

The Texas Education Agency (TEA) adopts amendments to §§89.1005, 89.1035, 89.1040, 89.1050, 89.1070, 89.1121, and 89.1131, concerning special education services. Section 89.1040 and §89.1050 are adopted with changes to the proposed text as published in the June 4, 2021 issue of the *Texas Register* (46 TexReg 3490) and will be republished. Sections 89.1005, 89.1035, 89.1070, 89.1121, and 89.1131 are adopted without changes to the proposed text as published in the June 4, 2021 issue of the *Texas Register* (46 TexReg 3490) and will not be republished. The adopted amendments make updates related to eligibility determination for specific learning disabilities and provisions for students who are eligible for special education and related services who enroll in local educational agencies (LEAs) during the summer. The adopted amendments also make conforming edits related to funding for special education; update terminology to implement Senate Bill (SB) 281, 86th Texas Legislature, 2019; and update cross references.

REASONED JUSTIFICATION: The rules in Chapter 89, Subchapter AA, address provisions for special education services, including general provisions, clarification of federal regulations and state law, and dispute resolution. Legislation from the 86th Texas Legislature, 2019, requires that some of the rules in the subchapter be revised. Other rules require revision to provide clarification and to clearly express the state requirements aligned with federal regulations. Specifically, the adopted amendments update the rules as follows.

#### *Division 1, General Provisions*

Section 89.1005, Instructional Arrangements and Settings, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to Texas Government Code (TGC), §392.002, by SB 281, 86th Texas Legislature, 2019.

#### *Division 2, Clarification of Provisions in Federal Regulations and State Law*

Section 89.1035, Age Ranges for Student Eligibility, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281.

Section 89.1040, Eligibility Criteria, is amended to more clearly express the state requirements for identifying students with specific learning disabilities (SLD) that are aligned with federal requirements. The changes revise wording and clarify the psychological process practices used in identifying an SLD as allowed for under federal regulation. Section 89.1040 is also amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. The following changes to §89.1040 were made at adoption.

In §89.1040(c)(3), a conforming edit was made to change the phrase "hearing impairment" to "students who are deaf or hard of hearing."

In response to public comment, §89.1040(c)(9)(C) was modified to remove the words "prior to and" to clarify that certain considerations must be made as part of the evaluation, not prior to the evaluation.

Section 89.1050, The Admission, Review, and Dismissal Committee, is amended to clarify how LEAs should provide services to students who are eligible for special education and related services when they enroll in an LEA during the summer. The changes specify that students with disabilities are to receive all IEP services starting the first day of school if they enrolled in an LEA during the summer. Additionally, references to "auditory impairment" are updated to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. In §89.1050(c)(3)(B), a conforming edit was made at adoption to change the phrase "a student with a suspected or documented auditory impairment" to "a student who is suspected to be deaf or hard of hearing."

Section 89.1070, Graduation Requirements, is amended to update cross references in subsections (g) and (h).

#### *Division 4, Special Education Funding*

Section 89.1121, Distribution of State Funds, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281. The adopted amendment also

makes conforming changes to the formula for funding special education to align with Texas Education Code (TEC), §48.102.

*Division 5, Special Education and Related Service Personnel*

Section 89.1131, Qualifications of Special Education, Related Service, and Paraprofessional Personnel, is amended to change references from "auditory impairment" to "deaf or hard of hearing" based on statutory changes made to TGC, §392.002, by SB 281.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began June 4, 2021, and ended July 5, 2021. Public hearings were held on June 15 and 17, 2021, via video conferencing. Following is a summary of the public comments received and corresponding responses.

Comment: An education professional commented that the agency should keep balance in mind when revising §89.1040. The individual acknowledged that language in the rule did need to be updated but also requested the consideration of additional perspectives. The individual asked for a balance in the process to consider not only the requests from parents but also the requests from educators to help meet the needs of students.

Response: The agency agrees that the rulemaking process benefits from input from all stakeholders.

Comment: A parent thanked the agency for adding the full definition of SLD in rule and commented that dyslexia is recognized in the Individuals with Disabilities Education Act (IDEA) as one of the specific learning disabilities. The parent stated that addressing this topic in rule will be helpful in providing clarity to school districts regarding SLD eligibility.

Response: The agency agrees.

Comment: An 11-year-old student with multiple disabilities commented that §89.1040 should be amended. The student described the pain and frustration of not being identified as a student with dyslexia by the school district and provided a personal account of learning to read and achieve great things despite obstacles. The student expressed the desire to see this for other students as well, noting that students with disabilities are "a galaxy of possibilities."

Response: The agency agrees that the rule change will be beneficial to all students. The agency is pleased to see youth involved in the process of rule revision and encourages students to advocate for themselves and others sharing similar experiences.

Comment: Disability Rights Texas (DRTx), the Texas Dyslexia Coalition, and a parent noted that, under TEC, disorders related to dyslexia are also recognized. DRTx requested inserting the phrase "and related disorders" after the term "dyslexia" in §89.1040(c)(9)(A).

Response: The agency disagrees. The language in §89.1040(c)(9)(A) is consistent with IDEA.

Comment: DRTx commented that the revision to §89.1040 incorporates the federal requirement of considerations to ensure that a student's SLD is not due to other variables such as certain disabilities. DRTx recommended further clarification to ensure that a student who has a co-occurring disability is not otherwise prevented from being identified as having an SLD and requested the insertion of a new clause under §89.1040(c)(9)(B) to read, "(v) subject to clause (iv), may have another disability."

Response: The agency disagrees that further clarification is required. The use of the word "primarily" in §89.1040(c)(9)(B)(iv) allows for consideration of other variables such as certain co-occurring disabilities. The agency provides guidance regarding conducting comprehensive evaluations on the TEA website at [https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20\\_11.5.19\\_accessible-locked\\_r.pdf](https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20_11.5.19_accessible-locked_r.pdf).

Comment: The Texas Dyslexia Coalition expressed concern about the use of accommodations and multiple attempts at examinations for students to achieve passing grades in the evaluation process, which the Texas Dyslexia Coalition

contends dilutes or impacts assessment results for discovering the presence of an SLD and determining eligibility for special education services. The Texas Dyslexia Coalition recommended inserting the words "initial attempts on TEKS-based" before the words "in-class tests" in §89.1040(c)(9)(B)(ii). Two parents made similar comments and requested that the agency add "initial" or "initial attempts on" before "in-class" in §89.1040(c)(9)(B)(ii). The commenters also expressed concerns about allowing students to retest or redo assignments for higher grades because doing so could skew the data used to determine if a student requires special education and related services.

Response: The agency disagrees that the recommended changes should be made because they would not provide additional clarity. Evaluations are comprehensive, and grades are only one data point used in the evaluation process. The commenters' suggestion to not allow a student to retest or redo assignments for higher grades would limit flexibility for LEAs to implement TEC, §28.0216, which allows retesting for a higher grade. Additionally, a student's grades are only one data point in the evaluation process, and a student's evaluation team and admission, review, and dismissal (ARD) committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 Code of Federal Regulations (CFR), §300.111.

Comment: Regarding language in §89.1040(c)(9)(B)(ii), a parent commented that grades are subjective and are not a reliable indication of performance or an accurate measure of a student's acquisition of the areas in question for mathematics and reading when it comes to students who have an SLD.

Response: The agency disagrees. A student's grades are only one data point in the evaluation process, and a student's evaluation team and ARD committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 CFR, §300.111.

