

The Texas Education Agency (TEA) adopts on an emergency basis an amendment to §153.1201 and new §153.1253, concerning definitions and temporary inclusion on the registry of persons not eligible for hire. The new section on temporary inclusions implements the requirements of Texas Education Code (TEC), §22A.152, Temporary Inclusion in Registry Based on Continuing and Imminent Threat to Public Welfare, which requires the commissioner of education to adopt rules and temporarily place a person in the registry if the commissioner determines that the person's continued employment at or provision of services to an educational entity constitutes a continuing and imminent threat to public welfare; and TEC, §22A.153, Temporary Inclusion in Registry for Certain Arrests, which requires the commissioner to adopt rules and temporarily include a person who is employed by or acting as a service provider for an educational entity in the registry if the person is arrested for an offense listed in TEC, §22A.201(a). The amendment to §153.1201 adds new definitions in new subsections (b), (c), and (e) to implement the requirements of TEC, §22A.051 and §22A.052, which require a superintendent or director of an educational entity to report misconduct to the commissioner, specifically inappropriate communications and failure to maintain appropriate boundaries with a student or minor as defined in State Board for Educator Certification (SBEC) rule. The remaining terms have been alphabetized with no changes to the definitions.

The amendment and new section are adopted on an emergency basis to take effect immediately. As a result of the SBEC recently proposing adjacent rules related to certified educators, and because of the risk of high-risk or dangerous individuals continuing to work in public schools despite actively being under criminal investigations and not in compliance with TEC, §22A.152 and §22A.153, TEA finds there is an imminent peril to public health, safety, or welfare and, pursuant to Texas Government Code, §2001.034, is adopting this emergency amendment and new rule on fewer than 30 days' notice in order to comply with requirements of state law found in TEC, Chapter 12, and its associated rules.

STATUTORY AUTHORITY. The amendment and new section are adopted under Texas Education Code (TEC), §22A.052, which requires the superintendent or director of an educational entity to report misconduct as outlined in TEC, §22A.051, to the commissioner; TEC, §22A.152, which requires the commissioner to temporarily include a person in the registry if the commissioner, based on evidence or information presented to the commissioner regarding a complaint alleging misconduct by the person, determines that the person's continued employment at or provision of services to an educational entity constitutes continuing and imminent threat to the public welfare; and TEC, §22A.153, which requires the commissioner to temporarily include a person who is employed by or acting as a service provider for educational entity if the person is arrested for an offense under TEC, §22A.201(a).

<rule>

§153.1201. Definitions.

- (a) Abuse--This term has the meaning assigned by Texas Family Code, §261.001(1).
- (b) Boundary--The employee or service provider shall maintain appropriate professional relationships and boundaries with a student based on a reasonably prudent person standard. Factors that may be considered in context and on the totality of the circumstances in assessing whether appropriate boundaries were maintained include, but are not limited to:
 - (1) physical proximity or physical contact beyond the professional role or that the student has indicated is unwelcome, unless such contact is professionally required;
 - (2) contacting or meeting the student beyond the professional role or making efforts to gain access to or time alone with a student with no discernible professional purpose;
 - (3) transporting the student without permission from the student's legal guardian or in violation of school board policy, unless for an emergency;
 - (4) taking or possessing a photo or video of the student beyond the professional role or in violation of school board policy; and
 - (5) showing favoritism or isolation through gifts, rewards, or privileges.

