ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (HHSC) adopts amendments to Chapter 371, Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity.

HHSC adopts the repeal of Subchapter A, concerning Introduction, and §371.1, concerning Purpose and Scope; §371.13, concerning Statutory Authority; §371.19, concerning Investigations; §371.1002, concerning Minimum Collection Goal; §371.1003, concerning Definitions; §371.1303, concerning Definitions; §371.1607, concerning Definitions; and §371.1713, concerning Restricted Reimbursement. HHSC also adopts new §371.1, concerning Definitions; §371.3, concerning Purpose and Authority; and §371.1311, concerning Role of the OIG and Special Investigative Units. HHSC also adopts amendments to §§371.11, 371.17, 371.23, 371.25, 371.27, 371.29, and 371.31, concerning Office of Inspector General; §§371.200, 371.201, 371.203, 371.204, 371.206, 371.208, 371.210, 371.212, 371.214, and 371.216, concerning Utilization Review; §§371.1001, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, and 371.1015, concerning Provider Disclosure and Screening; §§371.1301, 371.1305, 371.1307, and 371.1309, concerning Investigations; §§371.1601, 371.1603, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1663, 371.1665, 371.1667, 371.1669, 371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1715, 371.1717, and 371.1719, concerning Administrative Actions and Sanctions. The rules are adopted without changes to the proposed text as published in the January 29, 2016, issue of the *Texas Register* (41 TexReg 717) and will not be republished.

BACKGROUND AND JUSTIFICATION

The existing rules in Chapter 371 include various provisions to ensure the integrity of Medicaid and other HHS programs by discovering, preventing, and correcting fraud, waste, or abuse.

The rules in Chapter 371 are adopted new, amended, or repealed to implement various provisions of Senate Bill 207 (S.B. 207), 84th Legislature, Regular Session, 2015; and to clarify, update, or eliminate obsolete provisions.

S.B. 207 amended various provisions in Texas Government Code Chapter 531 related to the Office of Inspector General's (OIG's) authority and duties. Among other things, the bill amended timelines in the OIG's investigation of fraud, waste, and abuse; clarified the use of payment holds; required the adoption of rules for opening and prioritizing cases; and required criminal history record information checks on health care professionals who wish to enroll as Medicaid providers.

The amendments consequently revise the current process for investigations and provider background checks as mandated by S.B. 207. The amendments also include components and clarifications related to management practices and processes of the OIG, provider disclosure and screening, administrative actions and sanctions, and grounds for enforcement by the OIG.

The new rules as adopted consolidate all definitions into a single rule; move and revise the rule regarding the purpose of the chapter; and address the role of the OIG related to managed care organizations' Special Investigation Units.

COMMENTS

The 30-day comment period ended February 29, 2016. During this period, HHSC received comments regarding the rules from three commenters: the Teaching Hospitals of Texas, the Texas Hospital Association, and the Texas Radiological Society. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Commenters requested additional amendments related to the OIG's compliance with federal coding guidelines in conducting diagnosis-related group (DRG) validation and related audits. Specifically, the commenters stated that the OIG should repeat the statutory mandate to follow federal coding guidelines and that the OIG provide specific references to the federal coding guidelines when supporting findings.

Response: HHSC declines to make the suggested amendments. The requirements of Texas Government Code §531.1023 are already set forth in statute and need not be repeated in rule.

Comment: Commenters requested additional amendments related to the OIG's compliance with federal coding guidelines in conducting DRG validation and related audits, and that the OIG develop a process through rulemaking to communicate with and educate providers about DRG validation criteria that resulted from S.B. 207.

Response: HHSC declines to make the suggested amendments. HHSC is continuing to examine the issue of what potential rule or policy changes are required to accurately implement S.B. 207. SB 207 already requires the OIG to comply with federal coding guidelines.

Comment: One commenter suggested possible strategies regarding communication, training, and education.

Response: These suggestions will be considered as HHSC continues to review the issue.

Comment: One commenter commented that SB 207 requires OIG to follow federal coding guidelines effective September 1, 2015 and requested that the rules address the effective date. Specifically, that the requirement to comply with federal coding guidelines be applied to any audits for which a provider has not received a final decision by the state by August 31, 2015.

Response: HHSC declines to make the suggested amendments. SB 207's implementation date is clearly delineated by statute, and the requirement need not be repeated in rule at this time. The statute does not require OIG to re-review cases that were initially reviewed prior to its implementation. Additionally, providers may appeal any final decision they believe does not include compliance with federal coding guidelines.

Comment: One commenter proposed amendments to §371.203(a)(5) to read as follows: "Day outlier review verifies the medical necessity of each day of the admission."

Response: HHSC declines to make the suggested amendments. The day outlier review is performed in two steps. Utilization review includes diagnosis related group validation to confirm documentation in the medical record of the critical elements necessary to assign the billed DRG are present.

Comment: One commenter questioned the need for §371.203(a)(6) regarding cost outlier reviews since DRGs are to be used.

Response: HHSC declines to make the suggested amendments. Utilization review selects claims for review based upon claims submitted by hospitals for reimbursement which may include both day and cost outliers. When an outlier is submitted for reimbursement, HHSC calculates the reimbursement as either a day or cost outlier, but not both, therefore utilization review reviews either.

