

Legal Issues in Update 119

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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 best practices and potential legal problems that may arise because of the district's unique local choices in the policy codes affected by Update 119.

Please note that your district may not have locally developed provisions in a policy code affected by Update 119 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 a 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.

Common Legal Issues in Revising Update 119 Local Policies

AE(LOCAL)—Educational Philosophy

Educational philosophy references religion

- **COMMON ISSUE:** Local policy includes reference to religion in educational philosophy.

If a policy states that spiritual growth or the spiritual development of a student is part of the district's educational philosophy, there may be a legal concern. Federal courts have consistently upheld the separation of church and state in matters involving public schools, even if the reference is nondenominational. *Lee v. Weisman*, 505 U.S. 577 (1992). Therefore, TASB Legal Services recommends references to church or spirituality not be included in policy.

- **LEGAL TIP:** To protect against First Amendment claims, a district's educational philosophy should not include spiritual growth or other references to religion.

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CPC(LOCAL)—Office Management: Records Management

Identification of records management officer

- **COMMON ISSUE:** The superintendent or designee serves as records management officer.

A policy that provides that the superintendent or a superintendent’s designee shall serve as the records management officer, without specifying an individual, office, or position, may not meet legal standards. Section 203.025 of the Texas Local Government Code requires that the board designate an individual, office, or position as the records management officer. In addition, the name, office, or position of the records management officer must be entered in the board minutes. If the board intends to designate as the records management officer an individual, office, or position other than the office of superintendent, the designation must identify a specific individual, office, or position, rather than an unspecified “designee,” and be recorded in the board minutes.

- **LEGAL TIP:** Local policy should identify a specific individual, office, or position as the records management officer.

EIF(LOCAL)—Academic Achievement: Graduation

Students with disabilities

- **COMMON ISSUE:** Local policy includes graduation requirements for students with disabilities.

If a policy includes provisions relating to the graduation of students with disabilities, this information may not be necessary. The EIF(LEGAL) policy adequately addresses the circumstances under which students with disabilities may graduate from high school, and TASB Legal Services recommends these provisions not be included in local policy.

- **LEGAL TIP:** Local policy should include specific standards for mastery for relevant grade levels.

Changing graduation requirements mid-stream

- **COMMON ISSUE:** Local policy changes graduation requirements for currently enrolled students.

When implementing changes to this policy, the district should not change its requirements for graduation for currently enrolled students. To minimize the risk of legal challenge, TASB Legal Services recommends that new requirements not be added midway through a student’s high school career.

- **LEGAL TIP:** Changes to graduation requirements in local policy should be implemented prospectively.

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FDA(LOCAL)—Admissions: Interdistrict Transfers

Transfer based on academic performance

- **COMMON ISSUE:** Local policy allows for the acceptance or revocation of a transfer student based on academic performance or academic standing.

If the district bases either the acceptance or revocation of transfer students on academic performance, this could result in discrimination claims by students with disabilities. Under federal law, a qualified student with a disability cannot be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination in any district service, program, or activity on the basis of disability. 42 U.S.C. § 12132; 29 U.S.C. § 794; 34 C.F.R. § 104.4(a). Some factors considered in a transfer application, while not obviously discriminatory, could be viewed as a proxy for discrimination. For example, the U.S. Department of Education, Office for Civil Rights, found that denying a nonresident student with a disability admission into the district based on the cost of providing services amounted to imposing an additional criterion solely for students with disabilities, thus treating those students differently. Tuslaw (OH) Sch. Dist., 114 LRP 48993 (OCR 2014).

Because of the likelihood that a student's academic standing will be linked to the student's eligibility for special education, TASB Legal Services recommends that the district not consider academic performance in deciding whether to accept or revoke a transfer student. At a minimum, we recommend that the district seek legal advice from an attorney regarding nondiscriminatory application of the district's policy.

- **LEGAL TIP:** Local policy should not authorize academics as a basis of transfer acceptance or revocation.

Midyear revocation of transfer agreement

- **COMMON ISSUE:** Local policy allows for midyear revocation of transfer agreement.

The commissioner of education has ruled that Texas Education Code section 25.036 requires that a transfer must be for a period of one year and therefore a transfer agreement cannot be terminated midyear. *Child b/n/f Parents v. Skidmore-Tynan Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 026-R5-1110 (Aug. 7, 2013). Accordingly, TASB Legal Services recommends that the policy reflect that transfer agreements are granted on an annual basis under state law.

- **LEGAL TIP:** Unless your district has exempted itself from Texas Education Code section 25.036, transfers cannot be revoked midyear absent a lack of tuition payment.

Tuition higher than actual expenses

- **COMMON ISSUE:** Local policy establishes tuition fees for transfer students.

If local policy establishes tuition fees for transfer students, note that Texas Education Code section 25.038 limits the amount of tuition a district may charge a transfer student. The district

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may charge no more than the difference between the amount of state aid per student and the district's actual expenditure per student. In addition, Texas Education Code section 29.203(e) prohibits the district from charging tuition to a student attending school in the district under a public education grant. The formula set in policy should comply with these statutes.

- **LEGAL TIP:** Local policy should not charge more than allowed by statute.

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. 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.

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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.