

The Texas Education Agency (TEA) proposes an amendment to §61.1034, concerning the new instructional facility allotment. The proposed amendment would modify the rule to reflect changes made by House Bill (HB) 3, 86th Texas Legislature, 2019, to increase the allotment.

BACKGROUND INFORMATION AND JUSTIFICATION: Texas Education Code (TEC), §42.158, enacted by Senate Bill 4, 76th Texas Legislature, 1999, created the New Instructional Facility Allotment (NIFA) for public school districts. The legislature did not provide funding under this allotment for the 2011-2012 through 2014-2015 school years. However, funding has been made available for the 2015-2016 through 2020-2021 school years. The NIFA is provided for operational expenses associated with the opening of a new instructional facility and is available to all public school districts and open-enrollment charter schools that meet the requirements of the statute and rule.

Former TEC, §42.158, was transferred to TEC, §48.152, by HB 3, 86th Texas Legislature, 2019. HB 3 increased funding for NIFA. The proposed amendment to 19 TAC §61.1034 is a conforming amendment that would update the rule to implement the increase in the maximum amount appropriated for allotments from \$25 million to \$100 million in a school year. The proposed amendment would update language related to NIFA distributions in subsection (e), including reference to excess local revenue provisions under TEC, §48.257. The proposed amendment would also update the authorizing statutory reference, changing TEC, §42.158, to §48.152.

FISCAL IMPACT: Leo Lopez, associate commissioner for school finance/chief school finance officer, has determined that for the first five-year period the proposal is in effect there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal.

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

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

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

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

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would not require an increase in future legislative appropriations to the agency, but the enabling legislation does allow an increase to future legislative appropriations to the agency from \$23.75 million to \$100 million per year of the biennium. The proposal would expand an existing regulation by increasing the allotment.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in fees paid to the agency; would not create a new regulation; would not limit or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Lopez has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be ensuring that rule language is based on current law, which increased maximum funding for NIFA from \$25 million to \$100 million in a school year. There is no anticipated economic cost to persons who are required to comply with the proposal.

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

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

PUBLIC COMMENTS: The public comment period on the proposal begins November 29, 2019, and ends December 30, 2020. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the Texas Register on November 29, 2019. A form for submitting public comments is available on the TEA website at [https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_\(TAC\)/Proposed_Commissioner_of_Education_Rules/](https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/). Comments on the proposal may also be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701.

STATUTORY AUTHORITY. The amendment is proposed under Texas Education Code (TEC), §48.004, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, authorizes the commissioner of education to adopt rules as necessary to implement and administer the Foundation School Program.

TEC, §48.152, as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, requires the commissioner to reduce each district's allotment under this section in the manner provided by TEC, §48.266(f), if the total amount of allotments to which districts are entitled under this section for a school year exceeds the amount appropriated under this subsection.

TEC, §48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019, describes how the commissioner will reduce allotments if entitlements exceed the amounts appropriated.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§48.004, 48.152, and 48.266(f), as transferred, redesignated, and amended by HB 3, 86th Texas Legislature, 2019.

<rule>

§61.1034. New Instructional Facility Allotment.

- (a) Definitions. The following definitions apply to the new instructional facility allotment (NIFA) in accordance with the Texas Education Code (TEC), §48.152 [~~§42.158~~].
- (1) Instructional campus--A campus that:
 - (A) has its own unique campus ID number registered with the Texas Education Agency (TEA), an assigned administrator, enrolled students who are counted for average daily attendance, and assigned instructional staff;
 - (B) receives federal and/or state and/or local funds as its primary support;
 - (C) provides instruction in the Texas Essential Knowledge and Skills (TEKS);
 - (D) has one or more grade groups in the range from early education through Grade 12; and
 - (E) is not a program for students enrolled in another public school.
 - (2) Instructional facility--A real property, an improvement to real property, or a necessary fixture of an improvement to real property that is used predominantly for teaching the curriculum required by the TEC, §28.002.
 - (3) New instructional facility--A facility that includes:
 - (A) a newly constructed instructional facility, which is a new instructional campus built from the ground up;