Comment: One commenter proposed further amendment to §371.203(b) regarding HHSC review of medical records so that the last sentence be read as follows: "If the complete medical record is not available during the review, HHSC issues a preliminary technical denial and notifies the facility specifying what is missing in sufficient detail for the provider to comply."

Response: HHSC declines to make the suggested amendments at this time. The rule currently requires HHSC to provide notice to facilities, and issues related to HHSC Appeals of OIG determinations are out of the scope of this rule rewrite.

Comment: One commenter proposed further amendment to §371.203(c) physician consultant medical necessity determinations. Specifically, commenter proposed amendment to the last sentence to read as follows: The written notification will explain any changes made to the process for appealing the denial.

Response: HHSC declines to make the suggested amendments at this time. The rule currently requires HHSC to provide notice to facilities, and issues related to HHSC Appeals of OIG determinations are out of the scope of this rule rewrite.

Comment: One commenter believes the proposed amendments related to enrollment of practice locations are a positive change.

Response: HHSC appreciates this feedback.

SUBCHAPTER A. INTRODUCTION

1 TAC §371.1

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2016.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §§371.1, 371.3, 371.11, 371.17, 371.23, 371.25, 371.27, 371.29, 371.31

STATUTORY AUTHORITY

The amendments and new rules are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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1 TAC §371.13, §371.19

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. UTILIZATION REVIEW

1 TAC §§371.200, 371.201, 371.203, 371.204, 371.206, 371.208, 371.210, 371.212, 371.214, 371.216

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. PROVIDER DISCLOSURE AND SCREENING

1 TAC §§371.1001, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, 371.1015

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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1 TAC §371.1002, §371.1003

STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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SUBCHAPTER F. INVESTIGATIONS

1 TAC §§371.1301, 371.1305, 371.1307, 371.1309, 371.1311

STATUTORY AUTHORITY

The amendments and new rules are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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1 TAC §371.1303

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS

DIVISION 1. GENERAL PROVISIONS

1 TAC §§371.1601, 371.1603, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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1 TAC §371.1607

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray
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DIVISION 2. GROUNDS FOR ENFORCEMENT

1 TAC §§371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1663, 371.1665, 371.1667, 371.1669

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1715, 371.1717, 371.1719

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 375. REFUGEE CASH ASSISTANCE AND MEDICAL ASSISTANCE PROGRAMS

SUBCHAPTER G. LOCAL RESETTLEMENT AGENCY REQUIREMENTS

1 TAC §375.701

The Texas Health and Human Service Commission (HHSC) adopts new §375.701, concerning Local Governmental and Community Input, with changes to the proposed text as published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 878). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

The new rule allows HHSC to require local resettlement agencies to obtain governmental and community input for the process of proposing refugee placements in Texas.

The HHSC Office of Immigration and Refugee Affairs is the single point of contact for federally funded refugee cash and medical assistance and social services in Texas. The process for refugee resettlement and placement primarily involves the U.S. Department of State, national resettlement agencies, and their local resettlement agency affiliates. HHSC contracts with the local resettlement agencies in Texas to provide refugee resettlement services under the State Plan for the Refugee Program.

Senate Bill (S.B.) 1928, 84th Legislature, Regular Session, 2015, enacted Texas Government §531.0411, which requires HHSC to adopt rules requiring local resettlement agencies to obtain governmental and community input for the process of proposing refugee placements in Texas. The new rule adds requirements for local resettlement agencies engaged in the refugee resettlement and placement process in Texas.

The new rule requires local resettlement agencies to:

1) Convene meetings at least quarterly at which local resettlement agencies can consult with local governmental entities and officials, and other community stakeholders, on proposed refugee placement.

2) Respond within ten business days as to whether requests from a local governmental entity or community stakeholder to meet regarding the resettlement process, outside of the quarterly meetings, will be granted. (This time period was extended based on public comments received.)

3) Consider input from these meetings in reporting annual refugee placement information to their national organizations for purposes of 8 U.S.C. §1522(b)(7)(E).

4) Provide HHSC, local governmental entities and officials, and local community stakeholders with a copy of proposed annual refugee placement data for purposes of 8 U.S.C. §1522(b)(7)(E).

5) Submit a final annual report to their national organizations and HHSC summarizing how this input contributed to the development of an annual refugee placement report for purposes of 8 U.S.C. §1522(b)(7)(E).

6) Provide HHSC with the preliminary number of refugees the local resettlement agencies recommend to the national voluntary agencies for placement throughout the State of Texas.

7) Respond within ten business days as to whether requests for information related to the resettlement process by local governmental entities and officials or community stakeholders will be granted, to the extent not otherwise prohibited by state or federal law. In addition, the rule provides that if such requests are granted, the requested information must be provided within 20 business days from the date of receipt of the request. (These timeframes were extended based on public comments received.)

Local resettlement agencies are already required by their national organizations and the U.S. Department of State to engage in community consultation and to provide quarterly narrative reports that describe both best practices and issues that may affect placement in their area. See: 8 U.S.C. §1522(a)(2)(C)(ii) and (b)(7). S.B. 1928 provides more specificity and structure around the existing federal requirements. As a result, any costs incurred by local resettlement agencies to comply with the new rule will be minimal.