Comment: A parent expressed concern that the wording of §89.1040(c)(9)(B)(ii) will be used to deny services to students with the SLD designation. The parent suggested either striking §89.1040(c)(9)(B)(ii) or adding language that clarifies that performance measures are not limited to the examples listed, allows national assessments to be used, and allows for examples of work products and data to be provided by parents. The parent also suggested adding language in §89.1040(c)(9)(C)(ii) to address the use of accommodated examinations during the evaluation for determining eligibility of a student for special education services. The parent provided a personal example of a child being denied special education services after being allowed multiple test retakes and commented that retesting and/or using accommodations can inflate grades and create data that does not accurately reflect the student's performance.

Response: The agency disagrees that the commenter's recommended changes should be made because they would not provide additional clarity. Evaluations are comprehensive, and grades are only one data point used in the evaluation process. The commenter's suggestion to not allow a student to retest or redo assignments for higher grades would limit flexibility for LEAs to implement TEC, §28.0216, which allows retesting for a higher grade. Additionally, a student's grades are only one data point in the evaluation process, and a student's evaluation team and ARD committee must consider the conditions under which the student is achieving passing grades. Finally, passing grades alone would not make a student ineligible for special education and related services. An LEA's child find obligation extends to students who are advancing from grade to grade as noted in 34 CFR, §300.111.

Comment: A parent questioned the appropriateness of instruction as it relates to the student's age and grade level when all students in self-contained classes are combined into one class for six grade levels with one teacher providing instruction to all grade levels. The parent commented that it is very infrequent that teachers give separate lessons to the students identified with an SLD when in a self-contained class and further added that this approach is not instruction that is appropriate for age and grade level.

Response: The agency disagrees that revision is required based on the comment. Instructional practices fall within the purview of LEAs. However, if a student is not receiving modified instruction as required by his or her individualized education program (IEP), the issue can be addressed with the campus or school district administration as well as through a special education complaint, mediation, or due process hearing.

Comment: A parent asked whether §89.1040(c)(9)(B)(iii) must include that a student's failure in response to intervention (RtI) or a student's exhibiting a pattern of strengths and weaknesses are absolutely required in order for a student to be found to have an SLD.

Response: The agency disagrees that additional language is necessary. Section 89.1040(c)(9)(B)(ii)(I) and (II) align with IDEA regarding requirements for determining eligibility.

Comment: A parent commented that §89.1040(c)(9)(B)(iv), regarding eligibility, fails to clearly define that a child who is deaf, blind, or DeafBlind can have dyslexia. The parent stated that the proposed amendment has left the qualification ambiguous by using the wording "primarily not caused by hearing or vision loss." The parent expressed concern that students will not be identified as having dyslexia because of their existing hearing and vision loss.

Response: The agency disagrees. The language in §89.1040(c)(9)(B)(iv) aligns with IDEA. It is the role of the student's ARD committee to determine the student's special education eligibility and design an IEP that meets the student's needs. The process is collaborative. If there is disagreement within the ARD committee, there are avenues available to the participants to assist with reaching an agreement. Additionally, the use of the word "primarily" in the rule allows for consideration of other variables such as certain co-occurring disabilities. The agency provides guidance regarding conducting comprehensive evaluations on the TEA website at [https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20\\_11.5.19\\_accessible-locked\\_r.pdf](https://tea.texas.gov/sites/default/files/FINAL%20Child%20Find%20and%20Evaluation%20_11.5.19_accessible-locked_r.pdf).

Comment: DRTx noted that the revision of rule language regarding the criteria a student must meet in exhibiting intellectual development will be beneficial, including reducing the reliance on a model dependent on a severe discrepancy between intellectual ability and achievement for determining whether a student has an SLD.

Response: The agency agrees.

Comment: The Texas Dyslexia Coalition and three parents commented that the use of accommodations during the evaluation process when determining eligibility for special education services can impact the results of the assessment(s). The Texas Dyslexia Coalition recommended adding language to read, "If accommodations are utilized on any measure, the impact of the accommodations on the student's performance must be considered to ensure an accurate representation of the presence of a disability."

Response: The agency disagrees that revision is required based on the comment. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of accommodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. Finally, IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments.

Comment: DRTx commented that the federal regulations governing the evaluation of students suspected of having an SLD require that the evaluation team consider certain factors. Additionally, DRTx explained that since these considerations only occur upon the commencement of the evaluation, the mention of prior considerations is inappropriate and recommended striking "prior to and" at the beginning of §89.1040(c)(9)(C). The Texas Dyslexia Coalition and two parents also made the same comment.

Response: The agency agrees. At adoption, the phrase "prior to and " was removed from §89.1040(c)(9)(C).

Comment: DRTx recommended amending §89.1040(c)(9)(C)(ii), relating to the requirement that schools share with parents the data-based documentation of repeated assessments of their student, to specify that the documentation must be provided in a timely manner.

Response: The agency disagrees. The language in §89.1040(c)(9)(C)(ii) aligns with IDEA.

Comment: A parent requested that RtI be limited to six weeks.

Response: The agency disagrees because limiting interventions does not take into account the individual needs of students.

Comment: DRTx commented that amendment to §89.1040 incorporates the federal requirement of considerations to ensure that a student's underachievement is not due to the lack of appropriate instruction in reading or mathematics. DRTx suggested that additional clarification would ensure that repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, are not skewed by mitigating measures employed by the school in an attempt to boost the student's achievement and progress. DRTx also commented that this clarification inserted into the proposed rule amendment would be consistent with other federal disability law intended to protect individuals with disabilities from discrimination. DRTx recommended inserting a sentence at the end of §89.1040(c)(9)(C)(ii) to read, "Consideration of data-based documentation shall be made without regard to the ameliorative effects of mitigating measures such as reasonable accommodations or auxiliary aids or services."

Response: The agency disagrees that revision is required based on the comments. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of accommodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. Finally, IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments.

Comment: DRTx commented that the federal regulations governing the evaluation of students suspected of having an SLD permit consideration of the student's RtI. DRTx suggested clarification that the utilization of RtI or a multi-tiered system of support is not necessary before the evaluation and identification of a student with an SLD.

Response: The agency disagrees that the additional language is necessary because 19 TAC §89.1011(a) addresses the commenter's concern.

Comment: The Texas Dyslexia Coalition and individual members of the Texas Dyslexia Coalition communicated concern that the use of accommodations and multiple attempts for passing a test was impacting the results of assessment(s) used to determine the student's eligibility for special education services. The Texas Dyslexia Coalition recommended amending §89.1040(c)(9)(C)(ii) by inserting "and the student's progress monitoring data (current rate of progress and movement towards closing achievement gaps)" after the clause "reflecting formal evaluation of student progress during instruction;" inserting "initial attempts on TEKS-based" before "in-class;" and inserting "not to exceed six weeks" at the end of the clause. The Texas Dyslexia Coalition recommended inserting four additional clauses after §89.1040(c)(9)(C)(ii), which would include considering the impact using accommodations had on the student's performance when conducting an evaluation for special education services, eliminating the requirement for struggling students to participate in support services prior to being referred for special education services, adding the consideration of an evaluation for special education specifically for SLD for any student when the student does not perform adequately on multiple measures, and not allowing intervention strategies to delay or deny an evaluation for special education as well as requiring school personnel to initiate a referral to special education when a student is suspected of having a disability.

Response: The agency disagrees that revision is required based on the comments. Evaluations are comprehensive and are not dependent upon one data source. Additionally, the use of accommodations in the classroom, district-wide assessments, and state assessments can be used to determine if a student requires specialized instruction under IDEA. If a student is successful with the use of accommodations, specialized instruction may not be necessary. IDEA already requires that assessments and other evaluation material used to assess a student be administered in accordance with any instructions provided by the producer of the assessments and requires that students be evaluated in all areas of suspected disability. Finally, the agency disagrees that the additional language is necessary because 19 TAC §89.1011(a) addresses the commenter's concerns regarding the use of intervention strategies.

