

The State Board for Educator Certification (SBEC) adopts amendments to §§249.3, 249.11, 249.12, 249.13, 249.14, 249.15, 249.17, 249.26, 249.27, and 249.37, concerning disciplinary proceedings, sanctions, and contested cases. Sections 249.3, 249.11, 249.12, 249.13, 249.14, 249.15, 249.26, 249.27, and 249.37 are adopted without changes to the proposed text as published in the January 10, 2025 issue of the *Texas Register* (50 TexReg 251) and will not be republished. Section 249.17 is adopted with changes to the proposed text as published in the January 10, 2025 issue of the *Texas Register* (50 TexReg 251) and will be republished. The adopted amendments reflect the results of prior discussions on Chapter 249 by the SBEC, as well as multiple stakeholder engagement sessions, by amending the contract abandonment mitigating factors; amending the definition of solicitation to add grooming behaviors; updating the SBEC's mandatory minimum sanctions; updating the SBEC's mailing procedures to allow original petitions and default petitions to be sent via electronic mail; clarifying that all notices sent to comply with Texas Government Code, §2001.054, will be sent via certified or registered mail, removing the requirement that exceptions must be filed or an issue is waived; clarifying the erroneously issued certificate section to explicitly state that the cancellation of a certificate issued as the result of a Texas Education Agency (TEA) information technology error will not result in a contested case; and amending the SBEC's definition of abuse to mirror the definition of abuse found in Texas Family Code, Chapter 261, as well as additional technical edits.

REASONED JUSTIFICATION: The SBEC rules in 19 TAC Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, establish the sanction requirements and procedures for disciplinary actions against educators.

The SBEC engaged in discussions related to potential amendments during the April, July, and September 2024 SBEC meetings. At the April meeting, the SBEC had a preliminary discussion on potential amendments to Chapter 249. The recommendations discussed were informed by challenges and areas for improvement identified by staff in the application of Chapter 249 or issues previously raised by the SBEC at prior meetings.

TEA staff brought these potential changes to the Educator Preparation Stakeholder Group on June 21, 2024, and held a stakeholder engagement meeting with the general public on July 9, 2024. TEA staff presented the feedback from these stakeholder engagement meetings to the SBEC at the July meeting. TEA staff presented the preliminary draft to stakeholders at a stakeholder engagement meeting on August 30, 2024, and presented the feedback from this stakeholder engagement meeting to the SBEC at the September meeting. TEA staff received feedback on the draft text presented at the September meeting, and the adopted amendments incorporate both SBEC input as well as input from stakeholders.

Subchapter A. General Provisions

§249.3. Definitions.

The adopted amendment to §249.3(1) aligns the definition of *Abuse* with the definition of *Abuse* in Texas Family Code, §261.001(1), as well as the commissioner of education's definition of *Abuse* in 19 TAC §153.1201(b), Definitions.

The adopted amendment to §249.3(29) updates the definition of *Mail* to include first-class United States mail and electronic mail and removes the phrase, "unless otherwise provided by this chapter."

The adopted amendment to §249.3(51) adds new subparagraph (K) to the definition of *Solicitation of a romantic relationship* to add grooming behaviors in the totality of the circumstances, specifically showing a student special attention; giving the student individual gifts, money, or privileges; isolating the student; exposing the student to adult topics or conversation and/or media that is not age appropriate; or meeting behind closed doors with the student without another adult present; as well as removes the word "may" and "prima facie" as related to what acts considered in context constitute evidence of solicitation. Subsequent subparagraphs were relettered.

Technical edits were made to §249.3(44) to correct a typographical error and to §249.3(52) to update a cross reference for clarity.

Subchapter B. Enforcement Actions and Guidelines

§249.11. Test Irregularities; Appeal, Sanctions.

The adopted amendment to §249.11(a) modifies the methods of service for written notice of alleged violations of certification test administration rules or procedures to allow for the notice to be sent via first-class United States mail or electronic notification only.

§249.12. Administrative Denial; Appeal.

The adopted amendment to §249.12(b) adds persons that are subject to placement on the Registry of Persons Not Eligible for Hire under TEC, §22.092, and conduct that demonstrates that a person violated 19 TAC Chapter 247, Educators' Code of Ethics, as reasons the TEA staff may administratively deny a certificate. Subsequent subparagraphs were relettered.

§249.13. Cancellation of an Erroneously Issued Certificate.

Adopted new §249.13(f) provides that this section does not apply to erroneously issued certificates as the result of a TEA systems error.

§249.14. Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition.

Adopted new §249.14(p) adds that before institution of agency proceedings, TEA staff shall send a letter via certified or registered mail to the certificate holder giving them notice of the facts or conduct alleged to warrant the intended action and an opportunity to show compliance with all requirements of law for the retention of the certificate. Subsequent subparagraphs were relettered.

§249.15. Disciplinary Action by State Board for Educator Certification.

The adopted amendment to §249.15(a)(5) adds that the SBEC may impose classes and treatment programs that the SBEC deems necessary as a condition or restriction on a certificate.

§249.17. Decision-Making Guidelines.

The adopted amendment to §249.17(d)(1) adds requirements that establish the good cause factors of serious illness or health condition of the educator or close family member of the educator, the educator must provide documentation from a licensed medical provider. It also adds the requirement to provide documentation to establish the good cause factor of relocation to a new city as a result of change in employer of the educator's spouse or partner as a requirement.

The adopted amendment to §249.17(d)(2) adds that a reduction of one month in suspension time be applied for each mitigating factor established.

At adoption, the phrase "except for factors in subparagraphs (G)-(I) of this paragraph" was added to §249.17(d)(2) to clarify which mitigating factors were not eligible for the one-month reduction in suspension time.

The adopted amendment to §249.17(e) adds that an educator who is required to complete pretrial diversion for a felony-level offense is subject to sanction.

The adopted amendment to §249.17(g) adds that an educator is subject to a one-year mandatory minimum sanction for intentional violations of the security or confidential integrity of a test required under TEC in a manner described by 19 TAC §101.3031(a)(3) and removes the mandatory minimum for manipulation of test results.

Adopted new §249.17(k) adds a mandatory minimum sanction of a one-year suspension for an educator who is court-ordered to complete a period of deferred adjudication, community supervision, or pretrial diversion for an offense under Texas Election Code, Chapter 255. The subsequent subsection was relettered.

Subchapter C. Prehearing Matters

§249.26. Petition.

The adopted amendment to §249.26(c) adds that TEA staff may serve a petition by electronic mail to the respondent as well as send a copy of the petition to the respondent's attorney if notice of representation has been provided by electronic mail. It removes the option for service of the petition on the respondent by United States certified mail, return receipt requested.

§249.27. Answer.

The adopted amendment to §249.27 allows a respondent to serve an answer on TEA by electronic mail and removes the requirement that a respondent serve an answer by United States certified mail, return receipt requested.

Subchapter E. Post-Hearing Matters

§249.37. Exceptions and Replies.

The adopted amendment to §249.37 removes the requirement that a disagreement with a factual finding or conclusion of law in the proposal for decision be contained in an exception to the proposal otherwise it is waived. Subsequent subparagraphs were relettered.

SUMMARY OF COMMENTS AND RESPONSES: The public comment period on the proposal began January 10, 2025, and ended February 10, 2025. The SBEC also provided an opportunity for registered oral and written comments on the proposal at the February 14, 2025 meeting's public comment period in accordance with the SBEC board operating policies and procedures. The following public comments were received on the proposal.

Comment: The Association of Texas Professional Educators commented with an appreciation of SBEC and TEA staff for continuing to engage stakeholders in the discussion regarding these proposed changes, but requested some revisions be made, including removing "shows the student special attention" and "meeting behind closed doors with the student without another adult present" from the proposed language that defines grooming behaviors. The commenter suggested the addition of language clarifying that such behaviors shall be considered evidence of solicitation only when they are engaged "without a legitimate educational purpose."

Response: The SBEC disagrees. The proposed grooming behaviors are under the definition of solicitation in 19 Texas Administrative Code (TAC) §249.3(51), which states that solicitation of a romantic relationship is "deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature." The definition further clarifies that the listed behavior must be considered in context. Therefore, the proposed factors are only evidence of solicitation when considered in context if they are deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature.

Comment: The Texas Classroom Teachers Association (TCTA) recommended that SBEC remove the language "meeting behind closed doors with the student without another adult present" from the grooming language defined in the proposed amendments, as teachers are often required to keep their doors closed and locked for safety. TCTA also suggested the word "may" be added to the language in 19 TAC §249.3(51) and supported the removal of the phrase "prima facie" from the provision. Additionally, TCTA raised concerns about the need for clarity regarding the "systems error" part of the proposed changes, the inability of mitigating factors to reduce contract abandonment to no sanction, and the inclusion of a mandatory one-year suspension for educators who undergo pre-trial diversion.

Response: The SBEC disagrees. The proposed grooming behaviors are under the definition of solicitation in 19 TAC §249.3(51), which states that solicitation of a romantic relationship is "deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature." The definition further clarifies that the listed behavior must be considered in context. Therefore, the proposed factors are only evidence of solicitation when considered in context if they are deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature.

In regard to the proposed language for the contract abandonment mitigating factors, 19 TAC §249.17(d)(3)(c) states that the mitigating factors "may mitigate an educator's sanction so significantly that the SBEC takes no disciplinary action." The SBEC has the authority under §249.17(d)(3)(c) to use the mitigating factors to mitigate the contract abandonment sanction down to no sanction.

Further, the plain language of the proposed text in §249.13(f) is clear that the proposed language only applies when a certificate is mistakenly or incorrectly issued as the result of a TEA systems error.

Lastly, the addition of pretrial diversion to the felony conduct minimum sanction is already contained in other sections of SBEC rule and is identical to the language in the mandatory minimum sanction for misdemeanor conduct in 19 TAC §249.17(f).