COMMENTS

The 30-day comment period ended March 7, 2016. During this period, HHSC received comments regarding the new rule. A summary of comments relating to the rule and HHSC's responses follow.

HHSC received comments in support of the proposed Refugee Resettlement Program rule, either in whole or in part, from Catholic Charities of Fort Worth and the Texas Catholic Conference.

HHSC received comments opposed to the proposed Refugee Resettlement Program rule, either in whole or in part, from the following entities: Refugee Services of Texas, Catholic Charities of Fort Worth, the International Rescue Committee, the Alliance for Multicultural Community Service, Caritas of Austin, Texas Catholic Conference, and Texas Impact.

HHSC received comments from the following entities requesting changes to the proposed Refugee Resettlement Program rule: Refugee Services of Texas, Catholic Charities of Fort Worth, the Alliance for Multicultural Community Service, Caritas of Austin, and Texas Impact.

Comments received regarding duplication of or conflict with federal law:

Comment: Several commenters stated that the S.B. 1928 provisions are unnecessary and duplicative because federal rules already require the same or similar actions by local resettlement agencies. Commenters noted that local resettlement agencies have invested significant time and energy in recent years to provide expanded and timely information regarding the refugee resettlement program.

Response: HHSC declines to comment on S.B. 1928. These are comments on the appropriateness of S.B. 1928, not the rules as proposed by HHSC. The Texas Legislature enacted S.B. 1928 pursuant to its constitutional authority, and required HHSC to enact rules to implement the legislation by May 1, 2016.

Comment: One commenter raised the concern that the rules proposed by HHSC to implement S.B. 1928 have the potential to come into conflict with federal law and obligations as a federal grantee.

Response: Given that the commenter did not elaborate on what specific federal law or federal grantee obligation may conflict with the proposed rule, HHSC can only respond that it is not aware of any such conflicts.

Comments regarding the costs associated with the proposed rule:

Comment: One commenter expressed concern that possible increased administrative costs to comply with the proposed rule risks the imposition of an impermissible state tax on federal activities.

Response: The commenter did not specify which costs risk constituting an impermissible tax.

The term "tax" is not defined under the Tax Code or by legislative definition. Where a term is not defined by statute or technical meaning, the Code Construction Act directs that the term "shall be construed according to the rules of grammar and common usage." Tex. Gov't Code §311.011. Black's Law Dictionary defines "tax" as "a charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." Black's Law Dictionary, p. 700 (Third Pocket Edition). The possible increase in administrative costs to an entity contracted with HHSC to provide Refugee Resettlement Program services does not meet this definition. The rule does not impose any charge or fee on contractors to be collected by HHSC or the State of Texas.

Comments regarding the Fiscal Analysis in the Preamble:

Comment: Several commenters expressed concern that the proposed rule included a fiscal note that did not recognize costs to resettlement agencies. Commenters stated that the financial impact of the proposed new rule on resettlement agencies would result in a significant financial burden that would hinder their ability to serve refugees. Specifically, commenters expressed concern that the proposed rule will require local resettlement agencies to redirect agency efforts to manage the new administrative burden or require additional fundraising to cover the costs of additional staff for turnaround times.

Response: To clarify, the Fiscal Note provided addresses only expected costs to state and local governments as required by the Administrative Procedure Act.

As stated by several commenters, the requirement for local resettlement agencies to meet regularly (not less often than quarterly) with state and local governmental entities was set forth by the United States Department of State (DOS) in a program announcement dated September 26, 2013. Under this DOS guidance, the following stakeholders were required to be involved at a minimum: the state refugee coordinator, the state refugee health coordinator, local governance (city and/or state as applicable), local and/or county public health, welfare and social services, and public education.

S.B. 1928 reiterates the requirement for local resettlement agencies to meet at least quarterly with certain government and community stakeholders. The identified government stakeholders in-

clude, at a minimum, municipal and county officials, local school district officials, and representatives of local law enforcement agencies. The identified community stakeholders include, at a minimum, major providers under the local health care system and major employers of refugees. These parties are identified in subsection (b) of the rule and are largely identical to the parties identified under the DOS guidance. As quarterly meetings with these parties are already required, HHSC does not anticipate additional costs to meet the requirements for quarterly meetings under the rule.

Regarding the requirements to respond to requests for meetings and information from certain stakeholders, HHSC expects the additional costs to do so to be minimal as these only apply, at a minimum, to certain identified parties. As many commenters mentioned, local resettlement agencies already engage in routine communications with community stakeholders as the need arises. These communications often occur outside the quarterly meetings. Subsections (c) and (d) of the rule seek to formalize the identified stakeholders' ability to seek timely and updated information. HHSC does not expect these provisions to require local resettlement agencies to significantly alter administrative efforts or funding. Regarding the timeline for responses, please see the discussion regarding subsections (c) and (d) of the rule below.

Comments on specific rule subsections:

§375.701(a):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§375.701(b):

Comment: Several commenters asked HHSC to clarify the definition of "community stakeholders" and expressed concern that the term was too vague in the proposed rule. One commenter expressed concern that the term did not specify what parties were not included. One commenter suggested that a broad definition would be beneficial to ensure local resettlement agencies have a meaningful spectrum of community input.

