

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

SUBCHAPTER B. ADVISORY COMMITTEES DIVISION 1. COMMITTEES

1 TAC §351.823

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §351.823, concerning e-Health Advisory Committee. The amendment to §351.823 is adopted without changes to the proposed text as published in the July 16, 2021, issue of the *Texas Register* (46 TexReg 4243), and therefore will not be republished.

BACKGROUND AND JUSTIFICATION

Texas Administrative Code Title 1, Part 15, §351.823(d), currently requires the e-Health Advisory Committee (eHAC) to prepare and submit an annual written report to the executive commissioner and Texas Legislature. eHAC reports are produced by members who are non-Health and Human Services employees.

In a July 2020 eHAC meeting, members voted to amend the rule to change the reporting requirement from annually to biennially. This amendment would afford members more time between reports, thus enabling members to more thoroughly research and address any recommendations made by the committee to HHSC.

Under Texas Government Code §2110.006, state agencies must annually evaluate the work of advisory committees as well as their usefulness and associated costs. To ensure HHSC continues to meet this obligation related to the eHAC, HHSC staff proposed eHAC members prepare an informational briefing memorandum in non-report years to report costs, accomplishments, and areas of focus for the eHAC. Such documentation would permit the agency to comply with its obligations under Texas Government Code §2110.006.

Additional amendments to §351.823 reorganize and format the rule so that the eHAC rule is consistent with other HHSC advisory committee rules established under Texas Government Code §531.012.

COMMENTS

The 31-day comment period ended August 16, 2021.

During this period, HHSC did not receive any comments regarding the proposed rule.

STATUTORY AUTHORITY

The amendment is adopted under 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 Government Code §531.012(c)(1), which requires the Executive Commissioner to adopt rules consistent with Texas Government Code Chapter 2110 to govern an advisory committee's reporting requirements.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 16, 2021.

TRD-202103672

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Effective date: October 6, 2021

Proposal publication date: July 16, 2021

For further information, please call: (512) 239-8300



TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING SPECIAL EDUCATION SERVICES

The Texas Education Agency (TEA) adopts amendments to §§89.1005, 89.1035, 89.1040, 89.1050, 89.1070, 89.1121, and 89.1131, concerning special education services. Section 89.1040 and §89.1050 are adopted with changes to the proposed text as published in the June 4, 2021 issue of the *Texas Register* (46 TexReg 3490) and will be republished. Sections 89.1005, 89.1035, 89.1070, 89.1121, and 89.1131 are adopted without changes to the proposed text as published in the June 4, 2021 issue of the *Texas Register* (46 TexReg 3490) and will not be republished. The adopted amendments make updates related to eligibility determination for specific learning disabilities

and provisions for students who are eligible for special education and related services who enroll in local educational agencies (LEAs) during the summer. The adopted amendments also make conforming edits related to funding for special education; update terminology to implement Senate Bill (SB) 281, 86th Texas Legislature, 2019; and update cross references.

REASONED JUSTIFICATION: The rules in Chapter 89, Subchapter AA, address provisions for special education services, including general provisions, clarification of federal regulations and state law, and dispute resolution. Legislation from the 86th Texas Legislature, 2019, requires that some of the rules in the subchapter be revised. Other rules require revision to provide clarification and to clearly express the state requirements aligned with federal regulations. Specifically, the adopted amendments update the rules as follows.

Division 1, General Provisions

Section 89.1005, Instructional Arrangements and Settings, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to Texas Government Code (TGC), §392.002, by SB 281, 86th Texas Legislature, 2019.

Division 2, Clarification of Provisions in Federal Regulations and State Law

Section 89.1035, Age Ranges for Student Eligibility, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281.

Section 89.1040, Eligibility Criteria, is amended to more clearly express the state requirements for identifying students with specific learning disabilities (SLD) that are aligned with federal requirements. The changes revise wording and clarify the psychological process practices used in identifying an SLD as allowed for under federal regulation. Section 89.1040 is also amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. The following changes to §89.1040 were made at adoption.

In §89.1040(c)(3), a conforming edit was made to change the phrase "hearing impairment" to "students who are deaf or hard of hearing."

In response to public comment, §89.1040(c)(9)(C) was modified to remove the words "prior to and" to clarify that certain considerations must be made as part of the evaluation, not prior to the evaluation.

Section 89.1050, The Admission, Review, and Dismissal Committee, is amended to clarify how LEAs should provide services to students who are eligible for special education and related services when they enroll in an LEA during the summer. The changes specify that students with disabilities are to receive all IEP services starting the first day of school if they enrolled in an LEA during the summer. Additionally, references to "auditory impairment" are updated to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. In §89.1050(c)(3)(B), a conforming edit was made at adoption to change the phrase "a student with a suspected or documented auditory impairment" to "a student who is suspected to be deaf or hard of hearing."

Section 89.1070, Graduation Requirements, is amended to update cross references in subsections (g) and (h).

Division 4, Special Education Funding

Section 89.1121, Distribution of State Funds, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. The adopted amendment also makes conforming changes to the formula for funding special education to align with Texas Education Code (TEC), §48.102.

Division 5, Special Education and Related Service Personnel

Section 89.1131, Qualifications of Special Education, Related Service, and Paraprofessional Personnel, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began June 4, 2021, and ended July 5, 2021. Public hearings were held on June 15 and 17, 2021, via video conferencing. Following is a summary of the public comments received and corresponding responses.

Comment: An education professional commented that the agency should keep balance in mind when revising §89.1040. The individual acknowledged that language in the rule did need to be updated but also requested the consideration of additional perspectives. The individual asked for a balance in the process to consider not only the requests from parents but also the requests from educators to help meet the needs of students.

Response: The agency agrees that the rulemaking process benefits from input from all stakeholders.

Comment: A parent thanked the agency for adding the full definition of SLD in rule and commented that dyslexia is recognized in the Individuals with Disabilities Education Act (IDEA) as one of the specific learning disabilities. The parent stated that addressing this topic in rule will be helpful in providing clarity to school districts regarding SLD eligibility.