- (c) Continuing and imminent threat to public welfare--In determining a continuing and imminent threat to the public welfare under Texas Education Code (TEC), §22A.152, the commissioner of education will consider:
- (1) if there is a real danger to a student or to the public from the acts or omissions of the person, including, but not limited to, solicitation, engagement of a romantic relationship, neglect, or abuse;
 - (2) whether the harm alleged is more than abstract, hypothetical, or remote;
 - (3) both actions and inactions by the person;
 - (4) whether the conduct occurred on or off a school district campus; and
 - (5) whether there have been prior complaints, investigations, or discipline of the same or similar nature against the person.
- (d) Employee--A person who is employed by a school district, district of innovation, charter school, service center, or shared services arrangement and does not hold a certification issued by the State Board for Educator Certification under TEC, Chapter 21, Subchapter B.
- (e) Inappropriate communication--The employee or service provider shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, email, instant messaging, blogging, or other social network communication. Factors that may be considered in context and on the totality of the circumstances in assessing whether the communication is inappropriate include, but are not limited to:
- (1) the nature, purpose, timing, and amount of the communication;
 - (2) the subject matter of the communication;
 - (3) whether the communication was made openly or the employee or service provider attempted to conceal the communication;
 - (4) whether the communication could be reasonably interpreted as soliciting sexual contact or a romantic relationship;
 - (5) whether the communication was sexually explicit;
 - (6) whether the communication involved discussion(s) of the physical or sexual attractiveness or the sexual history, activities, preferences, or fantasies of either the employee or service provider or the student; and
 - (7) whether the communication could be reasonably interpreted as threatening the welfare and/or safety of the student.
- (f) Nonprofit teacher organization--An organization approved by the commissioner to participate in a tutoring program under TEC, §33.913.
- (g) Private school--A non-public school that offers a course of instruction for students in Texas in one or more grades from Prekindergarten-Grade 12 and is:
- (1) accredited by an organization that is monitored and approved by the Texas Private School Accreditation Commission;
 - (2) listed in the National Center for Education Statistics database; or
 - (3) a child care provider that is licensed by the Texas Health and Human Services Commission.
- (h) ~~(f)~~ Solicitation of sexual contact--Deliberate or repeated acts that can be reasonably interpreted as the solicitation by an employee of a relationship with a student that is sexual in nature. Solicitation of sexual contact is often characterized by a strong emotional or sexual attachment and/or by patterns of exclusivity but does not include appropriate relationships that arise out of legitimate contexts such as familial connections or longtime acquaintance. The following acts, considered in context, may constitute prima facie evidence of the solicitation by an employee of sexual contact with a student:

- (1) behavior, gestures, expressions, or communications with a student that are unrelated to the employee's job duties and evidence a sexual intent or interest in the student, including statements of love, affection, or attraction. Factors that may be considered in determining the intent of such communications or behavior, include, without limitation:
 - (A) the nature of the communications;
 - (B) the timing of the communications;
 - (C) the extent of the communications;
 - (D) whether the communications were made openly or secretly;
 - (E) the extent that the employee attempts to conceal the communications;
 - (F) if the employee claims to be counseling a student, the commissioner ~~[of education]~~ may consider whether the employee's job duties included counseling, whether the employee 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 employee reported the abuse or neglect to the appropriate authorities; and
 - (G) any other evidence tending to show the context of the communications between employee and student;
- (2) 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;
- (3) making sexually demeaning comments to a student;
- (4) making comments about a student's potential sexual performance;
- (5) requesting details of a student's sexual history;
- (6) requesting a date, sexual acts, or any activity intended for the sexual gratification of the employee;
- (7) engaging in conversations regarding the sexual problems, preferences, or fantasies of either party;
- (8) inappropriate hugging, kissing, or excessive touching;
- (9) providing the student with drugs or alcohol;
- (10) violating written directives from school administrators regarding the employee's behavior toward a student;
- (11) suggestions that a romantic relationship is desired after the student graduates, including post-graduation plans for dating or marriage; and
- (12) any other acts tending to show that the employee solicited sexual contact with a student.