Comment: DRTx commented that §89.1040(c)(9)(D) incorporates the federal requirement of an observation of the student but that additional clarification would be beneficial to ensure that there is no delay in other aspects of the evaluation. DRTx recommended inserting an additional sentence at the end of the subparagraph to read,

"Conducting an observation shall not delay or deny the evaluation described in subparagraph (B) and 34 CFR, §§300.307-300.311."

Response: The agency disagrees that additional clarification is needed. The ARD committee can use observation data from before the referral for an initial evaluation or may use data gathered through observations taking place during the evaluation process.

Comment: A parent commented that an evaluation could be delayed when it is summer or if the school building is closed and recommended adding to §89.1040(c)(9)(D) the option for a virtual observation to prevent a delay in evaluation.

Response: The agency disagrees that additional clarification is needed. The timeline for completing an initial evaluation is based on school days. Therefore, a student not being present for observation at school during a holiday or school closure would not delay the initial evaluation process.

Comment: A parent commented that §89.1040(c)(9)(E) should be modified to specify that any participant in the committee must have passed the HB 3 Reading Academies or minimally know the science of reading in order to be able to serve in the committee when the student in question has an SLD related to reading.

Response: The agency disagrees. The recommended change would place limitations on who could attend a student's ARD committee meeting, which would violate 34 CFR, §300.321, related to ARD committee membership.

Comment: An education service center staff member questioned whether §89.1050(j)(4), relating to a student who enrolls in a new district before the start of a new school year, conflicts with, and therefore replaces, 34 CFR, §300.323(f). The commenter also requested information regarding practical application of the amendment, specifically related to summer enrollment and how to serve a student who enters an LEA over the summer.

Response: The agency clarifies that the changes to §89.1050(j) are not in conflict with federal law, as the transfer requirements set out in 34 CFR, §300.323(f), including requirements related to evaluations, only apply to students who transfer into the LEA during the school year. The amendment addresses the requirement of 34 CFR, §300.323(a), mandating that at the beginning of the school year, the LEA must have an IEP in effect for each student with a disability within its jurisdiction. Thus, the LEA must ensure that the IEP of a student who enrolls in the LEA over the summer, in accordance with state enrollment requirements, is implemented in full on the first day of school. The IEP can be the IEP in place from the student's previous school district or it can be one that is developed by an ARD committee convened by the LEA prior to the first day of school. If the ARD committee determines an evaluation is necessary, the IEP can be implemented during the evaluation process.

STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

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**§89.1005. Instructional Arrangements and Settings.**

- (a) Each local school district shall be able to provide services with special education personnel to students with disabilities in order to meet the special needs of those students in accordance with 34 Code of Federal Regulations, §§300.114-300.118.
- (b) Subject to §89.1075(e) of this title (relating to General Program Requirements and Local District Procedures), for the purpose of determining the student's instructional arrangement/setting, the regular school day is defined as the period of time determined appropriate by the admission, review, and dismissal (ARD) committee.
- (c) Instructional arrangements/settings shall be based on the individual needs and individualized education programs (IEPs) of eligible students receiving special education services and shall include the following.
  - (1) Mainstream. This instructional arrangement/setting is for providing special education and related services to a student in the regular classroom in accordance with the student's IEP. Qualified special education personnel must be involved in the implementation of the student's IEP through the provision of direct, indirect, and/or support services to the student and/or the student's regular classroom teacher(s) necessary to enrich the regular classroom and enable student success. The student's IEP must specify the services that will be provided by qualified special education personnel to enable the student to appropriately progress in the general education curriculum and/or appropriately advance in achieving the goals set out in the student's IEP. Examples of services provided in this instructional arrangement include, but are not limited to, direct instruction, helping teacher, team teaching, co-teaching, interpreter, educational aides, curricular or instructional modifications/accommodations, special materials/equipment, positive classroom behavioral interventions and supports, consultation with the student and his/her regular classroom teacher(s) regarding the student's progress in regular education classes, staff development, and reduction of ratio of students to instructional staff.
  - (2) Homebound. This instructional arrangement/setting is for providing special education and related services to students who are served at home or hospital bedside.
    - (A) Students served on a homebound or hospital bedside basis are expected to be confined for a minimum of four consecutive weeks as documented by a physician licensed to practice in the United States. Homebound or hospital bedside instruction may, as provided by local district policy, also be provided to chronically ill students who are expected to be confined for any period of time totaling at least four weeks throughout the school year as documented by a physician licensed to practice in the United States. The student's ARD committee shall determine the amount of services to be provided to the student in this instructional arrangement/setting in accordance with federal and state laws, rules, and regulations, including the provisions specified in subsection (b) of this section.
    - (B) Home instruction may also be used for services to infants and toddlers (birth through age 2) and young children (ages 3-5) when determined appropriate by the child's individualized family services plan (IFSP) committee or ARD committee. This arrangement/setting also applies to school districts described in Texas Education Code, §29.014.
  - (3) Hospital class. This instructional arrangement/setting is for providing special education instruction in a classroom, a hospital facility, or a residential care and treatment facility not operated by the school district. If the students residing in the facility are provided special education services outside the facility, they are considered to be served in the instructional arrangement in which they are placed and are not to be considered as in a hospital class.
  - (4) Speech therapy. This instructional arrangement/setting is for providing speech therapy services whether in a regular education classroom or in a setting other than a regular education classroom. When the only special education or related service provided to a student is speech therapy, then this instructional arrangement may not be combined with any other instructional arrangement.
  - (5) Resource room/services. This instructional arrangement/setting is for providing special education and related services to a student in a setting other than regular education for less than 50% of the regular school day.

- (6) Self-contained (mild, moderate, or severe) regular campus. This instructional arrangement/setting is for providing special education and related services to a student who is in a self-contained program for 50% or more of the regular school day on a regular school campus.
  - (7) Off-home campus. This instructional arrangement/setting is for providing special education and related services to the following, including, but not limited to, students at South Texas Independent School District and Windham School District:
    - (A) a student who is one of a group of students from more than one school district served in a single location when a free appropriate public education is not available in the respective sending district;
    - (B) a student in a community setting or environment (not operated by a school district) that prepares the student for postsecondary education/training, integrated employment, and/or independent living in coordination with the student's individual transition goals and objectives, including a student with regularly scheduled instruction or direct involvement provided by school district personnel or a student in a facility not operated by a school district (other than a nonpublic day school) with instruction provided by school district personnel; or
    - (C) a student in a self-contained program at a separate campus operated by the school district that provides only special education and related services.
  - (8) Nonpublic day school. This instructional arrangement/setting is for providing special education and related services to students through a contractual agreement with a nonpublic school for special education.
  - (9) Vocational adjustment class/program. This instructional arrangement/setting is for providing special education and related services to a student who is placed on a job (paid or unpaid unless otherwise prohibited by law) with regularly scheduled direct involvement by special education personnel in the implementation of the student's IEP. This instructional arrangement/setting shall be used in conjunction with the student's individual transition goals and only after the school district's career and technical education classes have been considered and determined inappropriate for the student.
  - (10) Residential care and treatment facility (not school district resident). This instructional arrangement/setting is for providing special education instruction and related services to students who reside in care and treatment facilities and whose parents do not reside within the boundaries of the school district providing educational services to the students. In order to be considered in this arrangement, the services must be provided on a school district campus. If the instruction is provided at the facility, rather than on a school district campus, the instructional arrangement is considered to be the hospital class arrangement/setting rather than this instructional arrangement. Students with disabilities who reside in these facilities may be included in the average daily attendance of the district in the same way as all other students receiving special education.
  - (11) State-supported living center. This instructional arrangement/setting is for providing special education and related services to a student who resides at a state-supported living center when the services are provided at the state-supported living center location. If services are provided on a local school district campus, the student is considered to be served in the residential care and treatment facility arrangement/setting.
- (d) The appropriate instructional arrangement for students from birth through the age of two with visual impairments or who are deaf or hard of hearing shall be determined in accordance with the IFSP, current attendance guidelines, and the agreement memorandum between the Texas Education Agency (TEA) and Texas Health and Human Services Commission Early Childhood Intervention Services.
  - (e) For nonpublic day school placements, the school district or shared service arrangement shall submit information to TEA indicating the students' identification numbers, initial dates of placement, and the names of the facilities with which the school district or shared service arrangement is contracting. The school district or shared service arrangement shall not count contract students' average daily attendance as eligible. TEA shall determine the number of contract students reported in full-time equivalents and pay state funds to the district according to the formula prescribed in law.
  - (f) Other program options that may be considered for the delivery of special education and related services to a student may include the following:
    - (1) contracts with other school districts; and
    - (2) other program options as approved by TEA.



