

The Texas Education Agency (TEA) adopts new §89.1094, concerning special education services. The new section is adopted with changes to the proposed text as published in the June 28, 2019 issue of the *Texas Register* (44 TexReg 3211) and will be republished. The adopted new section establishes provisions for TEA's approval and monitoring of off-campus programs for students receiving special education and related services.

REASONED JUSTIFICATION: Adopted new 19 TAC §89.1094 establishes the process for placing a student in an off-campus setting or program to fulfill the requirements under the Individuals with Disabilities Education Act (IDEA), Part B, in providing a continuum of alternative placements, ensuring monitoring of placements to maintain the provision of a free appropriate public education (FAPE), ensuring state monitoring of implementation of IDEA, and ensuring appropriateness of state and federal funding for students placed in off-campus programs. The new rule applies to all non-district facilities where special education services are provided.

Specifically, the new rule provides procedures for placement of students in off-campus programs that are on approved provider lists, programs not on the approved provider list, and programs in which a student is ordered to be placed by a special education hearing officer or judge.

The new rule also establishes a process for the approval and renewal of off-campus programs, identifies the period of approval and renewal, and establishes funding procedures and parameters for students placed in such settings.

In response to public comment, a clarifying change was made to the rule since published as proposed. Language in subsection (a)(2), which specifies the definition of an off-campus program, was modified to add "by someone other than school district personnel" in the definition of special education and related services provided during school hours in a facility other than a school district campus.

SUMMARY OF COMMENTS AND AGENCY RESPONSES: The public comment period on the proposal began June 28, 2019, and ended July 29, 2019. Following is a summary of public comments received and corresponding agency responses.

Comment: A representative of Disabilities Right Texas (DRTx) emphasized the need for oversight and monitoring to ensure students in out-of-district placements, including "county system[s]," are receiving the related services and specialized evidence-based instruction necessary for each student to make meaningful progress and receive a FAPE.

Agency Response: The agency agrees.

Comment: A representative of DRTx expressed agreement that at least "two on-site visits annually" is necessary in order to ensure individualized education program (IEP) implementation and the wellbeing of the student.

Agency Response: The agency agrees that annual onsite visits are necessary and notes that the rule requires two visits annually.

Comment: A representative of Texas Council of Administrators of Special Education (TCASE) and representatives of DRTx proposed to add clarifying language in the definition of an "off-campus program" that would revise the definition to state, "An off-campus program includes special education and related services provided during school hours in a facility other than a school district campus and that are not provided by school district personnel."

Agency Response: The agency agrees that the specification of services not provided by school district personnel should be added and has modified subsection (a)(2) at adoption to clarify the definition of an off-campus program.

Comment: A representative of TCASE and representatives of DRTx proposed to add subsection (a)(4) that would add additional exclusionary language to the rule eliminating programs (not operated by a school district) that prepare students 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 by school district personnel.

Agency Response: The agency disagrees. The rule seeks to clarify responsibilities under IDEA for local education agencies (LEAs) when placing students in programs or facilities other than those operated by the LEA. Additionally, the rule seeks to clarify the TEA's responsibility to ensure a FAPE to all eligible students in the state through procedures for placement of students in these programs and facilities. Exclusion of a certain population of students, who may also be placed in programs or facilities other than those operated by the LEA, would not comply with the requirements found in 34 CFR §300.146 and §300.147.

Comment: A representative of TCASE and representatives of DRTx proposed to add language to emphasize that off-campus placements should be limited to those that deliver a FAPE in the least restrictive environment (LRE). The commenters recommended modifying subsection (b)(3) to state, "... if the committee determines that a FAPE is best provided to the student in this placement and is determined to be the least restrictive environment, or the nature and severity of the student's disability and special education needs are such that the student cannot be satisfactorily education in the school district."

Agency Response: The agency agrees that an off-campus placement is only appropriate when an admission, review, and dismissal (ARD) committee has determined that such a placement is necessary in order for a student to receive a FAPE in the LRE. However, TEA disagrees with adding the suggested language. It is not necessary to explicitly reiterate the FAPE and LRE requirements of IDEA in rule.

Comment: A representative of TCASE and representatives of DRTx proposed to add language to clarify what must be included in the student's IEP. The commenters recommended modifying subsection (b)(3)(A) to add, "... or when applicable, which services the school district will provide and which services the off campus program provider will provide for the provision of a free appropriate public education" to the end of the proposed sentence.

Agency Response: The agency agrees that the IEP must include a clear statement of the services to be provided by the school district and those to be provided by the facility. However, because subsection (b)(3)(A) seeks to specifically identify which services the school district is unable to provide that will be provided by the facility, TEA disagrees that the suggested additional language is necessary.

