

The Texas Education Agency (TEA) proposes new §89.1094, concerning special education services. The proposed new section would establish provisions for TEA's approval and monitoring of off-campus programs for students receiving special education and related services.

BACKGROUND INFORMATION AND JUSTIFICATION: Proposed new 19 TAC §89.1094 would establish the process for placing a student in an off-campus setting or program to fulfill the requirements under the Individuals with Disabilities Education Act (IDEA) to provide a continuum of alternative placements, ensure monitoring of placements to maintain the provision of a free appropriate public education, ensure state monitoring of implementation of IDEA, and ensure appropriateness of state and federal funding for students placed in off-campus programs. The proposed new rule would apply to all non-district facilities where special education services are provided.

Specifically, the proposed new rule would provide procedures for placement of students in off-campus programs that are on approved provider lists, programs not on the approved provider list, and programs in which a student is ordered to be placed by a special education hearing officer or judge.

The proposed new rule would also establish a process for the approval and renewal of off-campus programs, identify the period of approval and renewal, and establish funding procedures and parameters for students placed in such settings.

FISCAL IMPACT: Matthew Montaña, deputy commissioner for special populations and monitoring, 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. During the first five years the proposed rulemaking would be in effect, it would create a new regulation that codifies current agency procedures related to the placement of a child with a disability in an off-campus program. The new rule would expand the agency's authority by defining "off-campus program provider" to include county systems, regional education service centers, non-public day schools, or any other public or private entity with which a school district enters into a contract for the provision of special education services in a facility other than a school district campus operated by a school district.

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 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: Mr. Montaña 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 increasing the accountability of school districts that contract for the placement of children with disabilities in off-campus programs that are not operated by the school district. It would also provide for increased monitoring and oversight of

off-campus programs through the approval process articulated in the proposed new rule. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have a data and reporting impact. School districts would be required to submit documentation for contracting for educational purposes along with student-level documentation (the student's individualized education program) to evidence the need for the contract for services and other associated verification documents in compliance with the proposed new rule. These data collections already occur for the vast majority of students in off-campus programs, specifically nonpublic day programs. The proposed new rule would expand the data collection to include any other public or private entity with which a school district enters into a contract under Texas Education Code, §11.157, for the provision of special education services in a facility not operated by the school district.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: The 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 June 28, 2019, and ends July 29, 2019. Public hearings to solicit testimony and input on the proposal will be held at 1:00 p.m. on July 15, 2019, and on July 18, 2019, in Room 1-100, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Anyone wishing to testify at one of the hearings must sign in between 12:45 p.m. and 1:30 p.m. on the day of the respective hearing. The hearing will conclude once all who have signed in have been given the opportunity to comment. Due to construction work around the William B. Travis Building, parking for persons with physical disabilities is limited, but spaces are available in Garage R, located on the block directly east of the William B. Travis Building, on every level nearest to the elevators. 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/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The new section is proposed under Texas Education Code (TEC), §29.001, which requires the state to have a statewide design, consistent with federal law, for the delivery of services to children with disabilities in the state; 34 Code of Federal Regulations (CFR), §300.115, which requires local education agencies (LEAs) to have available a continuum of alternative placements for students with disabilities; 34 CFR, §300.146 and §300.147, which require the state to monitor and ensure that students placed in or referred to a private school or facility by an LEA receive a free appropriate public education; and 34 CFR, §300.600, which gives the state general supervisory authority to monitor the implementation of the Individuals with Disabilities Education Act, Part B.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §29.001, and 34 Code of Federal Regulations, §§300.115, 300.146, 300.147, and 300.600.

<rule>

§89.1094. Students Receiving Special Education and Related Services in an Off-Campus Program.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) School district--The definition of a school district includes independent school districts established under Texas Education Code (TEC), Chapter 11, Subchapters A-F, and open-enrollment charter schools established under TEC, Chapter 12, Subchapter D.
- (2) Off-campus program--An off-campus program includes special education and related services provided during school hours in a facility other than a school district campus.
- (3) Off-campus program provider--An off-campus program provider is an entity that provides the services identified in subsection (a)(2) of this section and includes:
 - (A) a county system operating under application of former law as provided in TEC, §11.301;