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STATUTORY AUTHORITY. The amendments are adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendments implement Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

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**§89.1035. Age Ranges for Student Eligibility.**

- (a) Pursuant to state and federal law, services provided in accordance with this subchapter must be available to all eligible students ages 3-21. Services will be made available to eligible students on their third birthday. Graduation with a regular high school diploma pursuant to §89.1070(b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this title (relating to Graduation Requirements) terminates a student's eligibility to receive services in accordance with this subchapter. An eligible student receiving special education services who is 21 years of age on September 1 of a school year will be eligible for services through the end of that school year or until graduation with a regular high school diploma pursuant to §89.1070(b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this title, whichever comes first.
- (b) In accordance with the Texas Education Code (TEC), §§29.003, 30.002(a), and 30.081, a free appropriate public education must be available from birth to students with visual impairments or who are deaf or hard of hearing.

**§89.1040. Eligibility Criteria.**

- (a) Special education services. To be eligible to receive special education services, a student must be a "child with a disability," as defined in 34 Code of Federal Regulations (CFR), §300.8(a), subject to the provisions of 34 CFR, §300.8(c), the Texas Education Code, §29.003, and this section. The provisions in this section specify criteria to be used in determining whether a student's condition meets one or more of the definitions in federal regulations or in state law.
- (b) Eligibility determination. The determination of whether a student is eligible for special education and related services is made by the student's admission, review, and dismissal committee. Any evaluation or re-evaluation of a student must be conducted in accordance with 34 CFR, §§300.301-300.306 and 300.122. The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility must include, but is not limited to, the following:
  - (1) a licensed specialist in school psychology (LSSP), an educational diagnostician, or other appropriately certified or licensed practitioner with experience and training in the area of the disability; or
  - (2) a licensed or certified professional for a specific eligibility category defined in subsection (c) of this section.
- (c) Eligibility definitions.
  - (1) Autism. A student with autism is one who has been determined to meet the criteria for autism as stated in 34 CFR, §300.8(c)(1). Students with pervasive developmental disorders are included under this category. The team's written report of evaluation must include specific recommendations for behavioral interventions and strategies.

- (2) Deaf-blindness. A student with deaf-blindness is one who has been determined to meet the criteria for deaf-blindness as stated in 34 CFR, §300.8(c)(2). In meeting the criteria stated in 34 CFR, §300.8(c)(2), a student with deaf-blindness is one who, based on the evaluations specified in subsection (c)(3) and (12) of this section:
- (A) meets the eligibility criteria for a student who is deaf or hard of hearing specified in subsection (c)(3) of this section and visual impairment specified in subsection (c)(12) of this section;
  - (B) meets the eligibility criteria for a student with a visual impairment and has a suspected hearing loss that cannot be demonstrated conclusively, but a speech/language therapist, a certified speech and language therapist, or a licensed speech language pathologist indicates there is no speech at an age when speech would normally be expected;
  - (C) has documented hearing and visual losses that, if considered individually, may not meet the requirements for a student who is deaf or hard of hearing or for visual impairment, but the combination of such losses adversely affects the student's educational performance; or
  - (D) has a documented medical diagnosis of a progressive medical condition that will result in concomitant hearing and visual losses that, without special education intervention, will adversely affect the student's educational performance.
- (3) Deaf or hard of hearing. A student who is deaf or hard of hearing is one who has been determined to meet the criteria for deafness as stated in 34 CFR, §300.8(c)(3), or for students who are deaf or hard of hearing as stated in 34 CFR, §300.8(c)(5). The evaluation data reviewed by the multidisciplinary team in connection with the determination of a student's eligibility based on being deaf or hard of hearing must include an otological examination performed by an otolaryngologist or by a licensed medical doctor, with documentation that an otolaryngologist is not reasonably available, and an audiological evaluation performed by a licensed audiologist. The evaluation data must include a description of the implications of the hearing loss for the student's hearing in a variety of circumstances with or without recommended amplification.
- (4) Emotional disturbance. A student with an emotional disturbance is one who has been determined to meet the criteria for emotional disturbance as stated in 34 CFR, §300.8(c)(4). The written report of evaluation must include specific recommendations for behavioral supports and interventions.
- (5) Intellectual disability. A student with an intellectual disability is one who has been determined to meet the criteria for an intellectual disability as stated in 34 CFR, §300.8(c)(6). In meeting the criteria stated in 34 CFR, §300.8(c)(6), a student with an intellectual disability is one who:
- (A) has been determined to have significantly sub-average intellectual functioning as measured by a standardized, individually administered test of cognitive ability in which the overall test score is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; and
  - (B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.
- (6) Multiple disabilities.
- (A) A student with multiple disabilities is one who has been determined to meet the criteria for multiple disabilities as stated in 34 CFR, §300.8(c)(7). In meeting the criteria stated in 34 CFR, §300.8(c)(7), a student with multiple disabilities is one who has a combination of disabilities defined in this section and who meets all of the following conditions:
    - (i) the student's disability is expected to continue indefinitely; and
    - (ii) the disabilities severely impair performance in two or more of the following areas:
      - (I) psychomotor skills;
      - (II) self-care skills;
      - (III) communication;
      - (IV) social and emotional development; or
      - (V) cognition.
  - (B) Students who have more than one of the disabilities defined in this section but who do not meet the criteria in subparagraph (A) of this paragraph must not be classified or reported as having multiple disabilities.