Response: HHSC agrees that a broad definition of "community stakeholder" is most appropriate to further the intent of S.B. 1928 in providing governmental entities with community stakeholder input regarding proposed refugee placement. As such, subsection (b) of the rule sets forth a minimum list of relevant stakeholders that HHSC requires local resettlement agencies to interact with, subject to the provisions of the rule. Local resettlement agencies are encouraged to interact with and seek the input of any additional stakeholder that can offer input relevant to the refugee resettlement process. Examples of additional stakeholders can be found under the U.S. Department of State program guidance letter from September 2013.

Regarding any limit to the definition, HHSC declines to include a list of excluded parties under the proposed rule, so as not to limit agency ability to seek additional input from interested stakeholders for S.B. 1928 purposes. Under the canon of construction known as "ejusdem generis," an enumeration of specific items that follows a general term limits unlisted items to items similar in nature. Tex. Att'y Gen. Op. No. JC-410 (2001). As such, subsection (b) of the rule is meant to apply to entities similar in nature to the stakeholders that are listed. The proposed rule addresses local resettlement agency interactions with stakeholders that actively participate in the refugee resettlement process, and that have obtained experience unique to this involvement. This is not intended to include members of the general public not engaged in the resettlement process.

Comment: One commenter suggested that HHSC define "community stakeholder" to track the guidance provided by the U.S. Department of State in Appendix 1 of the program guidance letter from September 2013.

Response: HHSC declines to provide an exhaustive list of which entities constitute community stakeholders. The rule provides a minimum set of stakeholders that HHSC expects local resettlement agencies to consult regarding the refugee resettlement program. HHSC encourages local resettlement agencies to consult and meet with any additional entities that the agency considers to be integral to the resettlement process.

Comments regarding both §375.701(c) and (d):

Comment: Several commenters stated that subsections (c) and (d) of the proposed rule exceeded HHSC's statutory authority under S.B. 1928.

Response: HHSC respectfully disagrees with this statement. S.B. 1928 enacted new Texas Government Code §531.0411(b), which requires the HHSC Executive Commissioner to "adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information." As stated by many commenters, cooperation and consultation with local communities are important for the success of resettlement programs.

In order to provide accurate and targeted input, local governmental entities and community stakeholders must be enabled to discuss or request information regarding the refugee resettlement process in addition to the information provided in the quarterly meetings required under subsection (b) of the rule. Subsection (c) of the rule seeks to ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the rapidly changing circumstances of worldwide immigration and population displacement in the last several months.

S.B. 1928 does not prohibit HHSC from ensuring that local governmental entities and community stakeholders have such access. While subsections (c) and (d) of the rule are not expressly set forth under S.B. 1928, HHSC believes the subsections are necessary to fully implement subsection (b) of the rule relating to quarterly meetings with local government and community stakeholders. Absent subsections (c) and (d), subsection (b) would arguably be implemented either inadequately or to no avail. HHSC believes that ensuring such access furthers the legislative intent stated under Texas Government Code §531.0411(b). Furthermore, where a statute leaves room for policy determinations regarding implementation, deference is given to an agency's reasonable interpretation of the statute. See Tex. Dep't of Ins. v. Am. Nat'l Ins. Co., 410 S.W.3d 843, 859 (Tex. 2012); and Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269, 273 (Tex. 1944).

Comment: One commenter expressed concern that subsections (c) and (d) of the proposed rule place a substantial burden on the free exercise of religion of local resettlement agencies that are faith-based organizations. Accordingly, the commenter requests that HHSC show subsections (c) and (d) provisions are necessary to achieve a compelling state interest and why a less restrictive means to achieve this interest is not available pursuant to Tex. Civ. Prac. & Rem. Code §110.003.

Response: The commenter did not identify how religious exercise was substantially burdened by the proposed rule. As such, HHSC can only respond generally.

State law prohibits a government agency from substantially burdening a person's free exercise of religion, unless the government agency demonstrates that the application of the burden to the person: 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem Code §110.003.

The Texas Legislature sought to strengthen the success of placing actual refugees throughout the state by ensuring that local governmental and community input was effectively considered regarding the refugee resettlement program. The state's interest in resettling genuine refugees in communities best prepared to serve and assist them is "paramount" and "of the highest order."

Subsections (c) and (d) of the rule are necessary to fully implement subsection (b), relating to regular meetings and informational sharing with local government and community stakeholders.

As stated by many commenters, cooperation and consultation with local communities are important for the success of resettlement programs. In order to provide accurate and targeted input, local governmental entities and community stakeholders may need to discuss or request information regarding refugees or the resettlement process in addition to the information provided in the quarterly meetings required under subsection (b) of the rule. Subsections (c) and (d) will help ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the ever-changing circumstances and challenges associated with worldwide immigration and population displacement. Texas Government Code §531.0411(b), as enacted by S.B. 1928, requires HHSC to ensure that local governmental entities and community stakeholders have such informational access.