The State Board of Education (SBOE) took no action on the review of the amendments to §§249.3, 249.11, 249.12, 249.13, 249.14, 249.15, 249.17, 249.26, 249.27, and 249.37 at the April 11, 2025 SBOE meeting.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §§21.006(a)-(c-2), (f)-(g-1), and (i), which require the superintendent or director of a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center or shared services arrangement to report to the SBEC within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct, unless the superintendent or director completes an investigation before the educator resigns or is terminated and determines that the educator did not commit the alleged misconduct. It also requires principals to report to superintendents within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct. It further authorizes the SBEC to impose sanctions on educators who fail to report as required by the statute, including authority to impose monetary administrative penalties, gives SBEC rulemaking authority as necessary to implement the statute, and requires the SBEC to create an internet portal to facilitate confidential and secure reporting; TEC, §21.0062, which requires the chief administrative officer of a private school to notify the SBEC within seven days when a private school educator resigns before the completion of an investigation or is terminated and there is evidence that the educator has engaged in certain misconduct and gives the SBEC rulemaking authority to implement the section; TEC, §21.007, which gives the SBEC authority to place a notice that an educator is under investigation for alleged misconduct on the educator's public certification records, requires the SBEC give the educator notice and an opportunity to show cause, requires that the SBEC limit the amount of time the notice can appear on the educator's certification, and gives the SBEC rulemaking authority as necessary to implement the provision; TEC, §21.009(e), which states that the SBEC may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that TEA staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041(a) and (b)(1), (4), (7), and (8), which authorize the SBEC to adopt rules as necessary for its own procedures, to regulate educators, specify the requirements for issuance or renewal of an educator certificate, provide for educator disciplinary proceedings and for enforcement of the educator's code of ethics; TEC, §21.044(a), which authorizes the SBEC to adopt rules establishing training requirements and academic qualifications required for a person to obtain an educator certificate; TEC, §21.058, which requires the SBEC to revoke the certification of an educator convicted or placed on deferred adjudication community supervision for certain offenses; TEC, §21.0581, which authorizes SBEC to take action against a person who assists another person obtain employment at a school despite knowing the other person engaged in sexual misconduct with a minor or student; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; TEC, §21.065, which sets requirements for the notice SBEC must send when it suspends an educator's certificate; TEC, §21.105(c), which allows the SBEC to impose sanctions against an educator who abandons a probationary contract; TEC, §21.160(c), which allows the SBEC to impose sanctions against an educator who abandons a continuing contract; TEC, §21.210(c), which allows the SBEC to impose sanctions against an educator who abandons a term contract; TEC, §22.082, which requires the SBEC to subscribe to the criminal

history clearinghouse and allows the SBEC to obtain any criminal history from any closed case file; TEC, §22.0831, which requires the SBEC to review the criminal history of certified educators and applicants for certification; TEC, §22.085, which requires school districts, charter schools, and shared services arrangements to conduct fingerprint criminal background checks on employees and refuse to hire those that have certain criminal history; TEC, §22.087, which requires superintendents and directors of school districts, charter schools, private schools, regional education service centers, and shared services arrangements to notify the SBEC if an applicant for a certification has criminal history that is not in the criminal history clearinghouse; TEC, §22.092, which requires school districts, charter schools, districts of innovation, regional education service centers, and shared services arrangements to discharge or refuse to hire any person listed on the registry of persons not eligible for employment in Texas public schools; TEC, §22.093, requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship with a student or minor; Texas Government Code (TGC), §411.090, which allows the SBEC to get from the Texas Department of Public Safety all criminal history record information about any applicant for licensure as an educator; TGC, §2001.054(c), which requires the SBEC to give notice by personal service or by registered or certified mail to the license holder of the factors or conduct alleged to warrant suspension, revocation, annulment, or withdrawal of an educator's certificate and to give the certified educator an opportunity to show that the educator is in compliance with the relevant statutes and rules; TGC, §2001.058(e), which sets out the requirements for when the SBEC can make changes to a proposal for decision from an administrative law judge; TGC, §2001.142(a), which requires all Texas state licensing agencies to notify parties to contested cases of orders or decisions of the agency by personal service, electronic means if the parties have agreed to it, first class, certified or registered mail, or by any method required under the agency's rules for a party to serve copies of pleadings in a contested case; Texas Family Code (TFC), §261.308(d) and (e), which require the Texas Department of Family and Protective Services to release information regarding a person alleged to have committed abuse or neglect to the SBEC; TFC, §261.406(a) and (b), which require the Texas Department of Family and Protective Services to send a copy of a completed investigation report involving allegations of abuse or neglect of a child in a public or private school to the TEA; Texas Occupations Code (TOC), §53.021(a), which allows the SBEC to suspend or revoke an educator's certificate or refuse to issue a certificate, if a person is convicted of certain offenses; TOC, §53.022, which sets out factors for the SBEC to determine whether a particular criminal offense relates to the occupation of education; TOC, §53.023, which sets out additional factors for the SBEC to consider when deciding whether to allow a person convicted of a crime to serve as an educator; TOC, §53.0231, which sets out information the SBEC must give an applicant when it denies a license and requires that the SBEC allow 30 days for the applicant to submit any relevant information to the SBEC; TOC, §53.0232, which precludes SBEC from considering arrests that did not result in convictions or placement on deferred adjudication community supervision in the determination of fitness to be licensed as an educator; TOC, §53.024, which states that proceedings to deny or sanction an educator's certification are covered by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001; TOC, §53.025, which gives the SBEC rulemaking authority to issue guidelines to define which crimes relate to the profession of education; TOC, §53.051, which requires that the SBEC notify a license holder or applicant after denying, suspending, or revoking the certification; TOC, §53.052, which allows a person who has been denied an educator certification or had their educator certification revoked or suspended to file a petition for review in state district court after exhausting all administrative remedies; TOC, §56.003, which prohibits state agencies from taking disciplinary action against licensees for student loan non-payment or default; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the jobseeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code (TEC), §§21.006(a), (b), (b-1), (b-2), (c), (c-1), (c-2), (f), (g), (g-1), and (i); 21.0062; 21.007; 21.009(e); 21.031(a); 21.035; 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a), 21.058; 21.0581; 21.060; 21.065; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085; 22.087; 22.092; and 22.093; Texas Government Code (TGC), §§411.090, 2001.054(c), 2001.058(e), and 2001.142(a); Texas Family Code (TFC), §261.308(d) and (e) and §261.406(a) and (b); Texas Occupations Code (TOC), §§53.021(a), 53.022-53.025, 53.051, 53.052 and 56.003; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926.

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§249.3. Definitions.

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

- (1) Abuse--This term has the meaning assigned by Texas Family Code, §261.001(1).
- (2) Administrative denial--A decision or action by the Texas Education Agency staff, acting on behalf of the State Board for Educator Certification, to deny certification (including certification following revocation, cancellation, or surrender of a previously issued certificate), renewal of certification, or reinstatement of a previously suspended certificate based on the withholding or voiding of certification test scores; the invalidation of a certification test registration; evidence of a lack of good moral character; or evidence of improper conduct.
- (3) Administrative law judge--A person appointed by the chief judge of the State Office of Administrative Hearings under the Texas Government Code, Chapter 2003.
- (4) Answer--The responsive pleading filed in reply to factual and legal issues raised in a petition.
- (5) Applicant--A party seeking issuance, renewal, or reinstatement of a certificate from the Texas Education Agency staff or the State Board for Educator Certification.
- (6) Cancellation--The invalidation of an erroneously issued certificate.
- (7) Certificate--The whole or part of any educator credential, license, or permit issued under the Texas Education Code, Chapter 21, Subchapter B. The official certificate is the record of the certificate as maintained on the Texas Education Agency's website.
- (8) Certificate holder--A person who holds an educator certificate issued under the Texas Education Code, Chapter 21, Subchapter B.
- (9) Chair--The presiding officer of the State Board for Educator Certification, elected pursuant to the Texas Education Code, §21.036, or other person designated by the chair to act in his or her absence or inability to serve.
- (10) Chief judge--The chief administrative law judge of the State Office of Administrative Hearings.
- (11) Code of Ethics--The Educators' Code of Ethics codified in Chapter 247 of this title (relating to the Educators' Code of Ethics).
- (12) Complaint--A written statement submitted to the Texas Education Agency staff that contains essential facts alleging improper conduct by an educator, applicant, or examinee, the complainant's verifiable contact information, including full name, complete address, and phone number, which provides grounds for sanctions.
- (13) Contested case--A proceeding under this chapter in which the legal rights, duties, and privileges related to a party's educator certificate are to be determined by the State Board for Educator Certification and/or the State Office of Administrative Hearings commencing when a petition is properly served under this chapter.
- (14) Conviction--An adjudication of guilt for a criminal offense. The term does not include the imposition of deferred adjudication for which the judge has not proceeded to an adjudication of guilt.
- (15) Deferred adjudication--The resolution of a criminal charge, based on a defendant's plea to the offense of guilty or nolo contendere, which results in the suspension of adjudication of the defendant's guilt and the imposition of conditions such as community supervision or restitution, and, upon successful completion of those conditions, the dismissal of the criminal case. In a contested case under this chapter, the defendant's acceptance of deferred adjudication in a criminal case may be considered as provided by the Texas Occupations Code, §53.021.
- (16) Disciplinary proceedings--Any matter arising under this chapter or Chapter 247 of this title (relating to the Educators' Code of Ethics) that results in a final order or finding issued by the Texas Education Agency staff, the State Office of Administrative Hearings, or the State Board for

Educator Certification relating to the legal rights, duties, privileges, and status of a party's educator certificate.

- (17) Educator--A person who is required to hold a certificate issued under the Texas Education Code, Chapter 21, Subchapter B.
- (18) Effective date--The date the decision or action taken by the State Board for Educator Certification or the Texas Education Agency staff becomes final under the appropriate legal authority.
- (19) Endanger--Exposure of a student or minor to unjustified risk of injury or to injury that jeopardizes the physical health or safety of the student or minor without regard to whether there has been an actual injury to the student or minor.
- (20) Examinee--A person who registers to take or who takes any examination required by the State Board for Educator Certification for admission to an educator preparation program or to obtain an educator certificate.
- (21) Expired--No longer valid because a specific period or term of validity of a certificate has ended; an expired certificate is not subject to renewal or revalidation and a new certificate must be issued.
- (22) Filing--Any written petition, answer, motion, response, other written instrument, or item appropriately filed under this chapter with the Texas Education Agency staff, the State Board for Educator Certification, or the State Office of Administrative Hearings.
- (23) Good moral character--The virtues of a person as evidenced by patterns of personal, academic, and occupational behaviors that, in the judgment of the State Board for Educator Certification, indicate honesty, accountability, trustworthiness, reliability, and integrity. Lack of good moral character may be evidenced by the commission of crimes relating directly to the duties and responsibilities of the education profession as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21), or by the commission of acts involving moral turpitude, but conduct that evidences a lack of good moral character is not necessarily limited to such crimes or acts.
- (24) Inactive--Lacking current effectiveness. An inactive certificate does not currently entitle the certificate holder to work as a professional educator in Texas public schools. An inactive certificate is distinguished from a certificate that is void or expired by the fact that it can be reactivated by satisfying the condition or conditions that caused it to be placed in inactive status (failure to renew, failure to submit fingerprint information, or payment of fees), subject to any other certification requirements applicable to active certificates.
- (25) Inappropriate relationship--A violation of Texas Penal Code, §21.12(a); a sexual or romantic relationship with a student or minor; or solicitation of a sexual or romantic relationship with a student or minor.
- (26) Informal conference--An informal meeting between the Texas Education Agency staff and an educator, applicant, or examinee; such a meeting may be used to give the person an opportunity to show compliance with all requirements of law for the granting or retention of a certificate or test score pursuant to Texas Government Code, §2001.054(c).
- (27) Invalid--Rendered void; lacking legal or administrative efficacy.
- (28) Law--The United States and Texas Constitutions, state and federal statutes, regulations, rules, relevant case law, and decisions and orders of the State Board for Educator Certification and the commissioner of education.
- (29) Mail--Certified United States mail, return receipt requested, first-class United States mail, or electronic mail.
- (30) Majority--A majority of the voting members of the State Board for Educator Certification who are present and voting on the issue at the time the vote is recorded.