- (7) Orthopedic impairment. A student with an orthopedic impairment is one who has been determined to meet the criteria for orthopedic impairment as stated in 34 CFR, §300.8(c)(8). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on an orthopedic impairment must include a licensed physician.
- (8) Other health impairment. A student with other health impairment is one who has been determined to meet the criteria for other health impairment due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette's Disorder as stated in 34 CFR, §300.8(c)(9). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on other health impairment must include a licensed physician.
- (9) Specific learning disability.
- (A) Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; intellectual disability; emotional disturbance; or environmental, cultural, or economic disadvantage.
- (B) A student with a specific learning disability is one who:
- (i) has been determined through a variety of assessment tools and strategies to meet the criteria for a specific learning disability as stated in 34 CFR, §300.8(c)(10), in accordance with the provisions in 34 CFR, §§300.307-300.311;
- (ii) when provided with learning experiences and instruction appropriate for the student's age or state-approved grade-level standards as indicated by performance on multiple measures such as in-class tests, grade average over time (e.g. six weeks or semester), norm- or criterion-referenced tests, and statewide assessments, does not achieve adequately for the student's age or to meet state-approved grade-level standards in one or more of the following areas:
- (I) oral expression;
- (II) listening comprehension;
- (III) written expression;
- (IV) basic reading skill;
- (V) reading fluency skills;
- (VI) reading comprehension;
- (VII) mathematics calculation; or
- (VIII) mathematics problem solving;
- (iii) meets one of the following criteria:
- (I) does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in clause (ii)(I)-(VIII) of this subparagraph when using a process based on the student's response to scientific, research-based intervention; or
- (II) exhibits a pattern of strengths and weaknesses in performance, achievement, or both relative to age, state-approved grade-level standards, or intellectual development that is determined to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 CFR, §300.304 and §300.305; and
- (iv) does not meet the findings under clauses (ii) and (iii) of this subparagraph primarily as the result of:
- (I) a visual, hearing, or motor disability;
- (II) an intellectual disability;
- (III) emotional disturbance;
- (IV) cultural factors;
- (V) environmental or economic disadvantage; or

- (VI) limited English proficiency.
- (C) As part of the evaluation described in subparagraph (B) of this paragraph and 34 CFR, §§300.307-300.311, and in order to ensure that underachievement by a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or mathematics, the following must be considered:
- (i) data that demonstrates the student was provided appropriate instruction in reading (as described in 20 United States Code (USC), §6368(3)), and/or mathematics within general education settings delivered by qualified personnel; and
  - (ii) data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal evaluation of student progress during instruction, which must be provided to the student's parents. Data-based documentation of repeated assessments may include, but is not limited to, response to intervention progress monitoring results, in-class tests on grade-level curriculum, or other regularly administered assessments. Intervals are considered reasonable if consistent with the assessment requirements of a student's specific instructional program.
- (D) The school district must ensure that the student is observed in the student's learning environment, including the regular classroom setting, to document the student's academic performance and behavior in the areas of difficulty. In determining whether a student has a specific learning disability, the admission, review, and dismissal (ARD) committee must decide to either use information from an observation in routine classroom instruction and monitoring of the student's performance that was conducted before the student was referred for an evaluation or have at least one of the members described in subsection (b) of this section conduct an observation of the student's academic performance in the regular classroom after the student has been referred for an evaluation and the school district has obtained parental consent consistent with 34 CFR, §300.300(a). In the case of a student of less than school age or out of school, a member described in subsection (b) of this section must observe the student in an environment appropriate for a student of that age.
- (E) The determination of whether a student suspected of having a specific learning disability is a student with a disability as defined in 34 CFR, §300.8, must be made by the student's parents and a team of qualified professionals, which must include at least one person qualified to conduct individual diagnostic examinations of children such as a licensed specialist in school psychology, an educational diagnostician, a speech-language pathologist, or a remedial reading teacher and one of the following:
- (i) the student's regular teacher;
  - (ii) if the student does not have a regular teacher, a regular classroom teacher qualified to teach a student of his or her age; or
  - (iii) for a student of less than school age, an individual qualified by the Texas Education Agency to teach a student of his or her age.
- (10) Speech impairment. A student with a speech impairment is one who has been determined to meet the criteria for speech or language impairment as stated in 34 CFR, §300.8(c)(11). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on a speech impairment must include a certified speech and hearing therapist, a certified speech and language therapist, or a licensed speech/language pathologist.
- (11) Traumatic brain injury. A student with a traumatic brain injury is one who has been determined to meet the criteria for traumatic brain injury as stated in 34 CFR, §300.8(c)(12). The multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on a traumatic brain injury must include a licensed physician, in addition to the licensed or certified practitioners specified in subsection (b)(1) of this section.
- (12) Visual impairment.
- (A) A student with a visual impairment is one who has been determined to meet the criteria for visual impairment as stated in 34 CFR, §300.8(c)(13). Information from a variety of

sources must be considered by the multidisciplinary team that collects or reviews evaluation data in connection with the determination of a student's eligibility based on visual impairment in order to determine the need for specially designed instruction as stated in 34 CFR, §300.39(b)(3), and must include:

- (i) a medical report by a licensed ophthalmologist or optometrist that indicates the visual loss stated in exact measures of visual field and corrected visual acuity, at a distance and at near range, in each eye. If exact measures cannot be obtained, the eye specialist must so state and provide best estimates. The report should also include a diagnosis and prognosis whenever possible and whether the student has:
    - (I) no vision or visual loss after correction; or
    - (II) a progressive medical condition that will result in no vision or a visual loss after correction;
  - (ii) a functional vision evaluation by a certified teacher of students with visual impairments or a certified orientation and mobility specialist. The evaluation must include the performance of tasks in a variety of environments requiring the use of both near and distance vision and recommendations concerning the need for a clinical low vision evaluation;
  - (iii) a learning media assessment by a certified teacher of students with visual impairments. The learning media assessment must include recommendations concerning which specific visual, tactual, and/or auditory learning media are appropriate for the student and whether or not there is a need for ongoing evaluation in this area; and
  - (iv) as part of the full individual and initial evaluation, an orientation and mobility evaluation conducted by a person who is appropriately certified as an orientation and mobility specialist. The evaluation must be conducted in a variety of lighting conditions and in a variety of settings, including in the student's home, school, and community, and in settings unfamiliar to the student.
- (B) A person who is appropriately certified as an orientation and mobility specialist must participate in any reevaluation as part of the multidisciplinary team, in accordance with 34 CFR, §§300.122 and 300.303-300.311, in evaluating data used to make the determination of the student's need for specially designed instruction.
- (C) A person who is appropriately certified as an orientation and mobility specialist must participate, as part of a multidisciplinary team, in accordance with 34 CFR, §§300.122 and 300.303-300.311, in evaluating data used in making the determination of the student's eligibility as a student with a visual impairment.
- (13) Noncategorical. A student between the ages of 3-5 who is evaluated as having an intellectual disability, an emotional disturbance, a specific learning disability, or autism may be described as noncategorical early childhood.

**§89.1050. The Admission, Review, and Dismissal Committee.**

- (a) Each school district must establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full individual and initial evaluation is conducted pursuant to §89.1011 of this title (relating to Full Individual and Initial Evaluation). The ARD committee is the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.321. The school district is responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including the following:
- (1) 34 CFR, §§300.320-300.325, and Texas Education Code (TEC), §29.005 (individualized education programs);
  - (2) 34 CFR, §§300.145-300.147 (relating to placement of eligible students in private schools by a school district);
  - (3) 34 CFR, §§300.132, 300.138, and 300.139 (relating to the development and implementation of service plans for eligible students placed by parents in private school who have been designated to receive special education and related services);
  - (4) 34 CFR, §300.530 and §300.531, and TEC, §37.004 (disciplinary placement of students with disabilities);

