



**Texas Association of School Boards**

Legal Services

P.O. Box 400 • Austin, Texas 78767-0400 • 512.467.3610 • 800.580.5345 • [legal.tasb.org](http://legal.tasb.org) • [legal@tasb.org](mailto:legal@tasb.org)

*Serving Texas Schools Since 1949*

**To: TASB Member School District Officials**  
**From: TASB Legal Services**  
**Date: October 19, 2020**

*Re: Letters from ACLU and Texas Values*

Many school districts received a letter dated October 12, 2020, from a group called Texas Values. The letter suggests that Update 115 to your TASB policy manual is flawed and should not be adopted. According to the letter, Update 115 applies a recent United States Supreme Court case, *Bostock v. Clayton County, Georgia*, which is about employment discrimination, to claims of student discrimination. The letter makes reference to another letter your district may have received from the American Civil Liberties Union (ACLU), dated September 2, 2020. The ACLU letter expressed concern about student dress and grooming standards that differentiate between genders, as well as standards that might have a disparate impact on students on the basis of their race, ethnicity, religion, or other protected characteristics. Both of these letters have been sent statewide by advocacy groups purporting to explain TASB's policy guidance.

In response to the ACLU letter, we directed school officials to our [TASB guidance](#) on student dress and appearance and suggested that school districts work with their own communities and attorneys to consider any changes to dress or grooming codes. We communicated that the ACLU letter did *not* require districts to take any action but was a transparent explanation of the position that advocacy group would take in the event of a legal challenge.

The same can be said about the Texas Values letter. Like the ACLU, Texas Values employs lawyers known to sue school districts. Letters from sparring advocacy groups should not be substituted for the advice of your district's school attorney.

Before you put any credence in the Texas Values letter, we would encourage you to read Update 115. Contrary to the letter, nothing in Update 115 says that the U.S. Supreme Court decision in *Bostock* applies to students. The case was added at TASB Policy DIA(LEGAL), in the Employment section in a code entitled "Employee Welfare: Freedom from Discrimination, Harassment, and Retaliation," with a statement taken almost verbatim from the Court's decision:

Firing an employee on the basis of homosexuality or transgender status violates Title VII's prohibition against sex discrimination in employment. *Bostock v. Clayton County, Georgia*, 17-1618, 2020 WL 3146686, (U.S. June 15, 2020).

## Changes at Update 115

A corresponding statement was added to DIA(LOCAL) to define discrimination on the basis of sex in accordance with the *Bostock* case: “In accordance with law, discrimination on the basis of sex includes discrimination on the basis of biological sex, gender identity, sexual orientation, gender stereotypes, or any other prohibited basis related to sex.” Although the *Bostock* case did not address gender stereotypes, another Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), concluded that an employer may not evaluate employees by assuming or insisting that they match the stereotype associated with their sex.

## Employment Policy vs. Student Policy

Texas Values says, “School districts should only rely on binding court precedent and not wishful predictions.” We agree. The *Bostock* case is the Supreme Court’s authoritative interpretation of Title VII, a federal law that prohibits discrimination on the basis of sex in employment. According to the U.S. Supreme Court, making an adverse employment decision on the basis of an employee’s homosexual or transgender status would constitute discrimination on the basis of sex. School districts cannot opt out of this binding Supreme Court precedent just by refusing to “adopt” Update 115.

Moreover, as school officials know, school boards do not “adopt” legally-referenced codes like DIA(LEGAL). The legal codes, which we identify as “(LEGAL),” are reference material included in the policy manual to give legal context for local decision-making. They are an unbiased presentation of the law. On the other hand, local codes, which we identify as “(LOCAL),” are board-adopted and represent local school board choices within the scope of their authority.

After confusing (LEGAL) codes with (LOCAL) codes, and employment policies with student policies, the Texas Values letter goes on at length about issues like dress codes, restrooms, housing, separate toilets, showers, and sports teams, none of which are addressed in Update 115, or indeed any recent TASB recommended policies.

The letter warns, “Many school districts will be receiving or have received guidance from the TASB encouraging them to change all school policies to add language that would grant special protections for ‘sexual orientation’, ‘gender identity’, and ‘gender expression.’” Nothing in Update 115 adds special protections. Instead, TASB recommended local policy language has prohibited discrimination and harassment against both employees and students on the basis of sex and gender for many years. Suggested adjustments to student-related codes, including policy FFH(LOCAL), in Update 115, address the Department of Education’s new regulations on Title IX. They have nothing to do with the *Bostock* case. Recommended policy FFH(LOCAL) does not grant any protected status; it simply helps school districts implement the new Title IX regulations on sexual harassment (as defined in the regulations) and resolve other complaints as efficiently and fairly as possible.

### Recommended Next Steps

- If you have legal questions, talk to your school attorney, not these advocacy groups competing for your attention.
- If you are interested in choosing alternative wording for your LOCAL policy, communicate any changes to your TASB policy consultant.
- Please understand that changing your board-adopted LOCAL policy does not change the precedents governing local school district decision-making and may even make the district vulnerable to legal challenges. The legal issues brought forth by both the ACLU and Texas Values are complex. We encourage you to make informed decisions in consultation with local counsel.

As always, if you have questions, we are happy to help. School officials can reach TASB Legal Services at 800.580.5345 or [legal@tasb.org](mailto:legal@tasb.org).

This document is continually updated, and references to online resources are hyperlinked, at [tasb.org/services/legal-services/tasb-school-law-esource/students/documents/tasb-response-to-texas-values-letter.pdf](https://tasb.org/services/legal-services/tasb-school-law-esource/students/documents/tasb-response-to-texas-values-letter.pdf). For more information on this and other school law topics, visit TASB School Law eSource at [schoolawesource.tasb.org](https://schoolawesource.tasb.org).

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