

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 88. POLYGRAPH EXAMINERS

16 TAC §§88.1, 88.10, 88.20 - 88.29, 88.40, 88.70 - 88.80, 88.90, 88.91, 88.100, 88.101

The Texas Department of Licensing and Regulation (Department) proposes the repeal of existing rules at 16 Texas Administrative Code (TAC), Chapter 88, §§88.1, 88.10, 88.20 - 88.29, 88.40, 88.70 - 88.80, 88.90, 88.91, 88.100, and 88.101, regarding the Polygraph Examiner Program. These proposed changes are referred to as "proposed repeals."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 88 implement Texas Occupations, Chapter 1703, Polygraph Examiners.

The proposed repeals implement House Bill (HB) 1560, 87th Legislature, Regular Session (2021), which deregulates the polygraph examiners program by repealing Chapter 1703, Occupations Code, effective September 1, 2021. The proposed repeals are necessary to repeal the existing chapter establishing the regulatory structure for polygraph examiner licenses. Due to the pending repeal of Chapter 1703, Occupations Code, the Department will no longer have authority over the licensure of Polygraph Examiners, and the proposed repeals remove all rules related to the regulation of this program.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §88.1, Authority. This section states the authority for regulation by the Department.

The proposed repeal of §88.10, Definitions. This section provides definitions for Chapter 88.

The proposed repeal of §88.20, Licensing Requirements--Polygraph Examiner. This section establishes licensure requirements for the Polygraph Examiner license.

The proposed repeal of §88.21, Licensing Requirements--Polygraph Examiner Renewal. This section establishes renewal licensure requirements for the Polygraph Examiner license.

The proposed repeal of §88.22, Licensing Requirements--Polygraph Examiner Non-resident Applicants. This section establishes non-resident application requirements for the Polygraph Examiner license.

The proposed repeal of §88.23, Licensing Requirements--Registration with County Clerk. This section establishes the registration requirements with county clerks.

The proposed repeal of §88.24, Licensing Requirements--Polygraph Examiner Applicant with Out-of-State License. This section establishes the out-of-state reciprocity procedures for Polygraph Examiner license applications.

The proposed repeal of §88.25, Continuing Education. This section establishes continuing education requirements for the licenses issued under Chapter 88.

The proposed repeal of §88.26, Licensing Requirements--Polygraph Examiner Internship License. This section establishes licensure requirements for the Polygraph Examiner Internship license.

The proposed repeal of §88.27, Polygraph Examiner Internship License Term. This section establishes the term of a Polygraph Examiner Internship license.

The proposed repeal of §88.28, Responsibilities of Registered Curriculum Providers. This section establishes requirements for curriculum providers.

The proposed repeal of §88.29, State Examination for Polygraph Examiner License. This section establishes the requirements for examination eligibility and passage.

The proposed repeal of §88.40, Financial Security. This section establishes financial security requirements of \$5,000 for Polygraph Examiner licensees.

The proposed repeal of §88.70, General Responsibilities--Sponsor. This section outlines the responsibilities of a sponsor for a trainee.

The proposed repeal of §88.71, General Responsibilities--Polygraph Examiner Internship. This section outlines the responsibilities of a trainee in an internship.

The proposed repeal of §88.72, Responsibility of Licensee--Change of Name and/or Address. This section establishes the requirement to inform the Department of a change of name or address.

The proposed repeal of §88.73, Responsibility of Licensee--Display of License. This section establishes the requirement to display a Polygraph Examiner license.

The proposed repeal of §88.74, Responsibility of Licensee--Conducting Polygraph Examinations. This section establishes the responsibilities of a Polygraph Examiner during a polygraph examination.

The proposed repeal of §88.75, Responsibility of Licensee--Prohibited Acts. This section establishes prohibited acts by licensees under Chapter 88.

The proposed repeal of §88.76, Responsibility of Licensee--Polygraph Examination Results. This section outlines the

responsibilities of licensees after conducting a polygraph examination.

The proposed repeal of §88.77, Responsibility of Licensee--Confidentiality of Examination Results. This section establishes the confidentiality of polygraph examination results.

The proposed repeal of §88.78, Responsibility of Licensee--Contract for Services and Waiver of Liability. This section contains mandatory language that must be included in any contract for polygraph examinations or waivers of liability.

The proposed repeal of §88.79, Responsibility of Licensee--Record Keeping. This section establishes the recordkeeping requirements a licensee must observe for polygraph examinations.

The proposed repeal of §88.80, Fees. This section establishes the fees to be paid to the Department for licenses issued under Chapter 88.

The proposed repeal of §88.90, Sanctions and Administrative Penalties. This section establishes that the Department may apply sanctions or administrative penalties under Chapter 88 or other Department laws and rules.

The proposed repeal of §88.91, Enforcement Authority. This section establishes the Department's enforcement authority.

The proposed repeal of §88.100, Technical Requirements--Polygraph Examiner Course Training Material and Internship. This section establishes the hours and subject matter requirements for Polygraph Examiner license training courses.

The proposed repeal of §88.101, Other Instruments and Instrumentation. This section states that the Texas Commission of Licensing and Regulation (Commission) may adopt rules to identify instruments acceptable for use in Texas.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed repeals are in effect, there will be a reduction in costs to the state government as a result of enforcing or administering the proposed repeals. Chapter 1703 of the Occupations Code, the Polygraph Examiners statute, will be repealed on September 1, 2021, and state regulation of the program will end. With the repeal of the statute and rules, and the deregulation of the program, it is estimated there will be a reduction in costs of approximately \$50,000 each year for resources the Department previously needed to regulate the program.

Additionally, for each year of the first five years the proposed repeals are in effect, Mr. Couvillon has determined that there will be a reduction in revenue to the state government as a result of enforcing or administering the proposed rules. With the repeal of the statute and rules, and the deregulation of the program, the state government will lose approximately \$90,000 in revenue each year in license application fees and renewal application fees, continuing education provider fees and course fees, and penalties collected.

Mr. Couvillon has determined that for each year of the first five years the proposed repeals are in effect, enforcing or administering the proposed repeals does not have foreseeable implications relating to costs or revenues of local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed repeals will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022. The repeal of the statute and rules, and the deregulation of the polygraph examiners program, will not have an impact on local employment. There should be no increase or decrease in the number of polygraph examiners as a result of the repeal and deregulation, but any possible increase or decrease would not be large enough to have an impact on local employment, and cannot be calculated by the Department.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed repeals are in effect, the public benefit will be that the repeal of the statute and rules, and the deregulation of the program, removes unnecessary state regulation of the polygraph examiner industry, and will save polygraph examiners and examiner trainees the cost of the fees for an annual state license and continuing education.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals. There could be an economic cost in the form of lost revenue for licensed continuing education providers which offer polygraph examiner continuing education courses for a fee since there will no longer be a statutory requirement for continuing education for license holders, and no rule requirement for license holders to complete continuing education hours to renew a license. However, the possible loss of revenue is unclear and cannot be calculated by the Department.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed repeals. Since the agency has determined that the proposed repeals will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required. The proposed repeals will have no adverse economic impact on polygraph examiners or examiner trainees. However, the repeal of the rules, as required by the repeal of the polygraph examiners statute, could have adverse economic impact on some or all of the small and micro-business continuing education providers that offer polygraph examiner continuing education courses, especially those offering only the polygraph examiner course. However, the possible loss of revenue is unclear and cannot be calculated by the Department.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed repeals do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the Department provides the following Government Growth Impact Statement for the

proposed repeals. For each year of the first five years the proposed repeals will be in effect, the Department has determined the following:

1. The proposed repeals do create or eliminate a government program. The proposed rules eliminate the polygraph examiner program.
2. Implementation of the proposed repeals does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed repeals does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed repeals do require an increase or decrease in fees paid to the agency. The proposed repeals eliminate all fees paid for licenses, renewals, and continuing education for the polygraph examiner program.
5. The proposed repeals do not create a new regulation.
6. The proposed repeals do expand, limit, or repeal an existing regulation. The proposed repeals repeal the existing 16 TAC Chapter 88, Polygraph Examiners.
7. The proposed repeals do increase or decrease the number of individuals subject to the rules' applicability. The proposed repeals decrease the number of individuals subject to the polygraph examiner program rules by eliminating all requirements for licensure.
8. The proposed repeals do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed repeals and the proposed repeals do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed repeals do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed repeals may be submitted electronically on the Department's website at <https://ga.tdlr.texas.gov:1443/form/gcerules>; by facsimile to (512) 475-3032; or by mail to Vanessa Vasquez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register*.

STATUTORY AUTHORITY

The proposed repeals are proposed under Texas Occupations Code, Chapters 51 and 1703, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed repeals are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the proposed repeals.

§88.1. *Authority.*

§88.10. *Definitions.*

§88.20. *Licensing Requirements--Polygraph Examiner.*

§88.21. *Licensing Requirements--Polygraph Examiner Renewal.*

§88.22. *Licensing Requirements--Polygraph Examiner Non-resident Applicants.*

§88.23. *Licensing Requirements--Registration with County Clerk.*

§88.24. *Licensing Requirements--Polygraph Examiner Applicant with Out-of-State License.*

§88.25. *Continuing Education.*

§88.26. *Licensing Requirements--Polygraph Examiner Internship License.*

§88.27. *Polygraph Examiner Internship License Term.*

§88.28. *Responsibilities of Registered Curriculum Providers.*

§88.29. *State Examination for Polygraph Examiner License.*

§88.40. *Financial Security.*

§88.70. *General Responsibilities--Sponsor.*

§88.71. *General Responsibilities--Polygraph Examiner Internship.*

§88.72. *Responsibility of Licensee--Change of Name and/or Address.*

§88.73. *Responsibility of Licensee--Display of License.*

§88.74. *Responsibility of Licensee--Conducting Polygraph Examinations.*

§88.75. *Responsibility of Licensee--Prohibited Acts.*

§88.76. *Responsibility of Licensee--Polygraph Examination Results.*

§88.77. *Responsibility of Licensee--Confidentiality of Examination Results.*

§88.78. *Responsibility of Licensee--Contract for Services and Waiver of Liability.*

§88.79. *Responsibility of Licensee--Record Keeping.*

§88.80. *Fees.*

§88.90. *Sanctions and Administrative Penalties.*

§88.91. *Enforcement Authority.*

§88.100. *Technical Requirements--Polygraph Examiner Course Training Material and Internship.*

§88.101. *Other Instruments and Instrumentation.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 6, 2021.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 463-3671



CHAPTER 117. MASSAGE THERAPY

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 117, Subchapter A, §117.2, Subchapter F, §§117.50, 117.55, 117.58, 117.59, 117.62, 117.66, 117.67, and 117.68, Subchapter G, §117.82, and Subchapter H, §§117.91 and 117.92, regarding the Massage Therapy program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 117 implement Texas Occupations Code, Chapter 455.

The proposed rules are necessary to implement bills passed in the 87th Legislature, Regular Session, and update the Massage Therapy rules. Specifically, the proposed rules implement Senate Bill 1130, 87th Legislature, Regular Session (2021), which expressly allows massage schools to teach certain subjects through distance learning. The proposed rules also implement House Bill 1540, 87th Legislature, Regular Session (2021), which amended the definition of "sexual contact" in the Massage Therapy statute. Additionally, the proposed rules include clarification and clean-up changes.

The proposed rules also include changes in response to violence and other misconduct against massage therapists, including the shootings at massage establishments near Atlanta, Georgia. These proposed amendments were recommended by department staff and the Massage Therapy Advisory Board's standard of care workgroup.

The proposed rules were presented to and discussed by the Massage Therapy Advisory Board at its meeting on July 26, 2021. The Advisory Board did not make any changes to the proposed rules. The Advisory Board voted and recommended that the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §117.2 by adding a definition for "distance learning" and renumbering the remaining definitions.

The proposed rules amend §117.50 by adding subsection (k), which requires department approval for distance learning.

The proposed rules amend §117.55 to require massage schools to maintain and make available for department inspection the documentation related to distance learning. The proposed amendments to §117.55 also allow the department to inspect a massage school's instruction, including the instruction offered through distance learning.

The proposed rules amend §117.58 by updating the responsibilities of a massage school's designated contact person to include the organization of all instruction, including instruction through distance learning.

The proposed rules amend §117.59 to include detail related to distance learning. Specifically, the proposed amendments: update the language in subsection (c) to refer to instructional hours and instruction time; update subsection (d) to require an instructor to be physically present with the student during any in-person hours, and to require that any make-up work completed through distance learning comply with the distance learning provisions in the chapter; require in subsection (e) that the internship be completed at a licensed massage school and not through distance learning; update subsection (h) to require a school to provide all instruction at the physical site where the student enrolled or through distance learning (if otherwise allowed), unless otherwise agreed to by the student and the educational program; and update subsection (i) to refer to instruction. The proposed amendments to §117.59(m) include requirements that massage schools must comply with if they offer distance learning. These requirements relate to verifying the student's identity, tracking student hours, monitoring the student's participation, offering an opportunity for direct interaction between the instructor and the student, providing interactive instruction, maintaining documentation, ensuring that students have all necessary educational materials, and using a time clock or similar technology in distance learning. The proposed amendments provide examples

of instruction that is interactive. The proposed amendments to subsection (m) also prohibit schools from using distance learning to provide the instruction required by Occupations Code, Section 455.156(b)(1)(A). In addition to distance learning-related amendments, the proposed rules amend subsection (n) to require that massage schools offer information in protecting the safety of massage therapists, including steps to take if a client initiates any verbal or physical contact with the massage therapist that is sexual in nature. This information would be provided as part of the minimum 500-hour supervised course of instruction, and could be provided at any time during the 500 hours. Additionally, the proposed amendments to §117.59(f) clarify that a massage therapy instructor must be available on the premises of the school and be immediately available to a student during the hands-on experience during the internship.

The proposed rules amend §117.62 by updating the language in subsection (d)(3) to refer to all instructional hours, including hours completed through distance learning.

The proposed rules amend §117.66 by updating the language in subsection (d) to refer to instruction rather than classes.

The proposed rules amend §117.67 to clarify that massage schools must report the hours that students successfully complete. The proposed amendments also allow the department to require that massage schools report the location where hours were completed or if hours were completed through distance learning.

The proposed rules amend §117.68 by updating the language in subsection (c) to refer to instruction rather than classes.

The proposed rules amend §117.82 by adding solicitation of prostitution to the definition of "sexual contact" in the section.

The proposed rules amend §117.91 by adding two required statements to the consultation document: one statement that the licensee may end the massage session if the licensee feels uncomfortable for any reason, and one statement that the licensee must immediately end the massage statement if a client initiates any verbal or physical contact that is sexual in nature. The proposed rules also include clean-up changes in subsection (b). These changes would require the initial consultation to be updated if a client's reason for seeking massage therapy changes at any time or any of the information in subsections (a)(1) through (a)(3) is modified.

The proposed rules amend §117.92 by adding solicitation of prostitution to the description of "sexual contact" in the section.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules. The proposed rules will not affect the amount of resources or personnel needed by the Department, and local governments do not enforce or administer the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules. The proposed rules will not increase or decrease the amount of fees paid to the Department, and local governments do not enforce or administer the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022. Although there may be additional massage therapy students because of the addition of distance learning, the overall increase would not be large enough to have an anticipated impact on local employment.

PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, there will be public benefit from implementing SB 1130, regarding distance learning. Specifically, the opportunities offered through distance learning could make massage therapy education available to more individuals, thereby increasing attendance at massage schools and increasing the number of license holders who serve the public. There could also be a decrease in the overall cost of massage therapy education, as students may have fewer expenses associated with commuting to class. Additionally, the proposed rules ensure that massage students who participate in distance learning receive all required instruction.

The proposed changes to the consultation document will benefit the public by setting clear expectations for the client and the licensee. Requiring massage schools to provide information in protecting the safety of the massage therapist may help reduce risk of harm to students once they become licensed.

The proposed changes implementing HB 1540 bring the rules up to date with the language in the massage therapy statute and changes to the Texas Penal Code. And finally, several rule language improvements and clarifications help make the rules clearer and easier for the reader to understand.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. Specifically, any costs associated with updating forms such as consultation documents or enrollment agreements would be minimal, if any. And updating course curriculum to include information in protecting the safety of a massage therapist would have minimal cost to schools, if any.

There would be no economic costs to massage schools to comply with the proposed rules regarding distance learning since schools are not required to offer distance education. However, if a school chooses to offer distance learning, the school may have to purchase a program or other system to verify the identity of the student, monitor student participation, accurately track the number of hours completed, and document its compliance with these requirements. If a school offers a class, lecture, or recitation through distance learning, the school would also be required to offer an opportunity for direct interaction between the instructor and the student. And if a school offers distance learning through a method other than live instruction, that instruction must be interactive. There are many available resources at a variety of costs. A sampling of the various programs shows that costs can range from monthly fees of \$15 to \$200, or annual fees of \$500 to \$1,500.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. The Department regulates massage therapists, massage establishments, and massage schools, some of which are small or micro-businesses. The Department does not collect data indicating how many of these licensees can be classified as small or micro-businesses.

The proposed rules would not have an anticipated adverse economic effect on any licensees. No school is required to offer distance learning, and if a school determines that meeting the requirements in the proposed rules would have an adverse economic effect on the school, the school can choose to not offer distance learning. Additionally, any potential costs associated with updating forms and curriculum would be so minimal as to not have an adverse economic effect on any business.

Since the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Specifically, if a massage school chooses to offer distance learning, there may be a cost associated with meeting the requirements in the proposed rules relating to distance learning. However, the proposed rules fall under the exception for rules that are necessary to protect the health, safety, and welfare of the residents of this state under §2001.0045(c)(6), and the exception for rules that are necessary to implement legislation under §2001.0045(c)(9). Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation. The proposed rules add requirements that must be met if a massage school offers distance learning. These requirements include obtaining approval from the Department, verifying student identity, accurately tracking student hours, monitoring student participation, and documenting compliance with distance learning requirements. The requirements also include: for classes and similar methods of instruction, providing an opportunity for direct interaction between the instructor and the student; and when dis-

tance learning is provided through a method other than live instruction, providing interactive instruction.

6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules expand requirements for the consultation document to include certain language. The proposed rules also expand the requirements for the 500-hour supervised course of instruction to include information in protecting massage therapist safety, and expand the requirements for the enrollment agreement to include information about distance learning. Additionally, the proposed rules expand the Department's inspection authority to allow the Department to inspect a massage school's instruction that is offered through distance learning. The proposed rules also allow the Department to require massage schools to identify the location where student hours were completed or if hours were completed through distance learning.

7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at <https://ga.tdlr.texas.gov:1443/form/gcerules>; by facsimile to (512) 475-3032; or by mail to Monica Nuñez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §117.2

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (8) (No change.)

(9) Distance learning--A formal instructional process in which the student and instructor are separated by physical distance and communication technology is used to deliver instruction to the student. The process may also be known as "distance education."

(10) [(9)] Executive Director --The executive director of the department.

(11) [(10)] Health and hygiene--The study of recognized methods of sanitation and cleanliness including prophylaxis or disease prevention as applied to massage therapy services and current knowledge of elements of healthy life styles.

(12) [(11)] Hydrotherapy--The use of generally accepted methods of external application of water for its mechanical, thermal, or chemical effect.

(13) [(12)] Instructor--A person employed at a licensed massage school who instructs one or more students in any section of the course of instruction, other than massage therapy techniques, manipulation of soft tissue, or the internship.

(14) [(13)] Kinesiology--The study of the anatomy, physiology, and mechanics of movement of the human body.

(15) [(14)] Licensee--A person or entity licensed under the Act as a massage therapist, massage school, massage therapy instructor, or massage establishment.

(16) [(15)] Linens--Includes, but is not limited to, sheets, towels, and robes or cloth materials used on or comes into contact with a client's body during a massage.

(17) [(16)] Massage school--An entity that:

(A) teaches at a minimum the course of instruction required for a massage therapist license; and

(B) has at least two instructors.

(18) [(17)] Massage therapist--A person who practices or administers massage therapy or other massage services to a client for compensation. The term includes a licensed massage therapist, therapeutic massage practitioner, massage technician, masseur, masseuse, myotherapist, body massager, body rubber, or any derivation of those titles.