- (31) Moral turpitude--Improper conduct, including, but not limited to, the following: dishonesty; fraud; deceit; theft; misrepresentation; deliberate violence; base, vile, or depraved acts that are intended to arouse or to gratify the sexual desire of the actor; drug or alcohol related offenses as described in §249.16(b) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21); or acts constituting abuse or neglect under the Texas Family Code, §261.001.
- (32) Neglect--The placing or leaving of a student or minor in a situation where the student or minor would be exposed to a substantial risk of physical or mental harm.
- (33) Party--Each person named or admitted to participate in a contested case under this chapter.
- (34) Permanent revocation--Revocation without the opportunity to reapply for a new certificate.
- (35) Person--Any individual, representative, corporation, or other entity, including the following: an educator, applicant, or examinee; the Texas Education Agency staff; or the State Board for Educator Certification, the State Office of Administrative Hearings, or any other agency or instrumentality of federal, state, or local government.
- (36) Petition--The written pleading served by the petitioner in a contested case under this chapter.
- (37) Petitioner--The party seeking relief, requesting a contested case hearing under this chapter, and having the burden of proof by a preponderance of the evidence in any contested case hearing or proceeding under this chapter.
- (38) Physical mistreatment--Any act of unreasonable or offensive touching that would be offensive to a reasonable person in a similar circumstance. It is an affirmative defense that any unreasonable or offensive touching was justified under the circumstances, using a reasonable person standard.
- (39) Presiding officer--The chair or acting chair of the State Board for Educator Certification.
- (40) Proposal for decision--A recommended decision issued by an administrative law judge in accordance with the Texas Government Code, §2001.062.
- (41) Quorum--A majority of the 14 members appointed to and serving on the State Board for Educator Certification (SBEC) pursuant to the Texas Education Code, §21.033; eight SBEC members, including both voting and non-voting members, as specified in the SBEC Operating Policies and Procedures.
- (42) Recklessly--An educator acts recklessly, or is reckless, with respect to circumstances surrounding his or her conduct or the results of his or her conduct when he or she is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or that the result will occur.
- (43) Reinstatement--The restoration of a suspended certificate to valid status by the State Board for Educator Certification.
- (44) Reported criminal history--Information concerning any formal criminal justice system charges and dispositions. The term includes, without limitation, arrests, detentions, indictments, criminal information, convictions, deferred adjudications, and probations in any state or federal jurisdiction.
- (45) Representative--A person representing an educator, applicant, or examinee in matters arising under this chapter; in a contested case proceeding before the State Office of Administrative Hearings (SOAH), an attorney licensed to practice law in the State of Texas or other person authorized as a party representative under SOAH rules.
- (46) Reprimand--The State Board for Educator Certification's formal censuring of a certificate holder.
 - (A) An "inscribed reprimand" is a formal, published censure appearing on the face of the educator's virtual certificate.
 - (B) A "non-inscribed reprimand" is a formal, unpublished censure that does not appear on the face of the educator's virtual certificate.

- (47) Respondent--The party who contests factual or legal issues or both raised in a petition; the party filing an answer in response to a petition.
- (48) Restricted--The condition of an educator certificate that has had limitations or conditions on its use imposed by State Board for Educator Certification order.
- (49) Revocation--A sanction imposed by the State Board for Educator Certification invalidating an educator's certificate.
- (50) Sanction--A disciplinary action by the State Board for Educator Certification, including a restriction, reprimand, suspension, revocation of a certificate, or a surrender in lieu of disciplinary action.
- (51) Solicitation of a romantic relationship--Deliberate or repeated acts that can be reasonably interpreted as the solicitation by an educator of a relationship with a student that is romantic in nature. A romantic relationship is often characterized by a strong emotional or sexual attachment and/or by patterns of exclusivity but does not include appropriate educator-student relationships that arise out of legitimate contexts such as familial connections or longtime acquaintance. The following acts, considered in context, constitute evidence of the solicitation by an educator of a romantic relationship with a student:
 - (A) behavior, gestures, expressions, or communications with a student that are unrelated to the educator's job duties and evidence a romantic intent or interest in the student, including statements of love, affection, or attraction. Factors that may be considered in determining the romantic intent of such communications or behavior, include, without limitation:
 - (i) the nature of the communications;
 - (ii) the timing of the communications;
 - (iii) the extent of the communications;
 - (iv) whether the communications were made openly or secretly;
 - (v) the extent that the educator attempts to conceal the communications;
 - (vi) if the educator claims to be counseling a student, the State Board for Educator Certification may consider whether the educator's job duties included counseling, whether the educator reported the subject of the counseling to the student's guardians or to the appropriate school personnel, or, in the case of alleged abuse or neglect, whether the educator reported the abuse or neglect to the appropriate authorities; and
 - (vii) any other evidence tending to show the context of the communications between educator and student;
 - (B) making inappropriate comments about a student's body, creating or transmitting sexually suggestive photographs or images, or encouraging the student to transmit sexually suggestive photographs or images;
 - (C) making sexually demeaning comments to a student;
 - (D) making comments about a student's potential sexual performance;
 - (E) requesting details of a student's sexual history;
 - (F) requesting a date, sexual contact, or any activity intended for the sexual gratification of the educator;
 - (G) engaging in conversations regarding the sexual problems, preferences, or fantasies of either party;
 - (H) inappropriate hugging, kissing, or excessive touching;

- (I) providing the student with drugs or alcohol;
 - (J) violating written directives from school administrators regarding the educator's behavior toward a student;
 - (K) grooming behaviors, considered in context and on the totality of circumstances, including, but not limited to:
 - (i) showing the student special attention;
 - (ii) giving the student individual gifts, money, or privileges;
 - (iii) isolating the student;
 - (iv) exposing the student to adult topics or conversations and/or media that is not age appropriate; or
 - (v) meeting behind closed doors with the student without another adult present;
 - (L) suggestions that a romantic relationship is desired after the student graduates, including post-graduation plans for dating or marriage; and
 - (M) any other acts tending to show that the educator solicited a romantic relationship with a student.
- (52) State assessment testing violation--Conduct that violates the security or confidential integrity of any test or assessment required by the Texas Education Code, Chapter 39, Subchapter B, or conduct that is a departure from the test administration procedures established by the commissioner of education in Chapter 101 of Part 2 of this title (relating to Assessment). The term does not include benchmark tests or other locally required assessments.
- (53) State Board for Educator Certification--The State Board for Educator Certification acting through its voting members in a decision-making capacity.
- (54) State Board for Educator Certification member(s)--One or more of the members of the State Board for Educator Certification, appointed and qualified under the Texas Education Code, §21.033.
- (55) Student--A person enrolled in a primary or secondary school, whether public, private, or charter, regardless of the person's age, or a person 18 years of age or younger who is eligible to be enrolled in a primary or secondary school, whether public, private, or charter.
- (56) Surrender--An educator's voluntary relinquishment of a particular certificate in lieu of disciplinary proceedings under this chapter resulting in an order of revocation of the certificate.
- (57) Suspension--A sanction imposed by the State Board for Educator Certification (SBEC) temporarily invalidating a particular certificate until reinstated by the SBEC.
- (58) Test administration rules or procedures--Rules and procedures governing professional examinations administered by the State Board for Educator Certification through the Texas Education Agency staff and a test contractor, including policies, regulations, and procedures set out in a test registration bulletin.
- (59) Texas Education Agency staff--Staff of the Texas Education Agency assigned by the commissioner of education to perform the State Board for Educator Certification's administrative functions and services.
- (60) Unworthy to instruct or to supervise the youth of this state--Absence of those moral, mental, and psychological qualities that are required to enable an educator to render the service essential to the accomplishment of the goals and mission of the State Board for Educator Certification policy and Chapter 247 of this title (relating to Educators' Code of Ethics). Unworthy to instruct serves as a basis for sanctions under §249.15(b)(2) of this title (relating to Disciplinary Action by State Board for Educator Certification) and for administrative denial under §249.12(b) of this title (relating to Administrative Denial; Appeal). A determination that a person is unworthy to instruct does not require a criminal conviction. It is a rebuttable presumption that an educator who violates written

directives from school administrators regarding the educator's behavior toward a student is unworthy to instruct or to supervise the youth of this state.

- (61) Virtual certificate--The official record of a person's certificate status as maintained on the Texas Education Agency's website.

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STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §§21.006(a)-(c-2), (f)-(g-1), and (i), which require the superintendent or director of a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center or shared services arrangement to report to the SBEC within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct, unless the superintendent or director completes an investigation before the educator resigns or is terminated and determines that the educator did not commit the alleged misconduct. It also requires principals to report to superintendents within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct. It further authorizes the SBEC to impose sanctions on educators who fail to report as required by the statute, including authority to impose monetary administrative penalties, gives SBEC rulemaking authority as necessary to implement the statute, and requires the SBEC to create an internet portal to facilitate confidential and secure reporting; TEC, §21.0062, which requires the chief administrative officer of a private school to notify the SBEC within seven days when a private school educator resigns before the completion of an investigation or is terminated and there is evidence that the educator has engaged in certain misconduct and gives the SBEC rulemaking authority to implement the section; TEC, §21.007, which gives the SBEC authority to place a notice that an educator is under investigation for alleged misconduct on the educator's public certification records, requires the SBEC give the educator notice and an opportunity to show cause, requires that the SBEC limit the amount of time the notice can appear on the educator's certification, and gives the SBEC rulemaking authority as necessary to implement the provision; TEC, §21.009(e), which states that the SBEC may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that TEA staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041(a) and (b)(1), (4), (7), and (8), which authorize the SBEC to adopt rules as necessary for its own procedures, to regulate educators, specify the requirements for issuance or renewal of an educator certificate, provide for educator disciplinary proceedings and for enforcement of the educator's code of ethics; TEC, §21.044(a), which authorizes the SBEC to adopt rules establishing training requirements and academic qualifications required for a person to obtain an educator certificate; TEC, §21.058, which requires the SBEC to revoke the certification of an educator convicted or placed on deferred adjudication community supervision for certain offenses; TEC, §21.0581, which authorizes SBEC to take action against a person who assists another person obtain employment at a school despite knowing the other person engaged in sexual misconduct with a minor or student; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; TEC, §21.065, which sets requirements for the notice SBEC must send when it suspends an educator's certificate; TEC, §21.105(c), which allows the SBEC to impose sanctions against an educator who abandons a probationary contract; TEC, §21.160(c), which allows the SBEC to impose sanctions against an educator who abandons a continuing contract; TEC, §21.210(c), which allows the SBEC to impose sanctions against an educator who abandons a term contract; TEC, §22.082, which requires the SBEC to subscribe to the criminal history clearinghouse and allows the SBEC to obtain any criminal history from any closed case file; TEC, §22.0831, which requires the SBEC to review the criminal history of certified educators and applicants for certification; TEC, §22.085, which requires school districts, charter schools, and shared services arrangements to conduct fingerprint criminal background checks on employees and refuse to hire those that have certain criminal history; TEC, §22.087, which requires superintendents and directors of school districts, charter schools, private schools, regional education service centers, and shared services arrangements to notify the SBEC if an applicant for a certification has criminal history that is not in the criminal history clearinghouse; TEC, §22.092, which requires school districts, charter schools, districts of innovation, regional education service centers, and shared services arrangements to discharge or refuse to hire any person listed on the registry of persons not eligible for employment in Texas public schools; TEC, §22.093, requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship with a student or minor; Texas Government Code (TGC), §411.090, which allows the SBEC to get from the Texas Department of Public Safety all criminal history record information about any applicant for licensure as an educator; TGC, §2001.054(c), which requires the SBEC