Response: The agency agrees.

Comment: An 11-year-old student with multiple disabilities commented that §89.1040 should be amended. The student described the pain and frustration of not being identified as a student with dyslexia by the school district and provided a personal account of learning to read and achieve great things despite obstacles. The student expressed the desire to see this for other students as well, noting that students with disabilities are "a galaxy of possibilities."

Response: The agency agrees that the rule change will be beneficial to all students. The agency is pleased to see youth involved in the process of rule revision and encourages students to advocate for themselves and others sharing similar experiences.

Comment: Disability Rights Texas (DRTx), the Texas Dyslexia Coalition, and a parent noted that, under TEC, disorders related to dyslexia are also recognized. DRTx requested inserting the phrase "and related disorders" after the term "dyslexia" in §89.1040(c)(9)(A).

Response: The agency disagrees. The language in §89.1040(c)(9)(A) is consistent with IDEA.

Comment: DRTx commented that the revision to §89.1040 incorporates the federal requirement of considerations to ensure that a student's SLD is not due to other variables such as certain disabilities. DRTx recommended further clarification to ensure that a student who has a co-occurring disability is not otherwise

prevented from being identified as having an SLD and requested the insertion of a new clause under §89.1040(c)(9)(B) to read, "(v) subject to clause (iv), may have another disability."

Response: The agency disagrees that further clarification is required. The use of the word "primarily" in §89.1040(c)(9)(B)(iv) allows for consideration of other variables such as certain co-occurring disabilities. The agency provides guidance regarding conducting comprehensive evaluations on the TEA website at https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20_11.5.19_accessible-locked_r.pdf.

Comment: The Texas Dyslexia Coalition expressed concern about the use of accommodations and multiple attempts at examinations for students to achieve passing grades in the evaluation process, which the Texas Dyslexia Coalition contends dilutes or impacts assessment results for discovering the presence of an SLD and determining eligibility for special education services. The Texas Dyslexia Coalition recommended inserting the words "initial attempts on TEKS-based" before the words "in-class tests" in §89.1040(c)(9)(B)(ii). Two parents made similar comments and requested that the agency add "initial" or "initial attempts on" before "in-class" in §89.1040(c)(9)(B)(ii). The commenters also expressed concerns about allowing students to retest or redo assignments for higher grades because doing so could skew the data used to determine if a student requires special education and related services.

Response: The agency disagrees that the recommended changes should be made because they would not provide additional clarity. Evaluations are comprehensive, and grades are only one data point used in the evaluation process. The commenters' suggestion to not allow a student to retest or redo assignments for higher grades would limit flexibility for LEAs to implement TEC, §28.0216, which allows retesting for a higher grade. Additionally, a student's grades are only one data point in the evaluation process, and a student's evaluation team and admission, review, and dismissal (ARD) committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 Code of Federal Regulations (CFR), §300.111.

Comment: Regarding language in §89.1040(c)(9)(B)(ii), a parent commented that grades are subjective and are not a reliable indication of performance or an accurate measure of a student's acquisition of the areas in question for mathematics and reading when it comes to students who have an SLD.

Response: The agency disagrees. A student's grades are only one data point in the evaluation process, and a student's evaluation team and ARD committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 CFR, §300.111.

Comment: A parent expressed concern that the wording of §89.1040(c)(9)(B)(ii) will be used to deny services to students with the SLD designation. The parent suggested either striking §89.1040(c)(9)(B)(ii) or adding language that clarifies that performance measures are not limited to the examples listed, allows national assessments to be used, and allows for exam-

ples of work products and data to be provided by parents. The parent also suggested adding language in §89.1040(c)(9)(C)(ii) to address the use of accommodated examinations during the evaluation for determining eligibility of a student for special education services. The parent provided a personal example of a child being denied special education services after being allowed multiple test retakes and commented that retesting and/or using accommodations can inflate grades and create data that does not accurately reflect the student's performance.

Response: The agency disagrees that the commenter's recommended changes should be made because they would not provide additional clarity. Evaluations are comprehensive, and grades are only one data point used in the evaluation process. The commenter's suggestion to not allow a student to retest or redo assignments for higher grades would limit flexibility for LEAs to implement TEC, §28.0216, which allows retesting for a higher grade. Additionally, a student's grades are only one data point in the evaluation process, and a student's evaluation team and ARD committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 CFR, §300.111.

Comment: A parent questioned the appropriateness of instruction as it relates to the student's age and grade level when all students in self-contained classes are combined into one class for six grade levels with one teacher providing instruction to all grade levels. The parent commented that it is very infrequent that teachers give separate lessons to the students identified with an SLD when in a self-contained class and further added that this approach is not instruction that is appropriate for age and grade level.

Response: The agency disagrees that revision is required based on the comment. Instructional practices fall within the purview of LEAs. However, if a student is not receiving modified instruction as required by his or her individualized education program (IEP), the issue can be addressed with the campus or school district administration as well as through a special education complaint, mediation, or due process hearing.

Comment: A parent asked whether §89.1040(c)(9)(B)(iii) must include that a student's failure in response to intervention (RtI) or a student's exhibiting a pattern of strengths and weaknesses are absolutely required in order for a student to be found to have an SLD.

Response: The agency disagrees that additional language is necessary. Section 89.1040(c)(9)(B)(ii)(I) and (II) align with IDEA regarding requirements for determining eligibility.

Comment: A parent commented that §89.1040(c)(9)(B)(iv), regarding eligibility, fails to clearly define that a child who is deaf, blind, or DeafBlind can have dyslexia. The parent stated that the proposed amendment has left the qualification ambiguous by using the wording "primarily not caused by hearing or vision loss." The parent expressed concern that students will not be identified as having dyslexia because of their existing hearing and vision loss.