(19) [(18)] Massage therapy--The manipulation of soft tissue by hand or through a mechanical or electrical apparatus for the purpose of body massage. The term includes effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve strokes, and Swedish gymnastics. Massage therapy may include the use of oil, lubricant, salt glows, heat lamps, hot and cold packs, or tub, shower, jacuzzi, sauna, steam or cabinet baths. Equivalent terms for massage therapy are massage, therapeutic massage, massage technology, myo-therapy, body massage, body rub, or any derivation of those terms. Massage therapy is a health care service when the massage is for therapeutic purposes. The terms "therapy" and "therapeutic" do not include diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy, or podiatry is required by law. Massage therapy does not constitute the practice of chiropractic.

(20) [(19)] Massage therapy educational program--The minimum 500 hour supervised course of instruction described in the Act, §455.156, required for licensure and provided by a licensed massage school.

(21) [(20)] Massage therapy establishment--A place of business that advertises or offers massage therapy or other massage services unless specifically exempted by the Act. The term includes a place of business that advertises or offers any service described by a derivation of the terms "massage therapy" or "other massage services" as defined by the Act.

(22) [(24)] Massage therapy instructor--A licensed massage therapist who provides to one or more students instruction approved by the department in massage therapy or manipulation of soft tissue and who holds a license issued by the department as a massage therapy instructor.

(23) [(22)] Owner--An owner is, in the case of a massage school or establishment, an individual, a partnership and any partners, a corporation, or any other legal business entity.

(24) [(23)] Pathology--The scientific study of the nature of disease and its causes, processes, development, and consequences.

(25) [(24)] Physiology--The study of the normal vital processes of the human body including the processes of cells, tissues, and organs including the contractibility of muscle tissue; coordination through the nervous system; digestion; circulatory; reproduction; and secretions.

(26) [(25)] State approved educational institution--An institution which is approved by the Texas Education Agency or which is an institution of higher education as defined in the Texas Codes Annotated, Texas Education Code, Chapter 61 or a higher education institution approved by a similar agency in another state.

(27) [(26)] Student permit--A permit issued by the department to a student enrolled in a licensed massage school which allows the student to practice massage therapy as prescribed by the massage therapy education program.

(28) [(27)] Swedish gymnastics--Passive and active joint movements, nonspecific stretches, passive and active exercise, or any combination of these.

(29) [(28)] Swedish massage therapy techniques--The manipulation of soft tissue utilizing effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve stroke, and Swedish gymnastics.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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For further information, please call: (512) 475-4879



SUBCHAPTER F. LICENSED MASSAGE SCHOOLS

16 TAC §§117.50, 117.55, 117.58, 117.59, 117.62, 117.66 - 117.68

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.50. *Massage School License--General Requirements and Application.*

(a) - (j) (No change.)

(k) A massage school must obtain department approval in writing before offering instruction through distance learning. A school must obtain additional written approval before changing the technology or method of providing distance learning or before offering additional instruction through distance learning.

§117.55. *Massage School Inspections.*

(a) There will be at least one unannounced inspection at the primary instructional location of each massage school and at each additional location every year. The massage school owner or the designated contact person must be available.

(b) Other inspections may be performed, announced or unannounced, at the discretion of the department to ensure compliance.

(c) A school must maintain and make available for department or student inspection the following documents for a period of the student's enrollment through thirty-six (36) months after the student completes the curriculum, withdraws, or is terminated:

(1) daily record of attendance;

(2) the following documents if a time clock is used:

(A) time clock record(s); and

(B) time clock failure and repair record(s); ~~and~~

(3) for a student completing instruction through distance learning, all documentation required under §117.59(m); and

(4) [(3)] all other relevant documents that account for a student's hours under this chapter.

(d) Upon completion of the inspection, the owner shall be advised in writing of the results. The inspection report will indicate whether the inspection was approved or not approved and will describe any violations identified during the inspection. For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner of the school within ten (10) days. Verification of corrected violations must be provided, in a manner prescribed by the department, within thirty (30) days of completion.

(e) The department may inspect a school's instruction, including observing or auditing any instruction offered through distance learning.

§117.58. *Massage School Administrative Personnel.*

(a) Each massage school that operates a massage therapy educational program shall notify the department of the designated contact person. The designated contact person is responsible for the educational program, the organization of classes and other instruction including distance learning, the maintenance of the physical location and the instructional site(s), the maintenance of proper administrative records and all other procedures related to the administration of the educational program.

(b) (No change.)

§117.59. *Massage School Curriculum Outline and Internship.*

(a) Each massage school shall follow the curriculum outline prescribed by the department for the minimum 500-hour supervised course of instruction.

(b) A student must successfully complete the first 250 hours of the supervised course of instruction, including the successful completion of at least 100 hours of massage therapy techniques and theory, before the student is eligible to enter the internship program.

(c) A classroom hour or instructional hour shall include at least 50 clock minutes of actual instruction [classroom] time and may include a maximum of 10 minutes of break time. Break time for hours which are taught consecutively in one sitting (i.e., in one evening) may be aggregated into a single break time during those consecutive hours, not to exceed 3-hour blocks of instruction, but not at the end of those hours. The 10 minutes of break time may not be accumulated and used in lieu of lunch or dinner breaks.

(d) An instructor must be physically present with the student(s) during any in-person [the] classroom hours, including in-person make-up work. Any make-up work completed through distance learning must comply with the distance learning provisions in this chapter.

(e) An internship program must provide a student with a minimum of 40 hours of hands-on massage therapy experience at the location of the student's enrollment. A student enrolled at an additional location shall not be required to travel to another location to complete the internship. The internship may not be offered through distance learning. The internship must be completed at a massage school licensed under this chapter.

(f) During the hands-on experience during the internship, a massage therapy instructor must be available on the premises of the massage school and be immediately available to the student(s).

(g) A massage school shall not require a student to advertise for clients or to obtain clients as part of the internship program. At the student's option and with the massage school's permission, a student may obtain clients for the student's hands-on massage therapy experience.

(h) Unless otherwise agreed to by both the student and the massage therapy educational program, a [A] massage school must provide all of the minimum 500 hours of the supervised course of instruction at the physical location of the licensed massage school [site] where the student enrolled or, if otherwise allowed under this chapter and the Act, through distance learning. [~~unless otherwise agreed to by both the student and the massage therapy educational program.~~]

(i) A massage school shall schedule instruction [classes] and internship clients so that the students will be able to complete the program during the length of time stipulated in the pre-enrollment information. No evening class or required instruction may be scheduled to extend beyond a reasonable time.

(j) Individuals who have completed the required minimum 500-hour supervised course of instruction, including the 50-hour internship, are eligible for examination and licensure.

(k) A massage school shall not allow a student to receive any form of compensation for massage therapy or other massage therapy services.

(l) A massage school shall not allow, authorize, or contract with a student enrolled in any course or portion of a course offered by the school to provide massage therapy or other massage therapy services to the public for compensation in excess of the internship.

(m) Distance learning.

(1) A massage school must verify the identity of a student receiving instruction through distance learning.

(2) A massage school must accurately track the hours each student completes through distance learning.

(3) A massage school must monitor each student's participation in distance learning to ensure that the student is receiving instruction. Any class, lecture, or recitation, whether offered through live instruction or not, must offer an opportunity for direct interaction between the instructor and the student. Additionally, when distance learning is provided through a method other than live instruction, the instruction must be interactive. This includes but is not limited to:

(A) participating in an activity where there is an opportunity for interaction between the instructor and the student;

(B) submitting an academic assignment;

(C) taking an assessment or an exam;

(D) participating in an interactive tutorial, webinar, or other interactive computer-assisted instruction;

(E) participating in a study group, group project, or an online discussion that is assigned by the school; and

(F) interacting with an instructor about academic matters.

(4) A massage school must document compliance with paragraphs (1)-(3) for each student who receives instruction through distance learning.

(5) A massage school must ensure that students receiving instruction through distance learning have the educational materials necessary to fulfill all course requirements.

(6) A massage school may not use distance learning to provide the instruction required by Section 455.156(b)(1)(A) of the Act.

(7) A massage school using a time clock or similar technology to track student hours completed through distance learning may not alter the time clock records, except in a documented case of technological failure or other situation which is documented by the school.

(n) As part of the minimum 500-hour supervised course of instruction, a massage school shall provide information in protecting the safety of a massage therapist, including steps to take if a client initiates any verbal or physical contact with the massage therapist that is intended to arouse or gratify the sexual desire of either person. This information may be provided at any time in the 500 hours.

§117.62. *Massage School Enrollment Procedures.*

(a) - (c) (No change.)

(d) Each massage school shall develop an enrollment agreement which shall be used to enroll each student. The agreement shall include but is not limited to:

(1) the full and correct name and location of the massage school and the massage school director(s) and owner(s);

(2) the program title, tuition, fees, reasonable estimated cost of books and supplies, any other expenses, total cost of the program, items subject to cost change, method of payment and payment schedule, disclosure statement (if interest is charged on more than three payments), student's right to cancel;

(3) the number of instructional hours included in the program, including internship hours, hours completed in a classroom, and hours completed through distance learning [classroom and internship hours included in the program];

(4) the date the program is to begin, the course length and course schedule;

(5) the name and address of the student; and

(6) a statement that the student has received a copy of the information in subsection (a) of this section.

(e) - (g) (No change.)

§117.66. *Massage School Cancellation, Refund, and School Closure Policies.*

(a) - (c) (No change.)

(d) In all refund computations, leaves of absence, suspensions, school holidays, days when instruction is [classes are] not offered, and summer vacations shall not be counted as part of the elapsed time for purposes of calculating a student's refund.

(e) - (i) (No change.)

§117.67. *Massage School Student Progress Requirements.*

(a) Appropriate standards must be implemented to ascertain the progress of the students enrolled. Each massage school shall have a progress evaluation system of a type and nature to reflect whether the student is making satisfactory progress to the point of being able to complete all subjects within the allotted time provided in the pre-enrollment information.

(b) Massage schools must submit to the department an electronic record of each student's successfully completed [~~accrued~~] clock hours at least one time per month in a manner and format prescribed by the department. The department may require massage schools to identify the location where hours were completed or if hours were completed through distance learning. A massage school's initial submission of clock hours shall include all hours successfully completed [~~accrued~~] at the school. Upon department approval, a massage school may submit data required under this subsection in an alternate manner and format as determined by the department, if the massage school demonstrates that the requirements of this subsection would cause a substantial hardship to the school.

(c) Except for a documented leave of absence, a massage school shall electronically submit a student's withdrawal or termination to the department within ten (10) calendar days after the withdrawal or termination. Except for a documented leave of absence, a school shall terminate a student who does not attend a massage school for thirty (30) school days.

(d) Upon a student's completion of the massage therapy educational program, the school shall notify the department that the student has successfully completed the required number of hours and is eligible to take the appropriate examination.

(e) Upon notification from the massage school, the department shall make the student eligible to take the appropriate examination.

§117.68. *Massage School Attendance Policy.*

(a) - (b) (No change.)

(c) An absence shall be charged for a full day when a student attends none of the scheduled instruction [classes] on that day. A partial day of absence shall be charged for any period of absence during the day.

(d) - (j) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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SUBCHAPTER G. LICENSED MASSAGE
ESTABLISHMENTS

16 TAC §117.82

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.82. *Massage Establishments--General Requirements.*

(a) - (h) (No change.)

(i) For purposes of this section:

(1) "Nude" means a person who is:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts or any portion of the genitals or buttocks.

(2) "Sexual contact" includes:

(A) any touching of any part of the genitalia or anus;

(B) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client as required in §117.91;

(C) any offer or agreement to engage in any activity described in subparagraph (A) or (B);

(D) kissing;

(E) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, solicitation of prostitution, and promotion of prostitution as described in Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in such activities;

(F) any behavior, gesture, or expression that may reasonably be interpreted as inappropriately seductive or sexual; or

(G) inappropriate sexual comments about or to a client, including sexual comments about a person's body.

(j) - (k) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER H. RESPONSIBILITIES OF THE LICENSEE AND CODE OF ETHICS

16 TAC §117.91, §117.92

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.91. Consultation Document and Written Consent.

(a) A licensee shall provide an initial consultation to each client before the first massage therapy session and obtain the signature of the client on the consultation document. The consultation document shall include:

- (1) the type of massage therapy services or techniques the licensee anticipates using during the massage therapy session;
- (2) the parts of the client's body that will be massaged or the areas of the client's body that will be avoided during the session, including indications and contraindications;
- (3) a statement that the licensee shall drape the breasts of all female clients and not engage in breast massage of female clients unless the client gives written consent before each session involving breast massage;
- (4) a statement that draping of the genital area and gluteal cleavage will be used at all times during the session for all clients;
- (5) a statement that if uncomfortable for any reason, the client may ask the licensee to cease the massage and the licensee will end the massage session; ~~and~~
- (6) a statement that the licensee may end the massage session if the licensee feels uncomfortable for any reason;
- (7) a statement that the licensee must immediately end the massage session if a client initiates any verbal or physical contact that is sexual in nature; and
- (8) ~~[(6)]~~ the signature of both the client and the licensee.

(b) If the client's reason for seeking massage therapy changes at any time or ~~and~~ any of the information in subsection (a)(1) - ~~(3)~~ ~~[(4)]~~, is modified, the licensee must provide an updated consultation reflecting any changes and modifications to the techniques used or the parts of the client's body to be massaged.

(c) (No change.)

§117.92. Sexual Misconduct.

(a) A licensee shall not engage in sexual contact during a session with a client. For the purposes of this section, sexual contact includes:

- (1) any touching of any part of the genitalia or anus;
 - (2) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client as required in §117.91;
 - (3) any offer or agreement to engage in any activity described in paragraph (1) or (2);
 - (4) kissing;
 - (5) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, solicitation of prostitution, and promotion of prostitution as described in the Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in any such activities;
 - (6) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual; or
 - (7) inappropriate sexual comments about or to a client, including making sexual comments about a person's body.
- (b) - (e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §4.8

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter A, §4.8, concerning excused absence for a person called to required military service. Specifically, this amendment will clarify that absence of a student from attending classes or other activities is excused because of required military service, not active military service.

Texas Education Code Section 51.9111, as amended by Senate Bill 937 (87R), directs the Coordinating Board to adopt rules for the determination of the maximum duration a student must be excused because of military service. Senate Bill 937 amended the statute by changing the phrase "active military service" to

"required military service." These amendments are limited to implementing the revision to statute enacted in Senate Bill 937.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the section is in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Silverman has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be clarification that absence of a student from attending classes or other activities is excused because of required military service, not active military service. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Stacey Silverman, Ph.D., Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788 or via email at RuleComments@higher.ed.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under Texas Education Code, Section 51.9111, which requires the Coordinating Board to adopt rules for establishing a maximum period for which a student may be excused for required military service.

The proposed amendment does not affect any other sections of statute or rule.

§4.8. *Excused Absence for a Person Called to Required [Active] Military Service.*

(a) Upon notice from a student required to participate in required [active] military service, an institution shall excuse a student from attending classes or engaging in other required activities, including examinations.

(b) A student shall not be penalized for an absence which is excused under this subsection and shall be allowed to complete an assignment or take an examination from which the student is excused within a reasonable time after the absence.

(c) Each institution shall adopt a policy under this subsection which includes:

(1) the retention of a student's course work completed during the portion of the course prior to the student being called to required [active] military service;

(2) the course syllabus or other instructional plan, so that the student will be able to complete the course without prejudice and under the same course requirements that were in effect when the student enrolled in the course;

(3) a definition of a reasonable time after the absence for the completion of assignments and examinations;

(4) procedures for failure of a student to satisfactorily complete the assignment or examination within a reasonable time after the absence; and

(5) an institutional dispute resolution process regarding the policy.

(d) The maximum period for which a student may be excused under this section shall be no more than 25% (twenty-five percent) of the total number of class meetings or the contact hour equivalent (not including the final examination period) for the specific course or courses in which the student is currently enrolled at the beginning of the period of required [active] military service.

(e) Institutions are directed to develop and publish policies and procedures to ensure that students enrolled in distance learning, self-paced, correspondence, and other asynchronous courses receive equivalent consideration for the purposes of determining acceptable duration of excused absences and time limits for the completion of course work following an excused absence under this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson
General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6206



19 TAC §4.9

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter A, §4.9, concerning limitations on the number of courses that may be dropped under certain circumstances by undergraduate students. Specifically, this amendment implements the express provisions of new Texas Education Code §51.907(e)(2), and will allow students to exceed the maximum limitation of courses dropped in the event of a disaster, recognized and declared by the governor, which results in the cessation or limitation of in-person course attendance by students at the institution.

Texas Education Code Section 51.907, as amended by Senate Bill 165 (87R), directs the Coordinating Board to adopt rules for the determination of the duration of no or limited in-person course attendance at institutions that significantly affects the stu-

dent's ability to participate in coursework under the conditions of an event which the governor has declared a disaster.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the section is in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Silverman has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the relief of undue hardship toward timely graduation for students enrolled and affected by a disaster that limits or stops in-person course attendance. There are no anticipated economic costs to persons who are required to comply with the section as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Stacey Silverman, Ph.D., Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788 or via email at RuleComments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under Texas Education Code, Section 51.907, which provides the Coordinating Board with the authority to adopt rules for the determination of the duration of limitation or cessation of course attendance as a result of a disaster which significantly affects student participation in course work.

The proposed amendment affects Texas public institutions of higher education.

§4.9. Limitations on the Number of Courses That May Be Dropped under Certain Circumstances By Undergraduate Students.

(a) Beginning with the fall 2007 academic term, and applying to students who enroll in higher education for the first time during the fall 2007 academic term or any term subsequent to the fall 2007 term, an institution of higher education may not permit an undergraduate student a total of more than six dropped courses, including any course a transfer student has dropped at another institution of higher education, unless:

(1) the institution has adopted a policy under which the maximum number of courses a student is permitted to drop is less than six; or

(2) a disaster declared by the governor results in cessation or limitation of in-person course attendance by students at the institution of a duration determined by the institution to significantly affect the student's ability to participate in course work with consideration of the length of time of the cessation or limitation of in-person course attendance, the type of courses, and the personal circumstances of students affected by the disaster; or

(3) [(2)] the student shows good cause for dropping more than that number, including but not limited to a showing of:

(A) a severe illness or other debilitating condition that affects the student's ability to satisfactorily complete the course;

(B) the student's responsibility for the care of a sick, injured, or needy person if the provision of that care affects the student's ability to satisfactorily complete the course;

(C) the death of a person who is considered to be a member of the student's family or who is otherwise considered to have a sufficiently close relationship to the student that the person's death is considered to be a showing of good cause;

(D) the active duty service as a member of the Texas National Guard or the armed forces of the United States of either the student or a person who is considered to be a member of the student's family or who is otherwise considered to have a sufficiently close relationship to the student that the person's active military service is considered to be a showing of good cause;

(E) the change of the student's work schedule that is beyond the control of the student, and that affects the student's ability to satisfactorily complete the course; or

(F) other good cause as determined by the institution of higher education.

(4) [(3)] the enrollment is for a student who qualifies for a seventh course enrollment, who:

(A) has reenrolled at the institution following a break in enrollment from the institution or another institution of higher education covering at least the 24-month period preceding the first class day of the initial semester or other academic term of the student's reenrollment; and

(B) successfully completed at least 50 semester credit hours of course work at an institution of higher education that are not exempt from the limitation on formula funding set out in §13.104(1) - (6) of this title (relating to Exemptions for Excess Hours) before that break in enrollment.

(b) - (e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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SUBCHAPTER D. DUAL CREDIT
PARTNERSHIPS BETWEEN SECONDARY
SCHOOLS AND TEXAS PUBLIC COLLEGES

19 TAC §4.84

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 4, Subchapter D, §4.84, concerning institutional agreements for dual credit partnerships between secondary schools and Texas public colleges. Specifically, this amendment will add an item to dual credit agreements between an institution of higher education and a school district that requires the designation of at least one employee of the district or institution as responsible for providing academic advising to a student who enrolls in a dual credit course under the program before the student begins the course.

The proposed amendments are necessary to implement legislative changes made to Texas Education Code Section 28.009 by Senate Bill 1277 (87R). Texas Education Code Sections 28.009(b) and 130.001(b)(3) - (4) authorize the Coordinating Board to regulate dual credit partnerships between public two-year associate degree-granting institutions and public universities with secondary schools.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the alignment of the rule requirements for dual credit institutional agreements with amendments to Texas Education Code. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and

(8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, Texas 78711-2788, or via email at RuleComments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under Texas Education Code, Sections 28.009(b) and 130.001(b)(3) - (4), which provides the Coordinating Board with the authority to regulate dual credit partnerships between public two-year associate degree-granting institutions and public universities with secondary schools.