to give notice by personal service or by registered or certified mail to the license holder of the factors or conduct alleged to warrant suspension, revocation, annulment, or withdrawal of an educator's certificate and to give the certified educator an opportunity to show that the educator is in compliance with the relevant statutes and rules; TGC, §2001.058(e), which sets out the requirements for when the SBEC can make changes to a proposal for decision from an administrative law judge; TGC, §2001.142(a), which requires all Texas state licensing agencies to notify parties to contested cases of orders or decisions of the agency by personal service, electronic means if the parties have agreed to it, first class, certified or registered mail, or by any method required under the agency's rules for a party to serve copies of pleadings in a contested case; Texas Family Code (TFC), §261.308(d) and (e), which require the Texas Department of Family and Protective Services to release information regarding a person alleged to have committed abuse or neglect to the SBEC; TFC, §261.406(a) and (b), which require the Texas Department of Family and Protective Services to send a copy of a completed investigation report involving allegations of abuse or neglect of a child in a public or private school to the TEA; Texas Occupations Code (TOC), §53.021(a), which allows the SBEC to suspend or revoke an educator's certificate or refuse to issue a certificate, if a person is convicted of certain offenses; TOC, §53.022, which sets out factors for the SBEC to determine whether a particular criminal offense relates to the occupation of education; TOC, §53.023, which sets out additional factors for the SBEC to consider when deciding whether to allow a person convicted of a crime to serve as an educator; TOC, §53.0231, which sets out information the SBEC must give an applicant when it denies a license and requires that the SBEC allow 30 days for the applicant to submit any relevant information to the SBEC; TOC, §53.0232, which precludes SBEC from considering arrests that did not result in convictions or placement on deferred adjudication community supervision in the determination of fitness to be licensed as an educator; TOC, §53.024, which states that proceedings to deny or sanction an educator's certification are covered by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001; TOC, §53.025, which gives the SBEC rulemaking authority to issue guidelines to define which crimes relate to the profession of education; TOC, §53.051, which requires that the SBEC notify a license holder or applicant after denying, suspending, or revoking the certification; TOC, §53.052, which allows a person who has been denied an educator certification or had their educator certification revoked or suspended to file a petition for review in state district court after exhausting all administrative remedies; TOC, §56.003, which prohibits state agencies from taking disciplinary action against licensees for student loan non-payment or default; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the jobseeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.006(a), (b), (b-1), (b-2), (c), (c-1), (c-2), (f), (g), (g-1), and (i); 21.0062; 21.007; 21.009(e); 21.031(a); 21.035; 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a), 21.058; 21.0581; 21.060; 21.065; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085; 22.087; 22.092; and 22.093; Texas Government Code (TGC), §§411.090, 2001.054(c), 2001.058(e), and 2001.142(a); Texas Family Code (TFC), §261.308(d) and (e) and §261.406(a) and (b); Texas Occupations Code (TOC), §§53.021(a), 53.022-53.025, 53.051, 53.052 and 56.003; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926.

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§249.11. Test Irregularities; Appeal; Sanctions.

- (a) Upon satisfactory evidence that the examinee has violated certification test administration rules or procedures, the State Board for Educator Certification may cancel the examinee's test scores or registration and bar the person from being admitted to future test administrations. The Texas Education Agency (TEA) staff shall provide written notice of this action and the factual and legal reasons for it to the examinee by first-class United States mail or electronic notification to the most recent address provided to the TEA or its test contractor by the examinee. The examinee may attempt to show compliance with test administration rules or procedures by written submission or by requesting an informal conference, and/or may appeal and request a State Office of Administrative Hearings (SOAH) hearing as hereafter provided.
- (b) The examinee may appeal and request a SOAH hearing of the administrative cancellation of test scores and/or test admission bar. The appeal of an administrative cancellation shall be in the form of a petition that complies in content and form with §249.26 of this title (relating to Petition) and 1 Texas Administrative Code, Part 7, §155.301 (relating to Required Form of Pleadings).

- (c) In order to be referred to the SOAH for a contested case hearing, an appeal petition must be filed with the TEA staff within 30 calendar days after the examinee received or is deemed to have received written notice of the TEA staff's action. Unless otherwise proved by the examinee, the notice shall be deemed to have been received by the examinee no later than five calendar days after mailing to the most recent address provided by the examinee. The TEA staff may dismiss an appeal not timely filed.
- (d) The TEA staff shall send an answer to the petition to the examinee and shall refer the petition and answer to the SOAH for a contested case hearing.

§249.12. Administrative Denial; Appeal.

- (a) This section applies to administrative denials, as that term is defined in §249.3 of this title (relating to Definitions). This section does not apply to the denial of an application for a certificate that has been permanently revoked, and it does not apply to the failure to issue a certificate because specific certification requirements have not been met.
- (b) The Texas Education Agency (TEA) staff may administratively deny any of the matters set out in subsection (a) of this section based on satisfactory evidence that:
 - (1) the person filed a fraudulent application;
 - (2) the person assisted another person in obtaining employment at a school district or open-enrollment charter school, other than by the routine transmission of administrative or personnel files when the person knew that the other person had previously engaged in an inappropriate relationship with a minor or student in violation of the law;
 - (3) the person has committed an act that would make them subject to required revocation under the Texas Education Code, §21.058, or placement on the Registry of Persons Not Eligible for Hire under Texas Education Code, §22.092, not due to State Board for Educator Certification (SBEC) action;
 - (4) the person has committed an act that would make them subject to mandatory permanent revocation or denial under §249.17(i) of this title (relating to Decision-Making Guidelines);
 - (5) the person has engaged in conduct or committed a crime or an offense that:
 - (A) demonstrates that the person lacks good moral character;
 - (B) demonstrates that the person violated the Educators' Code of Ethics under Chapter 247 of this title (relating to Educators' Code of Ethics);
 - (C) demonstrates that the person is unworthy to instruct or to supervise the youth of this state; or
 - (D) constitutes the elements of a crime or offense relating directly to the duties and responsibilities of the education profession; or
 - (6) the person failed to comply with the terms or conditions of an order issued by or on behalf of the SBEC or the TEA staff.
- (c) The TEA staff shall provide written notice of the denial and the factual and legal reasons for it to the person whose application or request has been administratively denied. The notice shall be given by registered or certified mail to the address the person has provided in the application or request that is being denied. The person may attempt to show compliance with legal requirements by written submission or by requesting an informal conference, and/or may appeal and request a State Office of Administrative Hearings (SOAH) hearing as hereafter provided. The 30-day deadline to appeal and request a hearing is not tolled during any attempts to show cause.
- (d) The appeal and request for a SOAH hearing of an administrative denial shall be in the form of a petition that complies in content and form with §249.26 of this title (relating to Petition) and 1 Texas Administrative Code, Part 7, §155.301 (relating to Required Form of Pleadings). In order to be referred to the SOAH for a contested case hearing, an appeal petition must be filed with the TEA staff within 30 calendar days after the person received or is deemed to have received written notice of the administrative

denial. Unless otherwise proved by the person, the notice shall be deemed to have been received by the examinee no later than five calendar days after mailing to the most recent address provided by the person. The TEA staff may dismiss an appeal that is not timely filed without further action.

- (e) The TEA staff shall send an answer to the petition to the person appealing an administrative denial and shall refer the petition and answer to the SOAH for a contested case hearing.

§249.13. Cancellation of an Erroneously Issued Certificate.

- (a) When satisfactory evidence indicates that a certificate was issued in error and the person issued the certificate has not fulfilled all certification requirements, the Texas Education Agency (TEA) staff shall cancel the certificate. The effective date of cancellation is the date the person's virtual certificate is updated to reflect that the certificate is no longer valid.
- (b) Before canceling the certificate, the TEA staff shall notify the person issued the certificate of the reasons for which the TEA intends to cancel the certificate and shall provide the person issued the certificate at least ten calendar days to respond and show cause why the certificate should not be canceled. Unless otherwise proved by the person, the show cause notice shall be deemed to have been received by the person no later than five calendar days after mailing to the most recent address the person is required to provide pursuant to §230.91 of this title (relating to Procedures in General).
- (c) The TEA staff shall notify the person and the person's employing school district, if any, that the person was issued a certificate in error, what actions the TEA staff have taken to cancel the erroneously issued certificate, and how the person can be issued a valid certificate.
- (d) The TEA staff will issue the person a valid certificate when it receives satisfactory evidence that all certification requirements have been fulfilled. The person will not be required to repeat any coursework, training, internship, or other certification requirements that an educator preparation program certifies that the person has completed.
- (e) The person whose erroneously issued certificate has been canceled may request a contested case hearing before the State Office of Administrative Hearings (SOAH). For the purposes of notice, time limits, appeal requirements, and determining the placement of the burden of proof at the SOAH contested case hearing, the person whose certificate has been canceled shall be deemed to have had his or her original application for the erroneously issued certificate administratively denied pursuant to §249.12 of this title (relating to Administrative Denial; Appeal) on the effective date of the cancellation.
- (f) This section does not apply to a certificate erroneously issued as the result of a documented TEA systems error.

§249.14. Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition.

- (a) The Texas Education Agency (TEA) staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the State Board for Educator Certification (SBEC) denying relief to or taking disciplinary action against the person or certificate.
- (b) Complaints against an educator, applicant, or examinee must be filed in writing.
- (c) The TEA staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.
- (d) A person who serves as the superintendent of a school district or district of innovation, the director of a charter school, regional education service center, or shared services arrangement, or the chief administrative officer of a private school may notify the SBEC of any educator misconduct that the person believes in good faith may be subject to sanctions under this chapter and/or Chapter 247 of this title (relating to Educators' Code of Ethics). However, under any of the following circumstances, a person who serves in such a position shall promptly notify the SBEC in writing by filing a report with the TEA staff within seven business days of the date the person either receives a report from a principal under subsection (e) of this section or knew of any of the following circumstances, except if the person is a superintendent or

director of a public school and has completed an investigation in accordance with Texas Education Code (TEC), §21.006(c-2), resulting in a determination that the educator did not engage in misconduct:

- (1) that an applicant for or a holder of a certificate has a reported criminal history, which the superintendent or director obtained information by a means other than the criminal history clearinghouse established under Texas Government Code, §411.0845;
 - (2) that a certificate holder was terminated from employment and there is evidence that he or she committed any of the following acts:
 - (A) sexually or physically abused a student or minor or engaged in any other illegal conduct with a student or minor;
 - (B) possessed, transferred, sold, or distributed a controlled substance;
 - (C) illegally transferred, appropriated, or expended school property or funds;
 - (D) attempted by fraudulent or unauthorized means to obtain or to alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate or permit or to receive additional compensation associated with a position;
 - (E) committed a crime, any part of such crime having occurred on school property or at a school-sponsored event; or
 - (F) solicited or engaged in sexual conduct or a romantic relationship with a student or minor;
 - (3) that a certificate holder has submitted a notice of resignation and that there exists evidence that he or she committed one of the acts specified in paragraph (2) of this subsection.
 - (A) Before accepting an employee's resignation that, under this paragraph, requires a person to notify the SBEC by filing a report with the TEA staff, the person shall inform the certificate holder in writing that such a report will be filed and that sanctions against his or her certificate may result as a consequence.
 - (B) A person required to comply with this paragraph shall notify the governing body of the employing school district before filing the report with the TEA staff.
 - (C) A superintendent or director of a school district shall complete an investigation of an educator if there is reasonable cause to believe the educator may have engaged in misconduct described in paragraph (2)(A) of this subsection despite the educator's resignation from district employment before completion of the investigation; or
 - (4) any other circumstances requiring a report under the TEC, §21.006.
- (e) A person who serves as a principal in a school district, a district of innovation, or a charter school must notify the superintendent or director of the school district, district of innovation, or charter school and may be subject to sanctions for failure to do so no later than seven business days after:
- (1) an educator's termination or resignation following an alleged incident of misconduct involving one of the acts described in subsection (d)(2) of this section; or
 - (2) the principal knew about an educator's reported criminal history.
- (f) Pursuant to the TEC, §21.006(b-2), (c), (h), and (i), a report filed under subsections (d) and (e) of this section must include:
- (1) the name or names of any student or minor who is the victim of abuse or unlawful conduct by an educator; and
 - (2) the factual circumstances requiring the report and the subject of the report by providing the following available information:
 - (A) name and any aliases; certificate number, if any, or social security number;
 - (B) last known mailing address and home and daytime phone numbers;