~~[(b) Abuse This term has the meaning assigned by Texas Family Code, §261.001(1).]~~

~~[(c) Private school A non public school that offers a course of instruction for students in Texas in one or more grades from Prekindergarten Grade 12 and is:]~~

~~[(1) accredited by an organization that is monitored and approved by the Texas Private School Accreditation Commission;]~~

~~[(2) listed in the National Center for Education Statistics database; or]~~

~~[(3) a child care provider that is licensed by the Texas Health and Human Services Commission.]~~

~~[(d) Employee A person who is employed by a school district, district of innovation, charter school, service center, or shared services arrangement and does not hold a certification issued by the State Board for Educator Certification under Texas Education Code, Chapter 21, Subchapter B.]~~

~~[(e) Nonprofit teacher organization An organization approved by the commissioner of education to participate in a tutoring program under Texas Education Code, §33.913.]~~

§153.1253. Temporary Inclusion in Registry.

- (a) For each temporary inclusion matter, the commissioner of education or designee shall temporarily include a person in the registry if:
 - (1) based on evidence or information presented to the commissioner or designee regarding a complaint alleging misconduct by the person, the commissioner or designee determines that the person's continued employment at or provision of services to an educational entity constitutes a continuing and imminent threat to the public welfare; or
 - (2) the person is arrested for an offense listed under Texas Education Code (TEC), §22A.201(a), and is employed by or acting as a service provider for an educational entity.
- (b) Evidence will be considered under a relaxed standard described in Texas Government Code, §2001.081, including information of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs, necessary to ascertain facts not reasonably susceptible of proof under formal rules of evidence, and not precluded by statute.
- (c) If the commissioner or designee temporarily includes a person on the registry, the inclusion shall have immediate effect, and the commissioner or designee will sign an order of temporary inclusion. The order of temporary inclusion shall be sent to the respondent via email or first-class mail.
- (d) In accordance with TEC, §22A.152(b), a person may be included without notice to the respondent if at the time of the inclusion, Texas Education Agency (TEA) staff initiates proceedings at the State Office of Administrative Hearings (SOAH) simultaneously with the temporary inclusion and a hearing is held as soon as possible under TEC, §22A.152, and Texas Government Code, Chapter 2001.
- (e) At the probable cause hearing, an administrative law judge (ALJ) shall determine whether there is probable cause to continue the temporary inclusion of the person and issue an order on that determination.
- (f) SOAH shall hold a hearing no later than 61 days from the date of the temporary inclusion or the date of the final disposition if the temporary inclusion is issued under TEC, §22A.153. At this hearing, TEA staff shall present evidence supporting the continued inclusion of the person and may present evidence of any additional violations related to the respondent. This hearing is referred to as the "final hearing."
- (g) TEA staff shall send notice of the final hearing in accordance with SOAH's rules. The respondent may request a continuance or waive the final hearing.
- (h) Following the final hearing, the ALJ shall issue a proposal for decision on the inclusion. The proposal for decision may also address any other additional violations related to the respondent.
- (i) For purposes of inclusion or restriction under TEC, §22A.153, final disposition of a criminal case includes evidence of:
 - (1) final, non-appealable conviction;
 - (2) acceptance and entry of a plea agreement;
 - (3) dismissal;
 - (4) acquittal; or
 - (5) successful completion of a deferred adjudication.
- (j) A temporary inclusion takes effect immediately and shall remain in effect until:
 - (1) a final or superseding order of the commissioner or designee is entered;
 - (2) TEA staff receives documentation that the information or indictment that served as the underlying basis for arrest has been dismissed or otherwise nullified, the prosecuting authority rejects the prosecution, or charges are dismissed for a temporary inclusion under TEC, §22A.153; or
 - (3) the ALJ issues an order determining that there is no probable cause to continue the temporary inclusion under TEC, §22A.152.

(k) Upon final disposition of a criminal case, a person may submit a written request prior to a final hearing requesting removal from the registry. Upon receipt, TEA staff shall verify any and all related dispositions prior to removal. The request must include:

(1) a certified copy of records listed in subsection (i) of this section; and

(2) a written confirmation that any related dispositions are not subject to TEC, §22A.201(a).