The proposed amendment affects Texas Education Code, Sections 28.010, .014, .025(b-18), .0252.

§4.84. *Institutional Agreements.*

(a) Need for Institutional Agreements. For any dual credit partnership between a secondary school and a public college, an agreement must be approved by the governing boards or designated authorities (e.g., principal and chief academic officer) of both the public school district or private secondary school and the public college prior to the offering of such courses.

(b) Elements of Institutional Agreements. Any dual credit agreement must address the following elements:

- (1) Eligible Courses;
- (2) Student Eligibility;
- (3) Location of Class;
- (4) Student Composition of Class;
- (5) Faculty Selection, Supervision, and Evaluation;
- (6) Course Curriculum, Instruction, and Grading;
- (7) Academic Policies and Student Support Services;
- (8) Transcribing of Credit;
- (9) Funding; and
- (10) Defined sequences of courses, where applicable.

(c) Institutional Agreement between Public Institution of Higher Education and Public School District. Any agreement entered into or renewed between a public institution of higher education and public school district on or after September 1, 2021 [~~September 1, 2019~~], including a memorandum of understanding or articulation agreement, must:

- (1) include specific program goals aligned with the statewide goals developed under TEC 28.009, Subsection (b-1);
- (2) establish common advising strategies and terminology related to dual credit and college readiness;
- (3) provide for the alignment of endorsements described by Section 28.025 (c-1) offered by the district, and dual credit courses offered under the agreement that apply towards those endorsements, with postsecondary pathways and credentials at the institution and industry certifications;
- (4) identify tools, including tools developed by the Texas Education Agency, Texas Higher Education Coordinating Board, or the Texas Workforce Commission, to assist counselors, students, and families in selecting endorsements offered by the district and dual credit courses offered under the agreement;

(5) establish, or provide a procedure for establishing, the course credits that may be earned under the agreement, including developing a course equivalency crosswalk or other method of equating high school courses with college courses and identifying the number of credits that may be earned for each course completed through the program;

(6) describe the academic supports and, if applicable, guidance that will be provided to students participating in the program;

(7) establish the institution of higher education's and the school district's respective roles and responsibilities in providing the program and ensuring the quality and instructional rigor of the program;

(8) state the sources of funding for courses offered under the program, including, at a minimum, the sources of funding for tuition, transportation, and any required fees or textbooks for students participating in the program;

(9) require the district and the institution to consider the use of free or low-cost open educational resources in courses offered under the program; ~~and~~

(10) designate at least one employee of the district or institution as responsible for providing academic advising to a student who enrolls in a dual credit course under the program before the student begins the course; and

(11) ~~(10)~~ be posted each year on the institution of higher education's and the school district's respective Internet websites.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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For further information, please call: (512) 427-6206



CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER C. APPROVAL OF NEW ACADEMIC PROGRAMS AT PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND REVIEW OF EXISTING DEGREE PROGRAMS

19 TAC §5.51

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 5, Subchapter C, §5.51, concerning the requirement to publish doctoral program data by public four-year institutions. Specifically, this repeal will remove the requirement

that public four-year institutions publish data annually regarding the performance of their doctoral programs, thereby reducing their reporting burden.

The Coordinating Board regularly reviews statutory language to repeal any unnecessary or duplicative data reporting. The proposed repeal reduces duplicative institutional reporting. The rule was not required by statute. The rule imposed additional reporting requirements on institutions for information that was not useful to the Coordinating Board.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the removal the requirement that public four-year institutions publish data annually regarding the performance of their doctoral programs, thereby reducing their reporting burden. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, TX 78711-2788, or via email at RuleComments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The repeal is proposed under Texas Education Code, Section 61.0512, which provides the Coordinating Board with the authority to review and approve degree programs at public institutions of higher education.

The proposed repeal affects all public institutions of higher education as defined in Texas Education Code Section 61.003 that offer doctoral programs.

§5.51. *Publishing of Doctoral Program Data.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

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CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §7.7, §7.8

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 7, Subchapter A, §7.7 and §7.8, concerning Degree-granting Colleges and Universities other than Texas Public Institutions. Specifically, these amendments will clarify institutions' compliance requirements and restrictions, including incorporation of Senate Bill 1490 (87R) requirements for authorization of professional degrees.

Texas Education Code, Title 3, Subtitle B, Chapter 61, Subchapter G, §61.311, allows the Coordinating Board to promulgate standards, rules, and regulations governing the administration of Subchapter G. The proposed amendments implement SB 1490 (87R) requirements for authorization of professional degrees, and will clarify institutions' compliance requirements and restrictions.

Newly enacted Education Code §61.303(c-1) prohibits the Coordinating Board from approving "the issuance of a certificate of authorization for an exempt institution to grant a professional degree or to represent that credits earned in this state are applicable toward a professional degree," except as required by State Authorization Reciprocity Agreement (SARA). The Coordinating Board amends §7.7(1) to implement this prohibition. Further, the Coordinating Board amends §7.7(6)(H) to clarify that a designated Deputy Commissioner with oversight over exempt institutions is authorized to approve closure agreements with regulated institutions. This delegation ensures that these agreements can be in place promptly before an institution closes, which ensures the smooth transition of students, records, and other financial conditions in wake of the closure.

Section 7.7 provides regulations related to institutions accredited by Coordinating Board-recognized accreditors. The amendments add requirements and restrictions contained in SB 1490 (87R) regarding professional degrees; deletes an unnecessary date reference for documentation of reserves, lines of credit, or surety instruments; and adds the Coordinating Board delegation of its authority to the Assistant Commissioner to approve institution closures. Newly enacted Education Code §61.303(c-1) prohibits the Coordinating Board approving "the issuance of a certificate of authorization for an exempt institution to grant a professional degree or to represent that credits earned in this state

are applicable toward a professional degree," except as required by SARA. The Coordinating Board amends §7.7(1) to implement this prohibition.

The Coordinating Board further amends §7.7(6)(H) to clarify that a designated Deputy Commissioner with oversight over exempt institutions is authorized to approve closure agreements with regulated institutions. This delegation ensures that these agreements can be in place promptly before an institution closes, which ensures the smooth transition of students, records, and other financial conditions in wake of the closure.

Newly enacted Education Code §61.306(c-1) limits the Coordinating Board's authority to approve the issuance of a certificate of authority for a proposed professional degree program to be offered by a private post-secondary institution. The statute limits the Coordinating Board to approving only professional degree programs that meet the same standards and criteria as other Texas public and private or independent institutions of higher education *and* only if the capacity and ability of other such Texas institutions has been exceeded. The Coordinating Board amends §7.8 to include this limitation.

Section 7.8 provides regulations related to institutions not accredited by a Coordinating Board-recognized accreditor. The amendments incorporate requirements and restrictions contained in SB 1490 (87R) regarding professional degrees, including the requirement to show capacity and ability of similar programs at public and private or independent institutions of higher education is insufficient, the applicant has the necessary faculty and resources to ensure student success, and applicant is subject to and agrees to meet the same standards for approval and all academic criteria applicable to similar professional degree programs at public and private or independent institutions of higher education.

The amendments to §7.8(3)(A)(iii) further clarify that a desk review of an application may be done by a reviewer in consultation with Coordinating Board staff to ensure Coordinating Board staff is able to utilize the subject matter expertise of an outside consultant at the point of receiving an application in order to verify the application is ready for a site team visit.

Revisions in the reference in §7.8(8) to institutional accrediting agencies instead of national or regional accrediting agencies to be consistent with the U.S. Department of Education change in terminology when referencing recognized institutional accreditors.

The amendments further add the Coordinating Board's delegation of its authority to the Assistant Commissioner to approve institution closures to memorialize a previous delegation of this authority by the Coordinating Board members.

Tina Jackson, Assistant Commissioner for Workforce Education, has determined that for each of the first five years the rules are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rules. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Tina Jackson, Assistant Commissioner for Workforce Education, has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of administering the rules will be the clarification of institutions' compliance requirements and restrictions.

The rules, which simply implement a legislative mandate, may have fiscal impact to unaccredited private institutions of higher education by ensuring the criteria that they must meet to offer professional degree programs is the same as the criteria applicable to accredited Texas institutions and that the programs may be offered only where there is a demonstrated market need. Such costs would be incurred based on the implementation of the statute.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create new rules;
- (6) the rules will limit §7.7 and §7.8;
- (7) the rules will change the number of individuals subject to the rules; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Tina Jackson, Assistant Commissioner, Workforce Education, P.O. Box 12788, Austin, Texas 78711-2788, or via email at RuleComments@highered.texas.gov. Comments will be accepted for thirty (30) days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Texas Education Code, Title 3, Subtitle B, Chapter 61, Subchapter G, §61.303, which provides private postsecondary educational institutions which are fully accredited and not operating under sanctions imposed by a recognized accrediting agency the ability to receive a certificate of authorization; §§61.304 - 310, which provide the requirements for private postsecondary educational institutions which are working toward institutional accreditation to apply for a certificate of authority; and §61.311, which provides the Coordinating Board with the authority to promulgate standards, rules, and regulations governing the administration of Subchapter G relating to regulation of private postsecondary educational institutions.

The proposed amendments incorporate restrictions added by Texas Education Code, Title 3, Subtitle B, Chapter 61, §61.303(c) and (c-1) and §61.306(a), (c), (c-1), and (d), enacted by the Texas Legislature (87R); and affect Texas Administrative Code, Title 19, Part 1, Chapter 7, Subchapter A, §7.7 and §7.8, specifically the proposed §7.7(1), renumbered §7.7(6), proposed §7.8(2), renumbered §7.8(3)(A), renumbered §7.8(8)(A), and renumbered §7.8(10)(F).

§7.7. *Institutions Accredited by Board-Recognized Accreditors.*

An institution which does not meet the definition of an institution of higher education contained in Texas Education Code §61.003, is accredited by a Board-recognized accreditor, and is interested in offering

degrees or courses leading to degrees in the State of Texas is subject to the restriction on professional degrees in paragraph (1) of this section and must follow the requirements in paragraphs (2) - (5) [(4) - (4)] of this section.

(1) Restriction on Professional Degrees. The Board may not approve the issuance of a Certificate of Authorization for an exempt institution to grant a professional degree, as defined in §7.3 of this title (relating to Definitions), or to represent that credits earned in this state are applicable toward a professional degree except to the extent allowed for an authorized institution operating under a State Authorization Reciprocity Agreement (SARA).

(2) [(1)] Authorization to Offer Degrees or Courses Leading to Degrees in Texas.

(A) - (G) (No change.)

(3) [(2)] Restrictions Placed on Institution under Sanctions by Its Accreditor.

(A) - (D) (No change.)

(4) [(3)] Grounds for Revocation of any Certificate of Authorization.

(A) - (F) (No change.)

(5) [(4)] Process for Removal of Authorization.

(A) - (G) (No change.)

(6) [(5)] Closure of an Institution.

(A) - (G) (No change.)

(H) The Coordinating Board has delegated its authority to approve institution closure arrangements and agreements to the Assistant Commissioner with oversight of the closing institution.

§7.8. *Institutions Not Accredited by a Board-Recognized Accrerator.*

An institution which is not accredited by a Board-recognized accreditor and which does not meet the definition of institution of higher education contained in Texas Education Code, §61.003, must follow the Certificate of Authority process in paragraphs (1) - (9) of this section in order to offer degrees or courses leading to degrees in the state of Texas. Institutions are encouraged to contact the Board staff before filing a formal application.

(1) Certificate of Authority Eligibility.

(A) The Board will accept applications for a Certificate of Authority only from those applicants:

(i) (No change.)

(ii) which meet one of the following conditions:

(I) - (IV) (No change.)

~~[(1)]~~ The Board may not issue a Certificate of Authority for a private postsecondary institution to grant a professional degree, as defined in §7.3 of this title (relating to Definitions) or to represent that credits earned in this state are applicable toward a degree if the institution is chartered in a foreign country or has its principal office or primary educational program in a foreign country.]

(B) (No change.)

(2) Certificate of Authority Restrictions for Professional Degrees.

(A) The Board may not issue a Certificate of Authority for a private postsecondary institution to grant a professional degree, as defined in §7.3 of this title (relating to Definitions), or to represent that

credits earned in this state are applicable toward a degree unless the Board determines there is evidence of program need and institutional ability, including but not limited to the following:

(i) capacity and ability of similar professional degree programs at institutions of higher education and private or independent institutions of higher education are insufficient to meet the state's current market needs;

(ii) the institution seeking the certificate of authority:

(I) has the necessary faculty and other resources to ensure student success; and

(II) is subject to and agrees to meet the same standards for approval and all academic criteria applicable to similar professional degree programs offered by institutions of higher education and private or independent institutions of higher education (as defined under Texas Education Code, §61.003).

(iii) sufficient placements are available to students for required field-based experience, such as clinicals or clerkships, for the proposed professional degree.

(B) The Board may not issue a Certificate of Authority for a private postsecondary institution to grant a professional degree or to represent that credits earned in this state are applicable toward a degree if the institution is chartered in a foreign country or has its principal office or primary educational program in a foreign country.

(3) [(2)] Certificate of Authority Application Submission and Requirements.

(A) An applicant must submit an application to the Board to be considered for a Certificate of Authority to offer identified proposed degree(s), and courses which may be applicable toward a degree, in Texas.

(i) - (ii) (No change.)

(iii) The desk review may be done, in consultation with Board staff, [will be done] by a reviewer who will act as the site review team leader if the application is deemed complete and ready for a site team visit.

(iv) The desk reviewer, in consultation with Board staff, may [will] make three possible recommendations. Board staff will make a final determination on acceptability of the application based on one of the three recommendations:

(I) - (III) (No change.)

(v) (No change.)

(B) - (E) (No change.)

(4) [(3)] Fees Related to Certificates of Authority.

(A) - (C) (No change.)

(5) [(4)] Authorization Process.

(A) - (L) (No change.)

(6) [(5)] Terms and Limitations of a Certificate of Authority.

(A) - (E) (No change.)

(7) [(6)] Amendments to a Certificate of Authority.

(A) - (E) (No change.)

(8) [(7)] Renewal of Certificate of Authority.

(A) At least one hundred eighty (180) days, but no more than two hundred ten (210) days, prior to the expiration of the current Certificate of Authority, an institution seeking renewal shall make application to the Board on forms provided upon request. The renewal application must include any applications for or renewal of accreditation by institutional [national or regional] accrediting agencies. The renewal application shall be accompanied by the fee described in paragraph (3) of this section [subsection].

(B) - (D) (No change.)

(9) [(8)] Revocation of Certificate of Authority.

(A) - (D) (No change.)

(10) [(9)] Closure of an Institution.

(A) - (E) (No change.)

(F) The Coordinating Board has delegated its authority to approve institution closure arrangements and agreements to the Assistant Commissioner with oversight of the closing institution.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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CHAPTER 9. PROGRAM DEVELOPMENT IN PUBLIC TWO-YEAR COLLEGES SUBCHAPTER N. BACCALAUREATE DEGREE PROGRAMS

19 TAC §9.673

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 9, Subchapter N, §9.673, concerning provisions for baccalaureate degree programs offered at public junior colleges. Specifically, this amendment will allow public junior colleges to apply for Coordinating Board approval to offer a baccalaureate degree program in nursing if the college district has a taxable property valuation of at least \$4 billion in the previous year and there are no four-year institutions of higher education located within the county(ies) included in the junior college district. It also increases the number of baccalaureate programs public junior colleges may offer from three to five for colleges that were previously limited to offering three baccalaureate programs.

The proposed amendments are required to implement legislative changes made to Texas Education Code Sections 130.306 and 130.307 by House Bills 3348 (87R) and HB 885 (87R). Texas Education Code Section 130.302 authorizes the Coordinating Board to approve applied baccalaureate degrees at public junior colleges. These legislative changes were intended to increase the number of public junior colleges authorized to offer baccalaureate degree programs in underserved communities.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be an increase in number of baccalaureate degree programs offered by junior public colleges. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this states economy.

Comments on the proposal may be submitted to Dr. Stacey Silverman, Assistant Commissioner for Academic and Health Affairs, P.O. Box 12788, Austin, TX 78711-2788, or via email at RuleComments@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Education Code, Section 130.302, which provides the Coordinating Board with the authority to authorize public junior colleges to offer baccalaureate degree programs.

The proposed amendments affect Texas Education Code, Chapter 130, Subchapter L.

§9.673. General Provisions.

- (a) All baccalaureate degree programs offered at public junior colleges must comply with the provisions of this subchapter.
- (b) A public junior college offering a baccalaureate degree program under this subchapter must meet all applicable accreditation requirements of the Southern Association of Colleges and Schools Commission on Colleges of a Level II institution.
- (c) A public junior college district offering a baccalaureate degree program may not offer more than five [~~three~~] baccalaureate degree

programs at any time unless the institution previously participated in a pilot project to offer baccalaureate degree as defined in §9.672(10) of this subchapter not-withstanding if accredited as a single institution or as separate institutions within a district.

(d) Except as provided by subsection (e) of this section, a [A] public junior college may be approved to offer a baccalaureate degree program under this subchapter only if its junior college district:

(1) has a taxable property valuation of not less than \$6 billion based on the preceding year's calculations as determined by the county's appraisal district. This valuation shall include the valuation of the taxing district as well as any branch campus maintenance tax valuations; and

(2) has received a positive assessment of the overall financial health, as defined in §9.672 of this subchapter, on the most recent Community College Financial Condition Report. If changes to financial reporting, mandated by external financial governing bodies as defined in §9.672 of this subchapter directing financial reporting processes, or other extraordinary factors have a short-term impact to the assessment of the financial health of the institution, the Coordinating Board may, at the Commissioner's discretion:

(A) Use the most recent report not impacted by the mandated changes; or

(B) Calculate the financial health correcting for the mandated changes or extraordinary factors.

(e) The requirement of subsection (d)(1) of this section does not apply to baccalaureate degree programs in nursing if the public junior college district:

(1) has a taxable property valuation of not less than \$4 billion on the preceding year's calculations as determined by the county's appraisal district; and

(2) does not have a four-year institution of higher education located in county(ies) of the public junior college district.

(f) [~~e~~] Offering a baccalaureate degree program under this subchapter does not otherwise alter the role and mission of a public junior college.

(g) [~~f~~] Degree programs offered under this subchapter are subject to the continuing approval of the coordinating board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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CHAPTER 17. RESOURCE PLANNING

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning Resource Planning. Specifically, the repeal of Chapter 17 is in anticipation of establishing a new Chapter 17 in Title 19.

The repeal of existing Chapter 17 and, via separate rulemaking, the re-adoption will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs. The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The amendments will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden for the Coordinating Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§17.1 - 17.3

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.1. *Purpose and Scope.*

§17.2. *Authority.*

§17.3. *Definitions.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

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For further information, please call: (512) 427-6548



SUBCHAPTER B. BOARD APPROVAL

19 TAC §§17.10 - 17.13

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.10. *Board Review.*

§17.11. *Projects Exempt from Board Review.*

§17.12. *Delegation of Approval Authority.*

§17.13. *Review Considerations.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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General Counsel

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SUBCHAPTER C. RULES APPLYING TO ALL PROJECTS

19 TAC §17.21

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.21. *Application Procedures.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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General Counsel

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SUBCHAPTER D. RULES APPLYING TO NEW CONSTRUCTION AND ADDITION PROJECTS

19 TAC §17.30

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.30. *Standards for New Construction and/or Addition Projects.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER E. RULES APPLYING TO REPAIR AND RENOVATION PROJECTS

19 TAC §17.40

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.40. *Standards for Repair and Renovation Projects.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

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SUBCHAPTER F. RULES APPLYING TO REAL PROPERTY PURCHASE PROJECTS

19 TAC §17.50, §17.51

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.50. *Standards for Improved Real Property Purchase Projects.*

§17.51. *Additional Requirements.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER I. RULES APPLYING TO ENERGY SAVINGS PERFORMANCE CONTRACTS

19 TAC §§17.80 - 17.82

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.80. *Projects Requiring Board Approval.*

§17.81. *Standards for Energy Savings Performance Contracts.*

§17.82. *Additional Requirements.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER K. REPORTS

19 TAC §17.100, §17.101

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.100. Board Reports.