- (C) all available contact information for any alleged victim or victims;
 - (D) name or names and any available contact information of any relevant witnesses to the circumstances requiring the report;
 - (E) current employment status of the subject, including any information about proposed termination, notice of resignation, or pending employment actions; and
 - (F) involvement by a law enforcement or other agency, including the name of the agency.
- (g) Pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 United States Code, §1232g(a)(4), and the federal regulations interpreting it at 34 Code of Federal Regulations, §99.3, education records that are protected by FERPA must be records that are directly related to a student, and the term "education records" does not include records that relate to a school employee in his or her capacity as a school employee.
- (h) A person who is required to file a report under subsections (d) and (e) of this section but fails to do so timely is subject to sanctions under this chapter.
- (i) If a school district board of trustees learns of a failure by the superintendent of the district or a district principal to provide a notice required under the Texas Code of Criminal Procedure (TCCP), §15.27(a), (a-1), or (b), the board of trustees shall report the failure to the SBEC. If the governing body of a private primary or secondary school learns of a failure by the principal of the school to provide a notice required under the TCCP, §15.27(e), and the principal holds a certificate issued under the TEC, Chapter 21, Subchapter B, the governing body shall report the failure to the SBEC.
- (j) The TEA staff shall not pursue sanctions against an educator who is alleged to have abandoned his or her TEC, Chapter 21, contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c), subject to the limitations imposed by the TEC, §21.4021(g), unless the board of trustees of the employing school district:
- (1) submits a written complaint to the TEA staff within 30 calendar days after the effective date of the educator's separation from employment from the school district. For purposes of this section, unless the school district and the educator have a written agreement to the contrary, the effective date of separation from employment is the first day that, without district permission, the educator fails to appear for work under the contract;
 - (2) renders a finding that good cause did not exist under the TEC, §§21.105(c)(2), 21.160(c)(2), or 21.210(c)(2). This finding constitutes prima facie evidence of the educator's lack of good cause, but is not a conclusive determination; and
 - (3) submits the following required attachments to the written complaint:
 - (A) the educator's resignation letter, if any;
 - (B) the agreement with the educator regarding the effective date of separation from employment, if any;
 - (C) the educator's contract; and
 - (D) school board meeting minutes indicating a finding of "no good cause" (if the board does not meet within 30 calendar days of the educator's separation from employment, the minutes may be submitted within 10 calendar days after the next board meeting).
- (k) To efficiently administer and implement the SBEC's purpose under this chapter and the TEC, the TEA staff may set priorities for the investigation of complaints based on the severity and immediacy of the allegations and the likelihood of harm posed by the subject of the investigation. All cases accepted for investigation shall be assigned one of the following priorities.
- (1) Priority 1: conduct that may result in the placement of an investigative notice pursuant to the TEC, §21.007, and subsection (l) of this section because it presents a risk to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague, including, but not limited to, the following:
 - (A) any conduct constituting a felony criminal offense;

- (B) indecent exposure;
 - (C) public lewdness;
 - (D) child abuse and/or neglect;
 - (E) possession of a weapon on school property;
 - (F) drug offenses occurring on school property;
 - (G) sale to or making alcohol or other drugs available to a student or minor;
 - (H) sale, distribution, or display of harmful material to a student or minor;
 - (I) certificate fraud;
 - (J) state assessment testing violations;
 - (K) deadly conduct; and
 - (L) conduct that involves inappropriate communication with a student as described in §247.2(3)(I) of this title (relating to Code of Ethics and Standard Practices for Texas Educators), inappropriate professional educator-student relationships and boundaries, or otherwise soliciting or engaging in sexual conduct or a romantic relationship with a student or minor.
- (2) Priority 2: any sanctionable conduct that is not Priority 1 conduct under paragraph (1) of this subsection. An investigative notice will not be placed on an educator's certification records on the basis of an allegation of Priority 2 conduct. The TEA staff may change a case's priority at any time based on information received. Priority 2 conduct includes, but is not limited to, the following:
- (A) any conduct constituting a misdemeanor criminal offense or testing violation that is not Priority 1 conduct;
 - (B) contract abandonment; and
 - (C) code of ethics violations that do not constitute Priority 1 conduct.
- (l) After accepting a case for investigation, if the alleged conduct indicates a risk to the health, safety, or welfare of a student or minor, as described in subsection (k)(1) of this section, the TEA staff shall immediately place an investigative notice on the certificate holder's certification records stating that the certificate holder is currently under investigation. The placement of such an investigative notice must follow the procedures set forth in subsection (m)(1) of this section. After accepting a case for investigation, if the alleged conduct indicates a risk to the health, safety, or welfare of a parent of a student, fellow employee, or professional colleague, as described in subsection (k)(1) of this section, the TEA staff may place an investigative notice on the certificate holder's certification records stating that the certificate holder is currently under investigation. The placement of an investigative notice must follow the procedures set forth in subsection (m)(2) of this section.
- (m) The following procedures must be followed for placing an investigative notice on the educator's certification records.
- (1) At the time of placing an investigative notice on an educator's certification records for alleged conduct that indicates a risk to the health, safety, or welfare of a student or minor, the TEA staff shall serve the certificate holder with a letter informing the educator of the investigation and the basis of the complaint.
 - (A) Within ten calendar days of placing an investigative notice on the educator's certification records, the letter notifying the certificate holder of the investigation shall be mailed to the address provided to the TEA staff pursuant to the requirements set forth in §230.91 of this title (relating to Procedures in General).
 - (B) The letter notifying the certificate holder of the investigation shall include a statement of the alleged conduct, which forms the basis for the investigative notice, and shall provide

the certificate holder the opportunity to show cause within ten calendar days why the notice should be removed from the educator's certification records.

- (2) Prior to placing an investigative notice on an educator's certification records for alleged conduct that indicates a risk to the health, safety, or welfare of a parent of a student, fellow employee, or professional colleague, as described in subsection (k)(1) of this section, the TEA staff shall serve the certificate holder with a letter informing the educator of the investigation and the basis of the complaint.
 - (A) At least ten calendar days before placing an investigative notice on the educator's certification records, the letter notifying the certificate holder of the investigation shall be mailed to the address provided to the TEA staff pursuant to the requirements set forth in §230.91 of this title.
 - (B) The letter notifying the certificate holder of the investigation shall include a statement of the alleged conduct, which forms the basis for the investigative notice, and shall provide the certificate holder the opportunity to show cause within ten calendar days why the notice should not be placed on the educator's certification records.
 - (3) The TEA staff shall determine whether or not to remove or place an investigative notice on the educator's certification records, taking into account the educator's response, if any, to the letter notifying the certificate holder of the investigation.
- (n) An investigative notice is subject to the following time limits.
 - (1) An investigative notice may remain on the certification records of a certificate holder for a period not to exceed 240 calendar days.
 - (2) The TEA staff may toll this time limit if information is received indicating that there is a pending criminal or administrative matter related to the alleged act of misconduct that gives rise to the investigative notice. For purposes of this subsection, a criminal or administrative matter includes an audit by a state or federal agency, an arrest, an investigation, related litigation or other enforcement action brought by a state or federal administrative agency, or a prosecution by a criminal law enforcement agency. Upon receiving notice that the criminal or administrative matter has been resolved the tolling period shall end. As part of its procedure, the TEA staff will attempt to make bimonthly (once every two months) contact with the agency where a related matter is pending to determine whether the related matter has been closed or otherwise resolved.
 - (3) The TEA staff may toll this time limit if the matter is referred for a contested case hearing, upon agreement of the parties, or while the matter is pending action by the SBEC on a proposed agreed order.
- (o) The TEA staff shall remove an investigative notice from an educator's certification records:
 - (1) when a case's final disposition occurs within the time limits established in subsection (n) of this section; or
 - (2) when the time limits for an investigative notice have been exceeded, if:
 - (A) the certificate holder has made a written demand to the TEA staff that the investigative notice be removed because the time limits have been exceeded; and
 - (B) the TEA staff has failed to refer the matter to the State Office of Administrative Hearings for a contested case hearing within 30 calendar days from the date of receipt of the written demand to remove the investigative notice.
- (p) Before institution of agency proceedings, TEA staff shall send a letter via certified or registered mail to the certificate holder giving them notice of the facts or conduct alleged to warrant the intended action and an opportunity to show compliance with all requirements of law for the retention of the certificate.
- (q) Only the TEA staff may file a petition seeking sanctions under §249.15 of this title (relating to Disciplinary Action by State Board for Educator Certification). Prior to filing a petition, the TEA staff shall mail to the

certificate holder affected by written notice of the facts or conduct alleged to warrant the intended action and shall provide the certificate holder an opportunity to show compliance with all requirements of law.

§249.15. Disciplinary Action by State Board for Educator Certification.

- (a) Pursuant to this chapter, the State Board for Educator Certification (SBEC) may take any of the following actions:
 - (1) place restrictions on the issuance, renewal, or holding of a certificate, either indefinitely or for a set term;
 - (2) issue an inscribed or non-inscribed reprimand;
 - (3) suspend a certificate for a set term or issue a probated suspension for a set term;
 - (4) revoke or cancel, which includes accepting the surrender of, a certificate without opportunity for reapplication for a set term or permanently;
 - (5) impose any conditions or restrictions, including classes and treatment programs, upon a certificate that the SBEC deems necessary to facilitate the rehabilitation and professional development of the educator or to protect students, parents of students, school personnel, or school officials; or
 - (6) impose an administrative penalty of \$500-\$10,000 on a superintendent or director who fails to file timely a report required under §249.14(d) of this title (relating to Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition) or on a principal who fails to timely notify a superintendent or director as required under §249.14(e) of this title under the circumstances and in the manner required by the Texas Education Code (TEC), §21.006.
- (b) The SBEC may take any of the actions listed in subsection (a) of this section based on satisfactory evidence that:
 - (1) the person has conducted school or education activities in violation of law;
 - (2) the person is unworthy to instruct or to supervise the youth of this state;
 - (3) the person has violated a provision of the Educators' Code of Ethics;
 - (4) the person has failed to report or has hindered the reporting of child abuse pursuant to the Texas Family Code, §261.001, or has failed to notify the SBEC, the commissioner of education, or the school superintendent or director under the circumstances and in the manner required by the TEC, §21.006, §21.0062, §22.093, and §249.14(d)-(f) of this title;
 - (5) the person has abandoned a contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c);
 - (6) the person has failed to cooperate with the Texas Education Agency (TEA) in an investigation;
 - (7) the person has failed to provide information required to be provided by §229.3 of this title (relating to Required Submissions of Information, Surveys, and Other Data);
 - (8) the person has violated the security or integrity of any assessment required by the TEC, Chapter 39, Subchapter B, as described in subsection (g) of this section or has committed an act that is a departure from the test administration procedures established by the commissioner of education in Chapter 101 of Part 2 of this title (relating to Assessment);
 - (9) the person has committed an act described in §249.14(k)(1) of this title, which constitutes sanctionable Priority 1 conduct, as follows:
 - (A) any conduct constituting a felony criminal offense;
 - (B) indecent exposure;
 - (C) public lewdness;
 - (D) child abuse and/or neglect;
 - (E) possession of a weapon on school property;

