

The State Board of Education (SBOE) proposes an amendment to §157.41, concerning certification criteria for independent hearing examiners. The proposed amendment would allow the commissioner of education to take action against the certificate of an independent hearing examiner if it is determined that the law firm with which the independent hearing examiner is associated, during the time the independent hearing examiner has been certified, meets specified criteria.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §21.252(a), requires the SBOE to establish certification criteria for independent hearing examiners. Section 157.41 specifies certification criteria such as license required, experience, continuing education, and annual recertification for independent hearing examiners. The examiners preside over due process hearings involving terminations, suspensions without pay, and nonrenewal of term employment contracts. The examiners also develop findings of fact and conclusions of law, which are referred to the school district board of trustees.

Currently, §157.41 specifies that the commissioner may take action against the certificate of an independent hearing examiner if it is determined that the independent hearing examiner, during the time the independent hearing examiner has been certified, has: (1) served as an agent or representative of a school district; (2) served as an agent or representative of a teacher in any dispute with a school district; (3) served as an agent or representative of an organization of school employees, school administrators, or school boards; or (4) failed to timely issue a recommendation. The proposed amendment would specify in subsection (1) that the commissioner may also take action against the certificate of an independent hearing examiner if it is determined that the law firm with which the independent hearing examiner is associated meets any of the same criteria. This change would align the rule with TEC, §21.252.

The SBOE approved the proposed amendment for first reading and filing authorization at its June 14, 2019 meeting.

FISCAL IMPACT: Von Byer, general counsel, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would expand an existing regulation and increase the number of individuals subject to its applicability. Currently, §157.41 specifies that the commissioner may take action against the certificate of an independent hearing examiner if it is determined that the independent hearing examiner, during the time the independent hearing examiner has been certified, meets certain criteria. The proposed amendment would specify that the commissioner may also take action against the certificate of an independent hearing examiner if it is determined that the law firm with which the independent hearing examiner is associated meets any of the same criteria. This change would align the rule with TEC, §21.252.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not 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. Byer 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 alignment of the rule with statutory provisions in TEC, §21.252. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins August 2, 2019, and ends September 6, 2019. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_\(TAC\)/Proposed_State_Board_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/SBOE_Rules_(TAC)/Proposed_State_Board_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. The SBOE will take registered oral and written comments on the proposal at the appropriate committee meeting in September 2019 in accordance with the SBOE board operating policies and procedures. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on August 2, 2019.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §21.252, which requires the State Board of Education, in consultation with the State Office of Administrative Hearings, by rule to establish criteria for certifying independent hearing examiners who conduct hearings under the TEC, Chapter 21, Subchapter F.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §21.252.

<rule>

§157.41. Certification Criteria for Independent Hearing Examiners.

- (a) License required. An individual who is certified as an independent hearing examiner must be licensed to practice law in the State of Texas.
- (b) Representations prohibited. An independent hearing examiner, and the law firm with which the independent hearing examiner is associated, must not serve as an agent or representative of:
 - (1) a school district;
 - (2) a teacher in any dispute with a school district; or
 - (3) an organization of school employees, school administrators, or school boards.
- (c) Moral character and criminal history. An independent hearing examiner must:
 - (1) possess good moral character; and
 - (2) as demonstrated by a criminal history report process required by the commissioner of education, not have been convicted, given probation (whether through deferred adjudication or otherwise), or fined for:
 - (A) a felony;
 - (B) a crime of moral turpitude; or
 - (C) a crime that directly relates to the duties of an independent hearing examiner in a public school setting.