§17.101. Institutional Reports.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER L. FACILITIES AUDIT

19 TAC §§17.110 - 17.114

Statutory Authority

The repeal is proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed repeal affects Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.110. General Provisions.

§17.111. Facilities Audit Objectives.

§17.112. Data Sources.

§17.113. Institutional Audit Cycle.

§17.114. On-Site Audit.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §§17.1 - 17.3

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning Resource Planning, and adoption of new rules in Chapter 17, Subchapter A, General Provisions, §§17.1 - 17.3. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter A, General Provisions, rules as detailed below:

Section 17.1, Purpose and Scope, as a declarative statement on what programs are governed by Chapter 17. It is amended from the existing §17.1 to reflect that the Coordinating Board is exercising its discretion to not review certain capital construction, improvement, and purchase projects. It also lists facilities projects governed under the chapter and makes typographical changes to improve the rule's organization.

Section 17.2, Authority, lays out the sections of Texas Education Code that grant the Coordinating Board authority to conduct the programs governed by Chapter 17. It is amended from the existing §17.2 to note that negotiated rulemaking is required to make changes to standards related to certain capital construction, improvement, and purchase projects in alignment with current statute.

Section 17.3 is a list of updated definitions relevant to Chapter 17 and the facilities programs. It is amended from the existing §17.3 to add the "Building Replacement Estimate Report" and make conforming adjustments to rename the "Campus Condition Index" to the "Educational and General (E&G) Building Replacement Estimate" and the "Campus Condition Index Value" to the "Institution-wide Building Replacement Estimate." Additionally, it removes the "Tracking Report" to reflect changes to what reports the Coordinating Board will produce based on new data reporting requirements.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of admin-

istering the section is reduced administrative burden and clarity for the Coordinating Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.1. Purpose and Scope.

(a) The purpose of this chapter is to provide guidance to the public and to public institutions of higher education regarding reporting of facilities project data to the Board, standards for new construction, repair and renovation projects, property acquisitions, or lease-purchase arrangements as authorized by law.

(b) This chapter establishes rules and an approval process for energy savings performance contracts.

(c) This chapter establishes rules for facilities audits.

(d) This chapter establishes guidelines for certain institutional reports to the Board and the Board's reports.

(e) This chapter does not apply to facilities used exclusively for auxiliary enterprise.

§17.2. Authority.

(a) Texas Education Code, §61.0572, requires the Board to assure the efficient use of construction funds and the orderly development of physical plants to accommodate projected college student enrollments.

(b) Texas Education Code, §61.058, authorizes the Board to review new construction and repair and renovation projects as well as purchases of improved real property at institutions. Standards used in review must be adopted using negotiated rulemaking.

(c) Texas Education Code, §61.0583, requires the Board to conduct a comprehensive audit of all educational and general facilities.

(d) Texas Education Code, §51.927, authorizes the Board to establish guidelines and an approval process for awarding energy savings performance contracts.

§17.3. Definitions.

The following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) Acquisition--To come into possession or control of real property or facilities. This includes the acceptance, purchase, lease-purchase, transfer, or exchange of land or facilities.

(2) Academic Facilities--Facilities used for primary instruction, research, and public service functions of the institution. Academic facilities typically would include classrooms, libraries, administrative and faculty offices, and student and research laboratories.

(3) Addition--Expansion or extension of an existing facility that increases its size or capacity.

(4) Assignable Area of a Building--The sum of all areas within the interior walls of rooms on all floors of a building assigned to, or available for assignment to, an occupant or use, excluding unassigned space. This is also referred to as net assignable square feet (NASF).

(5) Athletic Facilities--Facilities used for athletic programs, including intercollegiate athletics, intramural athletics, and athletically oriented academic programs.

(6) Auditorium or Assembly--A room, hall, or building designed and equipped for the assembly of large groups for such events as dramatic and musical productions, devotional activities, livestock judging, faculty/staff meetings, or commencement. Included are theaters, concert halls, arenas, chapels, and livestock judging pavilions. Assembly facilities may also serve instructional purposes to a minor or incidental extent.

(7) Auxiliary Enterprise Buildings or Space--Income-generating structures and space such as dormitories, cafeterias, student union buildings, stadiums, athletic facilities, housing or boarding facilities used by a fraternity, sorority, or private club, and alumni centers used solely for those purposes. Auxiliary space is not supported by State appropriations.

(8) Board or Coordinating Board--The Texas Higher Education Coordinating Board members and the agency staff.

(9) Building--A structure with at least two walls for permanent or temporary shelter of persons, animals (excluding animal caging equipment), plants, materials, or equipment that is attached to a foundation, roofed, serviced by a utility (exclusive of lighting), is a source of maintenance and repair activities, and is under the control or jurisdiction of the institution's governing board, regardless of its location.

(10) Building Replacement Estimate Report--A report that provides an overall estimate of the campus' buildings replacement cost. The Board produces this report to aid institutions in reporting their deferred maintenance needs as a percentage of the total campus' replacement value.

(11) Educational and General (E&G) Building Replacement Estimate--A comparative indicator of the relative condition of facilities calculated by dividing the deferred maintenance backlog by the current Building Replacement Estimate. This may be calculated for an individual building, group of buildings, or an entire campus.

(12) Institution-Wide Building Replacement Estimate--The institution-wide relative value of an institution's facilities, as determined annually by the Board. The method of calculation is based on approved Board project costs. Building Replacement Estimates are calculated for Educational and General space and Institution-Wide space. A 25 percent add-on is included to account for the cost of necessary infrastructure. These are NOT to be used for insurance purposes.

(13) Campus Condition Report--A report outlining facility maintenance needs in the areas of deferred maintenance and critical deferred maintenance.

(14) Campus Master Plan--A detailed long-range plan of institutional physical plant needs, including facilities construction and/or development, land acquisitions, and campus facilities infrastructure; the plan provides long-range and strategic analyses and facilities development guidelines.

(15) Certification--Institutional attestation of reports or other submissions as being true or as represented.

(16) Classroom--A room used for scheduled classes. These rooms may be called lecture rooms, lecture-demonstration rooms, seminar rooms, or general-purpose classrooms. A classroom may contain multimedia or telecommunications equipment, such as those used for distance learning. A classroom may be furnished with special equipment (e.g., globes, maps, pianos) appropriate to a specific area of study. A classroom does not include conference rooms, meeting rooms, auditoriums, or class laboratories.

(17) Class Laboratory--A room used primarily by regularly scheduled classes that require special-purpose equipment for student participation, experimentation, observation, or practice in a field of study. Class laboratories may be referred to as teaching laboratories, instructional shops, computer laboratories, drafting rooms, band rooms, choral rooms, group studios. Laboratories that serve as individual or independent study rooms are not included.

(18) Clinical Facility--A facility often associated with a hospital or medical school that is devoted to the diagnosis and care of patients in the instruction of health professions and allied health professions; medical instruction may be conducted, and patients may be examined and discussed. Clinical facilities include, but are not limited to, patient examination rooms, testing rooms, and consultation rooms.

(19) Committee--The members of the Board appointed to consider facility-related issues.

(20) Commissioner--The chief executive officer of the Texas Higher Education Coordinating Board agency.

(21) Cost--The portion of the total project costs that are reported by the institution as being for the actual cost of construction, repair/renovation, or the actual purchase price for improved real property purchases. Not included are costs associated with site acquisition (for construction projects), closing costs (for improved real property purchases) fixed equipment, site development, furniture and moveable equipment, construction services, life safety compliance, professional services fees, demolition costs, eminent domain costs, environmental development, or contingency amounts.

(22) Critical Deferred Maintenance--Any deferred maintenance that if not corrected in the current budget cycle places its building occupants at risk of harm or the facility at risk of not fulfilling its functions.

(23) Deferred Maintenance--The accumulation of facility components in need of repair or replacement brought about by age,

use, or damage, for which remedies are postponed or considered backlogged, that is necessary to maintain and extend the life of a facility. This includes repairs postponed due to funding limitations.

(24) Education and General (E&G) Space--Space used for teaching, research, or the preservation of knowledge, including the proportional share used for those activities in any building or facility used jointly with auxiliary enterprise, or space that is permanently unassigned. E&G space may be supported by state appropriations.

(25) E&G Cost--E&G Space/Total Space x Cost. The costs associated with the E&G space included in a project. This is determined by dividing the E&G assignable square feet by the total project assignable square feet and then multiplying the result by the cost.

(26) Efficiency--The proportion of the gross square feet that can be assigned. This is determined by dividing the net assignable square feet by the gross square feet.

(27) Energy Systems--Infrastructure in a building that includes facility electric, gas, heating, ventilation, air conditioning, and water systems.

(28) Energy Savings Performance Contract--A contract for energy or water conservation measures to reduce energy or water consumption or operating costs of institutional facilities in which the estimated savings in utility costs resulting from the conservation measures is guaranteed to offset the cost of the measures over a specified period.

(29) Facilities Audit--Comprehensive review of institutional facility development, planning activities, and reports.

(30) Facilities Inventory--A collection of building and room records that reflects institutional space and how it is being used. The records contain codes that are uniformly defined by the Board and the United States Department of Education and reported by the institutions on an ongoing basis to reflect a current facilities inventory. The facilities inventory includes a record of property owned by or under the control of the institution.

(31) Capital Expenditure Plan (MP1)--A detailed formulation of institutional programs to address repairs, renovations, deferred maintenance, critical deferred maintenance, facilities construction, demolition, property acquisitions, or infrastructure.

(32) Gift--A donation or bequest of money or another tangible item, a pledge of a contribution, or the acquisition of real property or facilities at no cost to the state or to the institution. It may also represent a method of finance for a project.

(33) Gross Square Feet (GSF)--The sum of all square feet of floor areas within the outside faces of a building's exterior walls. This includes the areas, finished and unfinished, on all floors of an enclosed structure, i.e., within the environmentally controlled envelope, for all stories or areas which have floor surfaces.

(34) Improved Real Property--Real property on which there are buildings or facilities.

(35) Information Resource Project--Projects related to the purchase or lease-purchase of computer equipment, purchase of computer software, purchase or lease-purchase of telephones, telephone systems, and other telecommunications and video-teleconferencing equipment.

(36) Infrastructure--The basic physical structures needed for the operation of a campus to include roads, water supply, sewers, power grids, telecommunications, and so forth. Systems within five feet of a building are considered building systems and are not infrastructure.

(37) Institution or institution of higher education--A Texas public institution of higher education as defined in Texas Education Code, §61.003(8), except a community/junior college.

(38) Legislative Authority--Specific statutory authorization.

(39) Lease--A contract by which real estate, equipment, or facilities are conveyed for a specified term and for a specified rent. Includes the transfer of the right to possession and use of goods for a term in return for consideration. Unless the context clearly indicates otherwise, the term includes a sublease.

(40) Lease-Purchase--A lease project that includes the acquisition of real property by purchase, gift, or any other voluntary transaction at some future time.

(41) Mixed Use--Facilities that have a mixture of uses. These may include facilities that are E&G and non-E&G.

(42) Net Assignable Square Feet (NASF)--The sum of all areas within the interior walls of rooms on all floors of a building assigned to, or available for assignment to, an occupant or use, excluding unassigned areas. NASF includes auxiliary space and E&G space.

(43) New Construction--The creation of a new building or facility, the addition to an existing building or facility, or new infrastructure that does not currently exist on campus. New construction would add gross square footage to an institution's existing space.

(44) Parking Structure--A facility or garage used for housing or storing vehicles. Included are garages, boathouses, airport hangars, and similar buildings. Barns or similar field buildings that house farm implements and surface parking lots are not included.

(45) Phased Project--A project that has more than one part, each one having fixed beginning and ending dates, specified cost estimates, and scope. Phased projects consider future phase needs in the project plan; each phase is able to stand alone as an individual project.

(46) Project--The process that includes the construction, repair, renovation, addition, alteration of a campus, building, or facility, or its infrastructure, or the acquisition of real property.

(47) Project Review--The process used by the Board and Board staff to determine whether the project meets Board adopted standards for cost, efficiency, space need and space use.

(48) Purchase--The acquisition of and interest in real property in exchange for valuable consideration.

(49) Real Property--Land with or without improvements such as buildings.

(50) Repair and Renovation (R&R)--Construction upgrades to an existing building, facility, or infrastructure that currently exists on campus; this includes the finish-out of shell space. R&R may add E&G NASF space.

(51) Research Facility--A facility used primarily for experimentation, investigation, or training in research methods, professional research and observation, or a structured creative activity within a specific program. Included are laboratories used for experiments or testing in support of instructional, research, or public service activities.

(52) Shell Space--An area within a building with an unfinished interior designed to be converted into usable space at a later date.

(53) Space Need--The result of the comparison of an institution's actual space to the predicted need as calculated by the Board's Space Projection Model.

(54) Space Use--The determination of the efficiency of use in existing facilities as determined by institutional performance on accepted measures.

(55) Standard--Basis, criteria, or benchmark used for evaluating the merits of a project request or an institutional comparison to a benchmark.

(56) Technical Research Building--Space used for research, testing, and training in a mechanical or scientific field. Special equipment is required for staff and/or student experimentation or observation. Included are specialized laboratories for new technologies that have stringent environmental controls on air quality, temperature, vibration, and humidity. Facilities generally include space for specialized technologies, semiconductors, biotechnology, advanced materials, quantum computing and advanced manufacturing quantum computing technology, nanoscale measurement tools, integrated microchip-level technologies for measuring individual biological molecules, and experiments in nanoscale disciplines.

(57) Tuition Revenue Bonds Project--A project for which an institution has legislative authority to finance a construction or land acquisition project as provided for in Texas Education Code, §§55.01 - 55.25.

(58) Unimproved Real Property--Real property on which there are no buildings or facilities.

(59) University System--The association of one or more public senior colleges or universities, medical or dental units, or other agencies of higher education under the policy direction of a single governing board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

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SUBCHAPTER B. REPORTING REQUIREMENTS

19 TAC §17.20, §17.21

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning Resource Planning, and adoption of new rules in Chapter 17, Subchapter B, Reporting Requirements, §17.20 and §17.21. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter B, Reporting Requirements, rules as detailed below:

Section 17.20, Facility Projects to Be Submitted to the Board, provides what projects are subject to and are exempt from reporting requirements to the Board. To improve organization, the new rule merges existing §17.10 that concerns projects that must be submitted to the board and §17.11 that concerns projects that exempt from board review. The merged rule also reflects that institutional submissions are now for data reporting, not approval purposes, which is in alignment with the agency exercising discretion to no longer review capital construction and purchase projects.

Section 17.21, Submission Procedures, lays out submission procedures, replacing existing §17.21 that governs application for approval procedures. The rule is changed to reflect that the agency no longer reviews facilities projects but still collects data on them in order to produce project standards and makes conforming adjustments to the elimination of the tracking of projects. The new rule requires submission to the board within certain time frames to improve the consistency of data collection. The new rule also incorporates parts of existing §17.51 that concerns submission requirements for real property purchase appraisals. This portion of the new rule is changed to extend the duration for which a property appraisal is valid for submission purposes from one year to two years on the basis that two years prevents the issue of institutions having to conduct a duplicative appraisal due to how long a property acquisition may take to finalize. A requirement in §17.51 that Texas State Technical Colleges in certain counties obtain additional approvals for property purchases is removed because the statute that established the requirement was repealed.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden and clarity for the Coordinating Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;

- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.20. Facility Projects to Be Submitted to the Board.

(a) Institutions shall submit data on the following projects to the Board:

(1) New construction of building and facilities and/or additions to buildings and facilities having an E&G project cost of \$10 million or greater;

(2) Repair and renovation projects for buildings and facilities having an E&G project cost of \$10 million or greater;

(3) Improved real property purchases that the institution intends to include in the E&G buildings and facilities inventory if the purchase price is more than \$1,000,000;

(4) Energy Savings Performance Contract projects; and

(5) Projects financed by tuition revenue bonds pursuant to Education Code §61.0572 and §61.058.

(b) Projects not specifically described in this rule, including but not limited to the following types of projects, are EXEMPT from Board submission:

(1) Projects at The University of Texas at Austin, Texas A&M University, and Prairie View A&M University financed more than 50 percent with Permanent University Fund bond proceeds or Available University Fund funds;

(2) New Construction, repair, or rehabilitation of privately-owned buildings and facilities on land leased from an institution if the new construction, repair, or rehabilitation is financed entirely from funds not under the control of the institution;

(3) Gifts, grants, or lease-purchase arrangements intended for clinical or research facilities;

(4) New construction, repair, or rehabilitation projects to be undertaken pursuant to specific legislative authority;

(5) Lease of property or facilities;

(6) Acquisitions of unimproved real property;

(7) Acquisitions of improved real property that the institution does not intend to include in its E&G buildings and facilities inventory;

(8) New Construction, repair, renovation, or acquisition of buildings and facilities that are to be used exclusively for auxiliary en-

terprises and will not require appropriations from the legislature for operations, maintenance, or repair; and

(9) All gifts and grants of improved real property.

§17.21. Submission Procedures.

Institutions shall submit the following materials to the Board:

(1) a signed Board of Regents Certification form certifying that the institution's Board of Regents or its delegated authority has approved the project and that the project complies with applicable state and federal requirements as listed on the form shall be submitted to the Board before the start of the project.

(2) Institutions shall submit a completed project application electronically through the Board's website once completed project costs are known, but no later than 90 days after the project has been added to the Facilities Inventory.

(3) For Real Property Purchase Projects, in addition to paragraphs (1) and (2) of this section, institutions shall submit appraisals in accordance with the below:

(A) An institution shall provide two current appraisal reports providing a current value of the property. The most recent appraisal of the local property tax appraisal district may be used for one of these reports.

(B) Appraisals shall be considered current if the appraisal was completed no more than two years prior to the date the project application is submitted to the Coordinating Board.

(4) Appraiser Credentials. Any appraisal report provided to the Board under this section shall certify that the appraiser(s) meets one of the following requirements:

(A) Is designated an Accredited Senior Appraiser by the American Society of Appraisers (A.S.A.) with the professional designation in real estate;

(B) Is a member of the Appraisal Institute designated M.A.I. by the Appraisal Institute and is experienced in the valuation and evaluation of commercial, industrial, residential, and other types of properties, and who advise clients on real estate investment decisions;

(C) Is a member of the Appraisal Institute designated S.R.P.A. and is experienced in the valuation of commercial, industrial, residential, and other types of property;

(D) Is a member of the Appraisal Institute designated S.R.A. and is a real estate solutions provider who is experienced in the analysis and valuation of residential real property;

(E) Is a senior member of the National Association of Independent Fee Appraisers designated IFAS;

(F) Is an appraiser-counselor member of the National Association of Independent Fee Appraisers designated IFAC;

(G) Is a licensee of the Texas Appraiser Licensing and Certification Board in good standing and certified or licensed at the appropriate level for the project and must comply with the Uniform Standards of Professional Appraisal Practice (USPAP). The appraiser must also state that they have the knowledge and experience to complete the assignment competently; or

(H) Is a member of the American Society of Farm Managers and Rural Appraisers (ASFMRA) designated as an Appraisal Rural Appraiser, or ARA, who is experienced to value rural property matters as they relate to rural property acquisitions, dispositions or condemnation needs.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

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SUBCHAPTER C. PROJECT STANDARDS

19 TAC §§17.30 - 17.32

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning Resource Planning, and adoption of new rules in Chapter 17, Subchapter C, Project Standards, §§17.30 - 17.32. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter C, Project Standards, rules as detailed below:

Section 17.30, Standards for New Construction and/or Addition Projects, lays out standards for new construction and addition projects. This new rule replaces existing §17.3 on the same standards and reframes them as a tool the institutions may use instead of a requirement due to the agency no longer reviewing the projects. The space need standard removes the current provision on how to consider the space surplus/deficit when multiple projects are submitted to the Board at the same time since the agency is no longer doing a review for compliance against the standard. The cost standard removes the adjustment for future inflation based on the projected timeline since the agency is no longer performing a review for compliance against the standard. Standards pertaining to the construction of parking structures are removed because the scope of review in statute is limited to Educational and General (E&G) spaces, which does not include parking structures. The usage efficiency standard is renamed to Space Usage Efficiency to align with the current name of the report providing the information along with related conforming adjustments.