- (F) drug offenses occurring on school property;
 - (G) sale to or making alcohol or other drugs available to a student or minor;
 - (H) sale, distribution, or display of harmful material to a student or minor;
 - (I) certificate fraud;
 - (J) state assessment testing violations;
 - (K) deadly conduct; or
 - (L) conduct that involves inappropriate communication with a student as described in §247.2(3)(I) of this title (relating to Code of Ethics and Standard Practices for Texas Educators), inappropriate professional educator-student relationships and boundaries as described in §247.2(3)(H) of this title, or otherwise soliciting or engaging in sexual conduct or a romantic relationship with a student or minor;
- (10) the person has committed an act that would constitute an offense (without regard to whether there has been a criminal conviction) that is considered to relate directly to the duties and responsibilities of the education profession, as described in §249.16(c) of this title (relating to Eligibility of Persons with Criminal History for a Certificate under Texas Occupations Code, Chapter 53, and Texas Education Code, Chapter 21). Such offenses indicate a threat to the health, safety, or welfare of a student or minor, parent of a student, fellow employee, or professional colleague; interfere with the orderly, efficient, or safe operation of a school district, campus, or activity; or indicate impaired ability or misrepresentation of qualifications to perform the functions of an educator and include, but are not limited to:
- (A) offenses involving moral turpitude;
 - (B) offenses involving any form of sexual or physical abuse or neglect of a student or minor or other illegal conduct with a student or minor;
 - (C) offenses involving any felony possession or conspiracy to possess, or any misdemeanor or felony transfer, sale, distribution, or conspiracy to transfer, sell, or distribute any controlled substance defined in the Texas Health and Safety Code, Chapter 481;
 - (D) offenses involving school property or funds;
 - (E) offenses involving any attempt by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle any person to hold or obtain a position as an educator;
 - (F) offenses occurring wholly or in part on school property or at a school-sponsored activity; or
 - (G) felony offenses involving driving while intoxicated (DWI);
- (11) the person has intentionally failed to comply with the reporting, notification, and confidentiality requirements specified in the Texas Code of Criminal Procedure, §15.27(a), relating to student arrests, detentions, and juvenile referrals for certain offenses;
- (12) the person has failed to discharge an employee or to refuse to hire an applicant when the employee or applicant was employed in a public school and on the registry of persons who are not eligible to be employed under TEC, §22.092, when the person knew that the employee or applicant had been adjudicated for or convicted of having an inappropriate relationship with a minor in accordance with the TEC, §21.009(e), or when the person knew or should have known through a criminal history record information review that the employee or applicant had been placed on community supervision or convicted of an offense in accordance with the TEC, §22.085;
- (13) the person assisted another educator, school employee, contractor, or agent in obtaining a new job as an educator or in a school, apart from the routine transmission of administrative and personnel files, when the educator knew or had probable cause to believe that such person engaged in an inappropriate relationship with a minor or student;

- (14) the person is a superintendent of a school district or the chief operating officer of an open-enrollment charter school who falsely or inaccurately certified to the commissioner of education that the district or charter school had complied with the TEC, §22.085; or
- (15) the person has failed to comply with an order or decision of the SBEC.
- (c) The TEA staff may commence a contested case to take any of the actions listed in subsection (a) of this section by serving a petition to the certificate holder in accordance with this chapter describing the SBEC's intent to issue a sanction and specifying the legal and factual reasons for the sanction. The certificate holder shall have 30 calendar days to file an answer as provided in §249.27 of this title (relating to Answer).
- (d) Upon the failure of the certificate holder to file a written answer as required by this chapter, the TEA staff may file a request for the issuance of a default judgment from the SBEC imposing the proposed sanction in accordance with §249.35 of this title (relating to Disposition Prior to Hearing; Default).
- (e) If the certificate holder files a timely answer as provided in this section, the case will be referred to the State Office of Administrative Hearings (SOAH) for hearing in accordance with the SOAH rules; the Texas Government Code, Chapter 2001; and this chapter.
- (f) The provisions of this section are not exclusive and do not preclude consideration of other grounds or measures available by law to the SBEC or the TEA staff, including child support arrears. The SBEC may request the Office of the Attorney General to pursue available civil, equitable, or other legal remedies to enforce an order or decision of the SBEC under this chapter.
- (g) The statewide assessment program as defined by the TEC, Chapter 39, Subchapter B, is a secure testing program.
 - (1) Procedures for maintaining security shall be specified in the appropriate test administration materials.
 - (2) Secure test materials must be accounted for before, during, and after each test administration. Only authorized personnel may have access to secure test materials.
 - (3) The contents of each test booklet and answer document are confidential in accordance with the Texas Government Code, Chapter 551, and the Family Educational Rights and Privacy Act of 1974. Individual student performance results are confidential as specified under the TEC, §39.030(b).
 - (4) Violation of security or confidential integrity of any test required by the TEC, Chapter 39, Subchapter B, shall be prohibited. A person who engages in conduct prohibited by this section may be subject to sanction of credentials, including any of the sanctions provided by subsection (a) of this section.
 - (5) Charter school test administrators are not required to be certified; however, any irregularity in the administration of any test required by the TEC, Chapter 39, Subchapter B, would cause the charter itself to come under review by the commissioner of education for possible sanctions or revocation, as provided under the TEC, §12.115(a)(4).
 - (6) Conduct that violates the security and confidential integrity of a test is evidenced by any departure from the test administration procedures established by the commissioner of education. Conduct of this nature may include, but is not limited to, the following acts and omissions:
 - (A) viewing a test before, during, or after an assessment unless specifically authorized to do so;
 - (B) duplicating secure examination materials;
 - (C) disclosing the contents of any portion of a secure test;
 - (D) providing, suggesting, or indicating to an examinee a response or answer to a secure test item or prompt;
 - (E) changing or altering a response or answer of an examinee to a secure test item or prompt;

- (F) aiding or assisting an examinee with a response or answer to a secure test item or prompt;
 - (G) fraudulently exempting or preventing a student from the administration of a required state assessment;
 - (H) encouraging or assisting an individual to engage in the conduct described in paragraphs (1)-(7) of this subsection; or
 - (I) failing to report to an appropriate authority that an individual has engaged in conduct outlined in paragraphs (1)-(8) of this subsection.
- (7) Any irregularities in test security or confidential integrity may also result in the invalidation of student results.
 - (8) The superintendent and campus principal of each school district and chief administrative officer of each charter school and any private school administering the tests as allowed under the TEC, §39.033, shall develop procedures to ensure the security and confidential integrity of the tests specified in the TEC, Chapter 39, Subchapter B, and shall be responsible for notifying the TEA in writing of conduct that violates the security or confidential integrity of a test administered under the TEC, Chapter 39, Subchapter B. A person who fails to report such conduct as required by this subsection may be subject to any of the sanctions provided by subsection (a) of this section.

§249.17. Decision-Making Guidelines.

- (a) Purpose. The purpose of these guidelines is to achieve the following objectives:
 - (1) to provide a framework of analysis for the Texas Education Agency (TEA) staff, the presiding administrative law judge (ALJ), and the State Board for Educator Certification (SBEC) in considering matters under this chapter;
 - (2) to promote consistency in the exercise of sound discretion by the TEA staff, the presiding ALJ, and the SBEC in seeking, proposing, and making decisions under this chapter; and
 - (3) to provide guidance for the informal resolution of potentially contested matters.
- (b) Construction and application. This section shall be construed and applied so as to preserve SBEC members' discretion in making final decisions under this chapter. This section shall be further construed and applied so as to be consistent with §249.5(b) of this title (relating to Purpose; Policy Governing Disciplinary Proceedings) and this chapter, the Texas Education Code (TEC), and other applicable law, including SBEC decisions and orders.
- (c) Consideration. The following factors may be considered in seeking, proposing, or making a decision under this chapter:
 - (1) the seriousness of the violation;
 - (2) whether the misconduct was premeditated or intentional;
 - (3) attempted concealment of misconduct;
 - (4) prior misconduct and SBEC sanctions;
 - (5) the potential danger the conduct poses to the health and welfare of students;
 - (6) the effect of the prior conduct upon any victims of the conduct;
 - (7) whether sufficient time has passed and sufficient evidence is presented to demonstrate that the educator or applicant has been rehabilitated from the prior conduct;
 - (8) the effect of the conduct upon the educator's good moral character and ability to be a proper role model for students;
 - (9) whether the sanction will deter future violations; and
 - (10) any other relevant circumstances or facts.

(d) Contract abandonment.

- (1) Good cause. The following factors may be considered good cause when an educator is reported to have abandoned a contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c):
 - (A) serious illness or health condition of the educator or close family member of the educator, as evidenced by documentation from a licensed medical provider;
 - (B) relocation to a new city as a result of change in employment of the educator's spouse or partner who resides with the educator as supported by documentation;
 - (C) significant change in the educator's family needs that requires the educator to relocate or to devote more time than allowed by current employment; or
 - (D) the educator's reasonable belief that the educator had written permission from the school district administration to resign.
- (2) Mitigating factors. The following factors shall be considered in seeking, proposing, or making a decision under this chapter regarding an educator who has abandoned a contract in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c). A reduction of one month in suspension time will be given for each factor established, except for factors in subparagraphs (G)-(I) of this paragraph. The educator:
 - (A) gave written notice to the school district 30 days or more in advance of the first day of instruction for which the educator will not be present;
 - (B) assisted the school district in finding a replacement educator to fill the position;
 - (C) continued to work until the school district hired a replacement educator;
 - (D) assisted in training the replacement educator;
 - (E) showed good faith in communications and negotiations with the school district;
 - (F) provided lesson plans for classes following the educator's resignation;
 - (G) changed careers within the field of education:
 - (i) to a position that required a different class of educator certification as defined in §230.33(b) of this title (relating to Classes of Certificates);
 - (ii) to a position with a higher level of authority within the principal class of certificate; or
 - (iii) to a position in an open-enrollment charter school or a district of innovation that is equivalent to the positions described in clauses (i) and (ii) of this subparagraph;
 - (H) had a reduction in base pay, excluding stipends, as compared to the educator's base pay for the prior year at the same school district;
 - (I) resigned due to working conditions that reasonably posed an immediate threat of significant physical harm to the educator; or
 - (J) any other relevant circumstances or facts.
- (3) Mandatory sanction for contract abandonment.
 - (A) An educator subject to sanction, who has abandoned a contract 44-30 days prior to the first day of instruction for the following school year in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c), in a case where the factors listed in subsection (c) of this section or in paragraph (1) or (2)(B)-(J) of this subsection do not mitigate or apply, shall receive a sanction of an inscribed reprimand.
 - (B) An educator subject to sanction, who has abandoned a contract less than 30 days prior to the first day of instruction for the following school year or at any point during the school

year in violation of the TEC, §§21.105(c), 21.160(c), or 21.210(c), in a case where the factors listed in subsection (c) of this section or in paragraph (1) or (2) of this subsection do not mitigate or apply, may not receive a sanction of less than:

- (i) suspension for one year from the first day that, without district permission, the educator failed to appear for work under the contract, provided that the educator has not worked as an educator during that year and the case is resolved within that one year through an agreed final order; or
- (ii) suspension for one year from either the effective date of an agreed final order resolving the case or an agreed future date at the beginning of the following school year, if the educator has worked as an educator after abandoning the contract; or
- (iii) suspension for one year from the date that the SBEC adopts an order that becomes final following a default under §249.35 of this title (relating to Disposition Prior to Hearing; Default) or a contested case hearing at the State Office of Administrative Hearings (SOAH).

(C) The factors listed in subsection (c) of this section and in paragraphs (1) and (2) of this subsection may mitigate an educator's sanction so significantly that the SBEC takes no disciplinary action.