The provision of resettlement information to the identified stakeholders is most efficiently and accurately done by requiring the local resettlement agencies to do so directly. Local resettlement agencies contract with both the federal government, to provide services and assistance in the initial resettlement phase, and with HHSC regarding longer term dynamics once refugees are settled within Texas. To give effect to S.B. 1928's directive to "ensure local government and community input in a federal refugee resettlement program" in the state, these stakeholders must have access to timely and accurate information when required. The most effective and least restrictive way to provide such information to these stakeholders is to require local resettlement agencies to provide the information requested directly to the identified stakeholders.

Comment: Some commenters expressed concern regarding the definition of "community stakeholder" for purposes of subsections (c) and (d) of the rule. The commenters explained that a broad definition would cause local resettlement agencies significant administrative burdens by having to respond to requests without any clarity as to which parties had standing to make such a request.

Response: Subsection (b) sets forth a minimum list of relevant stakeholders that HHSC requires local resettlement agencies to interact with for purposes of subsections (c) and (d). Local resettlement agencies are encouraged to interact with and seek the input of any additional stakeholder that can offer input relevant to the refugee resettlement process.

Comments specific to §375.701(c):

Comment: Several commenters are opposed to the additional meetings local governmental entities and community stakeholders may request with local resettlement agencies. Many commenters pointed to already existing relationships with local community stakeholders maintained through the existing quarterly meetings and ongoing community engagement measures. Some commenters requested the removal of this provision from the rule.

Response: HHSC declines to remove subsection (c) from the rule. HHSC agrees that local resettlement agencies interact with community stakeholders through the quarterly meetings already required by federal rules and through ongoing community engagement. However, the purpose of the ability to request additional meetings is to ensure that local community stakeholders have a continual and ongoing mechanism to obtain information as it arises, and to not be limited by the quarterly meetings. This provision simply seeks to formalize what many commenters have identified as an existing ability to provide needed information to community stakeholders.

Comment: One commenter stated that, by implementing the proposed rule, HHSC failed to distinguish between prescribing by rule and delegating authority to the public. The commenter further stated that in doing so, HHSC exceeded its statutory authority under Texas Government Code Chapters 531 and 752. Specifically, the commenter pointed to HHSC "authoriz(ing) any member of the general public to demand a meeting with a local resettlement agency within 5 days."

Response: To clarify, the proposed rule does not authorize a member of the general public to "demand" a meeting with a local resettlement agency. Rather, the proposed rule requires local resettlement agencies to respond to meeting requests from certain identified local governmental entities and community stakeholders, as described. Local resettlement agencies may decline a request for a meeting, and in such situations the response must be in writing with the reason for the decision clearly stated. A copy of the response is then submitted to HHSC within three business days.

In adopting proposed §375.701(c), HHSC does not delegate any agency authority to the general public, or exceed the statutory authority provided by S.B. 1928. Texas Government Code §531.0411(b) requires the HHSC Executive Commissioner to "adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information." Subsection (c) seeks to ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the rapidly changing circumstances of worldwide immigration and population displacement in the last several months. S.B. 1928 does not prohibit HHSC from ensuring that local governmental entities and community stakeholders have such access. On the contrary, ensuring such access furthers the legislative intent stated under Texas Government Code §531.0411(b).

Comment: Several commenters opposed the inclusion of a mandated maximum time period of five business days to respond to meeting requests from governmental entities and community stakeholders. Specifically, several entities commented that this

proposed time restraint would cause an undue burden on staff, interrupt community engagement efforts, and increase administrative costs to the resettlement agency. One commenter suggested that the five business day timeframe be extended to ten business days.

Response: HHSC recognizes that responding to a meeting request, either by agreeing to meet or by declining the request in writing, is only one of a local resettlement agency's many responsibilities. As such, HHSC will modify subsection (c)(1) by extending the period from five business days to ten business days for a local resettlement agency to grant or decline a requested meeting. This edit can be found in the updated rule language below.

§375.701(d):

Comment: Several commenters opposed the inclusion of a mandated maximum time period of five business days to respond to information requests from governmental entities and community stakeholder. Specifically, several entities commented this proposed time restraint would cause an undue burden on staff, interrupt community engagement efforts, and increase administrative costs to the resettlement agency. One commenter suggested that the five business day timeframe be extended to ten business days.

Response: The five business day response timeframe under subsection (d) of the rule applies to the local resettlement agencies' duty to state whether a request for information will be granted. Local resettlement agencies may decline a request for information, and in such situations the response must be in writing with the reason for the decision clearly stated. A copy of the response is then submitted to HHSC within three business days.

HHSC recognizes that responding to an information request, either by agreeing to provide the information or by declining the request in writing, is only one of a local resettlement agency's many responsibilities. As such, HHSC will modify subsection (d)(1) by extending the period from five business days to ten business days for a local resettlement agency to grant or decline a request for information. This edit can be found in the updated rule language below.

Comment: One commenter stated that the 15 business day period to provide information requested by any member of the public placed a substantial burden on agency resources and staff.

Response: To clarify, the community stakeholders identified under subsection (d) are the same as those listed under subsection (b). HHSC did not intend to give any member of the general public standing to request information from local resettlement agencies about the refugee resettlement process. However, given the extension of the grant/denial period under subsection (d)(1), HHSC will modify the rule to commensurately expand the timeframe in which a local resettlement agency must provide requested information once a request is granted. This has been extended from 15 to 20 business days. The edit can be found in the rule language below.

