

Legal Issues in Update 117

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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 117.

Please note that your district may not have locally developed provisions in a policy code affected by Update 117 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 117 Local Policies

CH(LOCAL)—Purchasing and Acquisition

Board Approval of Contracts

- **COMMON ISSUE:** Local policy does not require board approval for contracts at or above a certain amount or creates broad exceptions to board approval.

As a matter of governmental efficiency, school districts typically delegate purchasing authority to the superintendent to enter into most contracts for goods and services. Most district policies include a monetary limit to the superintendent's authority, requiring board approval of any purchase at or above a certain value. Sometimes, however, a district adopts a policy with no monetary limit to the superintendent's purchasing authority. Or a district may create broad exceptions to the requirement for board approval, such as exceptions for budgeted purchases, large purchases made using a statutory procurement method, or purchases discussed by a board committee.

TASB Legal Services recommends that district policy state clearly when board approval is required so that the lines of purchasing authority are clearly established. State law does not specify an appropriate threshold for board approval, but we recommend that policies require

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board approval of contracts valued at or above a certain amount as a best practice. Any exceptions to the policy's requirement for board approval should be narrow and specific to avoid arbitrary interpretations.

We also recommend that an amount be stated in policy to avoid an inference that the district's accounting practices are inadequate. The commissioner of education may order members of a board of trustees to file financial statements under certain circumstances, including when the commissioner determines that accounting practices are not adequate to safeguard state and district funds. Tex. Educ. Code § 11.064. The commissioner might consider the delegation of unspecified purchasing authority to the superintendent as evidence that the district's practices are not adequate.

- **LEGAL TIP:** Local policy should specify the parameters of a superintendent's purchasing authority.

Emergency Purchasing

- **COMMON ISSUE:** Local policy provisions related to emergency purchasing may be overbroad.

After an emergency or a disaster, districts sometimes seek to adjust their purchasing policy or procedures to address perceived constraints on administrators' authority to respond to the district's needs. The breadth of such changes may inadvertently implicate complicated state and federal legal issues. The Texas Education Code authorizes the board of trustees to delegate purchasing authority to the superintendent or other designated person in the event of a catastrophe, emergency, or natural disaster. Tex. Educ. Code § 44.0312(c). TASB Policy CH(LOCAL) includes a provision delegating the authority, in the event of a catastrophe, emergency, or natural disaster affecting the district, to contract for the replacement, construction, or repair of school equipment or facilities. In accordance with law, this provision applies only if the emergency replacement, construction, or repair is necessary for the health and safety of district students and staff. If your district has other language and desires TASB's local policy language for such a delegation, language is available from TASB Policy Service.

Remember that the delegation regarding emergency contracts does not waive competitive purchasing requirements under Education Code Chapter 44. Although the Texas Education Code provides some purchasing flexibility after an emergency, a district's local policy cannot contravene or exceed the authority provided by the law. In some instances, board resolutions and actions at the time of the emergency are necessary to address the situation. Tex. Educ. Code § 44.031(h). Local board policy cannot substitute for legally required actions that necessitate a case-by-case approach.

- **LEGAL TIP:** Only delegate emergency purchasing authority to the extent allowed by law.

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CV(LOCAL)—Facilities Construction

Board Approval of Contracts

- **COMMON ISSUE:** Local policy does not include a statement that construction contracts valued at or above a certain amount require board approval.

State law authorizes the board to delegate its purchasing authority to a designated person or committee unless that action explicitly must be taken by the board. Tex. Educ. Code § 44.0312. For purchasing construction services, the district must provide potential bidders with notice of the delegation and the limits of the delegation by rule or in the procurement documents. Tex. Gov't Code § 2269.053 (b). Sometimes local policy omits TASB-recommended language providing a threshold value at which construction contracts must be submitted for board approval. By not addressing the issue of delegation of authority, these policies are unclear as to whether, and to what extent, the board has delegated its authority to enter into a construction contract. TASB Legal Services recommends that a specific statement be included in local policy so that the lines of authority are clearly established, particularly since facilities construction contracts frequently involve a high level of vendor competition, community interest, and potential litigation.

- **LEGAL TIP:** Include a statement in local policy requiring board approval of construction contracts valued at or above a certain amount.

Contract Amount Requiring Competitive Procurement

- **COMMON ISSUE:** Local policy changes the contract value that triggers the district's obligation to competitively procure a construction contract from \$50,000 to a higher amount.