- (e) Mandatory minimum sanction for felony-level conduct. An educator subject to sanction, who is court-ordered to complete a period of deferred adjudication, community supervision, or pretrial diversion for a felony-level criminal offense under state or federal law, may not receive a sanction of less than:
 - (1) suspension for a period concurrent with the term of deferred adjudication or community supervision, if the case is resolved through an agreed final order prior to the educator completing deferred adjudication or community supervision and the educator has not been employed as an educator during the period of deferred adjudication or community supervision; or
 - (2) suspension beginning on the effective date of an agreed final order for a period extending beyond the end of the educator's deferred adjudication or community supervision but may be less than the initial court-ordered term of deferred adjudication or community supervision, if the case is resolved through an agreed final order prior to the educator completing deferred adjudication or community supervision and the educator has been employed as an educator during the period of deferred adjudication or community supervision; or
 - (3) suspension beginning on the effective date of an agreed final order for a period at least half as long as the initial court-ordered term of deferred adjudication or community supervision, if the case is resolved through an agreed final order after the educator has completed deferred adjudication or community supervision; or
 - (4) suspension for a period equal to the term of deferred adjudication or community supervision that the criminal court initially ordered but beginning from the date of the final board decision, if the case is resolved through a final board decision following a contested case hearing at the SOAH or a default under §249.35 of this title.
- (f) Mandatory minimum sanction for misdemeanor-level conduct. If an educator is subject to sanction, and a court has ordered the educator to complete a period of deferred adjudication, community supervision, or pretrial diversion for a misdemeanor-level criminal offense under state or federal law, the educator may not receive a sanction of less than an inscribed reprimand.
- (g) Mandatory minimum sanction for test security violation. An educator who intentionally, as defined in §247.1 of this title (relating to Purpose and Scope; Definitions), violates the security or confidential integrity of any test required by the TEC, Chapter 39, Subchapter B, in a manner described by §101.3031(a)(3) of Part 2 of this title (relating to Required Test Administration Procedures and Training Activities to Ensure Validity, Reliability, and Security of Assessments), may not receive a sanction of less than a one year suspension.

- (h) Mandatory minimum sanction for drugs and alcohol on school campus. An educator who is subject to sanction because the educator has tested positive for drugs or alcohol while on school campus, was under the influence of drugs or alcohol on school campus, or was in possession of drugs or alcohol on school campus may not receive a sanction of less than a one-year suspension and required completion of a drug or alcohol treatment program.
- (i) Mandatory permanent revocation or denial. Notwithstanding subsection (c) of this section, the SBEC shall permanently revoke the teaching certificate of any educator or permanently deny the application of any applicant if, after a contested case hearing or a default under §249.35 of this title, it is determined that the educator or applicant:
 - (1) engaged in any sexual contact or romantic relationship with a student or minor;
 - (2) solicited any sexual contact or romantic relationship with a student or minor;
 - (3) possessed or distributed child pornography;
 - (4) was registered as a sex offender;
 - (5) committed criminal homicide;
 - (6) transferred, sold, distributed, or conspired to possess, transfer, sell, or distribute any controlled substance, the possession of which would be at least a Class A misdemeanor under the Texas Health and Safety Code, Chapter 481, on school property;
 - (7) intentionally, knowingly, or recklessly causes bodily injury to a student or minor when the conduct of the educator or applicant is not immune from disciplinary proceedings by TEC, §22.0512; or
 - (8) committed any offense described in the TEC, §21.058.
- (j) Mandatory minimum for failure to report. An educator subject to sanction, who fails to report educator misconduct under the circumstances and in the manner required by the TEC, §21.006, and §249.14(d)-(f) of this title (relating to Complaint, Required Reporting, and Investigation; Investigative Notice; Filing of Petition), when the case is resolved through an agreed final order, may not receive a sanction of less than:
 - (1) an inscribed reprimand and a \$5,000 administrative penalty for a superintendent or director who fails to file timely a report to the SBEC; or
 - (2) an inscribed reprimand and a \$500 administrative penalty for a principal who fails to timely notify a superintendent or director.
- (k) Mandatory minimum for electioneering. An educator subject to sanction, who is court-ordered to complete a period of deferred adjudication, community supervision, or pretrial diversion for an offense under Texas Election Code, Chapter 255, may not receive a sanction of less than a one-year suspension.
- (l) Sanctioned misconduct in another state. The findings of fact contained in final orders from any other state jurisdiction may provide the factual basis for SBEC disciplinary action. If the underlying conduct for the administrative sanction of an educator's certificate or license issued in another state is a violation of SBEC rules, the SBEC may initiate a disciplinary action regarding the educator's Texas educator certificate and impose a sanction as provided under this chapter.

STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §§21.006(a)-(c-2), (f)-(g-1), and (i), which require the superintendent or director of a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center or shared services arrangement to report to the SBEC within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct, unless the superintendent or director completes an investigation before the educator resigns or is terminated and determines that the educator did not commit the alleged misconduct. It also requires principals to report to superintendents within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct. It further authorizes the SBEC to impose sanctions on educators who fail to report as required by the statute, including authority to impose monetary administrative penalties, gives SBEC rulemaking authority as necessary to implement the statute, and requires the SBEC to create an internet portal to facilitate confidential and secure reporting; TEC, §21.0062, which requires the chief administrative officer of a private school to notify the SBEC within seven days when a private school educator resigns before the completion of an investigation or is terminated and there is evidence that the educator has engaged in certain misconduct and gives the SBEC rulemaking authority to implement the section; TEC, §21.007, which gives the SBEC authority to place a notice that an educator is under investigation for alleged misconduct on the educator's public certification records, requires the SBEC give the educator notice and an opportunity to show cause, requires that the SBEC limit the amount of time the notice can appear on the educator's certification, and gives the SBEC rulemaking authority as necessary to implement the provision; TEC, §21.009(e), which states that the SBEC may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that TEA staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041(a) and (b)(1), (4), (7), and (8), which authorize the SBEC to adopt rules as necessary for its own procedures, to regulate educators, specify the requirements for issuance or renewal of an educator certificate, provide for educator disciplinary proceedings and for enforcement of the educator's code of ethics; TEC, §21.044(a), which authorizes the SBEC to adopt rules establishing training requirements and academic qualifications required for a person to obtain an educator certificate; TEC, §21.058, which requires the SBEC to revoke the certification of an educator convicted or placed on deferred adjudication community supervision for certain offenses; TEC, §21.0581, which authorizes SBEC to take action against a person who assists another person obtain employment at a school despite knowing the other person engaged in sexual misconduct with a minor or student; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; TEC, §21.065, which sets requirements for the notice SBEC must send when it suspends an educator's certificate; TEC, §21.105(c), which allows the SBEC to impose sanctions against an educator who abandons a probationary contract; TEC, §21.160(c), which allows the SBEC to impose sanctions against an educator who abandons a continuing contract; TEC, §21.210(c), which allows the SBEC to impose sanctions against an educator who abandons a term contract; TEC, §22.082, which requires the SBEC to subscribe to the criminal history clearinghouse and allows the SBEC to obtain any criminal history from any closed case file; TEC, §22.0831, which requires the SBEC to review the criminal history of certified educators and applicants for certification; TEC, §22.085, which requires school districts, charter schools, and shared services arrangements to conduct fingerprint criminal background checks on employees and refuse to hire those that have certain criminal history; TEC, §22.087, which requires superintendents and directors of school districts, charter schools, private schools, regional education service centers, and shared services arrangements to notify the SBEC if an applicant for a certification has criminal history that is not in the criminal history clearinghouse; TEC, §22.092, which requires school districts, charter schools, districts of innovation, regional education service centers, and shared services arrangements to discharge or refuse to hire any person listed on the registry of persons not eligible for employment in Texas public schools; TEC, §22.093, requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship with a student or minor; Texas Government Code (TGC), §411.090, which allows the SBEC to get from the Texas Department of Public Safety all criminal history record information about any applicant for licensure as an educator; TGC, §2001.054(c), which requires the SBEC

to give notice by personal service or by registered or certified mail to the license holder of the factors or conduct alleged to warrant suspension, revocation, annulment, or withdrawal of an educator's certificate and to give the certified educator an opportunity to show that the educator is in compliance with the relevant statutes and rules; TGC, §2001.058(e), which sets out the requirements for when the SBEC can make changes to a proposal for decision from an administrative law judge; TGC, §2001.142(a), which requires all Texas state licensing agencies to notify parties to contested cases of orders or decisions of the agency by personal service, electronic means if the parties have agreed to it, first class, certified or registered mail, or by any method required under the agency's rules for a party to serve copies of pleadings in a contested case; Texas Family Code (TFC), §261.308(d) and (e), which require the Texas Department of Family and Protective Services to release information regarding a person alleged to have committed abuse or neglect to the SBEC; TFC, §261.406(a) and (b), which require the Texas Department of Family and Protective Services to send a copy of a completed investigation report involving allegations of abuse or neglect of a child in a public or private school to the TEA; Texas Occupations Code (TOC), §53.021(a), which allows the SBEC to suspend or revoke an educator's certificate or refuse to issue a certificate, if a person is convicted of certain offenses; TOC, §53.022, which sets out factors for the SBEC to determine whether a particular criminal offense relates to the occupation of education; TOC, §53.023, which sets out additional factors for the SBEC to consider when deciding whether to allow a person convicted of a crime to serve as an educator; TOC, §53.0231, which sets out information the SBEC must give an applicant when it denies a license and requires that the SBEC allow 30 days for the applicant to submit any relevant information to the SBEC; TOC, §53.0232, which precludes SBEC from considering arrests that did not result in convictions or placement on deferred adjudication community supervision in the determination of fitness to be licensed as an educator; TOC, §53.024, which states that proceedings to deny or sanction an educator's certification are covered by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001; TOC, §53.025, which gives the SBEC rulemaking authority to issue guidelines to define which crimes relate to the profession of education; TOC, §53.051, which requires that the SBEC notify a license holder or applicant after denying, suspending, or revoking the certification; TOC, §53.052, which allows a person who has been denied an educator certification or had their educator certification revoked or suspended to file a petition for review in state district court after exhausting all administrative remedies; TOC, §56.003, which prohibits state agencies from taking disciplinary action against licensees for student loan non-payment or default; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the jobseeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code (TEC), §§21.006(a), (b), (b-1), (b-2), (c), (c-1), (c-2), (f), (g), (g-1), and (i); 21.0062; 21.007; 21.009(e); 21.031(a); 21.035; 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a), 21.058; 21.0581; 21.060; 21.065; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085; 22.087; 22.092; and 22.093; Texas Government Code (TGC), §§411.090, 2001.054(c), 2001.058(e), and 2001.142(a); Texas Family Code (TFC), §261.308(d) and (e) and §261.406(a) and (b); Texas Occupations Code (TOC), §§53.021(a), 53.022-53.025, 53.051, 53.052 and 56.003; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926.

<rule>

§249.26. Petition.