§375.701(e):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§375.701(f):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§375.701(g):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§375.701(h):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§375.701(i):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Government Code §752.004, which authorize HHSC to apply for and distribute funds to agencies responsible for providing services to refugees; and Texas Government Code §531.0411 which requires the Executive Commissioner of HHSC to adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information.

§375.701. Local Governmental and Community Input.

(a) For purposes of this subchapter, the following definitions apply:

(1) Business day--A day that is not a Saturday, Sunday, or federal legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or federal legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or federal legal holiday.

(2) HHSC--Texas Health and Human Services Commission, or its designee.

(3) Local resettlement agency--As defined by 45 C.F.R. §400.2, means a local affiliate or subcontractor of a national voluntary agency that has entered into a grant, contract, or cooperative agreement with the United States Department of State or other appropriate federal agency to provide for the reception and initial placement of refugees in the United States.

(4) National voluntary agency--As defined by 45 C.F.R. §400.2, means one of the national resettlement agencies or a state or local government that has entered into a grant, contract, or cooperative agreement with the United States Department of State or other appropriate federal agency to provide for the reception and initial placement of refugees in the United States.

(b) A local resettlement agency must convene meetings at least quarterly at which representatives of the local resettlement agency have an opportunity to consult with and obtain feedback regarding proposed refugee placement from, at a minimum:

(1) local governmental entities and officials, including:

(A) municipal and county officials;

(B) local school district officials; and

(C) representatives of local law enforcement agencies; and

(2) community stakeholders, including:

(A) major providers under the local health care system; and

(B) major employers of refugees.

(c) In addition to the quarterly meetings held under subsection (b) of this section, local governmental entities and community stakeholders may request to meet with a local resettlement agency regarding refugee placement.

(1) A local resettlement agency must respond within ten business days to a request from a local governmental entity or community stakeholder to meet.

(2) If a request for a meeting is denied, the response must be in writing and the reason for denial must be clearly stated.

(3) A copy of the denial must be submitted to HHSC by the local resettlement agency no later than three business days after it is sent to the local governmental entity or community stakeholder.

(d) To facilitate consultation and effective feedback, local governmental entities and community stakeholders may request information from a local resettlement agency related to the resettlement process.

(1) A local resettlement agency must respond within ten business days as to whether a request for information from a local governmental entity or community stakeholder will be granted.

(2) If the request is granted, the local resettlement agency must provide the requested information no later than twenty business days from the date of the receipt of the request, to the extent not otherwise prohibited by state or federal law.

(3) If a request for information is denied, the response must be in writing and the reason for denial must be clearly stated.

(4) A copy of the denial must be submitted to HHSC by the local resettlement agency no later than three business days after it is sent to the local governmental entity or community stakeholder.

(e) A local resettlement agency must consider all feedback obtained in community consultation meetings under subsections (b) and (c) of this section in reporting annual refugee placement information to the local refugee resettlement agency's national voluntary agency for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(f) A local resettlement agency must provide HHSC, local governmental entities and officials, and community stakeholders described under subsection (b) of this section a copy of proposed annual refugee placement data for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(g) A local resettlement agency must develop and submit a final annual report to the local refugee resettlement agency's national voluntary agency and for HHSC that includes a summary regarding how community stakeholder input contributed to the development of an annual refugee placement report for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(h) A local resettlement agency must provide HHSC with the preliminary number of refugees the local resettlement agencies recommend to the national voluntary agencies for placement throughout the State of Texas.

(i) In addition to applicable requirements specified in Subchapter B of this chapter (relating to Contractor Requirements for the Refugee Cash Assistance Program), Subchapter C of this chapter (relating to Program Administration for the Refugee Cash Assistance Program), and Subchapter E of this chapter (relating to Refugee Medical Assistance), a contract with a local resettlement agency to provide Refugee Cash Assistance services must comply with the requirements of this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2016.

TRD-201601625
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 1, 2016
Proposal publication date: February 5, 2016
For further information, please call: (512) 424-6900

CHAPTER 376. REFUGEE SOCIAL SERVICES SUBCHAPTER J. LOCAL RESETTLEMENT AGENCY REQUIREMENTS

1 TAC §376.1001

The Texas Health and Human Service Commission (HHSC) adopts new §376.1001, concerning Local Governmental and Community Input, with changes to the proposed text as published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 880). The text of the rule will be republished.

BACKGROUND AND JUSTIFICATION

The new rule allows HHSC to require local resettlement agencies to obtain governmental and community input for the process of proposing refugee placements in Texas.

The HHSC Office of Immigration and Refugee Affairs is the single point of contact for federally funded refugee cash and medical assistance and social services in Texas. The process for refugee resettlement and placement primarily involves the U.S. Department of State, national resettlement agencies, and their local resettlement agency affiliates. HHSC contracts with the local resettlement agencies in Texas to provide refugee resettlement services under the State Plan for the Refugee Program.

Senate Bill (S.B.) 1928, 84th Legislature, Regular Session, 2015, enacted Texas Government §531.0411, which requires HHSC to adopt rules requiring local resettlement agencies to obtain governmental and community input for the process of proposing refugee placements in Texas. The new rule adds requirements for local resettlement agencies engaged in the refugee resettlement and placement process in Texas.