Section 17.31, Standards for Repair & Renovation Projects, lays out standards for repair and renovation projects. This new rule replaces existing §17.4 on the same standards without changes to the standards but reframes them as a tool the institutions may use instead of a requirement due to the agency no longer reviewing the projects. The new rule is reorganized for clarity and includes language in alignment with the standards for new construction and/or addition projects instead of referencing that section of code to make it easier to institutions to see the applicable standards.

Section 17.32, Standards for Improved Real Property Purchase Projects, lays out standards for improved real property purchases. This new rule replaces existing §17.5 on the same standards without changes to the standards but reframes them as a tool the institutions may use instead of a requirement due to the agency no longer reviewing the projects. The new rule includes language in alignment with the space need standard for new construction and/or addition projects instead of referencing that section of code to make it easier to institutions to see the applicable standard.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden and clarity for the Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.30. Standards for New Construction and/or Addition Projects.

The established project standards for New Construction and Addition projects are as follows:

(1) Space Need--The project shall not create a campus space surplus, or add to an existing surplus, as determined by the Board's space projection model report, required by §17.100 of this title (relating to Board Reports).

(2) Cost--The construction building cost per gross square foot shall not exceed one standard deviation above the mean of similar projects received by the Board within the last seven years, adjusted for inflation as described in the Board's Construction Cost report, §17.100 of this title.

(3) Building Efficiency--The ratio of NASF to GSF for the space in projects for classrooms and general-purpose facilities shall be 0.60 or greater. Where the following specialized space is predominant in the project, the ratios of NASF to GSF shall be as follows:

(A) Office space: 0.65 or greater;

(B) Clinical facility; 0.50 or greater;

(C) Diagnostic support laboratories: 0.50 or greater;

(D) Technical research buildings: 0.50 or greater; and

(E) For mixed-use facilities, the ratio of NASF to GSF shall be calculated for each space type and considered separately.

(4) Space Usage Efficiency--The use of existing classroom and class laboratory facilities will be considered when the project includes Education & General (E&G) square footage.

(A) Classroom space usage efficiency--

(i) A score of 75 points or higher is considered as meeting the standard; and

(ii) The classroom score will determine compliance for projects involving the following facility types: classroom, general; auditorium/theater; other facility types that appear to contain classrooms or similar space.

(B) Class laboratory space usage efficiency--

(i) A score of 75 points or higher is considered as meeting the standard; and

(ii) The class laboratory score will determine compliance for projects involving facility type laboratory, general and other facility types that appear, as determined by the THECB staff, to contain class laboratories or similar space.

(C) Overall space usage efficiency--

(i) Overall score is a function of the classroom and class laboratory scores. A combined score of 150 or higher, as determined by summing the classroom and class laboratory scores, is considered as meeting the overall standard; and

(ii) The overall score is applicable for projects involving the following facility types: athletic; office, general; office, high rise; student center; other; and projects that cannot clearly be classified in a single category of facility type.

§17.31. Standards for Repair & Renovation Projects.

The established project standards for Repair and Renovation projects are as follows:

(1) Space Need--The project shall not create a campus space surplus, or add to an existing surplus, as determined by the Board's space projection model report, required by §17.100 of this title (relating to Board Reports).

(2) Cost--The construction building cost per gross square foot shall not exceed one standard deviation above the mean of similar projects received by the Board within the last seven years, adjusted for inflation as described in the Board's Construction Cost report, §17.100 of this title.

(3) Building Efficiency--The institution shall demonstrate that the project does not reduce the existing ratio of NASF to GSF for the building by more than 10 percent. If the project renovation is required to comply with federal or state requirements, the institution shall explain any reduction in the ratio of NASF to GSF for the building.

§17.32. Standards for Improved Real Property Purchase Projects. The established project standards for Improved Real Property Purchase projects are as follows:

(1) Space Need--The project shall not create a campus space surplus, or add to an existing surplus, as determined by the Board's space projection model report, required by §17.100 of this title (relating to Board Reports).

(2) Cost--The proposed purchase price should not exceed the higher of two appraisal values. If the purchase price is greater than the highest appraised value, the institution shall demonstrate the need for purchasing the property at the greater value.

(3) Repair and Renovation--If the project includes repair and renovation of any improvements on the property, the standards in §17.31 of this title (relating to Standards for Repair & Renovation Projects) shall apply.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 427-6548



SUBCHAPTER D. ENERGY SAVING PERFORMANCE CONTRACTS

19 TAC §§17.40 - 17.42

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning Resource Planning, and adoption of new rules in Chapter 17, Subchapter D, Energy Saving Performance Contracts, §§17.40 - 17.42. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter D, Energy Savings Performance Contracts, rules as detailed below:

Section 17.40, Projects Requiring Board Approval, lays out that public institutions of higher education are required by Texas Education Code to obtain approval from the Board before entering into an Energy Savings Performance Contract. It replaces existing §17.80 with stylistic revisions to improve clarity.

Section 17.41, Delegation of Approval Authority for Energy Savings Performance Contracts, describes the process to obtain approval for an energy savings performance contract. The new rule replaces §17.12 that contained the approval process for energy savings performance contracts in order to put all such provisions within a single subchapter. The rule is amended to establish that the Board authorizes an Assistant Commissioner designated by the Commissioner to approve contracts under certain conditions rather than the existing language that specifically designated the Assistant Commissioner for Strategic Planning and Funding. This change is due to updated naming conventions at the agency and to make clear the delegation of authority from the Board. The rule is amended to provide that the appropriate standing Coordinating Board committee with authority for facilities rules and applications can approve Energy Savings Performance Contracts instead of a specific named committee because the committee specifically identified in the existing rule has been renamed. Additionally, the new rule clarifies that for approval purposes, the Board considers the contract terms to begin on the date of installation, a point that is unaddressed in the existing rule.

Section 17.42, Additional Requirements, lays out additional requirements for applications for the approval of Energy Savings Performance Contracts, particularly regarding approvals from institutional leaders and engineers. It replaces existing §17.82 with grammatical changes to improve clarity.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden and clarity for the Coordinating Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;

- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.40. Projects Requiring Board Approval.

An institution is required to obtain Board approval before the institution enters into an energy savings performance contract as defined in Texas Education Code, §51.927. Energy Savings Performance Contract projects shall be evaluated under the provisions of §17.31 of this title (relating to Standards for Repair & Renovation Projects). Additionally, the Board will conduct a review based on a set of guidelines to be developed in collaboration with the State Energy Conservation Office.

§17.41. Delegation of Approval Authority for Energy Savings Performance Contracts.

(a) Assistant Commissioner. The Board authorizes the appropriate Assistant Commissioner designated by the Commissioner to approve the following types of energy savings performance contracts, upon certification of authority by the proposing institution's governing board that the project meets all of the Board standards and statutory requirements:

- (1) Less than \$20 million in cost with a contract term of ten or fewer years from the date of installation; and
- (2) \$10 million or less in cost with a contract term greater than 10 years but less than or equal to 15 years from the date of installation.

(b) Board Standing Committee. The Board authorizes the standing committee designated to consider facilities rules and applications to approve the following types of energy savings performance contracts, upon certification of authority by the proposing institution's governing board that the project meets all of the specified Board standards and statutory requirements:

- (1) Greater than \$20 million in cost with a contract term of 15 or fewer years from the date of installation;
- (2) Greater than \$10 million but less than or equal to \$20 million in cost with a contract term of greater than ten years but less than 20 years from the date of installation; and
- (3) \$10 million or less in cost with a contract term of greater than 15 years from the date of installation.

(c) Board. The Board shall consider for approval the following types of energy savings performance contracts. Contracts with a project cost of greater than \$20 million and a contract term greater than 15 years from the date of installation.

(d) Any project that is not approved by a delegated party is immediately referred to the next higher-level approval authority.

(e) The Assistant Commissioner may refer projects to the appropriate Board Committee for review.

(f) Decisions of the Assistant Commissioner may be appealed to the appropriate Board Committee. Decisions of the Committee may be appealed to the Board.

§17.42. Additional Requirements.

(a) In addition to those outlined in §17.21 of this title (Relating to Submission Procedures), each institution must include a statement with the application, certified by a Professional Engineer licensed in the State of Texas who shall not be an officer or employee of the offeror for the contract, the institution seeking approval, or otherwise associated with the contract, that the contract meets the following guidelines:

- (1) The contract complies with any and all applicable federal, state and local statutes;
- (2) The contract contains an energy audit report, a Measurement and Verification plan that conforms to the International Performance Measurement and Verification Protocol (IPMPV) or a case-specific methodology conforming to IPMPV principles, and a detailed calculation of energy savings as a direct result of the project;
- (3) The savings achieved over the specified term is equal to or greater than the cost of the project; and
- (4) The contract meets the guidelines specified in Texas Education Code, §51.927, (relating to Energy Savings Performance Contracts).

(b) In addition to those outlined in §17.21 of this title (Relating to Submission Procedures), the institution's chief financial officer and general counsel must include a written certification that they have reviewed the energy contract and that the costs do not exceed the guaranteed savings and that other legal provisions are in compliance with applicable laws and statutes.

(c) The institution shall provide to the Board a copy of the signed contract within 30 days of the effective date of the contract.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.
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 Nichole Bunker-Henderson
 General Counsel
 Texas Higher Education Coordinating Board
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 For further information, please call: (512) 427-6548



SUBCHAPTER E. REPORTS

19 TAC §17.100, §17.101

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L, concerning

Resource Planning, and adoption of new rules in Chapter 17, Subchapter E, Reports, §§17.100 and 17.101. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter E, Reports, rules as detailed below:

Section 17.100, Board Reports, lays out the reports the Coordinating Board produces in relation to facilities programs. The new rule replaces existing §17.100 and is amended to remove reference to the Campus Condition Index Report that the Coordinating Board no longer produces. The rule is amended to reflect that the Coordinating Board has renamed the "Space Utilization" reports to "Space Usage Efficiency" reports. The rule is amended to reflect the Coordinating Board no longer uses data collected in the reports for evaluation of facilities development projects and is only for standards. The rule is amended to remove the requirement to produce the construction costs by a certain date due to availability of the data.

Section 17.101, Institutional Reports, lays out the reports that institutions are required to provide the Coordinating Board. The new rule replaces existing §17.101 and is amended to remove reference to Project Status and Tracking reports, which the Coordinating Board will no longer collect due to the new data submission time frame requirements. Conforming edits are made to reference the Building Replacement Report instead of the Campus Condition Index Value. The rule is updated to clarify that facilities audit data will be used for the Space Usage Efficiency report specifically instead of the general term "classroom and class lab utilization." The rule is updated to reflect that Coordinating Board no longer approves certain capital construction, renovation, and purchase projects. The rule renames the Facilities Development Plan to the Capital Expenditure Plan in accordance with current naming convention. The rule is changed to use active instead of passive voice to clarify who is doing what.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden and clarity for the Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.100. Board Reports.

The Board shall annually prepare the following reports:

(1) Space Projection Model. The Board, in consultation with the institutions, shall develop space planning models to estimate the NASF of E&G space needed at institutions of higher education.

(A) Periodic Review. Each biennium, the Commissioner may convene an advisory committee of institutional representatives to review the model and recommend changes.

(B) Use. The Board shall use the models developed under this section to determine the need for space on campuses, as a component of funding formulas for public institutions other than community colleges, and as standards for facilities development projects.

(2) Space Usage Efficiency (SUE). The Board shall collect data and publish reports designed to inform the public and other state agencies of the intensity of use of E&G facilities at institutions of higher education. Classroom and class lab utilization data are not calculated for health-related institutions.

(A) Periodic Review. The Board shall annually calculate the utilization of classrooms and class laboratories for the institutions.

(B) Use. The Board shall use the models developed under this section to determine the utilization of classrooms and class laboratories for the institutions.

(3) Construction Costs. The Board shall annually calculate and report the mean and one standard deviation above the mean for construction building costs per square foot. The costs shall be based on similar projects reported to the Board, within the immediate prior seven years, annually adjusted for inflation for the region of the state where the project is located. As a minimum, the calculations shall be

developed for both new construction/addition and repair and renovation for all facility types available and shall be published on the agency website.

§17.101. Institutional Reports.

Institutions of higher education shall submit current data to the Board for the following reports:

(1) Facilities Inventory.

(A) Periodic Review. Institutions shall report a record of all property, buildings, and rooms occupied or in the control of an institution in a format specified by the Board.

(i) The institution shall update its inventory of facilities on an ongoing basis.

(ii) The inventory is subject to periodic audits.

(iii) The inventory shall be certified by the institution annually on or before November 1, or as specified by the Board.

(B) Use. The Board shall use the data reported in the facilities inventory for the facilities audit program and for other required or requested analyses. The facilities inventory shall be used to complete the following reports:

(i) the Space Projection Model;

(ii) calculation of an institution's Building Replacement Estimate Report; and

(iii) calculation of the Space Usage Efficiency (SUE) report.

(2) Facilities Development Reports.

(A) Capital Expenditure Plan (MP1). On or before July 1 of every year, beginning in 2004, an institution shall submit an update to its Capital Expenditure Plan (MP1) on file with the Board, as required by Texas Education Code, §61.0572(b)(4). In every even-numbered year, the Board shall provide Facilities Development Plan data to the Bond Review Board for inclusion in the Capital Expenditure Report. This report may include planned maintenance, facilities adaptation, and deferred maintenance projects. The data may be used by the Board to respond to legislative requests, predictions of future space need, and similar analyses. The report shall include projects that are planned or may be submitted to the Board within the next five years, regardless of funding source:

(i) new construction projects \$1,000,000 or more;

(ii) repair and rehabilitation projects \$1,000,000 or more;

(iii) information resource projects that cumulatively would total \$1,000,000 or more in one year;

(iv) property purchases that cumulatively would total \$1,000,000 or more in one year (the actual property address or location for individual property acquisitions may be, but are not required to be, identified in a single proposed project entitled "property acquisitions" with a total cost of all purchases or acquisitions projected over the reporting period);

(v) the funding source for any planned project identified in clauses (i) - (iv) of this subparagraph; and

(B) Campus Condition Report. Annually, an institution shall provide a copy of its Campus Condition Report, as supplied to their Governing Board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.

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Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 427-6548



SUBCHAPTER F. FACILITIES AUDIT

19 TAC §§17.110 - 17.114

The Texas Higher Education Coordinating Board (Coordinating Board) proposes the repeal of Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapters A - F, I, K, and L concerning Resource Planning, and adoption of new rules in Chapter 17, Subchapter F, Facilities Audit, §§17.110 - 17.114. Specifically, the repeal and new rules will update Chapter 17 to clarify and reform rules to reduce administrative burden for both the Coordinating Board and the institutions in relation to facilities programs.

The agency is exercising its discretion to not review capital construction and purchase projects and instead only collect data on them. The new rules will reform sections pertaining to facilities audits for clarity and accuracy in how the agency implements the program and make clarifying changes to the Energy Savings Performance Contract approval program.

The Coordinating Board proposes new Chapter 17, Subchapter F, Facilities Audit, rules as detailed below:

Section 17.110, General Provisions, lays out the facilities audit program in general. It replaces existing §17.110 and amends it to include a portion of existing §17.114 (c), amended to provide more specific reference to the presentation of the Facilities Audit Report to the Board and then an amended list of whom reports are delivered, aligning to the required recipients in statute. It also clarifies under what conditions institutions may self-audit in lieu of a peer audit, a point that was unclear in the existing rule.

Section 17.111, Facilities Audit Objectives, states the objectives of an audit of an institution's facilities. It replaces without change existing §17.111.

Section 17.112, Data Sources, states the data that will be used in conducting an audit. It replaces existing §17.112 and amends it to remove mention of Campus Master Plans as it is a duplicate of the report called "Capital Expenditure Plan" which is already listed as a replacement to the current Facilities Development Plan, in accordance with current report naming convention. The rule is changed to use active instead of passive voice to clarify who is doing what.

Section 17.113, Institutional Audit Cycle, establishes the frequency of audits. It replaces without change existing §7.113.

Section 17.114, Audit Components, describes what takes place during an audit. It replaces existing §17.114 with significant changes to describe the obligations of institutions participating in peer audits and what they must do should they chose not to participate in the peer audit. The reason for these changes is due to a lack of clarity on the components of the audit and

process for completion of the audit in current rule and to align with current audit protocol and practice. It removes the requirement that institutions reimburse the Coordinating Board for the cost of administering audits because the stipulation has not been applied since the Coordinating Board established the Peer Review Team (PRT) process. The rule is amended to state that the Coordinating Board will publish on its website details of the process to conduct the peer audits.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier, Assistant Commissioner for Funding, has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section is reduced administrative burden and clarity for the Coordinating Board and the institutions as it pertains to facilities programs. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will create a new rule;
- (6) the rules will limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, TX 78711-2788, or via email at pa@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Statutory Authority

The new rules are proposed under Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927, which provide the Coordinating Board with the authority to conduct the facilities programs governed by Chapter 17.

The proposed rules affect Texas Education Code, Sections 61.0572, 61.058, 61.0583, and 51.927.

§17.110. General Provisions.

(a) The Board shall periodically conduct a comprehensive audit of all education and general facilities on the campuses of institu-

tions to verify the accuracy of the institutional facilities inventory and approved facilities development projects for each of those institutions.

(b) No later than 30 days after THECB staff has presented the Facilities Audit Report to the Board (or appropriate standing committee of the Board), the Board files a copy of the report with the institution and the Legislative Budget Board.

(c) Institutions that conduct regularly scheduled self-audits may be exempted from the on-site review providing that:

(1) The institution presents to the THECB a copy of the formal report of the audit and its documented processes that demonstrate the accuracy of the data; and

(2) confirmation that the review includes consideration of the facilities audit objectives stated in §17.111 of this title (relating to Facilities Audit Objectives).

§17.111. Facilities Audit Objectives.

The objectives of the audit are to determine whether selected institutions of higher education:

(1) are accurately reporting their facilities inventory data to the Board; and

(2) have followed the Board rules and received approval where such approval was required.

§17.112. Data Sources.

At a minimum, Board shall use the following data sources in the course of the audit:

(1) Institutional Capital Expenditure Plans (MP1);

(2) Campus Condition Report as submitted to the governing board;

(3) Space Model Projection Reports;

(4) Reports required by the Educational Data Center;

(5) Facilities Inventory Reports;

(6) Facilities Development and Improvement Applications and Reviews;

(7) Classroom and Class Laboratory Utilization Reports;

(8) Energy Savings Performance Contracts;

(9) Governing Board facilities approvals; and

(10) Any other institutional data deemed appropriate by the Coordinating Board staff.

§17.113. Institutional Audit Cycle.

(a) The Board shall determine the frequency and the scope of the audits authorized by this section; audits shall be limited to objectives stated in §17.111 of this title (relating to Facilities Audit Objectives).

(b) The Board may conduct an audit of an institution more often than every five years upon the request of the institution, the Board, the Legislature, or another agency within revenue appropriated for this purpose.

(c) Staff of the Board shall publish a schedule of audits for the succeeding fiscal year.

§17.114. Audit Components.

Audits consist of two components:

(1) On-Site Audit of an Institution's Facilities Inventory;

(A) Institutions may participate in the Peer Review Team (PRT) process, by which institutions aid in auditing one another, with the participation of THECB staff. Institutions participating in the PRT program must provide one or more qualified individuals with facilities management for the PRT pool maintained by the THECB Staff; or

(B) Institutions choosing not to participate in the PRT audit process are required to conduct self-audits in accordance with Subchapter F, 17.110(c).

(2) Audit of an Institution's Facilities Development Projects:

(A) The Internal Auditor of an institution (or its System Office) may determine if facilities projects were submitted to the Board in accordance with §17.20 of this title (Relating to Facility Projects to Be Submitted to the Board) and submit a report to the THECB.

(B) The THECB shall publish a Facilities Audit Protocol on the agency's website, including details on the process and timing of these components.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.

TRD-202103115

Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 427-6548



PART 2. TEXAS EDUCATION AGENCY

CHAPTER 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING [TECHNOLOGY AND] INSTRUCTIONAL MATERIALS AND TECHNOLOGY ALLOTMENT

19 TAC §§66.1309, 66.1311, 66.1312

The Texas Education Agency (TEA) proposes amendments to §§66.1309, 66.1311, and 66.1312, concerning the technology and instructional materials allotment. The proposed amendments would update terminology, provide clarifications, make technical edits, and remove outdated information.