- (B) a repurposed instructional facility, which is a facility that has been renovated to become an instructional facility for the first time for the applying school district or charter school; or
 - (C) a leased facility operating for the first time as an instructional facility for the applying school district or charter school with a minimum lease term of not less than 10 years. The lease must not be a continuation of or renegotiation of an existing lease for an instructional facility.
- (b) Eligibility. The following eligibility criteria apply to the NIFA in accordance with the TEC, §48.152 [~~§42.158~~].
- (1) Both school districts and open-enrollment charter schools are eligible to apply for the NIFA for eligible facilities.
 - (2) The facility for which NIFA funds are requested must meet the following requirements.
 - (A) The facility must qualify as an instructional campus and a new instructional facility used for teaching the curriculum required by the TEC, Chapter 28.
 - (B) To qualify for first-year funding, a new facility must not have been occupied in the prior school year. To qualify for follow-up funding, the facility must have been occupied for the first time in the prior school year and funded for the NIFA for that first year. If an instructional facility qualifies as a new instructional facility but did not receive the allotment in the first year of eligibility due to a failure to apply, the school district or open-enrollment charter school may still apply for and receive funding for the average daily attendance (ADA) earned only during the second year of occupation in the new instructional facility.
 - (C) With the exception of a covered walkway connecting the new facility to another building, the new facility must be physically separate from other existing school structures.
 - (D) If the applicant is an open-enrollment charter school, the facility must be a charter school site approved for instructional use in the original open-enrollment charter as granted by either the State Board of Education or the commissioner of education or in an amendment granted under §100.1033(b)(9)-(11) of this title (relating to Charter Amendment), as described in §100.1001(3)(D) of this title (relating to Definitions).
 - (3) Expansion or renovation of existing instructional facilities, as well as portable and temporary structures, are not eligible for the NIFA.
- (c) Application process. To apply for the NIFA, school districts and open-enrollment charter schools must complete the TEA's online application process requesting funding pursuant to the NIFA.
- (1) The initial (first-year) application, or an application for one-year funding only, must be submitted electronically no later than July 15. The application must include the following:
 - (A) the electronic submission of the TEA's online application for initial funding; and
 - (B) the electronic submission of the following materials:
 - (i) a brief description and photograph of the newly constructed, repurposed, or leased instructional facility;
 - (ii) a copy of a legal document that clearly describes the nature and dates of the new or repurposed construction or a copy of the applicable lease;
 - (iii) a site plan;
 - (iv) a floor plan; and
 - (v) if applicable, a demolition plan.
 - (2) Second-year applications require only the electronic submission of the TEA's online application for follow-up funding no later than July 15 of the year preceding the applicable school year.

- (d) Survey on days of instruction. In the fall of the school year after a school year for which an applicant received NIFA funds, the school district or open-enrollment charter school that received the funds must complete an online survey on the number of instructional days held in the new facility and submit the completed survey electronically. The TEA will use submitted survey information in determining the final (settle-up) amount earned by each eligible school district and open-enrollment charter school, as described in subsection (e)(6) of this section.
- (e) Costs and payments. The costs and payments for the NIFA are determined by the commissioner.
- (1) The allotment for the NIFA is a part of the cost of the first tier of the Foundation School Program (FSP). This allotment is not counted in the calculation of weighted average daily attendance for the second tier of the FSP.
 - (2) If, for all eligible applicants combined, the total cost of the NIFA exceeds the amount appropriated, each allotment is reduced so that the total amount to be distributed equals the amount appropriated. Reductions to allotments are made by applying the same percentage adjustment to each school district and charter school.
 - ~~(3) If an additional \$1 million is appropriated for the NIFA for a school year under the TEC, §42.158(d-1), and if proration as described in paragraph (2) of this subsection is necessary for the school year, the additional appropriation must first be applied to prevent a reduction in the NIFA for eligible high school facilities. Any funds remaining after preventing all reductions in the NIFA for eligible high school facilities will be prorated as described in paragraph (2) of this subsection.~~
 - (3) ~~(4)~~ Allocations will be made in conjunction with allotments for the FSP in accordance with the school district's or open-enrollment charter school's payment class. For school districts that are ~~not~~ subject to the ~~excess local revenue provisions under TEC, §48.257, requirements of the TEC, Chapter 41,~~ and do not receive payments from the Foundation School Fund, NIFA distributions will be reflected as reduced recapture payments ~~correspond to the schedule for payment class 3~~.
 - (4) ~~(5)~~ For school districts that are ~~subject to the excess local revenue provisions under TEC, §48.257,~~ NIFA distributions increase the amount of the FSP entitlement and so will automatically reduce any excess local revenue and reduce the requirement to send recapture to the state in the amount of the NIFA allocation ~~required to reduce wealth pursuant to the TEC, Chapter 41, any NIFA funds for which the school district is eligible are applied as credits to the amounts owed to equalize wealth~~.
 - (5) ~~(6)~~ For all school districts and open-enrollment charter schools receiving the NIFA, a final (settle-up) amount earned is determined by the commissioner when information reported through the survey described in subsection (d) of this section is available in the fall of the school year after the school year for which NIFA funds were received. The final amount earned is determined using the submitted survey information and final counts of ADA for the school year for which NIFA funds were received, as reported through the Texas Student Data System Public Education Information Management System.
 - (6) ~~(7)~~ The amount of funds to be distributed for the NIFA to a school district or open-enrollment charter school is in addition to any other state aid entitlements.
- (f) Ownership of property purchased with NIFA funds. Property purchased with NIFA funds by an open-enrollment charter school is presumed to be public property under the TEC, §12.128, and remains public property in accordance with that section.