- (B) a regional education service center established under TEC, Chapter 8;
 - (C) a nonpublic day school; or
 - (D) any other public or private entity with which a school district enters into a contract under TEC, §11.157, for the provision of special education services in a facility other than a school district campus operated by a school district.
 - (b) Off-campus program placement. A school district may contract with an off-campus program provider to provide some or all of the special education and related services to a student in accordance with the requirements in this section.
 - (1) Before the school district places a student with a disability in, or refers a student to, an off-campus program, the district shall initiate and conduct an onsite review to ensure that the off-campus program is appropriate for meeting the student's educational needs.
 - (2) Before the school district places a student with a disability in, or refers a student to, an off-campus program, the district shall initiate and conduct a meeting of the student's admission, review, and dismissal (ARD) committee to develop an individualized education program (IEP) for the student in accordance with 34 Code of Federal Regulations (CFR), §§300.320-300.325, state statutes, and commissioner of education rules in Chapter 89 of this title (relating to Commissioner's Rules Concerning Special Education Services).
 - (3) The appropriateness of the off-campus program for each student placed shall be documented in the IEP annually. The student's ARD committee may only recommend an off-campus program placement for a student if the committee determines that the nature and severity of the student's disability and special education needs are such that the student cannot be satisfactorily educated in the school district.
 - (A) The student's IEP must list which services the school district is unable to provide and which services the facility will provide.
 - (B) The ARD committee shall establish, in writing, criteria and estimated timelines for the student's return to the school and document this information in the IEP.
 - (C) The school district shall make two on-site visits annually, one announced and one unannounced, to:
 - (i) verify that the off-campus program can, and will, provide the services listed in the student's IEP that the off-campus program has agreed to provide to the student;
 - (ii) obtain written verification that the facility meets minimum standards for health and safety and holds applicable local and state accreditation and permit requirements; and
 - (iii) verify the educational program provided at the off-campus program facility is the least restrictive environment for the student.
 - (4) The placement of more than one student in the same off-campus program facility may be considered in the same on-site visit to a facility. However, the IEP of each student must be individually reviewed, and a determination of appropriateness of placement and services must be made for each student.
 - (c) Notification. Within 30 calendar days from an ARD committee's decision to place a student in an off-campus program, a school district must electronically submit to the Texas Education Agency (TEA) notice of, and information regarding, the placement in accordance with submission procedures specified by the TEA.
 - (1) If the off-campus program is on the commissioner's list of approved off-campus programs, the TEA will review the student's IEP and placement as required by 34 CFR, §300.120, and, in the case of a placement in or referral to a private school or facility, 34 CFR, §300.146. After review, the TEA will notify the school district whether federal or state funds for the off-campus program

placement are approved. If the TEA does not approve the use of funds, it will notify the school district of the basis for the non-approval.

- (2) If the off-campus program is not on the commissioner's list of approved off-campus programs, the TEA will begin the approval procedures described in subsection (d) of this section. School districts must ensure there is no delay in implementing a child's IEP in accordance with 34 CFR, §300.103(c).
- (3) If an off-campus program placement is ordered by a special education hearing officer or court of competent jurisdiction, the school district must notify the TEA of the order within 30 calendar days. The off-campus program serving the student is not required to go through the approval procedures described in subsection (d) of this section for the ordered placement. If, however, the school district or other school districts intend to place other students in the off-campus program, the off-campus program will be required to go through the approval procedures to be included on the commissioner's list of approved off-campus programs.
- (d) Approval of the off-campus program. Off-campus programs must have their educational programs approved for contracting purposes by the commissioner.

 - (1) For a program to be approved, the school district must electronically submit to the TEA notice of, and information regarding, the placement in accordance with submission procedures specified by the TEA. The TEA shall begin approval procedures and conduct an on-site visit to the facility within 30 calendar days after the TEA has been notified by the school district. Initial approval of the off-campus program shall be for one calendar year.
 - (2) The off-campus program may be approved only after, at minimum, a programmatic evaluation of personnel qualifications, adequacy of physical plant and equipment, and curriculum content.
 - (3) The commissioner shall renew approvals and issue new approvals only for those facilities that have a contract already in place with a school district for the placement of one or more students or that have a pending request from a school district. This approval does not apply to facilities that only provide related services. Nor does it apply to facilities when the school district, within which the facility is located, provides the educational program. Re-approval of the off-campus program may be for one, two, or three years at the TEA's discretion.
- (e) Funding procedures and other requirements. The cost of off-campus program placements will be funded according to TEC, §42.151 (Special Education), and §89.63(e) of this title (relating to Instructional Arrangements and Settings).

 - (1) Contracts between school districts and approved off-campus programs must not exceed a school district's fiscal year and shall not begin prior to July 1 of the contracted fiscal year.
 - (2) Amendments to a contract must be electronically submitted to the TEA in accordance with submission procedures specified by the TEA no later than 30 calendar days from the change in placement or services within the school district's fiscal year.
 - (3) If a student who is placed in an off-campus program by a school district changes his or her residence to another Texas school district during the school year, the school district must notify the TEA within 10 calendar days of the date on which the school district ceased contracting with the off-campus program for the student's placement. The student's new school district must meet the requirements of 34 CFR, §300.323(e), by providing comparable services to those described in the student's IEP from the previous school district until the new school district either adopts the student's IEP from the previous school district or develops, adopts, and implements a new IEP. The new school district must comply with all procedures described in this section for continued or new off-campus program placement.