BACKGROUND INFORMATION AND JUSTIFICATION: The rules in Chapter 66, Subchapter CC, implement Texas Education Code, §31.0211, which establishes the instructional materials and technology allotment and gives the commissioner rulemaking authority over the allotment. The proposed amendments would update the subchapter as follows.

The title of Chapter 66, Subchapter CC, would be updated to "Commissioner's Rules Concerning Instructional Materials and

Technology Allotment" to align with the name of the allotment used in statute.

The proposed amendment to §66.1309, High Enrollment Growth Adjustment, would update references to the instructional materials and technology allotment.

The proposed amendment to §66.1311, Special Instructional Materials, would update language to refer to the federal Web Content Accessibility Guidelines (WCAG) generally. As the federal WCAG standards are updated, the amended rule language would refer to the WCAG standards applicable according to each instructional materials proclamation and not become outdated. In addition, the specific reference to the EMAT system would be replaced with a more general reference to the state ordering system.

The proposed amendment to §66.1312, Delayed Publisher Payment Option, would update references to the instructional materials and technology allotment for consistency.

FISCAL IMPACT: Kristen Hole, associate commissioner for instructional strategy, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Ms. Hole has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be updating the rules to add clarity to expectations related to WCAG compliance for adopted instructional materials. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins August 20, 2021, and ends September 20, 2021. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on August 20, 2021. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/Proposed_Commissioner_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/).

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §31.0211, as amended by House Bill (HB) 1525 and HB 3261, 87th Texas Legislature, Regular Session, 2021, which authorizes the commissioner to adopt rules regarding the instructional materials allotment (IMA), including the amount of the per-student allotment, the authorization of juvenile justice alternative education program allotments, allowed expenditures, required priorities, and adjustments to the number of students for which a district's IMA is calculated; TEC, §31.0212, which requires the commissioner to adopt rules regarding the documentation required for requisitions and disbursement to be approved, rules regarding districts' online instructional materials ordering system accounts, and rules requiring school districts to submit to the commissioner the title and publication information for any materials the district purchases with its IMA; TEC, §31.0214, which authorizes the commissioner to adopt rules regarding high enrollment growth; TEC, §31.0215, which authorizes the commissioner to adopt rules regarding allotment purchases, including announcing to districts the amount of their allotments and delayed payment options; TEC, §31.0231, which requires the commissioner to adopt rules regarding the Commissioner's List of Instructional Materials, including electronic or other tools, models, and investigative materials for Kindergarten-Grade 5 science and Kindergarten-Grade 8 personal financial literacy, various requirements for the adoption, the criteria the materials must meet, coverage of the Texas Essential Knowledge and Skills, teacher training, accessibility standards, and allowed changes; TEC, §31.029, which requires the commissioner to adopt rules regarding instructional materials for use in bilingual education classes; TEC, §31.031, which requires the commissioner to adopt rules regarding the purchase of college preparatory instructional materials with the IMA; TEC, §31.076, which authorizes the commissioner to adopt rules regarding state-developed open-source instructional materials; and TEC, §31.104, which requires the commissioner to adopt rules that include criteria for determining whether instructional materials and technological equipment are returned in an acceptable condition.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§31.0211; 31.0212; 31.0214; 31.0215; 31.0231; 31.029; 31.031; 31.076; and 31.104.

§66.1309. High Enrollment Growth Adjustment.

(a) From the biennial instructional materials fund, the commissioner of education shall set aside an amount not to exceed \$10 million for each year of the biennium to make high-enrollment-growth

adjustments for school districts and open-enrollment charter schools that experience the highest enrollment growth from the previous year.

(b) High-enrollment-growth adjustments will be based on the difference between the school district's or open-enrollment charter school's percentage of enrollment growth and that of the state. Enrollment growth calculations will be determined each fiscal year based on fall Texas Student Data System Public Education Information Management System enrollment data.

(c) The amount of the adjustment determined by the commissioner is final and may not be appealed.

(d) If sufficient instructional materials funds are available, high-enrollment-growth adjustments will be granted once each fiscal year.

(e) The per-student high-enrollment-growth adjustment granted in the second year of a biennium shall not exceed one-half of the per-student amount established as the biennial instructional materials and technology allotment.

(f) Notwithstanding subsection (d) of this section, a school district or an open-enrollment charter school that experiences an unexpected growth of at least two percent due to a natural or man-made disaster or catastrophic event may apply to the commissioner for additional [~~instructional material~~] allotment [~~(IMA)~~] funding at any time during a fiscal year. Any additional funding will be dependent on the availability of funds.

(g) Notwithstanding subsection (d) of this section, a school district or an open-enrollment charter school that experiences an unexpected growth in its bilingual population of at least 10 percent in any school year may apply to the commissioner for additional bilingual allotment [~~IMA~~] funding at any time during a fiscal year. Any additional funding will be dependent on the availability of funds.

§66.1311. Special Instructional Materials.

(a) All laws and rules applying to instructional materials provided to students with no disabilities that are not in conflict with the Texas Education Code, §31.028, or this section shall apply to the distribution and control of special instructional materials.

(b) Special instructional materials include braille, large-print, and audio books and any other formats designed specifically to provide equal access to students with disabilities.

(c) Requisitions for special instructional materials shall be based on actual student enrollment but may include up to two copies per student if necessary to meet individual needs.

(d) Special instructional materials are the property of the state. School districts and open-enrollment charter schools are responsible for replacing or reimbursing the state for lost, stolen, or damaged special instructional materials.

(e) Publishers shall grant permission to the state to have adopted instructional materials converted into special instructional materials without penalty or royalty.

(f) On or before the deadline specified in the schedule of adoption procedures, each publisher of newly adopted print instructional materials shall provide computerized files to the state as specified in the proclamation to be used for producing special instructional materials. All information contained in adopted instructional materials shall be included on the computerized files. Computerized files may be copied and distributed to school districts, upon request, for use with a student who requires the use of computerized instructional materials, pursuant to an individualized plan developed for the student under the

Rehabilitation Act, §504, the Americans with Disabilities Act, or the Individuals with Disabilities Education Act.

(g) Gifts of special instructional materials may be accepted by the commissioner of education and shall become state property. Gift materials may be shipped by Free Matter for the Blind and Other Physically Handicapped Persons to the Special Textbook Redistribution Center or other location designated by the TEA.

(h) Adopted instructional materials needed by a Texas public school teacher with a print disability to carry out his or her instructional duties shall be furnished in the required format without cost. The materials are to be loaned to the public school districts as long as needed and are to be returned to the state when they are no longer needed.

(i) Large-print instructional materials intended for student use must comply with the standards in the latest edition of the Manufacturing Standards and Specifications for Textbooks.

(j) Adopted instructional materials in a specialized format that are requested by a parent with a print disability shall be furnished without cost by the state. Requests for electronic files will be filled by the TEA after the parent signs and the TEA receives a statement, through the appropriate school district, promising that the parent will safeguard the security of the files and observe all current copyright laws, including those that forbid reproduction of the files and their transfer to other parties. All special instructional materials and electronic files that have been provided must be returned to the local school district at the end of the school year.

(k) Adopted instructional materials that are not compliant with the technical standards of the Federal Rehabilitation Act, Section 508, or do not conform to the Web Content Accessibility Guidelines required in the proclamation [2-0, Level AA,] will be removed from the state ordering [EMAF] system and will not be available for order through the TEA.

(l) Producers that enter into a contract with the TEA for the production and distribution of special instructional materials shall provide them to students with disabilities at the same time other students in the same school district receive print instructional materials.

§66.1312. *Delayed Publisher Payment Option.*

(a) A school district or an open-enrollment charter school may requisition and receive state-adopted instructional materials before instructional materials and technology allotment [(HMA)] funds for those materials are available.

(b) The total cost of delayed-payment-option materials requisitioned by a school district or an open-enrollment charter school may not exceed 80% of the district's or charter school's expected allotment [HMA] for the subsequent biennium.

(c) When a school district or an open-enrollment charter school submits a requisition for instructional materials under this section, the Texas Education Agency (TEA) will expend a district's or charter school's existing allotment [HMA] balance before applying the delayed payment option.

(d) The TEA will make payment for any remaining balance for a school district's or an open-enrollment charter school's order under this section as the allotment [HMA] funds become available.

(e) The TEA will prioritize payment for requisitions under this section over reimbursement of purchases made directly by a school district or an open-enrollment charter school.

(f) Publishers may decline orders for which payments could be delayed. A publisher's decision to decline an order under this section shall affect all of that publisher's orders for which payments could

be delayed. Publishers may not selectively decline individual orders or orders from individual school districts or open-enrollment charter schools.

(g) Texas Government Code, Chapter 2251, does not apply to requisitions placed under this section.

(h) Texas Education Code, §31.151, does apply to orders placed under this section.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.

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Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 475-1497



PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 229. ACCOUNTABILITY SYSTEM FOR EDUCATOR PREPARATION PROGRAMS

19 TAC §§229.1, 229.4, 229.5

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 19 TAC §229.1(c) is not included in the print version of the Texas Register. The figure is available in the on-line version of the August 20, 2021, issue of the Texas Register.)

The State Board for Educator Certification (SBEC) proposes amendments to §§229.1, 229.4, and 229.5, concerning accountability system for educator preparation programs. Chapter 229 establishes the performance standards and procedures for educator preparation program (EPP) accountability. The proposed amendments would provide for adjustments to the 2020-2021 *Accountability System for Educator Preparation (ASEP) Manual* due to the ongoing public health situation; implement House Bill (HB) 159, 87th Texas Legislature, Regular Session, 2021, to add students with disabilities to the student achievement ASEP performance indicator regarding student performance; provide additional clarity for certificate category calculations; and provide updates to the *ASEP Manual*.

BACKGROUND INFORMATION AND JUSTIFICATION: EPPs are entrusted to prepare educators for success in the classroom. The Texas Education Code (TEC), §21.0443, requires EPPs to adequately prepare candidates for certification. Similarly, TEC, §21.031, requires the SBEC to ensure candidates for certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state. TEC, §21.045, also requires the SBEC to establish standards to govern the continuing accountability of all EPPs. The SBEC rules in 19 Texas Administrative Code (TAC) Chapter 229 establish the process used for issuing annual accreditation ratings for all EPPs to comply with these provisions of the TEC and to en-

sure the highest level of educator preparation, which is codified in the SBEC Mission Statement.

At the April 2021 meeting, Texas Education Agency (TEA) staff presented draft rule text and received direction from the SBEC related to potential rule changes in Chapter 229. The SBEC directed staff to receive additional feedback on certificate category pass rates. Staff hosted a meeting with the Educator Preparation Advisory Committee (EPAC) on May 21, 2021, to receive feedback on the proposed text.

Following is a description of the proposed amendments to 19 TAC Chapter 229, including the Figure: 19 TAC §229.1(c), which is the *ASEP Manual*.

§229.1. General Provisions and Purpose of Accountability System for Educator Preparation Programs.

Update of *ASEP Manual*:

The proposed amendment to Figure: 19 TAC §229.1(c) would provide the following updates to the *ASEP Manual*:

Updates to Chapter 3 would include language to exclude candidates issued a probationary certificate under the condition of the waiver issued by the governor. These candidates are removed from the calculation per 19 TAC §229.4(a)(1)(D), therefore, this update clarifies this removal in the *ASEP Manual*. Chapter 3 would also be updated to align with the pass rate approach for the 2020-2021 academic year (AY), per 19 TAC §229.4(a)(1)(B). This update aligns the *ASEP Manual* with existing rule language. Chapter 3 would further be updated with clarification about the Core Subjects Adjustment, which is no longer needed due to changes in how data is reported to TEA but is still used for historic data. A new section, Disaggregation at the Certification or Category Level, would be added to the *ASEP Manual*, providing clarity on the calculations for proposed new 19 TAC §229.5(c). These changes were prompted by feedback from the SBEC and stakeholders, as noted in the description of changes to 19 TAC §229.5(c) below. The old section, The Disaggregation at the Test Level, would be removed. Finally, updates to the worked examples would be made, removing old examples and providing new ones, to align with the text updates. The updates include a new example pertaining to 19 TAC §229.5(c).

Updates to Chapter 5 would implement HB 159, 87th Texas Legislature, Regular Session, 2021, to clarify that all students, including students with disabilities, would be used in the calculation of the standard.

Updates to Chapter 8 would provide the new focus area for the Innovative EPP commendation. This focus area was approved by the EPP commendation committee at its meeting on April 29, 2021.

Updates to Chapter 9 would remove the date reference to streamline the text.

Updates throughout the *ASEP Manual* would correct date references and correct minor technical errors as well as provide transparency to the field as to the calculations used to determine accreditation statuses.

§229.4. Determination of Accreditation Status.

The proposed amendment in §229.4(a) would prescribe that due to the governor's ongoing disaster declaration, the 2020-2021 AY data for the performance indicators would be reported to EPPs but not be used for accountability purposes. Given that the governor declared a disaster during which many campuses, facili-

ties, and services were closed, impacting the ability of EPPs to meet these accountability measures, this amendment would prevent EPPs from receiving accountability ratings based on data that are partial or incomplete.

Determination of Accreditation Status

The proposed amendment to §229.4(b), (b)(1), and (b)(2) would delay the implementation of the previously adopted index system. This would continue to provide a year in which the recommended accreditation status would be the more favorable outcome of the index system described in the §229.4(b)(1)(A)-(D) or the existing system in §229.4(b)(2)(A)-(D) for each EPP. This would align with the previous approach to the implementation timeline as being the year immediately following the end of the *Not Rated: Declared State of Disaster* accreditation status.

The proposed amendment to §229.4(b)(4) would extend the accreditation status of *Not Rated: Declared State of Disaster* to the 2020-2021 reporting year for all EPPs. This status is based on the governor's declaration of disaster on March 13, 2020, due to COVID-19. This status would limit the continued impact of test center closures and local education agency (LEA) closures on EPP accreditation statuses. The proposed amendment to §229.4(b)(4) would prescribe that the ASEP status that each EPP was assigned by the SBEC for the 2018-2019 reporting year would be the operative accreditation status for purposes prescribed in 19 TAC Chapter 228, Requirements for Educator Preparation Programs, for 2019-2020 and 2020-2021 AYs.

Proposed new §229.4(b)(4)(D) would prescribe that EPPs that were not assigned an ASEP status of *Accredited* for the 2018-2019 AY and that meet the requirements to be assigned an ASEP status of *Accredited* for the 2020-2021 AY, as described in §229.4(b)(1)(A) or (2)(A), would provide for a break in consecutively measured years or next most recent years as prescribed in §229.4(b)(1)-(3), and would allow an EPP to be eligible for commendations as described in §229.1(d). Proposed new §229.4(b)(4)(D) would allow an EPP that has made program improvements during the pandemic that would have resulted in an *Accredited* status if ASEP was not paused to break from the 2018-2019 ASEP status for purposes of determining future ASEP accreditation status based on consecutive years of poor performance and be eligible for a commendation.

A technical edit would be made to a cross reference in §229.4(a)(3) to apply *Texas Register* style requirements.

§229.5. Accreditation Sanctions and Procedures.

The proposed amendment to §229.5(c) would clarify that the determination of pass rates evaluated at the level of a certification class or category is calculated at the exam level, and that all exams required for certification, as listed in Figure: 19 TAC §230.21(e), are included. This amendment would require EPPs to meet the performance standard for all non-PPR exams required for certification within a certification class or category. This aligns with the requirements for candidates to be certified.

At the May 21, 2021 meeting of the EPAC, there was discussion about the update to §229.5(c). Stakeholders noted the importance of using all tests available and ensuring specifically that results from the Science of Teaching Reading (STR) exam were able to be used. The group discussed a number of options, including combining pass rates and having each pass rate count separately. Stakeholders also noted that candidates are required to pass all exams for certification and that expectations for EPPs should be aligned. Proposed amendments in §229.5(c)

and Chapter 3 of the *ASEP Manual* would provide for this alignment.

Proposed new §229.5(c)(3) would prescribe that EPPs that failed to meet the performance standard in subsection (c) regarding performance on a certification examination in the 2018-2019 AY and that would meet the requirements for the 2020-2021 AY will provide a break in consecutively measured years for that class or category for the purposes of determining future consecutive years of poor performance. This would allow an EPP that has made program improvements in a certificate class or category that would have resulted in a reset if the calculation was not paused to break from the 2018-2019 consecutively measured years.

The proposed amendment in §229.5(c) would provide technical edits to renumber and reletter subsections (d) and (e) to paragraphs (1) and (2) and subsections (f) and (g) to subsections (d) and (e).

FISCAL IMPACT: Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, has determined that for the first five-year period the proposal is in effect, there is no additional fiscal impact on state or local governments and that there are no additional costs to entities required to comply with the proposal.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code (TGC), §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in TGC, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to TGC, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: The TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would limit an existing regulation by removing accountability requirements for EPPs for the 2020-2021 academic year due to the ongoing disaster declaration. EPPs will not be held accountable for performance metrics during this time as outlined in this proposed rule.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not expand or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: The public benefit anticipated as a result of the proposal would be an accountability system that informs the public of the quality of educator

preparation provided by each SBEC-approved EPP. There is no anticipated cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no new data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The TEA staff has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins August 20, 2021, and ends September 20, 2021. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_\(TAC\)/Proposed_State_Board_for_Educator_Certification_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBEC_Rules_(TAC)/Proposed_State_Board_for_Educator_Certification_Rules/). The SBEC will take registered oral and written comments on the proposal at the October 1, 2021 meeting in accordance with the SBEC board operating policies and procedures. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the Department of Educator Preparation, Certification, and Enforcement, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, Attention: Ms. Emily Garcia, associate commissioner for educator preparation, certification, and enforcement, not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on August 20, 2021.

STATUTORY AUTHORITY. The amendments are proposed under Texas Education Code (TEC), §21.041(a), which allows the State Board of Educator Certification (SBEC) to adopt rules as necessary for its own procedures; TEC, §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of TEC, Chapter 21, Subchapter B, in a manner consistent with TEC, Chapter 21, Subchapter B; TEC, §21.041(d), which states that the SBEC may adopt a fee for the approval and renewal of approval of an educator preparation program, for the addition of a certificate or field of certification, and to provide for the administrative cost of appropriately ensuring the accountability of educator preparation program (EPPs); TEC, §21.043(b) and (c), which require the SBEC to provide EPPs with data, as determined in coordination with stakeholders, based on information reported through the Public Education Information Management System (PEIMS) that enables an EPP to assess the impact of the program and revise the program as needed to improve; TEC, §21.0441(c) and (d), which require the SBEC to adopt rules setting certain admission requirements for EPPs; TEC, §21.0443, which states that the SBEC shall propose rules to establish standards to govern the approval or renewal of approval of EPPs and certification fields authorized to be offered by an EPP. To be eligible for approval or renewal of approval, an EPP must adequately prepare candidates for educator certification and meet the standards and requirements of the SBEC. The SBEC shall require that each EPP be reviewed for renewal of approval at least every five years. The SBEC shall adopt an evaluation process to be used in reviewing an EPP for renewal of approval; TEC, §21.045, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021, which states that the SBEC shall propose rules establishing standards to govern the approval and continuing accountability of all EPPs; TEC, §21.0451, which states that the SBEC shall propose rules for the sanction of EPPs that do not meet accountability standards and shall annually review the accreditation status of each EPP. The costs of technical assistance

required under TEC, §21.0451(a)(2)(A), or the costs associated with the appointment of a monitor under TEC, §21.0451(a)(2)(C), shall be paid by the sponsor of the EPP; TEC, §21.0452, which states that to assist persons interested in obtaining teaching certification in selecting an EPP and to assist school districts in making staffing decisions, the SBEC shall make certain specified information regarding EPPs in this state available to the public through the SBEC's Internet website.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.041(a), (b)(1), and (d); 21.043(b) and (c), 21.0441(c) and (d); 21.0443; 21.045, as amended by HB 159, 87th Texas Legislature, Regular Session, 2021; 21.0451; and 21.0452.

§229.1. *General Provisions and Purpose of Accountability System for Educator Preparation Programs.*

(a) The State Board for Educator Certification (SBEC) is responsible for establishing standards to govern the continuing accountability of all educator preparation programs (EPPs). The rules adopted by the SBEC in this chapter govern the accreditation of each EPP that prepares individuals for educator certification. No candidate shall be recommended for any Texas educator certification class or category except by an EPP that has been approved by the SBEC pursuant to Chapter 228 of this title (relating to Requirements for Educator Preparation Programs) and is accredited as required by this chapter.