The Texas Education Code generally requires school districts to use an approved method of competitive procurement for the purchases of goods and services valued at \$50,000 or more in the aggregate for each 12-month period. Tex. Educ. Code § 44.031(a). A district cannot override the statutory amount through local policy. If the district follows local policy with a higher amount for competitive procurement rather than Texas Education Code section 44.031, it will violate state procurement law. TASB Legal Services recommends that districts not adopt policies that set an amount for competitive procurement higher than \$50,000.

- **LEGAL TIP:** Do not adopt a local policy setting an amount for competitive procurement higher than the statutory amount of \$50,000.

DEC(LOCAL)—Compensation and Benefits: Leaves and Absences

Local Leave Policy Contains Provisions Not Necessary in Board-Adopted Policy

- **COMMON ISSUE:** Local policy contains administrative details for administration of leave.

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Revisions recommended at Update 117 remove administrative details not required to be in board policy and that may be more appropriately addressed elsewhere, such as in the employee handbook. To support the removal of these administrative details, new language directs the superintendent to develop administrative regulations to implement the policy.

- **LEGAL TIP:** Board-adopted local policy should not include provisions suited for administrative regulations.

District with Sick Leave Pool or Bank Does Not Limit Reasons for Use to “Catastrophic” Illness or Injury

- **COMMON ISSUE:** Without limitations, the donor of leave to a pool or bank could owe taxes.

A district is not legally required to provide employees a sick leave pool or bank. If a district does offer such leave, it is recommended that the use be limited to “catastrophic” illness or injury. The IRS requires that donated leave programs be limited to mental or physical conditions that necessitate a prolonged absence from work and could result in substantial loss of income because an employee has exhausted all available paid leave. If the district allows leave for purposes other than catastrophic illness or injury, the employee who donates the leave may have to pay income tax on the donated leave. I.R.S. Priv. Ltr. Rul. 2007-20017 (May 18, 2007).

- **LEGAL TIP:** Local policy should include a definition of “catastrophic” illness or injury if the district provides a leave bank or pool.

Exceptions to Limitations on Duration of Discretionary Leave

- **COMMON ISSUE:** Local policy gives the superintendent discretion to make an exception to limits on the use of discretionary leave.

Local policy should not give administration the authority to make exceptions to the number of consecutive days an employee can be out on discretionary use if the board has determined a maximum in policy. The board has authority to adopt a policy governing employees’ use of state personal leave. Tex. Educ. Code § 22.003(a). The board may not, however, regulate the reasons for the leave. Allowing an administrator to determine if extenuating circumstances exist for purposes of consecutive leave days is taking the reasons for the employee’s leave request into consideration. The district could instead rely, for purposes of limiting the number of days used, on policy language that permits the employee’s supervisor to consider the effect of the employee’s absence on the educational program or district operations, as well as the availability of substitutes.

- **LEGAL TIP:** Do not allow administrators to make exceptions to the duration of discretionary leave.

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No Criteria for Award of Extended Sick Leave

- **COMMON ISSUE:** Local policy provides for extended sick leave but does not include criteria.

This policy does not set forth the criteria used to grant or deny extended sick leave. Without criteria in the policy, the district runs the risk of claims of discrimination. Federal and state laws prohibit employers from discriminating on the basis of disability or pregnancy in making leave decisions. For fair and consistent implementation, the district should formulate, and include in policy or regulations, some objective criteria on which to base such decisions.

- **LEGAL TIP:** Include reasons for use of extended sick leave in local policy.

Policy Includes Provisions Regarding Neutral Absence Control without Reference to ADA

- **COMMON ISSUE:** Local policy includes neutral absence control but does not reference reasonable accommodations under the Americans with Disabilities Act (ADA).

A local policy may provide that employees who fail to return to work after exhausting all available paid leave will be terminated. A district that terminates an employee for violating a reasonable absence-control provision cannot be liable for retaliatory discharge as long as the rule is uniformly enforced. *Continental Coffee Products Co. v. Cazarez*, 937 S.W.2d 444 (Tex. 1996). However, if the employee is out on leave because of a disability, the Equal Employment Opportunity Commission (EEOC) advises that the employee's eligibility for reasonable accommodations, as required by the ADA, shall be considered before termination. EEOC, Employer Provided Leave and the Americans with Disabilities Act (May 9, 2016), [eeoc.gov/eeoc/publications/ada-leave.cfm](https://www.eeoc.gov/eeoc/publications/ada-leave.cfm). If the district includes a neutral absence control provision in its local leave policy, it should acknowledge the employee's rights under the ADA.

- **LEGAL TIP:** Include a reference to additional leave as a reasonable accommodation if the district has a neutral absence control policy.

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.

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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.