

Local assessment/testing and human sexuality instruction under Texas Education Code, Section 28.004

The 87th Legislature passed House Bill 1525, which, in section 7 of the bill, included revisions to statutory regulations regarding human sexuality instruction. Among other enactments, this legislation requires a school district to first obtain written consent from a parent before a student may receive instruction in human sexuality. This “opt in” provision is in addition to the current statutory provisions in Section 28.004, Education Code (TEC), which authorize a parent to remove the parent’s child from any part of the human sexuality instruction without subjecting the student to an academic penalty or other sanction from the public school.

Questions have been raised regarding the interplay of these provisions (removing a student from human sexuality instruction) and a school’s use of local assessments to determine a student’s proficiency in the subject matter. Some proponents have argued that removal from “instruction” does not relieve a student’s responsibility to take a local assessment that assesses content related to human sexuality when a school district uses the local assessment as the method to determine academic achievement or to demonstrate proficiency in content that is required in the Texas Essential Knowledge and Skills. Among other reasons, proponents refer to statutory provisions in TEC, Section 28.021, that impose a requirement on school districts to only allow student promotion on the basis of academic achievement or demonstrated proficiency of the subject matter and look to TEC, Section 26.010, which expressly removes a parent’s right for the parent’s child to avoid a test or exempt the student from satisfying grade level requirements in a manner acceptable to the district.

Many have requested that the agency provide insight on how to resolve this conflict. It is difficult to reconcile the statutory requirement that a parent’s request for removal of a student from instruction must be implemented “...without subjecting the student to any ... academic penalty, or other sanction...” with the possibility that a student could be compelled to take the parts of a local assessment to demonstrate proficiency of content for which they did not receive instruction.

While TEC, Section 26.010, does not relieve a child from satisfying grade level requirements, the statute only applies this limitation to instructional exemptions under that section and does not apply to special exemption provisions contained in TEC, Section 28.004. Additionally, the statutory construction mechanisms codified in Section 311.026, Government Code, provide that, as a general rule, where two statutory provisions conflict, special (i.e., specific) statutory provisions provide an exception to general statutory provisions.

Accordingly, the most reasonable interpretation of these provisions is that the legislation creates an exception for purposes of human sexuality instruction that would prohibit a district from requiring the student to take a local assessment to demonstrate proficiency of content related to human sexuality that the parent did not want and did not opt for the parent’s child to receive.

The information in this guidance is subject to revision based on additional information and analysis. School districts have the responsibility for implementing the provisions of TEC, Section 28.004, and, as always, should seek advice from their own legal counsel when determining how to operate. It should be noted that under TEC, Section 28.004, parents have an explicit right to file a grievance with the school board for a violation of the provisions of TEC, Section 28.004. TEC, Section 7.057, authorizes a person to appeal to the commissioner if a person is aggrieved by the actions or decisions of a school board that violate the school laws of this state. It is the hope of the agency that this guidance may provide some useful insight as districts grapple with these issues.