Response: The agency disagrees. The language in §89.1040(c)(9)(B)(iv) aligns with IDEA. It is the role of the student's ARD committee to determine the student's special education eligibility and design an IEP that meets the student's needs. The process is collaborative. If there is disagreement

within the ARD committee, there are avenues available to the participants to assist with reaching an agreement. Additionally, the use of the word "primarily" in the rule allows for consideration of other variables such as certain co-occurring disabilities. The agency provides guidance regarding conducting comprehensive evaluations on the TEA website at https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20_11.5.19_accessible-locked_r.pdf.

Comment: DRTx noted that the revision of rule language regarding the criteria a student must meet in exhibiting intellectual development will be beneficial, including reducing the reliance on a model dependent on a severe discrepancy between intellectual ability and achievement for determining whether a student has an SLD.

Response: The agency agrees.

Comment: The Texas Dyslexia Coalition and three parents commented that the use of accommodations during the evaluation process when determining eligibility for special education services can impact the results of the assessment(s). The Texas Dyslexia Coalition recommended adding language to read, "If accommodations are utilized on any measure, the impact of the accommodations on the student's performance must be considered to ensure an accurate representation of the presence of a disability."

Response: The agency disagrees that revision is required based on the comment. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of accommodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. Finally, IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments.

Comment: DRTx commented that the federal regulations governing the evaluation of students suspected of having an SLD require that the evaluation team consider certain factors. Additionally, DRTx explained that since these considerations only occur upon the commencement of the evaluation, the mention of prior considerations is inappropriate and recommended striking "prior to and" at the beginning of §89.1040(c)(9)(C). The Texas Dyslexia Coalition and two parents also made the same comment.

Response: The agency agrees. At adoption, the phrase "prior to and " was removed from §89.1040(c)(9)(C).

Comment: DRTx recommended amending §89.1040(c)(9)(C)(i-i), relating to the requirement that schools share with parents the data-based documentation of repeated assessments of their student, to specify that the documentation must be provided in a timely manner.

Response: The agency disagrees. The language in §89.1040(c)(9)(C)(ii) aligns with IDEA.

Comment: A parent requested that Rtl be limited to six weeks.

Response: The agency disagrees because limiting interventions does not take into account the individual needs of students.

Comment: DRTx commented that amendment to §89.1040 incorporates the federal requirement of considerations to ensure that a student's underachievement is not due to the lack of

appropriate instruction in reading or mathematics. DRTx suggested that additional clarification would ensure that repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, are not skewed by mitigating measures employed by the school in an attempt to boost the student's achievement and progress. DRTx also commented that this clarification inserted into the proposed rule amendment would be consistent with other federal disability law intended to protect individuals with disabilities from discrimination. DRTx recommended inserting a sentence at the end of §89.1040(c)(9)(C)(ii) to read, "Consideration of data-based documentation shall be made without regard to the ameliorative effects of mitigating measures such as reasonable accommodations or auxiliary aids or services."

Response: The agency disagrees that revision is required based on the comments. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of accommodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. Finally, IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments.

Comment: DRTx commented that the federal regulations governing the evaluation of students suspected of having an SLD permit consideration of the student's Rtl. DRTx suggested clarification that the utilization of Rtl or a multi-tiered system of support is not necessary before the evaluation and identification of a student with an SLD.

Response: The agency disagrees that the additional language is necessary because 19 TAC §89.1011(a) addresses the commenter's concern.

Comment: The Texas Dyslexia Coalition and individual members of the Texas Dyslexia Coalition communicated concern that the use of accommodations and multiple attempts for passing a test was impacting the results of assessment(s) used to determine the student's eligibility for special education services. The Texas Dyslexia Coalition recommended amending §89.1040(c)(9)(C)(ii) by inserting "and the student's progress monitoring data (current rate of progress and movement towards closing achievement gaps)" after the clause "reflecting formal evaluation of student progress during instruction;" inserting "initial attempts on TEKS-based" before "in-class;" and inserting "not to exceed six weeks" at the end of the clause. The Texas Dyslexia Coalition recommended inserting four additional clauses after §89.1040(c)(9)(C)(ii), which would include considering the impact using accommodations had on the student's performance when conducting an evaluation for special education services, eliminating the requirement for struggling students to participate in support services prior to being referred for special education services, adding the consideration of an evaluation for special education specifically for SLD for any student when the student does not perform adequately on multiple measures, and not allowing intervention strategies to delay or deny an evaluation for special education as well as requiring school personnel to initiate a referral to special education when a student is suspected of having a disability.

Response: The agency disagrees that revision is required based on the comments. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of ac-

commodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments and requires that students be evaluated in all areas of suspected disability. Finally, the agency disagrees that the additional language is necessary because 19 TAC §89.1011(a) addresses the commenter's concerns regarding the use of intervention strategies.

Comment: DRTx commented that §89.1040(c)(9)(D) incorporates the federal requirement of an observation of the student but that additional clarification would be beneficial to ensure that there is no delay in other aspects of the evaluation. DRTx recommended inserting an additional sentence at the end of the subparagraph to read, "Conducting an observation shall not delay or deny the evaluation described in subparagraph (B) and 34 CFR, §§300.307-300.311."

Response: The agency disagrees that additional clarification is needed. The ARD committee can use observation data from before the referral for an initial evaluation or may use data gathered through observations taking place during the evaluation process.

Comment: A parent commented that an evaluation could be delayed when it is summer or if the school building is closed and recommended adding to §89.1040(c)(9)(D) the option for a virtual observation to prevent a delay in evaluation.

Response: The agency disagrees that additional clarification is needed. The timeline for completing an initial evaluation is based on school days. Therefore, a student not being present for observation at school during a holiday or school closure would not delay the initial evaluation process.

Comment: A parent commented that §89.1040(c)(9)(E) should be modified to specify that any participant in the committee must have passed the HB 3 Reading Academies or minimally know the science of reading in order to be able to serve in the committee when the student in question has an SLD related to reading.

Response: The agency disagrees. The recommended change would place limitations on who could attend a student's ARD committee meeting, which would violate 34 CFR, §300.321, related to ARD committee membership.