- (5) 34 CFR, §§300.302-300.306 (relating to evaluations, re-evaluations, and determination of eligibility);
  - (6) 34 CFR, §§300.114-300.117 (relating to least restrictive environment);
  - (7) TEC, §28.006 (Reading Diagnosis);
  - (8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);
  - (9) TEC, §28.0212 (Junior High or Middle School Personal Graduation Plan);
  - (10) TEC, §28.0213 (Intensive Program of Instruction);
  - (11) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);
  - (12) TEC, §30.002 (Education for Children with Visual Impairments);
  - (13) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);
  - (14) TEC, §33.081 (Extracurricular Activities);
  - (15) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and
  - (16) TEC, §48.102 (Special Education).
- (b) For a student from birth through two years of age with a visual impairment or who is deaf or hard of hearing, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§300.320-300.324, and the memorandum of understanding between the Texas Education Agency and the Texas Health and Human Services Commission. For students three years of age and older, school districts must develop an IEP.
- (c) ARD committee membership.
- (1) ARD committees must include the following:
    - (A) the parents of the student;
    - (B) not less than one regular education teacher of the student (if the student is, or may be, participating in the regular education environment) who must, to the extent practicable, be a teacher who is responsible for implementing a portion of the student's IEP;
    - (C) not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
    - (D) a representative of the school district who:
      - (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities;
      - (ii) is knowledgeable about the general education curriculum; and
      - (iii) is knowledgeable about the availability of resources of the school district;
    - (E) an individual who can interpret the instructional implications of evaluation results, who may be a member of the committee described in subparagraphs (B)-(D) and (F) of this paragraph;
    - (F) at the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel, as appropriate;
    - (G) whenever appropriate, the student with a disability;
    - (H) to the extent appropriate, with the consent of the parents or a student who has reached the age of majority, a representative of any participating agency that is likely to be responsible for providing or paying for transition services;
    - (I) a representative from career and technical education (CTE), preferably the teacher, when considering initial or continued placement of a student in CTE; and
    - (J) a professional staff member who is on the language proficiency assessment committee who may be a member of the committee described in subparagraphs (B) and (C) of this paragraph, if the student is identified as an English language learner.
  - (2) The special education teacher or special education provider that participates in the ARD committee meeting must be appropriately certified or licensed as required by 34 CFR, §300.18 and §300.156.
  - (3) If the student is:
    - (A) a student with a suspected or documented visual impairment, the ARD committee must include a teacher who is certified in the education of students with visual impairments;

- (B) a student who is suspected to be deaf or hard of hearing, the ARD committee must include a teacher who is certified in the education of students who are deaf or hard of hearing; or
  - (C) a student with suspected or documented deaf-blindness, the ARD committee must include a teacher who is certified in the education of students with visual impairments and a teacher who is certified in the education of students who are deaf or hard of hearing.
- (4) An ARD committee member is not required to attend an ARD committee meeting if the conditions of either 34 CFR, §300.321(e)(1), regarding attendance, or 34 CFR, §300.321(e)(2), regarding excusal, have been met.
- (d) The school district must take steps to ensure that one or both parents are present at each ARD committee meeting or are afforded the opportunity to participate, including notifying the parents of the meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place. Additionally, a school district must allow parents who cannot attend an ARD committee meeting to participate in the meeting through other methods such as through telephone calls or video conferencing. The school district must provide the parents with written notice of the ARD committee meeting that meets the requirements in 34 CFR, §300.322, at least five school days before the meeting unless the parents agree to a shorter timeframe.
- (e) Upon receipt of a written request for an ARD committee meeting from a parent, the school district must:
  - (1) schedule and convene a meeting in accordance with the procedures in subsection (d) of this section; or
  - (2) within five school days, provide the parent with written notice explaining why the district refuses to convene a meeting.
- (f) If the parent is unable to speak English, the school district must provide the parent with a written notice required under subsection (d) or (e)(2) of this section in the parent's native language, unless it is clearly not feasible to do so. If the parent's native language is not a written language, the school district must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication so that the parent understands the content of the notice.
- (g) All members of the ARD committee must have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the ARD committee concerning required elements of the IEP must be made by mutual agreement if possible. The ARD committee may agree to an annual IEP or an IEP of shorter duration.
  - (1) When mutual agreement about all required elements of the IEP is not achieved, the parent who disagrees must be offered a single opportunity to recess and reconvene the ARD committee meeting. The period of time for reconvening the ARD committee meeting must not exceed ten school days, unless the parties mutually agree otherwise. The ARD committee must schedule the reconvened meeting at a mutually agreed upon time and place. The opportunity to recess and reconvene is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense that may lead to a placement in a disciplinary alternative education program. The requirements of this subsection do not prohibit the ARD committee from recessing an ARD committee meeting for reasons other than the failure to reach mutual agreement about all required elements of an IEP.
  - (2) During the recess, the ARD committee members must consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons who may assist in enabling the ARD committee to reach mutual agreement.
  - (3) If a recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the school district must implement the IEP that it has determined to be appropriate for the student.
  - (4) Each member of the ARD committee who disagrees with the IEP developed by the ARD committee is entitled to include a statement of disagreement in the IEP.
- (h) Whenever a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free appropriate public education to the student, the school district must provide prior written notice as required in 34 CFR, §300.503, including providing the notice in the parent's native language or other mode of communication. This notice must be provided to the parent at least five school days before the school district proposes or refuses the action unless the parent agrees to a shorter timeframe.



- (i) If the student's parent is unable to speak English and the parent's native language is Spanish, the school district must provide a written copy or audio recording of the student's IEP translated into Spanish. If the student's parent is unable to speak English and the parent's native language is a language other than Spanish, the school district must make a good faith effort to provide a written copy or audio recording of the student's IEP translated into the parent's native language.
- (1) For purposes of this subsection, a written copy of the student's IEP translated into Spanish or the parent's native language means that all of the text in the student's IEP in English is accurately translated into the target language in written form. The IEP translated into the target language must be a comparable rendition of the IEP in English and not a partial translation or summary of the IEP in English.
  - (2) For purposes of this subsection, an audio recording of the student's IEP translated into Spanish or the parent's native language means that all of the content in the student's IEP in English is orally translated into the target language and recorded with an audio device. A school district is not prohibited from providing the parent with an audio recording of an ARD committee meeting at which the parent was assisted by an interpreter as long as the audio recording provided to the parent contains an oral translation into the target language of all of the content in the student's IEP in English.
  - (3) If a parent's native language is not a written language, the school district must take steps to ensure that the student's IEP is translated orally or by other means to the parent in his or her native language or other mode of communication.
  - (4) Under 34 CFR, §300.322(f), a school district must give a parent a written copy of the student's IEP at no cost to the parent. A school district meets this requirement by providing a parent with a written copy of the student's IEP in English or by providing a parent with a written translation of the student's IEP in the parent's native language in accordance with paragraph (1) of this subsection.
- (j) A school district must comply with the following for a student who is new to the school district.
- (1) When a student transfers to a new school district within the state in the same school year and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(e), regarding the provision of special education services. The timeline for completing the requirements outlined in 34 CFR, §300.323(e)(1) or (2), is 30 school days from the date the student is verified as being a student eligible for special education services.
  - (2) When a student transfers from a school district in another state in the same school year and the parents verify that the student was receiving special education services in the previous school district or the previous school district verifies in writing or by telephone that the student was receiving special education services, the new school district must meet the requirements of 34 CFR, §300.323(f), regarding the provision of special education services. If the new school district determines that an evaluation is necessary, the evaluation is considered a full individual and initial evaluation and must be completed within the timelines established by §89.1011(c) and (e) of this title. The timeline for completing the requirements in 34 CFR, §300.323(f)(2), if appropriate, is 30 calendar days from the date of the completion of the evaluation report. If the school district determines that an evaluation is not necessary, the timeline for completing the requirements outlined in 34 CFR, §300.323(f)(2), is 30 school days from the date the student is verified as being a student eligible for special education services.
  - (3) In accordance with TEC, §25.002, and 34 CFR, §300.323(g), the school district in which the student was previously enrolled must furnish the new school district with a copy of the student's records, including the student's special education records, not later than the 10th working day after the date a request for the information is received by the previous school district.
  - (4) A student with a disability who has an IEP in place from a previous in- or out-of-state school district and who enrolls in a new school district during the summer is not considered a transfer student for the purposes of this subsection or for 34 CFR, §300.323(e) or (f). For these students, the new school district must implement the IEP from the previous school district in full on the first day of class of the new school year or must convene an ARD committee meeting during the summer to revise the student's IEP for implementation on the first day of class of the new school year.

