohibition against bringing **weapons** on any district property has been added to the policy. An exception permits weapons for district-approved and supervised activities.

Previously, bringing a licensed concealed handgun onto school property other than the areas specifically prohibited by law—sidewalks, parking lots, etc.—where a district had posted prohibitions made the bearer subject to criminal trespass charges. After repeal by the 78th Legislature, a district can still post signs, but it is no longer automatically a criminal trespass offense.