Comment: An education service center staff member questioned whether §89.1050(j)(4), relating to a student who enrolls in a new district before the start of a new school year, conflicts with, and therefore replaces, 34 CFR, §300.323(f). The commenter also requested information regarding practical application of the amendment, specifically related to summer enrollment and how to serve a student who enters an LEA over the summer.

Response: The agency clarifies that the changes to §89.1050(j) are not in conflict with federal law, as the transfer requirements set out in 34 CFR, §300.323(f), including requirements related to evaluations, only apply to students who transfer into the LEA during the school year. The amendment addresses the requirement of 34 CFR, §300.323(a), mandating that at the beginning of the school year, the LEA must have an IEP in effect for each student with a disability within its jurisdiction. Thus, the LEA must ensure that the IEP of a student who enrolls in the LEA over the summer, in accordance with state enrollment requirements, is

implemented in full on the first day of school. The IEP can be the IEP in place from the student's previous school district or it can be one that is developed by an ARD committee convened by the LEA prior to the first day of school. If the ARD committee determines an evaluation is necessary, the IEP can be implemented during the evaluation process.

DIVISION 1. GENERAL PROVISIONS

19 TAC §89.1005

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 15, 2021.

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



DIVISION 2. CLARIFICATION OF PROVISIONS IN FEDERAL REGULATIONS AND STATE LAW

19 TAC §§89.1035, 89.1040, 89.1050, 89.1070

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

§89.1040. Eligibility Criteria.

(a) Special education services. To be eligible to receive special education services, a student must be a "child with a disability," as defined in 34 Code of Federal Regulations (CFR), §300.8(a), subject to the provisions of 34 CFR, §300.8(c), the Texas Education Code, §29.003, and this section. The provisions in this section specify criteria to be used in determining whether a student's condition meets one or more of the definitions in federal regulations or in state law.

(b) Eligibility determination. The determination of whether a student is eligible for special education and related services is made by the student's admission, review, and dismissal committee. Any evaluation or re-evaluation of a student must be conducted in accordance with 34 CFR, §§300.301-300.306 and 300.122. The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility must include, but is not limited to, the following:

(1) a licensed specialist in school psychology (LSSP), an educational diagnostician, or other appropriately certified or licensed practitioner with experience and training in the area of the disability; or

(2) a licensed or certified professional for a specific eligibility category defined in subsection (c) of this section.

(c) Eligibility definitions.

(1) Autism. A student with autism is one who has been determined to meet the criteria for autism as stated in 34 CFR, §300.8(c)(1). Students with pervasive developmental disorders are included under this category. The team's written report of evaluation must include specific recommendations for behavioral interventions and strategies.

(2) Deaf-blindness. A student with deaf-blindness is one who has been determined to meet the criteria for deaf-blindness as stated in 34 CFR, §300.8(c)(2). In meeting the criteria stated in 34 CFR, §300.8(c)(2), a student with deaf-blindness is one who, based on the evaluations specified in subsection (c)(3) and (12) of this section:

(A) meets the eligibility criteria for a student who is deaf or hard of hearing specified in subsection (c)(3) of this section and visual impairment specified in subsection (c)(12) of this section;

(B) meets the eligibility criteria for a student with a visual impairment and has a suspected hearing loss that cannot be demonstrated conclusively, but a speech/language therapist, a certified speech and language therapist, or a licensed speech language pathologist indicates there is no speech at an age when speech would normally be expected;

(C) has documented hearing and visual losses that, if considered individually, may not meet the requirements for a student who is deaf or hard of hearing or for visual impairment, but the combination of such losses adversely affects the student's educational performance; or

(D) has a documented medical diagnosis of a progressive medical condition that will result in concomitant hearing and visual losses that, without special education intervention, will adversely affect the student's educational performance.

(3) Deaf or hard of hearing. A student who is deaf or hard of hearing is one who has been determined to meet the criteria for deafness as stated in 34 CFR, §300.8(c)(3), or for students who are deaf or hard of hearing as stated in 34 CFR, §300.8(c)(5). The evaluation data reviewed by the multidisciplinary team in connection with the determination of a student's eligibility based on being deaf or hard of hearing must include an otological examination performed by an otolaryngologist or by a licensed medical doctor, with documentation that an otolaryngologist is not reasonably available, and an audiological evaluation performed by a licensed audiologist. The evaluation data must include a description of the implications of the hearing loss for the student's hearing in a variety of circumstances with or without recommended amplification.

(4) Emotional disturbance. A student with an emotional disturbance is one who has been determined to meet the criteria for emotional disturbance as stated in 34 CFR, §300.8(c)(4). The written report of evaluation must include specific recommendations for behavioral supports and interventions.

(5) Intellectual disability. A student with an intellectual disability is one who has been determined to meet the criteria for an intellectual disability as stated in 34 CFR, §300.8(c)(6). In meeting the criteria stated in 34 CFR, §300.8(c)(6), a student with an intellectual disability is one who:

(A) has been determined to have significantly sub-average intellectual functioning as measured by a standardized, individually administered test of cognitive ability in which the overall test score

is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; and

(B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

(6) Multiple disabilities.

(A) A student with multiple disabilities is one who has been determined to meet the criteria for multiple disabilities as stated in 34 CFR, §300.8(c)(7). In meeting the criteria stated in 34 CFR, §300.8(c)(7), a student with multiple disabilities is one who has a combination of disabilities defined in this section and who meets all of the following conditions:

(i) the student's disability is expected to continue indefinitely; and

(ii) the disabilities severely impair performance in two or more of the following areas:

- (I) psychomotor skills;
- (II) self-care skills;
- (III) communication;
- (IV) social and emotional development; or
- (V) cognition.

(B) Students who have more than one of the disabilities defined in this section but who do not meet the criteria in subparagraph (A) of this paragraph must not be classified or reported as having multiple disabilities.

(7) Orthopedic impairment. A student with an orthopedic impairment is one who has been determined to meet the criteria for orthopedic impairment as stated in 34 CFR, §300.8(c)(8). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on an orthopedic impairment must include a licensed physician.