(b) The purpose of the accountability system for educator preparation is to assure that each EPP is held accountable for the readiness for certification of candidates completing the programs.

(c) The relevant criteria, formulas, calculations, and performance standards relevant to subsection (d) of this section and §229.4 of this title (relating to Determination of Accreditation Status) are prescribed in the *Texas Accountability System for Educator Preparation (ASEP) Manual* provided as a figure in this subsection.

Figure: 19 TAC §229.1(c)

[Figure: 19 TAC §229.1(e)]

(d) An accredited EPP that is not under an active SBEC order or otherwise sanctioned by the SBEC may receive commendations for success in the following four dimensions identified by the SBEC and prescribed in the figure in subsection (c) of this section:

- (1) Rigorous and Robust Preparation;
- (2) Preparing the Educators Texas Needs;
- (3) Preparing Educators for Long-Term Success; and
- (4) Innovative Educator Preparation.

§229.4. *Determination of Accreditation Status.*

(a) Accountability performance indicators. The State Board for Educator Certification (SBEC) shall determine the accreditation status of an educator preparation program (EPP) at least annually, based on the following accountability performance indicators, disaggregated by demographic group and other requirements of this chapter and determined with the formulas and calculations included in the figure provided in §229.1(c) of this title (relating to General Provisions and Purpose of Accountability System for Educator Preparation Programs). Data will be used only if the following indicators were included in the accountability system for that academic year. Except for the 2019-2020 and 2020-2021 academic years [year], when the data described in paragraphs (1)-(5) of this subsection will be reported to EPPs and will not be used to determine accreditation statuses, EPP accreditation statuses shall be based on:

(1) the EPP candidates' performance on examinations of pedagogy and professional responsibilities (PPR) and non-PPR stan-

dard certification examinations. The EPP candidates' performance on PPR and non-PPR examinations shall provide separate accountability performance indicators for EPPs; [-]

(A) For both PPR and non-PPR examinations, the performance standard shall be calculated based on the percentage of individuals admitted after December 26, 2016, who passed an examination within the first two attempts. For purposes of determining the pass rate, an individual shall not be excluded because the individual has not been recommended for a standard certificate. The pass rate is based solely on the examinations approved by the EPP and required to obtain initial certification in the class or category for which the individual serves his or her internship, clinical teaching, or practicum. Examinations not required for certification in that class or category, whether taken before or after admission to an EPP, are not included in the rate. The formula for calculation of pass rate is the number of individuals who have passed an examination on their first or second attempt, including any attempts after the candidate completed the EPP, divided by the number of individuals who passed an examination on their first attempt plus those who passed or failed on their second attempt.

(B) For the 2020-2021 academic year and following, the performance standard shall be the percent of individuals admitted after December 26, 2016, who passed an examination within the first two attempts, including those examinations attempted after the individual has completed the EPP or when the EPP has not recommended the individual for a standard certificate. The pass rate is based solely on the examinations approved by the EPP. Examinations taken before admission to the EPP or specific examinations taken for pilot purposes are not included in the pass rate. Completers who have been issued a probationary certificate under a waiver issued by the governor pursuant to the declaration of disaster on March 13, 2020, are not included in the pass rate for the 2020-2021 academic year.

(C) For examinations of PPR, the pass rate will be calculated as described in subparagraph (A) of this paragraph for the 2018-2019 and 2019-2020 academic years and subparagraph (B) of this paragraph beginning with the 2020-2021 academic year. The performance standard shall be a pass rate of 85%.

(D) For non-PPR examinations, the pass rate will be calculated as described in subparagraph (A) of this paragraph for the 2018-2019 and 2019-2020 academic years and subparagraph (B) of this paragraph beginning with the 2020-2021 academic year. The performance standard shall be a pass rate of 75%.

(2) the results of appraisals of first-year teachers by administrators, based on a survey in a form to be approved by the SBEC. The performance standard shall be 70% of first-year teachers from the EPP who are appraised as "sufficiently prepared" or "well prepared[-]" ;

(3) the growth of students taught by beginning teachers as indicated by the STAAR Progress Measure, determined at the student level as described in Figure: 19 TAC §97.1001(b) of Part II of this title (relating to Accountability Rating System), and aggregated at the teacher level as described in Figure: 19 TAC §229.1(c) of this title [(relating to General Provisions and Purpose of Accountability System for Educator Preparation Programs)]. The performance standard shall be 70% of beginning teachers from the EPP reaching the individual performance threshold. The first two academic years for which the Texas Education Agency (TEA) has data necessary to calculate this performance standard following the 2019-2020 academic year will be reporting years only and will not be used to determine accreditation status;

(4) the results of data collections establishing EPP compliance with SBEC requirements specified in §228.35(g) of this title (relating to Preparation Program Coursework and/or Training), regarding

the frequency, duration, and quality of field supervision to candidates completing clinical teaching or an internship. The frequency and duration of field supervision shall provide one accountability performance indicator, and the quality of field supervision shall provide a separate accountability performance indicator; [-]

(A) The performance standard as to the frequency, duration, and required documentation of field supervision shall be that the EPP meets the requirements of documentation of §228.35(g) of this title for 95% of the EPP's candidates.

(B) The performance standard for quality shall be 90% of candidates rating the field supervision as "frequently" or "always or almost always" providing the components of structural guidance and ongoing support; and

(5) the results from a teacher satisfaction survey, in a form approved by the SBEC, of new teachers administered at the end of the first year of teaching under a standard certificate. The performance standard shall be 70% of teachers responding that they were "sufficiently prepared" or "well prepared" by their EPP.

(b) Accreditation status assignment. For the 2021-2022 [~~2020-2021~~] academic year, the assigned accreditation status shall be the better result for the EPP from the system described in paragraph (1) of this subsection and paragraph (2) of this subsection.

(1) Beginning in the 2021-2022 [~~2020-2021~~] academic year, all approved EPPs may be assigned an accreditation status based on their performance in the Accountability System for Educator Preparation Programs (ASEP) Index system, as described in Figure: 19 TAC §229.1(c) of this title.

(A) Accredited status. An EPP shall be assigned an Accredited status if the EPP has met the standard of 85% of the possible points in the ASEP Index system as described in Figure: 19 TAC §229.1(c) of this title and has been approved by the SBEC to prepare, train, and recommend candidates for certification.

(B) Accredited-Not Rated status. An EPP shall be assigned Accredited-Not Rated status upon initial approval to offer educator preparation, until the EPP can be assigned a status based on the ASEP Index system as described in Figure: 19 TAC §229.1(c) of this title. An EPP is fully accredited and may recommend candidates for certification while it is in Accredited-Not Rated status.

(C) Accredited-Warned status.

(i) An EPP shall be assigned Accredited-Warned status if the EPP accumulates 80% or greater but less than 85% of the possible points in the ASEP Index system as described in Figure: 19 TAC §229.1(c) of this title.

(ii) An EPP may be assigned Accredited-Warned status if the SBEC determines that the EPP has violated SBEC rules, orders, and/or Texas Education Code (TEC), Chapter 21.

(D) Accredited-Probation status.

(i) An EPP shall be assigned Accredited-Probation status if the EPP accumulates less than 80% of the possible points in the ASEP Index system as described in Figure: 19 TAC §229.1(c) of this title.

(ii) An EPP may be assigned Accredited-Probation status if the SBEC determines that the EPP has violated SBEC rules, orders, and/or TEC, Chapter 21.

(2) Through the 2021-2022 [~~2020-2021~~] academic year, all approved EPPs may be assigned an accreditation status as follows.

(A) Accredited status. An EPP shall be assigned an Accredited status if the EPP has met the accountability performance standards described in subsection (a) of this section and has been approved by the SBEC to prepare, train, and recommend candidates for certification.

(B) Accredited-Not Rated status. An EPP shall be assigned Accredited-Not Rated status upon initial approval to offer educator preparation, until the EPP can be assigned a status based on the performance standards described in subsection (a) of this section. An EPP is fully accredited and may recommend candidates for certification while it is in Accredited-Not Rated status.

(C) Accredited-Warned Status.

(i) An EPP shall be assigned Accredited-Warned status if the EPP:

(I) fails to meet the performance standards set by the SBEC for the overall performance of all its candidates on any of the indicators set forth in subsection (a) of this section in any one year;

(II) fails to meet the performance standards in two demographic groups on an indicator set forth in subsection (a) of this section in any one year; or

(III) fails to meet the performance standards for a demographic group on any of the indicators set forth in subsection (a) of this section for two consecutively measured years, regardless of whether the deficiency is in the same demographic group or standard.

(ii) An EPP may be assigned Accredited-Warned status if the SBEC determines that the EPP has violated SBEC rules, orders, and/or TEC, Chapter 21.

(D) Accredited-Probation status.

(i) An EPP shall be assigned Accredited-Probation status if the EPP:

(I) fails to meet the performance standards set by the SBEC for the overall performance of all its candidates on any of the indicators set forth in subsection (a) of this section for two consecutively measured years;

(II) fails to meet the performance standards in three demographic groups on an indicator set forth in subsection (a) of this section in any one year; or

(III) fails to meet the performance standards for a demographic group on any of the indicators set forth in subsection (a) of this section for three consecutively measured years, regardless of whether the deficiency is in the same demographic group or standard.

(ii) An EPP may be assigned Accredited-Probation status if the SBEC determines that the EPP has violated SBEC rules, orders, and/or TEC, Chapter 21.

(3) Not Accredited-Revoked status.

(A) An EPP shall be assigned Not Accredited-Revoked status and its approval to recommend candidates for educator certification revoked if it is assigned Accredited-Probation status for three consecutively measured years.

(B) An EPP may be assigned Not Accredited-Revoked status if the EPP has been on Accredited-Probation status for one year, and the SBEC determines that revoking the EPP's approval is reasonably necessary to achieve the purposes of the TEC, §21.045 and §21.0451.

(C) An EPP may be assigned Not Accredited-Revoked status if the EPP fails to pay the required ASEP technology fee by the

deadline set by TEA as prescribed in §229.9(7) of this title (relating to Fees for Educator Preparation Program Approval and Accountability).

(D) An assignment of Not Accredited-Revoked status and revocation of EPP approval to recommend candidates for educator certification is subject to the requirements of notice, record review, and appeal as described in this chapter.

(E) A revocation of an EPP approval shall be effective for a period of two years, after which a program may reapply for approval as a new EPP pursuant to Chapter 228 of this title (relating to Requirements for Educator Preparation Programs).

(F) Upon revocation of EPP approval, the EPP may not admit new candidates for educator certification but may complete the training of candidates already admitted by the EPP and recommend them for certification. If necessary, TEA staff and other EPPs shall cooperate to assist the previously admitted candidates of the revoked EPP to complete their training.

(4) Not Rated: Declared State of Disaster status.

(A) Due to the governor's declaration of disaster on March 13, 2020, in accordance with Texas Government Code, §418.014, all EPPs shall be assigned a status of Not Rated: Declared State of Disaster for the 2019-2020 and 2020-2021 academic years [year].

(B) The assignment of Not Rated: Declared State of Disaster shall not interrupt consecutively measured years or next most recent prior years as prescribed in this chapter. The assignment of Not Rated: Declared State of Disaster shall not be included in any count of years prescribed in this chapter.

(C) For the purposes of §228.10 of this title (relating to Approval Process), §228.17(c) of this title (relating to Change of Ownership and Name Change), and §228.20 of this title (relating to Governance of Educator Preparation Programs), the status the SBEC assigned an EPP for the 2018-2019 academic year shall be the operative accreditation status.

(D) For EPPs with an assigned status other than Accredited for the 2018-2019 academic year that meet the requirements for a status of Accredited as described in subsection (b)(1)(A) or (b)(2)(A) of this section based on their 2020-2021 data:

(i) the 2020-2021 academic year shall represent a break in consecutively measured years or next most recent prior years as prescribed in subsection (b)(1)-(3) of this section; and

(ii) the EPP shall be eligible for commendations as described in §229.1(d) of this title for the 2020-2021 academic year.

(c) Small group exception.

(1) For purposes of accreditation status determination, the performance of an EPP candidate group, aggregated or disaggregated by demographic group, shall be measured against performance standards described in this chapter in any one year in which the number of individuals in the group exceeds 10. The small group exception does not apply to compliance with the frequency and duration of field supervisor observations.

(2) For an EPP candidate group, aggregated or disaggregated by demographic group, where the group contains 10 or fewer individuals, the group's performance shall not be counted for purposes of accreditation status determination for that academic year based on only that year's group performance.

(3) If the current year's EPP candidate group, aggregated or disaggregated by demographic group, contained between one and 10

individuals, that group performance shall be combined with the next most recent prior year's group performance for which there was at least one individual, and if the two-year cumulated group contains more than 10 individuals, then the two-year cumulated group performance must be measured against the standards in the current year.

(4) If the two-year cumulated EPP candidate group, aggregated or disaggregated by demographic group, contains between one and 10 individuals, then the two-year cumulated group performance shall be combined with the next most recent group performance for which there was at least one individual. The three-year cumulated group performance must be measured against the standards in the current year, regardless of how small the cumulated number of group members may be.

(5) In any reporting year in which the EPP candidate group, aggregated or disaggregated by demographic group, does not meet the necessary number of individuals needed to measure against performance standards for that year, for all indicators, the accreditation status will continue from the prior year. Any sanction assigned as a result of an accredited-warned or accredited-probation status in a prior year will continue if that candidate group has not met performance standards since being assigned accredited-warned or accredited-probation status. The SBEC may modify the sanction as the SBEC deems necessary based on subsequent performance, even though that performance is not measured against performance standards for a rating.

§229.5. Accreditation Sanctions and Procedures.

(a) The State Board for Educator Certification (SBEC) may assign an educator preparation program (EPP) Accredited-Warned or Accredited-Probation status if the SBEC determines that the EPP has violated SBEC rules and/or Texas Education Code, Chapter 21.

(b) If an EPP has been assigned Accredited-Warned or Accredited-Probation status, or if the SBEC determines that additional action is a necessary condition for the continuing approval of an EPP to recommend candidates for educator certification, the SBEC may take any one or more of the following actions, which shall be reviewed by the SBEC at least annually:

(1) require the EPP to obtain technical assistance approved by the Texas Education Agency (TEA) or SBEC;

(2) require the EPP to obtain professional services approved by the TEA or SBEC;

(3) appoint a monitor to participate in the activities of the EPP and report the activities to the TEA or SBEC; and/or

(4) require the EPP to develop an action plan addressing the deficiencies and describing the steps the program will take to improve the performance of its candidates. TEA staff may prescribe the information that must be included in the action plan. The action plan must be sent to TEA staff no later than 45 calendar days following notification to the EPP that SBEC has ordered the action plan.

(c) Notwithstanding the accreditation status of an EPP, if the performance of candidates on an examination required for certification (as listed in Figure: 19 TAC §230.21(e) of this title (relating to Educator Assessment)) in an individual certification class or category offered by an EPP fails to meet the performance standard on the non-PPR examinations as described in §229.4(a)(1)(D) of this title (relating to Determination of Accreditation Status) for three consecutive years, the approval to offer that certification class or category shall be revoked. Any candidates already admitted for preparation in that class or category may continue in the EPP and be recommended for certification after program completion, but no new candidates shall be admitted for preparation in that class or category unless and until the SBEC reinstates approval for the EPP to offer that certification class or category.

(1) [(d)] For purposes of determining compliance with subsection (c) of this section, candidate performance in individual certification classes or categories in only the 2016-2017 academic year and subsequent academic years will be considered.

(2) [(e)] Performance indicators by demographic group shall not be counted for purposes of subsection (c) of this section pertaining to performance standards for individual certification classes or categories. If the aggregated number of individuals counted for a certification class or category is 10 or fewer, the performance on the standard shall be cumulated and counted in the same manner as provided in §229.4(c) of this title.

(3) For EPPs that failed to meet the standard described in subsection (c) of this section for a certification class or category in the 2018-2019 academic year that meet the requirements based on their 2020-2021 data, the 2020-2021 academic year shall represent a break in consecutively measured years for the purpose of subsection (c) of this section.

(d) [(f)] An EPP shall be notified in writing regarding any action proposed to be taken pursuant to this section, or proposed assignment of an accreditation status of Accredited-Warning, Accredited-Probation, or Not Accredited-Revoked. The notice shall state the basis on which the proposed action is to be taken or the proposed assignment of the accreditation status is to be made.

(e) [(g)] All costs associated with providing or requiring technical assistance, professional services, or the appointment of a monitor pursuant to this section shall be paid by the EPP to which the services are provided or required, or its sponsor.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.
TRD-202103093
Cristina De La Fuente-Valadez
Director, Rulemaking
State Board for Educator Certification
Earliest possible date of adoption: September 19, 2021
For further information, please call: (512) 475-1497



TITLE 22. EXAMINING BOARDS

PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.11

The Texas Optometry Board proposes the repeal of 22 TAC §280.11, Treatment of Glaucoma by an Optometric Glaucoma Specialist. SB993 of the 87th Regular Legislative Session, related to the practice of optometry and specifically the treatment of glaucoma by an optometric glaucoma specialist, is effective as of September 1, 2021. Therefore, the Texas Optometry Board finds that Board §280.11 is no longer necessary since the amended statute as of September 1, 2021, and other related rules will govern the treatment of glaucoma.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed repeal of the rule is in effect, there will be no fiscal implications for the state and local governments as a result of repealing the rule.

Kelly Parker, Executive Director, has determined that for each of the first five years the proposed repeal is in effect, the public benefit anticipated is the elimination of obsolete administrative regulations. There will be no economic cost to persons required to comply with the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS ON SMALL BUSINESSES AND RURAL COMMUNITIES

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed repeal. Since the agency has determined that the proposed repeal will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, are not required.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT

The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed repeal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action, and therefore does not constitute a taking under Texas Government Code §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT

During the first five years that the proposed repeal will be in effect, it is anticipated that the proposed repeal will not create or eliminate a government program as no program changes are proposed. Further, implementation of the proposed repeal will not require the creation of new employee position or the elimination of an existing employee position; and implementation of the proposed repeal will not require an increase or decrease in fees paid to the agency. The proposed repeal simply eliminates a regulation that is now governed in statute. There will be no effect on the state's economy.

PUBLIC COMMENTS

Comments on the proposed repeal may be submitted electronically to: kelly.parker@tob.texas.gov, Kelly Parker, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The repeal of §280.11 is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.165.

No other sections are affected by this repeal.

§280.11. *Treatment of Glaucoma by an Optometric Glaucoma Specialist.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 5, 2021.
TRD-202103050

Kelly Parker
Executive Director
Texas Optometry Board
Earliest possible date of adoption: September 19, 2021
For further information, please call: (512) 305-8502



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 1. MISCELLANEOUS PROVISIONS SUBCHAPTER D. LOW-THC CANNABIS

FOR COMPASSIONATE USE [DESIGNATING INCURABLE NEURODEGENERATIVE DISEASES]

25 TAC §1.65

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes new §1.65, relating to Compassionate-use Research and Reporting.

BACKGROUND AND PURPOSE

This proposal is necessary to comply with House Bill (H.B.) 1535, 87th Legislature, Regular Session, 2021, which amended Texas Health and Safety Code, Chapter 487 by adding Subchapter F, Compassionate-use Research and Reporting. H.B. 1535 requires the Executive Commissioner of HHSC to adopt rules to implement Subchapter F. H.B. 1535 also states that a compassionate-use institutional review board (CIRB) may be established to evaluate, approve, and oversee research programs to study the medical use of low-THC cannabis and to submit written reports that describe and assess the research findings to HHSC and the Legislature. The Executive Commissioner charged the implementation of H.B. 1535 to DSHS.

SECTION-BY-SECTION SUMMARY

Proposed new §1.65(a) - (f) provides guidance for compassionate-use IRBs when reviewing and approving low-THC cannabis research program studies.

Proposed new §1.65(g) designates that each CIRB submit a written report to DSHS by October 1 of each year, and to the Texas Legislature by October 1 of even-numbered years.