- (d) Status as a licensed attorney. An independent hearing examiner must:
 - (1) currently be a member in good standing of the State Bar of Texas;
 - (2) within the last five years, not have had the independent hearing examiner's bar license:
 - (A) reprimanded, either privately or publicly;
 - (B) suspended, either probated or otherwise; or
 - (C) revoked;
 - (3) have been licensed to practice law in the State of Texas or any other state for at least five years prior to application; and
 - (4) have engaged in the actual practice of law on a full-time basis, as defined by the Texas Board of Legal Specialization, for at least five years.
- (e) Experience. During the three years immediately preceding certification, an independent hearing examiner must have devoted a minimum of 50% of the examiner's time practicing law in some combination of the following areas, with a total of at least one-tenth or 10% of the independent hearing examiner's practice involving substantial responsibility for taking part in a contested evidentiary proceeding convened pursuant to law in which the independent hearing examiner personally propounded and/or defended against questions put to a witness under oath while serving as an advocate, a hearing officer, or a presiding judicial officer:
 - (1) civil litigation;
 - (2) administrative law;
 - (3) school law; or
 - (4) labor law.
- (f) Continuing education. During each year of certification, an independent hearing examiner must receive credit for ten hours of continuing legal education, with three hours in the area of school law and seven hours in the area of civil trial advocacy and legal writing skills, which must include any combination of course work in evidence, civil procedure, and legal writing skills, during the period January 1 to December 31 of each year of certification.
- (g) Sworn application. In order to be certified as an independent hearing examiner, an applicant must submit a sworn application to the commissioner of education. The application shall contain the following acknowledgments, waivers, and releases.
 - (1) The applicant agrees to authorize appropriate institutions to furnish relevant documents and information necessary in the investigation of the application, including information regarding grievances maintained by the State Bar of Texas.
 - (2) If selected as an independent hearing examiner, the applicant has the continuing duty to disclose grievance matters under subsection (d)(2) of this section at any time during the certification period. Failure to report these matters constitutes grounds for rejecting an application or removal as an independent hearing examiner.
 - (3) If selected as an independent hearing examiner, the applicant has the continuing duty to disclose criminal matters under subsection (d)(2) of this section at any time during the certification period. Failure to report these matters constitutes grounds for rejecting an application or removal as an independent hearing examiner.
- (h) Assurances as to position requirements. In the sworn application, the applicant must:
 - (1) demonstrate that the applicant currently maintains an office or offices within the State of Texas;
 - (2) designate the office locations from which the applicant will accept appointments;
 - (3) demonstrate that the applicant provides telephone messaging and facsimile services during regular business hours;

- (4) agree to attend meetings of independent hearing examiners in Austin, Texas, at the examiner's expense; and
 - (5) agree to comply with all reporting and procedural requirements established by the commissioner.
- (i) Voluntary evaluations. The commissioner may solicit voluntary evaluations from parties to a case regarding their observations of the independent hearings process.
- (j) Insufficient examiners in a region. In the event that insufficient numbers of independent hearing examiners are certified for any geographic region of the state, the commissioner may assign an independent hearing examiner whose office is within reasonable proximity to the school district.
- (k) Annual recertification.
 - (1) Certification expires on December 31 of each calendar year. All independent hearing examiners seeking recertification shall reapply on a date specified by the commissioner. Certification as a hearing examiner is effective on a yearly basis only and does not confer any expectation of recertification in subsequent years.
 - (2) The commissioner, in his discretion, after providing notice and an opportunity to respond, may decline to recertify an independent hearing examiner, if the commissioner determines that the independent hearing examiner has failed to perform the duties of an independent hearing examiner in a competent manner. The commissioner may consider, but is not limited to, the following factors:
 - (A) timeliness;
 - (B) accuracy and appropriateness of procedural and evidentiary rulings;
 - (C) decorum or control; or
 - (D) application of appropriate legal standards.
 - (3) The commissioner's decision in regard to recertification is final and not appealable.
- (l) Action against certification. The commissioner, after providing notice and an opportunity to respond, may take action against the certificate of an independent hearing examiner if it is determined that the independent hearing examiner or the law firm with which the independent hearing examiner is associated , during the time the independent hearing examiner has been certified, has:
 - (1) served as an agent or representative of a school district;
 - (2) served as an agent or representative of a teacher in any dispute with a school district;
 - (3) served as an agent or representative of an organization of school employees, school administrators, or school boards; or
 - (4) failed to timely issue a recommendation.