(8) Other health impairment. A student with other health impairment is one who has been determined to meet the criteria for other health impairment due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette's Disorder as stated in 34 CFR, §300.8(c)(9). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on other health impairment must include a licensed physician.

(9) Specific learning disability.

(A) Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; intellectual disability; emotional disturbance; or environmental, cultural, or economic disadvantage.

(B) A student with a specific learning disability is one who:

(i) has been determined through a variety of assessment tools and strategies to meet the criteria for a specific learning disability as stated in 34 CFR, §300.8(c)(10), in accordance with the provisions in 34 CFR, §§300.307-300.311;

(ii) when provided with learning experiences and instruction appropriate for the student's age or state-approved grade-level standards as indicated by performance on multiple measures such as in-class tests, grade average over time (e.g. six weeks or semester), norm- or criterion-referenced tests, and statewide assessments, does not achieve adequately for the student's age or to meet state-approved grade-level standards in one or more of the following areas:

- (I) oral expression;
- (II) listening comprehension;
- (III) written expression;
- (IV) basic reading skill;
- (V) reading fluency skills;
- (VI) reading comprehension;
- (VII) mathematics calculation; or
- (VIII) mathematics problem solving;

(iii) meets one of the following criteria:

(I) does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in clause (ii)(I)-(VIII) of this subparagraph when using a process based on the student's response to scientific, research-based intervention; or

(II) exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, state-approved grade-level standards, or intellectual development that is determined to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 CFR, §300.304 and §300.305; and

(iv) does not meet the findings under clauses (ii) and (iii) of this subparagraph primarily as the result of:

- (I) a visual, hearing, or motor disability;
- (II) an intellectual disability;
- (III) emotional disturbance;
- (IV) cultural factors;
- (V) environmental or economic disadvantage; or
- (VI) limited English proficiency.

(C) As part of the evaluation described in subparagraph (B) of this paragraph and 34 CFR, §§300.307-300.311, and in order to ensure that underachievement by a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or mathematics, the following must be considered:

(i) data that demonstrates the student was provided appropriate instruction in reading (as described in 20 United States Code (USC), §6368(3)), and/or mathematics within general education settings delivered by qualified personnel; and

(ii) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal evaluation of student progress during instruction, which must be provided to the student's parents. Data-based documentation of repeated assessments may include, but is not limited to, response to

intervention progress monitoring results, in-class tests on grade-level curriculum, or other regularly administered assessments. Intervals are considered reasonable if consistent with the assessment requirements of a student's specific instructional program.

(D) The school district must ensure that the student is observed in the student's learning environment, including the regular classroom setting, to document the student's academic performance and behavior in the areas of difficulty. In determining whether a student has a specific learning disability, the admission, review, and dismissal (ARD) committee must decide to either use information from an observation in routine classroom instruction and monitoring of the student's performance that was conducted before the student was referred for an evaluation or have at least one of the members described in subsection (b) of this section conduct an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and the school district has obtained parental consent consistent with 34 CFR, §300.300(a). In the case of a student of less than school age or out of school, a member described in subsection (b) of this section must observe the student in an environment appropriate for a student of that age.

(E) The determination of whether a student suspected of having a specific learning disability is a student with a disability as defined in 34 CFR, §300.8, must be made by the student's parents and a team of qualified professionals, which must include at least one person qualified to conduct individual diagnostic examinations of children such as a licensed specialist in school psychology, an educational diagnostician, a speech-language pathologist, or a remedial reading teacher and one of the following:

(i) the student's regular teacher;

(ii) if the student does not have a regular teacher, a regular classroom teacher qualified to teach a student of his or her age; or

(iii) for a student of less than school age, an individual qualified by the Texas Education Agency to teach a student of his or her age.

(10) Speech impairment. A student with a speech impairment is one who has been determined to meet the criteria for speech or language impairment as stated in 34 CFR, §300.8(c)(11). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on a speech impairment must include a certified speech and hearing therapist, a certified speech and language therapist, or a licensed speech/language pathologist.

(11) Traumatic brain injury. A student with a traumatic brain injury is one who has been determined to meet the criteria for traumatic brain injury as stated in 34 CFR, §300.8(c)(12). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on a traumatic brain injury must include a licensed physician, in addition to the licensed or certified practitioners specified in subsection (b)(1) of this section.

(12) Visual impairment.

(A) A student with a visual impairment is one who has been determined to meet the criteria for visual impairment as stated in 34 CFR, §300.8(c)(13). Information from a variety of sources must be considered by the multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on visual impairment in order to determine the need for specially designed instruction as stated in 34 CFR, §300.39(b)(3), and must include:

(i) a medical report by a licensed ophthalmologist or optometrist that indicates the visual loss stated in exact measures of visual field and corrected visual acuity, at a distance and at near range, in each eye. If exact measures cannot be obtained, the eye specialist must so state and provide best estimates. The report should also include a diagnosis and prognosis whenever possible and whether the student has:

(I) no vision or visual loss after correction; or

(II) a progressive medical condition that will result in no vision or a visual loss after correction;

(ii) a functional vision evaluation by a certified teacher of students with visual impairments or a certified orientation and mobility specialist. The evaluation must include the performance of tasks in a variety of environments requiring the use of both near and distance vision and recommendations concerning the need for a clinical low vision evaluation;

(iii) a learning media assessment by a certified teacher of students with visual impairments. The learning media assessment must include recommendations concerning which specific visual, tactual, and/or auditory learning media are appropriate for the student and whether or not there is a need for ongoing evaluation in this area; and

(iv) as part of the full individual and initial evaluation, an orientation and mobility evaluation conducted by a person who is appropriately certified as an orientation and mobility specialist. The evaluation must be conducted in a variety of lighting conditions and in a variety of settings, including in the student's home, school, and community, and in settings unfamiliar to the student.

(B) A person who is appropriately certified as an orientation and mobility specialist must participate in any reevaluation as part of the multidisciplinary team, in accordance with 34 CFR, §§300.122 and 300.303-300.311, in evaluating data used to make the determination of the student's need for specially designed instruction.