FISCAL NOTE

Donna Sheppard, DSHS Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rule will be in effect:

(1) the proposed rule will not create or eliminate a government program;

(2) implementation of the proposed rule will not affect the number of DSHS employee positions;

(3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;

(4) the proposed rule will not affect fees paid to DSHS;

(5) the proposed rule will create a new rule;

(6) the proposed rule will not expand, limit, or repeal existing rule;

(7) the proposed rule will not change the number of individuals subject to the rule; and

(8) the proposed rule will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The new rule does not impose any requirements or costs to small businesses, microbusinesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Dr. Manda Hall, Associate Commissioner of DSHS Community Health Improvement Division, has determined that for each year of the first five years the rule is in effect, the public may benefit from research programs approved by compassionate-use IRBs to investigate low-THC cannabis in treating certain medical conditions.

Donna Sheppard has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule. The new rule is intended to provide guidelines for compassionate-use IRBs, which may be established to evaluate and approve proposed research studies for the investigation of low-THC cannabis in treating certain medical conditions.

TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day

to submit comments falls on a holiday, comments must be post-marked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 21R129" in the subject line.

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies; and Texas Health and Safety Code Chapter 487, Subchapter F, which requires the Executive Commissioner of HHSC to adopt a rule to implement H.B. 1535.

The new section affects Texas Health and Safety Code, Chapter 487.

§1.65. Compassionate-use Research and Reporting.

(a) A compassionate-use institutional review board (CIRB) will be established to evaluate and approve proposed research to study the medical use of low-THC cannabis, in accordance with Texas Health and Safety Code §487.253.

(b) When seeking approval from a CIRB, the principal investigator of a proposed research program must clearly identify the medical condition for which a patient will be treated with low-THC cannabis.

(c) A principal investigator shall only study the use of low-THC cannabis in treating the medical condition identified in the proposed research program application approved by a CIRB.

(d) The CIRB shall specify an end date to any study it approves. A study may terminate earlier than the date specified by the CIRB if the principal investigator chooses to end the study early. However, a CIRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the CIRB's requirements or that has been associated with unexpected serious harm to subjects.

(e) Approval of a research program by a CIRB is not transferable to another research program.

(f) A medical condition may be treated with low-THC cannabis as part of an approved research program if:

(1) treatment is overseen by a CIRB;

(2) it is administered by a physician in accordance with Texas Occupations Code §169.002 and certified by a CIRB to participate in the program;

(3) the patient is a resident of Texas; and

(4) the patient or, if the patient is a minor or lacks capacity to consent, a parent, guardian, or conservator signs a written informed consent form provided by the approved research program.

(g) Reports.

(1) Not later than October 1 of each year, each CIRB must submit a written report that describes and assesses the research findings of each approved research program to the Texas Department of State Health Services.

(2) Not later than October 1 of each even-numbered year, each CIRB must submit a written report that describes and assesses the research findings of each approved research program to the Legislature.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 9, 2021.

TRD-202103085

Barbara L. Klein

General Counsel

Department of State Health Services

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 776-3829

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 79. LEGAL SERVICES

SUBCHAPTER S. CONTRACTING ETHICS

40 TAC §§79.1801 - 79.1806

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS that have not been repealed or administratively transferred to Title 26, Health and Human Services, as appropriate, are codified in Title 40, Part 1. Until the remaining rules in Title 40, Part 1, are repealed or administratively transferred, those rules govern the functions previously performed by DADS that have transferred to HHSC.

Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the Health and Human Services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of Chapter 79, Subchapter S, concerning Contracting Ethics, which comprises §§79.1801 - 79.1806.

BACKGROUND AND PURPOSE

The purpose of the proposal is to repeal obsolete rules in Chapter 79, Subchapter S, concerning Contracting Ethics, which were last updated in 1999, and do not reflect subsequent agency changes and consolidation, or statutory changes made to Texas Government Code Chapter 572, Personal Financial Disclosure, Standards of Conduct, and Conflict of Interest, and other ethics statutes.

The need for this repeal of obsolete Chapter 79, Subchapter S rules was initially identified in connection with a legislatively mandated review of HHSC processes for completing nursing facility changes of ownership, based on which HHSC was required to submit recommendations for improvement in its required report to the Office of the Governor and the Legislature.

Ethical standards addressed by the subchapter proposed for repeal will continue to be addressed, including for contracts for goods and services for which DADS previously contracted, through:

- HHSC rules in Title 1, Part 15, Chapter 391, Purchase of Goods and Services by the Texas Health and Human Services Commission, Subchapter D, Standards of Conduct for Vendors;

- self-implementation of longer standing and more recent statutory ethics provisions, particularly in Texas Government Code Chapter 572;

- the Health and Human Services Ethics Policy; and

- incorporation of applicable standards of conduct and restrictions into HHSC contracts.

SECTION BY SECTION SUMMARY

The proposed repeal of §§79.1801 - 79.1806 removes outdated and obsolete rules with substance that continues to be addressed in state statutes, other HHSC rules, and in HHSC policy and contracts.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule repeals will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule repeals will be in effect:

- (1) the proposed rule repeals will not create or eliminate a government program;
- (2) implementation of the proposed rule repeals will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule repeals will result in no assumed change in future legislative appropriations;
- (4) the proposed rule repeals will not affect fees paid to HHSC;
- (5) the proposed rule repeals will not create a new rule;
- (6) the proposed rule repeals will not expand or limit existing rules, but will repeal existing rules;
- (7) the proposed rule repeals will not change the number of individuals subject to the rules; and
- (8) the proposed rule repeals will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood, Chief Financial Officer, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities.

Statutory standards and restrictions in Texas Government Code Chapter 572 and other ethics statutes continue in effect notwithstanding the repeal of outdated and obsolete rules in Chapter 79, Subchapter S, as do HHSC Standards of Conduct for Vendors in Subchapter D of Title 1, Part 15, Chapter 391, Purchase of Goods and Services by the Texas Health and Human Services Commission. Repealing the obsolete rules imposes no additional cost on small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rule repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rule repeals do not impose a cost on regulated persons and relate to a state agency procurement.

PUBLIC BENEFIT AND COSTS

Nycia Deal, Director of the Legal Services Division, has determined that for each year of the first five years the rule repeals are in effect, the public benefit from the repeals will be greater HHSC rule clarity through consolidation of overlapping rules within the same agency and the reduction of obsolete and outdated rules. This will contribute to efficient operation of HHSC procurement and contracting.

Trey Wood has also determined that for the first five years the rule repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because current statutory standards and restrictions in Texas Government Code Chapter 572 and other ethics statutes continue in effect, and the repeal of outdated and obsolete rules neither eliminates nor adds to potential costs associated with compliance with that statute.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to the Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R105" in the subject line.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of, and provision of services by, the health and human services agencies, including for contracting, purchasing, and related policies, subject to other state agency contracting and purchasing laws.

The repeals affect Texas Government Code §531.0055 and Chapter 572.

§79.1801. *Introduction.*

§79.1802. *Definitions.*

§79.1803. *Presumption against Contracts Involving Former Employees, Former Board Members, and Their Relatives.*

§79.1804. *Contracts Involving Current Employees.*

§79.1805. *Contracts Involving Current Board Members.*

§79.1806. *Nongovernmental Contractor Certification.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 4, 2021.

TRD-202103036

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: September 19, 2021

For further information, please call: (512) 438-4038



TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 217. VEHICLE TITLES AND REGISTRATION

SUBCHAPTER B. MOTOR VEHICLE REGISTRATION

43 TAC §217.41

INTRODUCTION. The Texas Department of Motor Vehicles (department) proposes amendments to 43 TAC §217.41, concerning disabled person license plates and disabled parking placards that will be issued to disabled veterans. The amendments are necessary to implement new Transportation Code §504.202(b-1) and (b-2) and amendments to Transportation Code §504.202 and §681.004, related to the issuance and use of disabled person license plates and disabled parking placards as added by Senate Bill 792, 87th Legislature, Regular Session (2021).

EXPLANATION. Senate Bill 792 establishes requirements on access to disabled parking. The proposed amendments to §217.41 are necessary to implement SB 792.

Section 217.41(b)(1) is added to define the term "disabled person" and clarify that it includes veterans who qualify for a disabled person license plate under Transportation Code §504.202(b-1).

Section 217.41(b)(2) is amended to address the new processes that will apply to obtain disabled person license plates with the International Symbol of Access. Transportation Code §504.202(b-1) provides a qualifying disabled veteran the option to receive disabled person license plates with the International Symbol of Access if the disabled veteran is eligible to receive disabled person license plates under Transportation Code §504.201. The language of Transportation Code §504.202(g) and §681.004(a)(3) requires a qualifying disabled veteran to elect to receive the disabled person license plates with the International Symbol of Access to obtain disabled parking placards. A qualifying disabled veteran is not required to accept a disabled person license plate displaying the International Symbol of Access; however, as stated in SECTION 8 and SECTION 9 of SB 792, beginning January 1, 2022, only vehicles displaying license plates bearing the International Symbol of Access or a disabled parking placard may lawfully park in disabled parking spaces under Transportation Code §§681.008, 681.009, and 681.011.

The statutory requirements for a disabled person under Transportation Code §504.201 differ from the requirements to qualify as a disabled veteran under Transportation Code §504.202. As

such, it is possible that not all persons who qualify for a disabled veteran license plate will meet the requirement in Transportation Code §504.202(b-1) and be able to obtain license plates bearing the International Symbol of Access or disabled parking placards.

Section 217.41(b)(2)(A) is also amended to establish satisfactory proof of eligibility for an organization that under Transportation Code §504.202(c) transports disabled veterans who would qualify for license plates issued under Transportation Code §504.202(b-1), as required in Transportation Code §504.202(b-2). As amended, §217.41(b)(2)(A) includes the certification requirements in Transportation Code §504.202(d) and adds a requirement for the certifying authority, the veteran's county service officer of the county in which a vehicle described by Transportation Code §504.202(c) is registered or the Department of Veterans Affairs certify that the vehicle regularly transports veterans that would qualify for license plates under Transportation Code §504.202(b-1). The department considers that Transportation Code §504.202(b-2) requires transportation on a regular but not constant basis.

Section 217.41(b)(2)(B) and (C) are amended to recognize that a disabled veteran may qualify for certain military specialty license plates under §217.43. Also, the terms "Disabled Person" and "International Symbol of Access" are restated for consistent usage in the section.

Section 217.41(b)(3)(A) is amended to inform the reader of the Transportation Code sections that establish requirements for the issuance of disabled parking placards. Section 217.41(b)(3)(B) is amended to inform the reader of department rules that have provisions related to the renewal of regular, military, and specialty license plates.

The department also proposes nonsubstantive changes for department style, including adding lead statements in §217.41(b)(2)(B) and (C); changing the term "Disabled Person" to "disabled person" throughout §217.41; and adding "tax assessor-collector" to references to "county" - what about in b.2.A. in §217.41(d)(1)(B) and (e)(1)(B) for consistency with other references in the subsections. Finally, the department proposes as a nonsubstantive change that all references in the section to the parking placard be styled "disabled parking placard," for consistency with the terminology in Transportation Code §504.201 and §504.202, and Chapter 681.

FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT. Sergio Rey, Assistant Chief Financial Officer, has determined that for each year of the first five years the proposed new section will be in effect, there will be no revenue impact, only a one-time technology cost of \$8,000 in the first year to implement programming for the department's automated systems. Therefore, for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal.

Roland D. Luna, Sr., Director of the Vehicle Titles and Registration Division, has determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT AND COST NOTE. Mr. Luna has also determined that, for each year of the first five years the proposed new section is in effect, the public benefits include establishing rules to implement SB 792, which limits access to disabled parking to those persons, including disabled veterans, with mobility issues and qualifying under Transportation Code §504.201 to receive li-

cense plates with the International Symbol of Access or disabled parking placards.

Mr. Luna anticipates that there will be no additional costs on a regulated person to comply with these rules because the rules do not establish any additional requirements on a regulated person, except for setting the requirement for satisfactory proof of eligibility for an organization that transports disabled veterans who would qualify for license plates issued as required under Transportation Code §504.202(b-2). In setting the requirement for satisfactory proof of eligibility, the department has referred to persons already authorized to provide a certification under Transportation Code §504.202(d) and requires only information that should be within the existing knowledge of the organization making the request to the certifying authority. The department does not regulate the means that a county service officer or the Department of Veterans Affairs would make the determination that an organization qualifies under Transportation Code §504.202(b-2), or existing Transportation Code §504.202(c). Cost to individuals and organizations desiring to obtain replacement license plates are not a result of the proposed rules but result from SB 792.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS. As required by Government Code, §2006.002, the department has determined that the proposed amended section will not have an adverse economic effect on small businesses, micro-businesses, or rural communities because the proposal amends §217.41 to comply with statute and imposes no requirements not specified in statute other than the means for an organization to provide satisfactory proof of eligibility, which the department is required to create under Transportation Code §504.202(b-2). That means of proof relies on the statutory certification requirement in Transportation Code §504.202(d) with an additional statement certifying that the organization regularly transports disabled veterans who would qualify for license plates issued under Transportation Code §504.202(b-1). The department does not regulate the means that a county service officer or the Department of Veterans Affairs would determine that an organization qualifies under Transportation Code §504.202(b-1), or existing Transportation Code §504.202(c). The department has determined that the proposed amended section will not have a financial effect, on any small businesses, micro-businesses, or rural communities. Therefore, the department is not required to prepare a regulatory flexibility analysis under Government Code §2006.002.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT STATEMENT. The department has determined that each year of the first five years the proposed new section is in effect, the proposed rule:

will not create or eliminate a government program;

will not require the creation of new employee positions or the elimination of existing employee positions;

will not require an increase or decrease in future legislative appropriations to the department;

will not require an increase or decrease in fees paid to the department;

will not create new regulation;

will expand existing regulations to implement Transportation Code §504.202(b-1) and (b-2) and other amended sections as added by SB 792;

will not repeal existing regulations;

will not increase or decrease the number of individuals subject to the rule's applicability; and

will not positively or adversely affect the Texas economy.

REQUEST FOR PUBLIC COMMENT.

If you want to comment on the proposal, submit your written comments by 5:00 p.m. CST on September 20, 2021. A request for a public hearing must be sent separately from your written comments. Send written comments or hearing requests by email to rules@txdmv.gov or by mail to Office of General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. If a hearing is held, the department will consider written comments and public testimony presented at the hearing.

STATUTORY AUTHORITY. The department proposes amendments to §217.41 under Transportation Code §§504.202, 504.0011, and 1002.001.

Transportation Code §504.202(b-2) requires the department to adopt rules prescribing satisfactory proof of eligibility for an organization that registers a motor vehicle under Transportation Code §504.202(c) to receive license plates under Transportation Code §504.202(b-1) if the vehicle regularly transports veterans who are eligible to receive license plates under Subsection (b-1).

Transportation Code §504.0011 authorizes the board to adopt rules to implement and administer Transportation Code Chapter 504.

Transportation Code §1002.001, authorizes the board to adopt rules that are necessary and appropriate to implement the powers and the duties of the department.

CROSS REFERENCE TO STATUTE. Transportation Code §§502.410, 504.202, 681.004, 681.008, 681.009, and 681.011.

§217.41. Disabled Person License Plates and Disabled Parking [Identification] Placards.

(a) Purpose. Transportation Code, Chapters 504 and 681, charge the department with the responsibility for issuing specially designed license plates and disabled parking [identification] placards for disabled persons. For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures for the application, issuance, and renewal of disabled person [Disabled Person] license plates and disabled parking placards.

(b) Issuance.

(1) For purposes of this section, "disabled person" means a person eligible for issuance of a license plate bearing the International Symbol of Access under Transportation Code §504.201, including a qualifying disabled veteran under §504.202(b-1).

(2) [(+)] Disabled person [Person] license plates.

(A) Eligibility. In accordance with Transportation Code[;] §504.201 and §504.202(b-1) and (b-2), the department will issue specially designed license plates displaying the International Symbol of Access [international symbol of access] to permanently disabled persons or their transporters instead of regular motor vehicle

license plates. As satisfactory proof of eligibility, an organization that transports disabled veterans who would qualify for license plates issued under Transportation Code §504.202(b-1) must provide a written statement from the veteran's county service officer of the county in which a vehicle described by Transportation Code §504.202(c) is registered or by the Department of Veterans Affairs that:

(i) the vehicle is used exclusively to transport veterans of the United States armed forces who have suffered, as a result of military service, a service-connected disability;

(ii) the vehicle regularly transports veterans who are eligible to receive license plates under Subsection (b-1); and

(iii) the veterans are not charged for the transportation.

(B) Specialty license plates. The department will issue disabled person [Disabled Person insignia on those] specialty license plates displaying the International Symbol of Access that can accommodate the identifying insignia and that are issued in accordance with §217.43 or §217.45 of this title [(relating to Specialty License Plates, Symbols, Tabs, and Other Devices)].

(C) License plate number. Disabled person [Person] license plates will bear a license plate number assigned by the department or will bear a personalized license plate number issued in accordance with §217.43 or §217.45 of this title.

(3) [(2)] Windshield disabled parking [identification] placards.

(A) Issuance. The department will issue removable windshield disabled parking [identification] placards to temporarily or permanently disabled persons and to the transporters of permanently disabled persons, as provided under Transportation Code §§504.201, 504.202, and 681.004.

(B) Display. A person who has been issued a windshield disabled parking [identification] placard shall hang the placard from a vehicle's rearview mirror when the vehicle is parked in a disabled person parking space or shall display the placard on the center portion of the dashboard if the vehicle does not have a rearview mirror.

(c) Renewal of disabled person [Disabled Person] license plates. Disabled person [Person] license plates are valid for a period of 12 months from the date of issuance[,], and are renewable as specified in §§217.28, 217.43, and 217.45 [§217.28] of this title [(relating to Vehicle Registration Renewal)].

(d) Replacement.

(1) License plates. If a disabled person [Disabled Person] metal license plate is lost, stolen, or mutilated, the owner may obtain a replacement metal license plate by applying with a county tax assessor-collector.

(A) Accompanying documentation. To replace disabled person [permanently Disabled Person] metal license plates, the owner must present the current year's registration receipt and personal identification acceptable to the county tax assessor-collector.

(B) Absence of accompanying documentation. If the current year's registration receipt is not available and the county tax assessor-collector cannot verify that the disabled person [Disabled Person] metal license plates were issued to the owner, the owner must reapply in accordance with this section.

(2) Disabled parking [Person identification] placards. If a disabled parking [Disabled Person identification] placard becomes

lost, stolen, or mutilated, the owner may obtain a new disabled parking [identification] placard in accordance with this section.

(c) Transfer of disabled person [Disabled Person] license plates and disabled parking [identification] placards.

(1) License plates.

(A) Transfer between persons. Disabled person [Person] license plates may not be transferred between persons. An owner who sells or trades a vehicle to which disabled person [Disabled Person] license plates have been issued shall remove the disabled person [Disabled Person] license plates from the vehicle. The owner shall return the license plates to the department and shall obtain appropriate replacement license plates to place on the vehicle prior to any transfer of ownership.

(B) Transfer between vehicles. Disabled person [Person] license plates may be transferred between vehicles if the county tax assessor-collector or the department can verify the plate ownership and the owner of the vehicle is a [the] disabled person or the vehicle is used to transport a [the] disabled person.

(i) Plate ownership verification may include:

(I) a Registration and Title System (RTS) inquiry;

(II) a copy of the department application [Application] for disabled person [Disabled Person] license plates; or

(III) the owner's current registration receipt.

(ii) An owner who sells or trades a vehicle with disabled person [Disabled Person] license plates must remove the plates from the vehicle.

(2) Disabled parking [Identification] placards.

(A) Transfer between vehicles. Disabled parking [Person identification] placards may be displayed in any vehicle driven by the disabled person or in which the disabled person is a passenger.

(B) Transfer between persons. Disabled parking [Person identification] placards may not be transferred between persons.

(f) Seizure and revocation of disabled parking placard.

(1) If a law enforcement officer seizes and destroys a disabled parking placard under Transportation Code[§] §681.012, the officer shall notify the department by email.

(2) The person to whom the seized disabled parking placard was issued may apply for a new disabled parking placard by submitting an application to the county tax assessor-collector of the county in which the person with the disability resides or in which the applicant is seeking medical treatment.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 6, 2021.

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Tracey Beaver

General Counsel

Texas Department of Motor Vehicles

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For further information, please call: (512) 465-5665