- (k) All disciplinary actions regarding students with disabilities must be determined in accordance with 34 CFR, §§300.101(a) and 300.530-300.536; TEC, Chapter 37, Subchapter A; and §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out).

**§89.1070. Graduation Requirements.**

- (a) Graduation with a regular high school diploma under subsections (b)(1), (b)(3)(D), (f)(1), (f)(2), (f)(3), or (f)(4)(D) of this section terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act and entitlement to the benefits of the Foundation School Program, as provided in Texas Education Code (TEC), §48.003(a).
- (b) A student entering Grade 9 in the 2014-2015 school year and thereafter who receives special education services may graduate and be awarded a regular high school diploma if the student meets one of the following conditions.
- (1) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110- 117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title (relating to Foundation High School Program) applicable to students in general education as well as satisfactory performance as established in the TEC, Chapter 39, on the required end-of-course assessment instruments.
  - (2) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title applicable to students in general education but the student's ARD committee has determined that satisfactory performance on the required end-of-course assessment instruments is not necessary for graduation.
  - (3) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110-117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation under the Foundation High School Program specified in §74.12 of this title through courses, one or more of which contain modified curriculum that is aligned to the standards applicable to students in general education, as well as satisfactory performance as established in the TEC, Chapter 39, on the required end-of course assessment instruments, unless the student's ARD committee has determined that satisfactory performance on the required end-of-course assessment instruments is not necessary for graduation. The student must also successfully complete the student's individualized education program (IEP) and meet one of the following conditions.
    - (A) Consistent with the IEP, the student has obtained full-time employment, based on the student's abilities and local employment opportunities, in addition to mastering sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district.
    - (B) Consistent with the IEP, the student has demonstrated mastery of specific employability skills and self-help skills that do not require direct ongoing educational support of the local school district.
    - (C) The student has access to services that are not within the legal responsibility of public education or employment or educational options for which the student has been prepared by the academic program.
    - (D) The student no longer meets age eligibility requirements.
- (c) A student receiving special education services may earn an endorsement under §74.13 of this title (relating to Endorsements) if the student:
- (1) satisfactorily completes the requirements for graduation under the Foundation High School Program specified in §74.12 of this title as well as the additional credit requirements in mathematics, science, and elective courses as specified in §74.13(e) of this title with or without modified curriculum;
  - (2) satisfactorily completes the courses required for the endorsement under §74.13(f) of this title without any modified curriculum or with modification of the curriculum, provided that the curriculum, as modified, is sufficiently rigorous as determined by the student's ARD committee; and

- (3) performs satisfactorily as established in the TEC, Chapter 39, on the required end-of-course assessment instruments unless the student's ARD committee determines that satisfactory performance is not necessary.
- (d) Notwithstanding subsection (c)(3) of this section, a student receiving special education services classified in Grade 11 or 12 who has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments is eligible to receive an endorsement if the student has met the requirements in subsection (c)(1) and (2) of this section.
- (e) A student receiving special education services who entered Grade 9 before the 2014-2015 school year may graduate and be awarded a high school diploma under the Foundation High School Program as provided in §74.1021 of this title (relating to Transition to the Foundation High School Program), if the student's ARD committee determines that the student should take courses under that program and the student satisfies the requirements of that program. Subsections (c) and (d) of this section apply to a student transitioning to the Foundation High School Program under this subsection. As the TEC, §28.0258 and §39.025(a-2), modify the state assessment requirements applicable to students in general education, a student receiving special education services who is classified in Grade 11 or 12 who has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments may graduate if the student has satisfied all other applicable graduation requirements.
- (f) A student receiving special education services who entered Grade 9 before the 2014-2015 school year may graduate and be awarded a regular high school diploma if the student meets one of the following conditions.
  - (1) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110- 117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation (under the recommended or distinguished achievement high school programs in Chapter 74, Subchapter F, of this title (relating to Graduation Requirements, Beginning with School Year 2007-2008) or Chapter 74, Subchapter G, of this title (relating to Graduation Requirements, Beginning with School Year 2012-2013)), as applicable, including satisfactory performance as established in the TEC, Chapter 39, on the required state assessments.
  - (2) Notwithstanding paragraph (1) of this subsection, as the TEC, §28.0258 and §39.025(a-2), modify the state assessment requirements applicable to students in general education, a student receiving special education services who is classified in Grade 11 or 12 may graduate under the recommended or distinguished achievement high school program, as applicable, if the student has taken each of the state assessments required by Chapter 101, Subchapter CC, of this title (relating to Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program) or Subchapter DD of this title (relating to Commissioner's Rules Concerning Substitute Assessments for Graduation) but failed to achieve satisfactory performance on no more than two of the assessments and has met all other applicable graduation requirements in paragraph (1) of this subsection.
  - (3) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110- 117, 126-128, and 130 of this title and satisfactorily completed credit requirements for graduation (under the minimum high school program in Chapter 74, Subchapter F or G, of this title), as applicable, including participation in required state assessments. The student's ARD committee will determine whether satisfactory performance on the required state assessments is necessary for graduation.
  - (4) The student has demonstrated mastery of the required state standards (or district standards if greater) in Chapters 110- 117, 126-128, and 130 of this title through courses, one or more of which contain modified content that is aligned to the standards required under the minimum high school program in Chapter 74, Subchapter F or G, of this title, as applicable, as well as the satisfactorily completed credit requirements under the minimum high school program, including participation in required state assessments. The student's ARD committee will determine whether satisfactory performance on the required state assessments is necessary for graduation. The student

graduating under this subsection must also successfully complete the student's IEP and meet one of the following conditions.

- (A) Consistent with the IEP, the student has obtained full-time employment, based on the student's abilities and local employment opportunities, in addition to mastering sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district.
  - (B) Consistent with the IEP, the student has demonstrated mastery of specific employability skills and self-help skills that do not require direct ongoing educational support of the local school district.
  - (C) The student has access to services that are not within the legal responsibility of public education or employment or educational options for which the student has been prepared by the academic program.
  - (D) The student no longer meets age eligibility requirements.
- (g) All students graduating under this section must be provided with a summary of academic achievement and functional performance as described in 34 Code of Federal Regulations (CFR), §300.305(e)(3). This summary must consider, as appropriate, the views of the parent and student and written recommendations from adult service agencies on how to assist the student in meeting postsecondary goals. An evaluation as required by 34 CFR, §300.305(e)(1), must be included as part of the summary for a student graduating under subsections (b)(2); (b)(3)(A), (B), or (C); or (f)(4)(A), (B), or (C) of this section.
- (h) Students who participate in graduation ceremonies but who are not graduating under subsections (b)(2); (b)(3)(A), (B), or (C); or (f)(4)(A), (B), or (C) of this section and who will remain in school to complete their education do not have to be evaluated in accordance with subsection (g) of this section.
- (i) Employability and self-help skills referenced under subsections (b)(3) and (f)(4) of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.
- (j) For students who receive a diploma according to subsections (b)(2); (b)(3) (A), (B), or (C); or (f)(4)(A), (B), or (C) of this section, the ARD committee must determine needed educational services upon the request of the student or parent to resume services, as long as the student meets the age eligibility requirements.
- (k) For purposes of this section, modified curriculum and modified content refer to any reduction of the amount or complexity of the required knowledge and skills in Chapters 110- 117, 126-128, and 130 of this title. Substitutions that are specifically authorized in statute or rule must not be considered modified curriculum or modified content.