(C) A person who is appropriately certified as an orientation and mobility specialist must participate, as part of a multidisciplinary team, in accordance with 34 CFR, §§300.122 and 300.303-300.311, in evaluating data used in making the determination of the student's eligibility as a student with a visual impairment.

(13) Noncategorical. A student between the ages of 3-5 who is evaluated as having an intellectual disability, an emotional disturbance, a specific learning disability, or autism may be described as noncategorical early childhood.

§89.1050. *The Admission, Review, and Dismissal Committee.*

(a) Each school district must establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full individual and initial evaluation is conducted pursuant to §89.1011 of this title (relating to Full Individual and Initial Evaluation). The ARD committee is the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.321. The school district is responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including the following:

(1) 34 CFR, §§300.320-300.325, and Texas Education Code (TEC), §29.005 (individualized education programs);

(2) 34 CFR, §§300.145-300.147 (relating to placement of eligible students in private schools by a school district);

(3) 34 CFR, §§300.132, 300.138, and 300.139 (relating to the development and implementation of service plans for eligible students placed by parents in private school who have been designated to receive special education and related services);

(4) 34 CFR, §300.530 and §300.531, and TEC, §37.004 (disciplinary placement of students with disabilities);

(5) 34 CFR, §§300.302-300.306 (relating to evaluations, re-evaluations, and determination of eligibility);

(6) 34 CFR, §§300.114-300.117 (relating to least restrictive environment);

(7) TEC, §28.006 (Reading Diagnosis);

(8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);

(9) TEC, §28.0212 (Junior High or Middle School Personal Graduation Plan);

(10) TEC, §28.0213 (Intensive Program of Instruction);

(11) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);

(12) TEC, §30.002 (Education for Children with Visual Impairments);

(13) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);

(14) TEC, §33.081 (Extracurricular Activities);

(15) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and

(16) TEC, §48.102 (Special Education).

(b) For a student from birth through two years of age with a visual impairment or who is deaf or hard of hearing, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§300.320-300.324, and the memorandum of understanding between the Texas Education Agency and the Texas Health and Human Services Commission. For students three years of age and older, school districts must develop an IEP.

(c) ARD committee membership.

(1) ARD committees must include the following:

(A) the parents of the student;

(B) not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment) who must, to the extent practicable, be a teacher who is responsible for implementing a portion of the student's IEP;

(C) not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;

(D) a representative of the school district who:

(i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;

(ii) is knowledgeable about the general education curriculum; and

(iii) is knowledgeable about the availability of resources of the school district;

(E) an individual who can interpret the instructional implications of evaluation results, who may be a member of the committee described in subparagraphs (B)-(D) and (F) of this paragraph;

(F) at the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate;

(G) whenever appropriate, the student with a disability;

(H) to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, a representative of any participating agency that is likely to be responsible for providing or paying for transition services;

(I) a representative from career and technical education (CTE), preferably the teacher, when considering initial or continued placement of a student in CTE; and

(J) a professional staff member who is on the language proficiency assessment committee who may be a member of the committee described in subparagraphs (B) and (C) of this paragraph, if the student is identified as an English language learner.

(2) The special education teacher or special education provider that participates in the ARD committee meeting must be appropriately certified or licensed as required by 34 CFR, §300.18 and §300.156.

(3) If the student is:

(A) a student with a suspected or documented visual impairment, the ARD committee must include a teacher who is certified in the education of students with visual impairments;

(B) a student who is suspected to be deaf or hard of hearing, the ARD committee must include a teacher who is certified in the education of students who are deaf or hard of hearing; or

(C) a student with suspected or documented deaf-blindness, the ARD committee must include a teacher who is certified in the education of students with visual impairments and a teacher who is certified in the education of students who are deaf or hard of hearing.

(4) An ARD committee member is not required to attend an ARD committee meeting if the conditions of either 34 CFR, §300.321(e)(1), regarding attendance, or 34 CFR, §300.321(e)(2), regarding excusal, have been met.

(d) The school district must take steps to ensure that one or both parents are present at each ARD committee meeting or are afforded the opportunity to participate, including notifying the parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place. Additionally, a school district must allow parents who cannot attend an ARD committee meeting to participate in the meeting through other methods such as through telephone calls or video conferencing. The school district must provide the parents with written notice of the ARD committee meeting that meets the requirements in 34 CFR, §300.322, at least five school days before the meeting unless the parents agree to a shorter timeframe.

(e) Upon receipt of a written request for an ARD committee meeting from a parent, the school district must:

(1) schedule and convene a meeting in accordance with the procedures in subsection (d) of this section; or

(2) within five school days, provide the parent with written notice explaining why the district refuses to convene a meeting.

(f) If the parent is unable to speak English, the school district must provide the parent with a written notice required under subsection (d) or (e)(2) of this section in the parent's native language, unless it is clearly not feasible to do so. If the parent's native language is not a written language, the school district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication so that the parent understands the content of the notice.

(g) All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible. The ARD committee may agree to an annual IEP or an IEP of shorter duration.

(1) When mutual agreement about all required elements of the IEP is not achieved, the parent who disagrees must be offered a single opportunity to recess and reconvene the ARD committee meeting. The period of time for reconvening the ARD committee meeting must not exceed ten school days, unless the parties mutually agree otherwise. The ARD committee must schedule the reconvened meeting at a mutually agreed upon time and place. The opportunity to recess and reconvene is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense that may lead to a placement in a disciplinary alternative education program. The requirements of this subsection do not prohibit the ARD committee from recessing an ARD committee meeting for reasons other than the failure to reach mutual agreement about all required elements of an IEP.

(2) During the recess, the ARD committee members must consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons who may assist in enabling the ARD committee to reach mutual agreement.

(3) If a recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the school district must implement the IEP that it has determined to be appropriate for the student.

(4) Each member of the ARD committee who disagrees with the IEP developed by the ARD committee is entitled to include a statement of disagreement in the IEP.