Comment: A representative of TCASE and representatives of DRTx proposed to clarify that the school district, during its two annual onsite visits, obtain written verification that the facility meets the specified minimum standards. The commenters recommended modifying subsection (b)(3)(C)(ii) to state, "obtain written verification from the facility that it meets minimum standards for health and safety and holds applicable local and state accreditation and permit requirements."

Agency Response: TEA disagrees with the recommended changes at subsection (b)(3)(C)(ii). The agency acknowledges that the written verification will, in most cases, be obtained from the facility. However, the LEA should not be limited from obtaining written verification from the licensing agency in meeting the intent of this requirement during its two annual onsite visits.

Comment: A school attorney commented that the proposed rule is unclear about whether the obligations for outside placement would be required if the school district decided to settle a dispute, due process hearing, complaint, or litigation by agreeing to pay for the student to attend an outside facility that the parent desires, even when the district believes it can educate the student such that outside placement would be unnecessary. The commenter proposed to add language to make clear that if a decision to place outside of the district resulting from a dispute settlement agreement occurs, then the rule would not apply.

Agency Response: The agency disagrees. The rule applies any time a school district seeks to use state or federal funds to place a student in an off-campus program for the provision of FAPE. In addition, IDEA requires TEA as the state education agency to ensure that a child with a disability who is placed in or referred to a private school or facility by a school district is provided a FAPE.

Comment: A representative from Texas Classroom Teachers Association (TCTA) proposed to strike the word "satisfactorily" due to inability to find it defined anywhere in the rule, or trackable in federal/state law/regulations and to replace with another term such as "appropriately."

Agency Response: The agency disagrees. Federal law, 34 Code of Federal Regulations (CFR), §300.114, requires each school district to ensure that "special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." An ARD committee must consider all relevant information and data in determining the LRE for the student.

Comment: A Texas school administrator expressed concerns with subsection (b)(3), relating to specification of what services must be listed in a student's IEP, as it relates to compliance with this requirement for students in an 18+ program who access a local non-profit agency that provides community activities and a peer group experience in preparation for their post-secondary experience.

Agency Response: The agency disagrees. The rule seeks to clarify a school district's responsibilities under IDEA when placing a student in programs or facilities other than those operated by the district. Additionally, the rule seeks to clarify the TEA's responsibility to ensure a FAPE to all eligible students in the state through procedures for placement of students in these programs and facilities. Excluding a certain population of students, who may also be placed in programs or facilities other than those operated by the district, would not be in compliance with the requirements found in 34 CFR §300.146 and §300.147.

STATUTORY AUTHORITY. The new section is adopted under Texas Education Code (TEC), §29.001, which requires the state to have a statewide design, consistent with federal law, for the delivery of services to children with disabilities in the state; 34 Code of Federal Regulations (CFR), §300.115, which requires local education agencies (LEAs) to have available a continuum of alternative placements for students with disabilities; 34 CFR, §300.146 and §300.147, which require the state to monitor and ensure that students placed in or referred to a private school or facility by an LEA receive a free appropriate public education; and 34 CFR, §300.600, which gives the state general supervisory authority to monitor the implementation of the Individuals with Disabilities Education Act, Part B.

CROSS REFERENCE TO STATUTE. The new section implements Texas Education Code, §29.001, and 34 Code of Federal Regulations, §§300.115, 300.146, 300.147, and 300.600.

<rule>

§89.1094. Students Receiving Special Education and Related Services in an Off-Campus Program.

- (a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.
- (1) School district--The definition of a school district includes independent school districts established under Texas Education Code (TEC), Chapter 11, Subchapters A-F, and open-enrollment charter schools established under TEC, Chapter 12, Subchapter D.
 - (2) Off-campus program--An off-campus program includes special education and related services provided during school hours by someone other than school district personnel in a facility other than a school district campus.
 - (3) Off-campus program provider--An off-campus program provider is an entity that provides the services identified in subsection (a)(2) of this section and includes:
 - (A) a county system operating under application of former law as provided in TEC, §11.301;
 - (B) a regional education service center established under TEC, Chapter 8;
 - (C) a nonpublic day school; or
 - (D) any other public or private entity with which a school district enters into a contract under TEC, §11.157, for the provision of special education services in a facility other than a school district campus operated by a school district.