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STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

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**§89.1121. Distribution of State Funds.**

- (a) Procedures for counting the average daily attendance (ADA) of students receiving special education services in various instructional settings must be developed by the commissioner of education and included in the student attendance accounting handbook adopted under §129.1025 of this title (relating to Adoption by Reference: Student Attendance Accounting Handbook).
- (b) State special education funds must be distributed to school districts on the basis of ADA of full-time equivalents of eligible students served in accordance with §129.21 of this title (relating to Requirements for Student Attendance Accounting for State Funding Purposes).
- (c) The special education attendance must be converted to contact hours by instructional arrangement and then to full-time equivalents. The full-time equivalent for each instructional arrangement is multiplied by the annual amount equal to the basic allotment or, if applicable, the sum of the basic allotment and the allotment under Texas Education Code (TEC), §48.101, and then multiplied by the weight for the instructional arrangement as prescribed in TEC, §48.102(a). Contact hours for any one student receiving special education services may not exceed six hours per day or 30 hours per week for funding purposes. The total contact hours generated per week is divided by 30 to determine the full-time equivalents. Special education full-time equivalents generated are deducted from the school district's ADA for purposes of the regular education allotment.
- (d) The receipt of special education funds is contingent upon the operation of an approved comprehensive special education program in accordance with state and federal laws and regulations. No district may divert special education funds for other purposes, with the exception of administrative costs as defined in Chapter 105, Subchapter B, of this title (relating to Use of State Funds). Funds generated by full-time equivalents in one instructional arrangement may be spent on the overall special education program and are not limited to the instructional arrangement which generated the funds. The district must maintain separate accountability for the total state special education program fund within the general fund.
- (e) A special education fund balance may be carried over to the next fiscal year but must be expended on the special education program in the subsequent year. State special education carryover funds cannot be used for administrative costs.
- (f) Students who are at least three, but younger than 22, years of age on September 1 of the current scholastic year who participate in the regional day school program for the deaf may be counted as part of the district's ADA if they receive instruction from the basic program for at least 50% of the school day.
- (g) Students from birth through age two with a visual impairment, who are deaf or hard of hearing, or both who are provided services by the district according to an individual family services plan (IFSP) must be enrolled on the district home or regional day school campus and must be considered eligible for ADA on the same basis as other students receiving special education services.

- (h) Funding for the mainstream special education instructional arrangement must be based on the average daily attendance of the students in the arrangement multiplied by the annual amount equal to the basic allotment or, if applicable, the sum of the basic allotment and the allotment under TEC, §48.101, and the 1.15 weight as provided by TEC, §48.102(a). The attendance must not be converted to contact hours/full-time equivalents as with the other instructional arrangements.

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STATUTORY AUTHORITY. The amendment is adopted under Texas Education Code (TEC), §28.025, which establishes requirements related to high school graduation and academic achievement records; TEC, §29.001, which establishes general statutory authority for the state to develop, implement, and monitor a statewide plan for special education; TEC, §29.003, which establishes state-specific criteria related to eligibility requirements for special education; TEC, §48.102, which establishes formulas for funding special education programs; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019, which establishes requirements related to the use of person first respectful language; 34 Code of Federal Regulations (CFR), §300.8, which establishes definitions of eligibilities under special education; 34 CFR, §300.100, which establishes general authority for the statewide plan for special education; 34 CFR, §300.307, which establishes requirements related to criteria that states must adopt for determining eligibility for specific learning disabilities; 34 CFR, §300.308, which establishes requirements related to who determines whether a student has a specific learning disability; 34 CFR, §300.309, which establishes requirements related to eligibility criteria for specific learning disabilities; 34 CFR, §300.310, which establishes requirements related to the use of observations in the evaluation process for determining eligibility for specific learning disabilities; 34 CFR, §300.311, which establishes requirements related to the documentation of the determination of eligibility for specific learning disabilities; and 34 CFR, §300.323, which establishes requirements related to the implementation of students' individualized education programs and requirements related to transfer students.

CROSS REFERENCE TO STATUTE. The amendment implements Texas Education Code, §§28.025, 29.001, 29.003, and 48.102; Texas Government Code, §392.002, as amended by Senate Bill 281, 86th Texas Legislature, 2019; and 34 Code of Federal Regulations, §§300.8, 300.100, 300.307-300.311, and 300.323.

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**§89.1131. Qualifications of Special Education, Related Service, and Paraprofessional Personnel.**

- (a) All special education and related service personnel must be certified, endorsed, or licensed in the area or areas of assignment in accordance with 34 Code of Federal Regulations, §300.156; the Texas Education Code, §§21.002, 21.003, and 29.304; or appropriate state agency credentials.
- (b) A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education instructional program serving eligible students 3-21 years of age, as defined in §89.1035(a) of this title (relating to Age Ranges for Student Eligibility), in accordance with the limitation of their certification, except for the following.
  - (1) Persons assigned to provide speech therapy instructional services must hold a valid Texas Education Agency certificate in speech and hearing therapy or speech and language therapy, or a valid state license as a speech/language pathologist.
  - (2) Teachers holding only a special education endorsement for early childhood education for students with disabilities must be assigned only to programs serving infants through Grade 6.
  - (3) Teachers certified in the education of students with visual impairments must be available to students with visual impairments, including deaf-blindness, through one of the school district's instructional options, a shared services arrangement with other school districts, or an education service center.
  - (4) Teachers certified in the education of students who are deaf or hard of hearing must be available to students who are deaf or hard of hearing, including deaf-blindness, through one of the school district's instructional options, a regional day school program for the deaf, or a shared services arrangement with other school districts.
  - (5) The following provisions apply to physical education.
    - (A) When the admission, review, and dismissal committee has made the determination and the arrangements are specified in the student's individualized education program, physical education may be provided by the following personnel:
      - (i) special education instructional or related service personnel who have the necessary skills and knowledge;
      - (ii) physical education teachers;
      - (iii) occupational therapists;
      - (iv) physical therapists; or
      - (v) occupational therapy assistants or physical therapy assistants working under supervision in accordance with the standards of their profession.
    - (B) When these services are provided by special education personnel, the district must document that they have the necessary skills and knowledge. Documentation may

include, but need not be limited to, inservice records, evidence of attendance at seminars or workshops, or transcripts of college courses.

- (6) Teachers assigned full-time or part-time to instruction of students from birth through age two with visual impairments, including deaf-blindness, must be certified in the education of students with visual impairments. Teachers assigned full-time or part-time to instruction of students from birth through age two who are deaf, including deaf-blindness, must be certified in education for students who are deaf and severely hard of hearing.
- (7) Teachers with secondary certification with the generic delivery system may be assigned to teach Grades 6-12 only.
- (c) Paraprofessional personnel must be certified and may be assigned to work with eligible students, general and special education teachers, and related service personnel. Educational aides may also be assigned to assist students with special education transportation, serve as a job coach, or serve in support of community-based instruction. Educational aides paid from state administrative funds may be assigned to special education clerical or administrative duties.
- (d) Interpreting services for students who are deaf must be provided by an interpreter who is certified in the appropriate language mode(s), if certification in such mode(s) is available. If certification is available, the interpreter must be a certified member of or certified by the Registry of Interpreters for the Deaf (RID) or the Texas Board for Evaluation of Interpreters (BEI), Department of Assistive and Rehabilitative Services (DARS), Office for Deaf and Hard of Hearing Services (DHHS).
- (e) Orientation and mobility instruction must be provided by a certified orientation and mobility specialist (COMS) who is certified by the Academy for Certification of Vision Rehabilitation and Education Professionals.