(h) Whenever a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education to the student, the school district must provide prior written notice as required in 34 CFR, §300.503, including providing the notice in the parent's native language or other mode of communication. This notice must be provided to the parent at least five school days before the school district proposes or refuses the action unless the parent agrees to a shorter timeframe.

(i) If the student's parent is unable to speak English and the parent's native language is Spanish, the school district must provide a written copy or audio recording of the student's IEP translated into Spanish. If the student's parent is unable to speak English and the parent's native language is a language other than Spanish, the school district must make a good faith effort to provide a written copy or audio recording of the student's IEP translated into the parent's native language.

(1) For purposes of this subsection, a written copy of the student's IEP translated into Spanish or the parent's native language means that all of the text in the student's IEP in English is accurately translated into the target language in written form. The IEP translated

into the target language must be a comparable rendition of the IEP in English and not a partial translation or summary of the IEP in English.

(2) For purposes of this subsection, an audio recording of the student's IEP translated into Spanish or the parent's native language means that all of the content in the student's IEP in English is orally translated into the target language and recorded with an audio device. A school district is not prohibited from providing the parent with an audio recording of an ARD committee meeting at which the parent was assisted by an interpreter as long as the audio recording provided to the parent contains an oral translation into the target language of all of the content in the student's IEP in English.

(3) If a parent's native language is not a written language, the school district must take steps to ensure that the student's IEP is translated orally or by other means to the parent in his or her native language or other mode of communication.

(4) Under 34 CFR, §300.322(f), a school district must give a parent a written copy of the student's IEP at no cost to the parent. A school district meets this requirement by providing a parent with a written copy of the student's IEP in English or by providing a parent with a written translation of the student's IEP in the parent's native language in accordance with paragraph (1) of this subsection.

(j) A school district must comply with the following for a student who is new to the school district.

(1) When a student transfers to a new school district within the state in the same school year and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(e), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 CFR, §300.323(e)(1) or (2), is 30 school days from the date the student is verified as being a student eligible for special education services.

(2) When a student transfers from a school district in another state in the same school year and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(f), regarding the provision of special education services. If the new school district determines that an evaluation is necessary, the evaluation is considered a full individual and initial evaluation and must be completed within the timelines established by §89.1011(c) and (e) of this title. The timeline for completing the requirements in 34 CFR, §300.323(f)(2), if appropriate, is 30 calendar days from the date of the completion of the evaluation report. If the school district determines that an evaluation is not necessary, the timeline for completing the requirements outlined in 34 CFR, §300.323(f)(2), is 30 school days from the date the student is verified as being a student eligible for special education services.

(3) In accordance with TEC, §25.002, and 34 CFR, §300.323(g), the school district in which the student was previously enrolled must furnish the new school district with a copy of the student's records, including the student's special education records, not later than the 10th working day after the date a request for the information is received by the previous school district.

(4) A student with a disability who has an IEP in place from a previous in- or out-of-state school district and who enrolls in a new school district during the summer is not considered a transfer student for the purposes of this subsection or for 34 CFR, §300.323(e) or (f). For these students, the new school district must implement the IEP from

the previous school district in full on the first day of class of the new school year or must convene an ARD committee meeting during the summer to revise the student's IEP for implementation on the first day of class of the new school year.

(k) All disciplinary actions regarding students with disabilities must be determined in accordance with 34 CFR, §§300.101(a) and 300.530-300.536; TEC, Chapter 37, Subchapter A; and §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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



DIVISION 4. SPECIAL EDUCATION FUNDING

19 TAC §89.1121

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of

Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 5. SPECIAL EDUCATION AND RELATED SERVICE PERSONNEL

19 TAC §89.1131

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 174. TELEMEDICINE

SUBCHAPTER A. TELEMEDICINE

22 TAC §174.5

The Texas Medical Board (Board) adopts amendments to Subchapter A: Telemedicine, §174.5, concerning Issuance of Prescriptions. The amendments to §174.5 are being adopted with non-substantive changes to the proposed text as published in the August 13, 2021, issue of the *Texas Register* (46 TexReg 4970). The adopted amendments to §174.5 will be republished.

Amendments to §174.5, Issuance of Prescriptions are adopted as follows:

§174.5 relating to Issuance of Prescriptions, the amendments to §174.5(e) allow physicians to utilize telemedicine to continue issuing previous prescription(s) for scheduled medications to established chronic pain patients, if the physician has, within the past 90 days, seen a patient in-person or via a telemedicine visit using two-way audio and video communication. The amendments will consistently and conveniently provide patients access to schedule drugs needed to ensure on-going treatment of chronic pain and avoid potential adverse consequences associated with the abrupt cessation of pain medication.

The Board received two comments. One joint written comment from the Texas Medical Association (TMA) and Texas Pain Society (TPS) and one comment from Emmanuel Elueze, PhD, regarding the proposed amendments to §174.5. No one appeared to testify regarding the amendments to §174.5 at the public hearing on September 17, 2021. A summary of the comments relating to §174.5, and the Board responses, are as follows.

Comment No. 1: TMA and TPS request that the reference in subsection (e)(1)(A) to "chronic pain patient" because identifying the patient in this manner unfairly stigmatizes patients who seek treatment for chronic pain. Instead, it should be clear that the individual is a patient of the physician, and the patient receives treatment for chronic pain.

Board Response: The Board believes that the language as proposed is necessary and appropriate based on the definitions of chronic pain in other rules. Accordingly, the Board declines this suggested change.

Comment No 2: TMA and TPS also state that the current language in subsection (e)(1)(B), "is receiving a prescription that is *identical* to a prescription issued at the previous visit", is too narrow and does not take into account flexibility in treatment needed to effectively manage chronic pain and could limit telemedicine

services from being provided in this situation. TMA and TPS suggest changing the word "identical" to "similar" as it relates to the prescription being issued during the telemedicine visit.

Dr. Elueze suggests including the words "or lower dose" to subsection (e)(1)(B) to read "is identical *or lower dose* to a prescription issued at the previous visit."