The new rule requires local resettlement agencies to:

1) Convene meetings at least quarterly at which local resettlement agencies can consult with local governmental entities and officials, and other community stakeholders, on proposed refugee placement.

2) Respond within ten business days as to whether requests from a local governmental entity or community stakeholder to meet regarding the resettlement process, outside of the quarterly meetings, will be granted. (This time period was extended based on public comments received.)

3) Consider input from these meetings in reporting annual refugee placement information to their national organizations for purposes of 8 U.S.C. §1522(b)(7)(E).

4) Provide HHSC, local governmental entities and officials, and local community stakeholders with a copy of proposed annual refugee placement data for purposes of 8 U.S.C. §1522(b)(7)(E).

5) Submit a final annual report to their national organizations and HHSC summarizing how this input contributed to the development of an annual refugee placement report for purposes of 8 U.S.C. §1522(b)(7)(E).

6) Provide HHSC with the preliminary number of refugees the local resettlement agencies recommend to the national voluntary agencies for placement throughout the State of Texas.

7) Respond within ten business days as to whether requests for information related to the resettlement process by local governmental entities and officials or community stakeholders will be granted, to the extent not otherwise prohibited by state or federal law. In addition, the rule provides that if such requests are granted, the requested information must be provided within 20 business days from the date of receipt of the request. (These timeframes were extended based on public comments received.)

Local resettlement agencies are already required by their national organizations and the U.S. Department of State to engage in community consultation and to provide quarterly narrative reports that describe both best practices and issues that may affect placement in their area. See: 8 U.S.C. §1522(a)(2)(C)(ii) and (b)(7). S.B. 1928 provides more specificity and structure around the existing federal requirements. As a result, any costs incurred by local resettlement agencies to comply with the new rule will be minimal.

COMMENTS

The 30-day comment period ended March 7, 2016. During this period, HHSC received comments regarding the new rule. A summary of comments relating to the rule and HHSC's responses follows.

HHSC received comments in support of the proposed Refugee Resettlement Program rule, either in whole or in part, from Catholic Charities of Fort Worth and the Texas Catholic Conference.

HHSC received comments opposed to the proposed Refugee Resettlement Program rule, either in whole or in part, from the following entities: Refugee Services of Texas, Catholic Charities of Fort Worth, the International Rescue Committee, the Alliance for Multicultural Community Service, Caritas of Austin, Texas Catholic Conference, and Texas Impact.

HHSC received comments from the following entities requesting changes to the proposed Refugee Resettlement Program rule: Refugee Services of Texas, Catholic Charities of Fort Worth, the Alliance for Multicultural Community Service, Caritas of Austin, and Texas Impact.

Comments received regarding duplication of or conflict with federal law:

Comment: Several commenters stated that the S.B. 1928 provisions are unnecessary and duplicative because federal rules already require the same or similar actions by local resettlement agencies. Commenters noted that local resettlement agencies have invested significant time and energy in recent years to provide expanded and timely information regarding the refugee resettlement program.

Response: HHSC declines to comment on S.B. 1928. These are comments on the appropriateness of S.B. 1928, not the rules as proposed by HHSC. The Texas Legislature enacted S.B. 1928 pursuant to its constitutional authority, and required HHSC to enact rules to implement the legislation by May 1, 2016.

Comment: One commenter raised the concern that the rules proposed by HHSC to implement S.B. 1928 have the potential to come into conflict with federal law and obligations as a federal grantee.

Response: Given that the commenter did not elaborate on what specific federal law or federal grantee obligation may conflict with the proposed rule, HHSC can only respond that it is not aware of any such conflicts.

Comments regarding the costs associated with the proposed rule:

Comment: One commenter expressed concern that possible increased administrative costs to comply with the proposed rule risks the imposition of an impermissible state tax on federal activities.

Response: The commenter did not specify which costs risk constituting an impermissible tax.

The term "tax" is not defined under the Tax Code or by legislative definition. Where a term is not defined by statute or technical meaning, the Code Construction Act directs that the term "shall be construed according to the rules of grammar and common usage." Tex. Gov't Code §311.011. Black's Law Dictionary defines "tax" as "a charge, usually monetary, imposed by the government on persons, entities, transactions, or property to yield public revenue." Black's Law Dictionary, p. 700 (Third Pocket Edition). The possible increase in administrative costs to an entity contracted with HHSC to provide Refugee Resettlement Program services does not meet this definition. The proposed rule does not impose any charge or fee on contractors to be collected by HHSC or the State of Texas.

Comments regarding the Fiscal Analysis in the Preamble:

Comment: Several commenters expressed concern that the proposed rule included a fiscal note that did not recognize costs to resettlement agencies. Commenters stated that the financial impact of the proposed new rule on resettlement agencies would result in a significant financial burden that would hinder their ability to serve refugees. Specifically, commenters expressed concern that the proposed rule will require local resettlement agencies to redirect agency efforts to manage the new administrative burden or require additional fundraising to cover the costs of additional staff for turnaround times.

Response: To clarify, the Fiscal Note provided addresses only expected costs to state and local governments as required by the Administrative Procedure Act.