- (a) The party seeking relief and requesting a contested case hearing under this chapter shall serve a petition as required under this chapter. The petitioner shall have the burden of proof by a preponderance of the evidence in all contested case proceedings brought under this chapter.
- (b) The petition shall contain the following items:
 - (1) a statement of the legal authority and jurisdiction under which the disciplinary action is being sought and the hearing is to be held;
 - (2) a reference to the particular sections of the statutes and rules involved;
 - (3) a statement of the matters asserted;
 - (4) a statement regarding the failure of the parties to reach an agreed settlement of the matters asserted in the petition;

- (5) the name, current mailing address, daytime telephone number, if any, and facsimile number, if any, of the petitioner and the petitioner's authorized representative; and
 - (6) if the petition seeks to impose sanctions against a certificate holder, a notification set forth as follows in at least 12-point boldface type: If you do not file a written answer to this petition with the Texas Education Agency (TEA) staff WITHIN 30 CALENDAR DAYS of being served with this petition, the State Board for Educator Certification may grant the relief requested in this petition, including revocation of your certificate by default. The matters asserted in the petition will be deemed admitted unless your written answer specifically denies each assertion pled and is filed within the prescribed time period. If you file a written answer but then fail to attend a scheduled hearing, the State Board for Educator Certification may grant any relief requested in this petition, up to and including REVOCATION OF YOUR CERTIFICATE.
- (c) The petition shall be served on the respondent by electronic mail or by regular first-class United States mail to the current mailing and email address a certified educator is required to provide pursuant to §230.91 of this title (relating to Procedures in General) and by electronic mail to the respondent's attorney if notice of representation has been provided to TEA staff, or as otherwise specified in this chapter. If an educator, applicant, or examinee is the petitioner, the address to which the petition shall be served is Texas Education Agency, Legal Certification Enforcement Division, 1701 North Congress Avenue, Austin, Texas 78701. A certificate evidencing service shall be included in the petition. For purposes of this section and §249.27 of this title (relating to Answer), it is a rebuttable presumption that a petition was served on the respondent no later than five calendar days after mailing.

§249.27. Answer.

- (a) The party responding to a petition filed under this chapter shall file a written answer with the petitioner within 30 calendar days after being served with such petition. For purposes of this section and §249.26 of this title (relating to Petition), it is a rebuttable presumption that a petition was served on the respondent no later than five calendar days after mailing. The respondent shall serve the answer on the petitioner by electronic mail or by regular first-class United States mail.
- (b) The answer shall specifically admit or deny each allegation in the petition and shall plead all affirmative defenses.
- (c) The answer shall contain the name, current mailing address, daytime telephone number, email address, and facsimile number, if any, of the respondent and the respondent's authorized representative.
- (d) All well-pled factual allegations in the petition will be deemed admitted unless the respondent's answer, containing specific denials to each allegation, is filed within the time period prescribed in subsection (a) of this section. A general denial shall not be sufficient to controvert factual allegations contained in the petition.
- (e) An answer that does not comply with the requirements of this section and 1 Texas Administrative Code, Part 7, §155.301 (relating to Required Form of Pleadings) may provide grounds for default judgment in favor of the petitioner, as provided in this chapter.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §§21.006(a)-(c-2), (f)-(g-1), and (i), which require the superintendent or director of a school district, district of innovation, open-enrollment charter school, other charter entity, regional education service center or shared services arrangement to report to the SBEC within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct, unless the superintendent or director completes an investigation before the educator resigns or is terminated and determines that the educator did not commit the alleged misconduct. It also requires principals to report to superintendents within seven business days of when the superintendent knew or received a report from a principal that an educator has resigned or is terminated and there is evidence that the educator has engaged in certain misconduct. It further authorizes the SBEC to impose sanctions on educators who fail to report as required by the statute, including authority to impose monetary administrative penalties, gives SBEC rulemaking authority as necessary to implement the statute, and requires the SBEC to create an internet portal to facilitate confidential and secure reporting; TEC, §21.0062, which requires the chief administrative officer of a private school to notify the SBEC within seven days when a private school educator resigns before the completion of an investigation or is terminated and there is evidence that the educator has engaged in certain misconduct and gives the SBEC rulemaking authority to implement the section; TEC, §21.007, which gives the SBEC authority to place a notice that an educator is under investigation for alleged misconduct on the educator's public certification records, requires the SBEC give the educator notice and an opportunity to show cause, requires that the SBEC limit the amount of time the notice can appear on the educator's certification, and gives the SBEC rulemaking authority as necessary to implement the provision; TEC, §21.009(e), which states that the SBEC may revoke the certificate of an administrator if the board determines it is reasonable to believe that the administrator employed an applicant despite being aware that the applicant had been adjudicated for or convicted of having an inappropriate relationship with a student or minor; TEC, §21.031(a), which charges the SBEC with regulating and overseeing all aspects of the certification, continuing education, and standards of conduct for public school educators; TEC, §21.035, which states that TEA staff provides administrative functions and services for SBEC and gives SBEC the authority to delegate to either the commissioner of education or to TEA staff the authority to settle or otherwise informally dispose of contested cases involving educator certification; TEC, §21.041(a) and (b)(1), (4), (7), and (8), which authorize the SBEC to adopt rules as necessary for its own procedures, to regulate educators, specify the requirements for issuance or renewal of an educator certificate, provide for educator disciplinary proceedings and for enforcement of the educator's code of ethics; TEC, §21.044(a), which authorizes the SBEC to adopt rules establishing training requirements and academic qualifications required for a person to obtain an educator certificate; TEC, §21.058, which requires the SBEC to revoke the certification of an educator convicted or placed on deferred adjudication community supervision for certain offenses; TEC, §21.0581, which authorizes SBEC to take action against a person who assists another person obtain employment at a school despite knowing the other person engaged in sexual misconduct with a minor or student; TEC, §21.060, which sets out crimes that relate to the education profession and authorizes the SBEC to sanction or refuse to issue a certificate to any person who has been convicted of one of these offenses; TEC, §21.065, which sets requirements for the notice SBEC must send when it suspends an educator's certificate; TEC, §21.105(c), which allows the SBEC to impose sanctions against an educator who abandons a probationary contract; TEC, §21.160(c), which allows the SBEC to impose sanctions against an educator who abandons a continuing contract; TEC, §21.210(c), which allows the SBEC to impose sanctions against an educator who abandons a term contract; TEC, §22.082, which requires the SBEC to subscribe to the criminal history clearinghouse and allows the SBEC to obtain any criminal history from any closed case file; TEC, §22.0831, which requires the SBEC to review the criminal history of certified educators and applicants for certification; TEC, §22.085, which requires school districts, charter schools, and shared services arrangements to conduct fingerprint criminal background checks on employees and refuse to hire those that have certain criminal history; TEC, §22.087, which requires superintendents and directors of school districts, charter schools, private schools, regional education service centers, and shared services arrangements to notify the SBEC if an applicant for a certification has criminal history that is not in the criminal history clearinghouse; TEC, §22.092, which requires school districts, charter schools, districts of innovation, regional education service centers, and shared services arrangements to discharge or refuse to hire any person listed on the registry of persons not eligible for employment in Texas public schools; TEC, §22.093, requires superintendents or directors of school districts, districts of innovation, charter schools, regional education service centers, or shared services arrangements to notify the commissioner of education if an employee resigned or was terminated and there is evidence that the employee abused or otherwise committed an unlawful act with a student or minor or was involved in a romantic relationship with a student or minor; Texas Government Code (TGC), §411.090, which allows the SBEC to get from the Texas Department of Public Safety all criminal history record information about any applicant for licensure as an educator; TGC, §2001.054(c), which requires the SBEC

to give notice by personal service or by registered or certified mail to the license holder of the factors or conduct alleged to warrant suspension, revocation, annulment, or withdrawal of an educator's certificate and to give the certified educator an opportunity to show that the educator is in compliance with the relevant statutes and rules; TGC, §2001.058(e), which sets out the requirements for when the SBEC can make changes to a proposal for decision from an administrative law judge; TGC, §2001.142(a), which requires all Texas state licensing agencies to notify parties to contested cases of orders or decisions of the agency by personal service, electronic means if the parties have agreed to it, first class, certified or registered mail, or by any method required under the agency's rules for a party to serve copies of pleadings in a contested case; Texas Family Code (TFC), §261.308(d) and (e), which require the Texas Department of Family and Protective Services to release information regarding a person alleged to have committed abuse or neglect to the SBEC; TFC, §261.406(a) and (b), which require the Texas Department of Family and Protective Services to send a copy of a completed investigation report involving allegations of abuse or neglect of a child in a public or private school to the TEA; Texas Occupations Code (TOC), §53.021(a), which allows the SBEC to suspend or revoke an educator's certificate or refuse to issue a certificate, if a person is convicted of certain offenses; TOC, §53.022, which sets out factors for the SBEC to determine whether a particular criminal offense relates to the occupation of education; TOC, §53.023, which sets out additional factors for the SBEC to consider when deciding whether to allow a person convicted of a crime to serve as an educator; TOC, §53.0231, which sets out information the SBEC must give an applicant when it denies a license and requires that the SBEC allow 30 days for the applicant to submit any relevant information to the SBEC; TOC, §53.0232, which precludes SBEC from considering arrests that did not result in convictions or placement on deferred adjudication community supervision in the determination of fitness to be licensed as an educator; TOC, §53.024, which states that proceedings to deny or sanction an educator's certification are covered by the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001; TOC, §53.025, which gives the SBEC rulemaking authority to issue guidelines to define which crimes relate to the profession of education; TOC, §53.051, which requires that the SBEC notify a license holder or applicant after denying, suspending, or revoking the certification; TOC, §53.052, which allows a person who has been denied an educator certification or had their educator certification revoked or suspended to file a petition for review in state district court after exhausting all administrative remedies; TOC, §56.003, which prohibits state agencies from taking disciplinary action against licensees for student loan non-payment or default; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926, which requires state educational agencies to make rules forbidding educators from aiding other school employees, contractors, or agents in getting jobs when the educator knows the jobseeker has committed sexual misconduct with a student or minor in violation of the law.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code (TEC), §§21.006(a), (b), (b-1), (b-2), (c), (c-1), (c-2), (f), (g), (g-1), and (i); 21.0062; 21.007; 21.009(e); 21.031(a); 21.035; 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a), 21.058; 21.0581; 21.060; 21.065; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085; 22.087; 22.092; and 22.093; Texas Government Code (TGC), §§411.090, 2001.054(c), 2001.058(e), and 2001.142(a); Texas Family Code (TFC), §261.308(d) and (e) and §261.406(a) and (b); Texas Occupations Code (TOC), §§53.021(a), 53.022-53.025, 53.051, 53.052 and 56.003; and the Every Student Succeeds Act (ESSA), 20 United States Code (U.S.C.) §7926.

<rule>

§249.37. Exceptions and Replies.

- (a) A party may file any exceptions to the proposal for decision within 15 calendar days of the date of the proposal for decision. Any replies to the exceptions shall be filed by other parties within 15 calendar days of the filing of exceptions. These time limits may be extended by agreement of the parties and the administrative law judge (ALJ). Exceptions and replies shall be:
 - (1) served upon the other party by mail, hand-delivery, facsimile, any method allowed by the State Office of Administrative Hearings rules, or any electronic transmission agreed to by the parties; and
 - (2) filed with the ALJ in accordance with 1 Texas Administrative Code, Part 7, Chapter 155 (relating to Rules of Procedure).
- (b) Each exception or reply to a finding of fact or conclusion of law shall be concisely stated and shall summarize the evidence in support of each exception.

- (1) Any evidence or arguments relied upon shall be grouped under the exceptions to which they relate.
 - (2) In summarizing evidence, the parties shall include a specific citation to the hearing record where such evidence appears or shall attach the relevant excerpts from the hearing record.
 - (3) Arguments shall be logical and coherent and citations to authorities shall be complete.
- (c) Exceptions to the proposal for decision may be based on the following:
- (1) the ALJ has made an incorrect conclusion of law;
 - (2) the ALJ has failed to make an essential fact finding;
 - (3) the ALJ applied the incorrect burden or standard of proof;
 - (4) the findings of fact do not support the conclusions of law; or
 - (5) the ALJ has made a finding of fact that is not supported by the preponderance of the evidence.