Board Response: The Board maintains that the language of the rule as published is clear and unambiguous. The effect of changing the word from "identical" to "similar" is less clear and leaves too much room for interpretation. This language as proposed satisfies the intent as it relates to prescribing for chronic pain via telemedicine utilizing a prescription in a quantity and dose that is identical, or lesser in quantity or dose, than previously issued. Accordingly, the Board declines the suggested changes to the rule as published.

Comment No. 3: TMA and TPS also suggest changing subsection (e)(1)(B), relating to the prescription issued at "the previous visit" to "a prescription issued at a previous visit," allowing for a prescription issued at any previous visit to be issued at the telemedicine visit, even if such medication was not prescribed at the previous visit.

Board Response: The language in subsection (e)(1)(B) clearly implements the Board's intent to ensure continuity of care of a patient being treated for chronic pain by the same physician or health professional consistent with the previous visit in which the prescription for chronic pain was written. Therefore, the Board declines to further amend the language as proposed.

Comment No 4: TMA and TPS also urge the board to add the word "other" in subsection (e)(1)(C) to read "has been seen by the prescribing physician or *other* health professional." TMA and TPS argue that such change will provide for those emergency circumstances in which a previous prescribing physician or healthcare professional is no longer available, and the new physician or healthcare professional can then issue a prescription to treat chronic pain via telemedicine, so long as they have been seen by another physician or another physician's delegate in the last 90 days in-person or via telemedicine.

Board Response: The language in subsection (e)(1)(C) clearly implements the Board's intent to ensure continuity of care of a patient being treated for chronic pain by the same physician or health professional in a consistent manner. Therefore, the Board declines to further amend the language as proposed.

Comment No. 5: TMA and TPS also request changing the word "provider" in subsection (e)(1)(A) to "physician or health professional" in order to be consistent with subsection (e)(1)(C).

Board Response: The Board agrees with this suggested change. Accordingly, the amendments are adopted with non-substantive changes to the proposed text to §174.5(e)(1)(A) as published in the August 13, 2021, issue of the *Texas Register* (46 TexReg 4970).

Comment No. 6: TMA also suggests changing the references in subsection (e)(1)(C) to "Chapter" 111 of the Occupations Code to "Section 111" for correctness.

Board Response: The Board agrees that correcting the reference is appropriate and the Board adopts the proposed amendments with that non-substantive change to the proposed text to §174.5(e)(1)(C) as published in the August 13, 2021, issue of the *Texas Register* (46 TexReg 4970).

The amendments are adopted under the authority of Texas Occupations Code §153.001, which provides authority for the Board to adopt rules necessary to administer and enforce the Medical Practice Act and to adopt rules necessary to regulate and license physicians.

Other statutes affected by this rule: Chapter 111 of the Texas Occupations Code.

§174.5. *Issuance of Prescriptions.*

(a) The validity of a prescription issued as a result of a telemedicine medical service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(b) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a telemedicine medical service.

(c) A valid prescription must be:

(1) issued for a legitimate medical purpose by a practitioner as part of patient-practitioner relationship as set out in §111.005, of Texas Occupations Code; and

(2) meet all other applicable laws before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.

(d) Any prescription drug orders issued as the result of a telemedicine medical service, are subject to all regulations, limitations, and prohibitions set out in the federal and Texas Controlled Substances Act, Texas Dangerous Drug Act and any other applicable federal and state law.

(e) **Limitation on Treatment of Chronic Pain.** Chronic pain is a legitimate medical condition that needs to be treated but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) **Treatment for Chronic Pain.** For purposes of this rule, chronic pain has the same definition as used in §170.2(4) of this title (relating to Definitions). Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(A) is an established chronic pain patient of the physician or health professional issuing the prescription;

(B) is receiving a prescription that is identical to a prescription issued at the previous visit; and

(C) has been seen by the prescribing physician or health professional defined under Section 111.001(1) of Texas Occupations Code, in the last 90 days either:

(i) in-person; or

(ii) via telemedicine using audio and video two-way communication.

(2) **Treatment for Acute Pain.** For purposes of this rule, acute pain has the same definition as used in §170.2(2) of this title. Telemedicine medical services may be used for the treatment of acute

pain with scheduled drugs, unless otherwise prohibited under federal and state law.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 17, 2021.

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Scott Freshour
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Texas Medical Board

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 515. LICENSES

22 TAC §515.3

The Texas State Board of Public Accountancy adopts an amendment to 22 TAC §515.3, concerning License Renewals for Individuals and Firm Offices, without changes to the proposed text as published in the July 30, 2021, issue of the *Texas Register* (46 TexReg 4531). The rule will not be republished.

Section 161.0085 of the Health and Safety Code requires state agencies to ensure that businesses do not require a client to provide documentation certifying the client's COVID-19 vaccination or post transmission recovery in order to gain access or receive services from the client or business. The rule amendment is adopted under the Public Accountancy Act, Texas Occupations Code, Section 901.151(a)(2) (West 2009) which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 16, 2021.

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Texas State Board of Public Accountancy

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Proposal publication date: July 30, 2021

For further information, please call: (512) 305-7842

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22 TAC §515.11

The Texas State Board of Public Accountancy adopts an amendment to 22 TAC §515.11, concerning Licensing for Military Service Members, Military Veterans, and Military Spouses, without changes to the proposed text as published in the July 30, 2021, issue of the *Texas Register* (46 TexReg 4532). The rule will not be republished.

HB 139 adds to the definition of "armed forces of the United States" to include Space Force. Members of the military are provided licensing accommodations to minimize the hardships of military service. Members of the recently created Space Force are being included in the definition of armed forces of the United States.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 527. PEER REVIEW

22 TAC §527.2

The Texas State Board of Public Accountancy adopts an amendment to §527.2, concerning Definitions, without changes to the proposed text as published in the July 30, 2021 issue of the *Texas Register* (46 TexReg 4533) and will not be republished.

The amendment eliminates the requirement for an onsite peer review. Technology permits enhanced communications without a requirement for in-person evaluations.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 and §901.655 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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