- (b) Off-campus program placement. A school district may contract with an off-campus program provider to provide some or all of the special education and related services to a student in accordance with the requirements in this section.
- (1) Before the school district places a student with a disability in, or refers a student to, an off-campus program, the district shall initiate and conduct an onsite review to ensure that the off-campus program is appropriate for meeting the student's educational needs.
 - (2) Before the school district places a student with a disability in, or refers a student to, an off-campus program, the district shall initiate and conduct a meeting of the student's admission, review, and dismissal (ARD) committee to develop an individualized education program (IEP) for the student in accordance with 34 Code of Federal Regulations (CFR), §§300.320-300.325, state statutes, and commissioner of education rules in Chapter 89 of this title (relating to Commissioner's Rules Concerning Special Education Services).
 - (3) The appropriateness of the off-campus program for each student placed shall be documented in the IEP annually. The student's ARD committee may only recommend an off-campus program placement for a student if the committee determines that the nature and severity of the student's disability and special education needs are such that the student cannot be satisfactorily educated in the school district.
 - (A) The student's IEP must list which services the school district is unable to provide and which services the facility will provide.
 - (B) The ARD committee shall establish, in writing, criteria and estimated timelines for the student's return to the school and document this information in the IEP.
 - (C) The school district shall make two on-site visits annually, one announced and one unannounced, to:
 - (i) verify that the off-campus program can, and will, provide the services listed in the student's IEP that the off-campus program has agreed to provide to the student;
 - (ii) obtain written verification that the facility meets minimum standards for health and safety and holds applicable local and state accreditation and permit requirements; and
 - (iii) verify the educational program provided at the off-campus program facility is the least restrictive environment for the student.
 - (4) The placement of more than one student in the same off-campus program facility may be considered in the same on-site visit to a facility. However, the IEP of each student must be individually reviewed, and a determination of appropriateness of placement and services must be made for each student.
- (c) Notification. Within 30 calendar days from an ARD committee's decision to place a student in an off-campus program, a school district must electronically submit to the Texas Education Agency (TEA) notice of, and information regarding, the placement in accordance with submission procedures specified by the TEA.
- (1) If the off-campus program is on the commissioner's list of approved off-campus programs, the TEA will review the student's IEP and placement as required by 34 CFR, §300.120, and, in the case of a placement in or referral to a private school or facility, 34 CFR, §300.146. After review, the TEA will notify the school district whether federal or state funds for the off-campus program placement are approved. If the TEA does not approve the use of funds, it will notify the school district of the basis for the non-approval.
 - (2) If the off-campus program is not on the commissioner's list of approved off-campus programs, the TEA will begin the approval procedures described in subsection (d) of this section. School districts must ensure there is no delay in implementing a child's IEP in accordance with 34 CFR, §300.103(c).

- (3) If an off-campus program placement is ordered by a special education hearing officer or court of competent jurisdiction, the school district must notify the TEA of the order within 30 calendar days. The off-campus program serving the student is not required to go through the approval procedures described in subsection (d) of this section for the ordered placement. If, however, the school district or other school districts intend to place other students in the off-campus program, the off-campus program will be required to go through the approval procedures to be included on the commissioner's list of approved off-campus programs.
- (d) Approval of the off-campus program. Off-campus programs must have their educational programs approved for contracting purposes by the commissioner.
 - (1) For a program to be approved, the school district must electronically submit to the TEA notice of, and information regarding, the placement in accordance with submission procedures specified by the TEA. The TEA shall begin approval procedures and conduct an on-site visit to the facility within 30 calendar days after the TEA has been notified by the school district. Initial approval of the off-campus program shall be for one calendar year.
 - (2) The off-campus program may be approved only after, at minimum, a programmatic evaluation of personnel qualifications, adequacy of physical plant and equipment, and curriculum content.
 - (3) The commissioner shall renew approvals and issue new approvals only for those facilities that have a contract already in place with a school district for the placement of one or more students or that have a pending request from a school district. This approval does not apply to facilities that only provide related services. Nor does it apply to facilities when the school district, within which the facility is located, provides the educational program. Re-approval of the off-campus program may be for one, two, or three years at the TEA's discretion.
- (e) Funding procedures and other requirements. The cost of off-campus program placements will be funded according to TEC, §42.151 (Special Education), and §89.63(e) of this title (relating to Instructional Arrangements and Settings).
 - (1) Contracts between school districts and approved off-campus programs must not exceed a school district's fiscal year and shall not begin prior to July 1 of the contracted fiscal year.
 - (2) Amendments to a contract must be electronically submitted to the TEA in accordance with submission procedures specified by the TEA no later than 30 calendar days from the change in placement or services within the school district's fiscal year.
 - (3) If a student who is placed in an off-campus program by a school district changes his or her residence to another Texas school district during the school year, the school district must notify the TEA within 10 calendar days of the date on which the school district ceased contracting with the off-campus program for the student's placement. The student's new school district must meet the requirements of 34 CFR, §300.323(e), by providing comparable services to those described in the student's IEP from the previous school district until the new school district either adopts the student's IEP from the previous school district or develops, adopts, and implements a new IEP. The new school district must comply with all procedures described in this section for continued or new off-campus program placement.