As stated by several commenters, the requirement for local resettlement agencies to meet regularly (not less often than quarterly) with state and local governmental entities was set forth by the United States Department of State (DOS) in a program announcement dated September 26, 2013. Under this DOS guidance, the following stakeholders were required to be involved at a minimum: the state refugee coordinator, the state refugee health coordinator, local governance (city and/or state as appli-

cable), local and/or county public health, welfare and social services, and public education.

S.B. 1928 reiterates the requirement for local resettlement agencies to meet at least quarterly with certain government and community stakeholders. The identified government stakeholders include, at a minimum, municipal and county officials, local school district officials, and representatives of local law enforcement agencies. The identified community stakeholders include, at a minimum, major providers under the local health care system and major employers of refugees. These parties are identified in subsection (b) of the rule and are largely identical to the parties identified under the DOS guidance. As quarterly meetings with these parties are already required, HHSC does not anticipate additional costs to meet the requirements for quarterly meetings under the rule.

Regarding the requirements to respond to requests for meetings and information from certain stakeholders, HHSC expects the additional costs to do so to be minimal as these only apply, at a minimum, to certain identified parties. As many commenters mentioned, local resettlement agencies already engage in routine communications with community stakeholders as the need arises. These communications often occur outside the quarterly meetings. Subsections (c) and (d) of the rule seek to formalize the identified stakeholders' ability to seek timely and updated information. HHSC does not expect these provisions to require local resettlement agencies to significantly alter administrative efforts or funding. Regarding the timeline for responses, please see the discussion regarding subsections (c) and (d) of the rule below.

Comments on specific rule subsections:

§376.1001(a):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§376.1001(b):

Comment: Several commenters asked HHSC to clarify the definition of "community stakeholders" and expressed concern that the term was too vague in the proposed rule. One commenter expressed concern that the term did not specify what parties were not included. One commenter suggested that a broad definition would be beneficial to ensure local resettlement agencies have a meaningful spectrum of community input.

Response: HHSC agrees that a broad definition of "community stakeholder" is most appropriate to further the intent of S.B. 1928 in providing governmental entities with community stakeholder input regarding proposed refugee placement. As such, subsection (b) of the rule sets forth a minimum list of relevant stakeholders that HHSC requires local resettlement agencies to interact with, subject to the provisions of the rule. Local resettlement agencies are encouraged to interact with and seek the input of any additional stakeholder that can offer input relevant to the refugee resettlement process. Examples of additional stakeholders can be found under the U.S. Department of State program guidance letter from September 2013.

Regarding any limit to the definition, HHSC declines to include a list of excluded parties under the proposed rule, so as not to limit agency ability to seek additional input from interested stakeholders for S.B. 1928 purposes. Under the canon of construction known as "ejusdem generis," an enumeration of specific items that follows a general term limits unlisted items to items similar in nature. Tex. Att'y Gen. Op. No. JC-410 (2001). As such, subsection (b) of the rule is meant to apply to entities similar in nature to the stakeholders that are listed. The proposed rule addresses local resettlement agency interactions with stakeholders that actively participate in the refugee resettlement process, and that have obtained experience unique to this involvement. This is not intended to include members of the general public not engaged in the resettlement process.

Comment: One commenter suggested that HHSC define "community stakeholder" to track the guidance provided by the U.S. Department of State in Appendix 1 of the program guidance letter from September 2013.

Response: HHSC declines to provide an exhaustive list of which entities constitute community stakeholders. The rule provides a minimum set of stakeholders that HHSC expects local resettlement agencies to consult regarding the refugee resettlement program. HHSC encourages local resettlement agencies to consult and meet with any additional entities that the agency considers to be integral to the resettlement process.

Comments regarding both §376.1001(c) and (d):

Comment: Several commenters stated that subsections (c) and (d) of the proposed rule exceeded HHSC's statutory authority under S.B. 1928.

Response: HHSC respectfully disagrees with this statement. S.B. 1928 enacted new Texas Government Code §531.0411(b), which requires the HHSC Executive Commissioner to "adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information." As stated by many commenters, cooperation and consultation with local communities are important for the success of resettlement programs.

In order to provide accurate and targeted input, local governmental entities and community stakeholders must be enabled to discuss or request information regarding the refugee resettlement process in addition to the information provided in the quarterly meetings required under subsection (b) of the rule. Subsection (c) of the rule seeks to ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the rapidly changing circumstances of worldwide immigration and population displacement in the last several months.

S.B. 1928 does not prohibit HHSC from ensuring that local governmental entities and community stakeholders have such access. While subsections (c) and (d) of the rule are not expressly set forth under S.B. 1928, HHSC believes the subsections are necessary to fully implement subsection (b) of the rule relating to quarterly meetings with local government and community stakeholders. Absent subsections (c) and (d), subsection (b) would arguably be implemented either inadequately or to no avail. HHSC believes that ensuring such access furthers the legislative intent stated under Texas Government Code §531.0411(b). Furthermore, where a statute leaves room for policy determinations regarding implementation, deference is given to an agency's reasonable interpretation of the statute. See Tex. Dep't of Ins. v. Am. Nat'l Ins. Co., 410 S.W.3d 843, 859 (Tex. 2012); and Stanford v. Butler, 142 Tex. 692, 181 S.W.2d 269, 273 (Tex. 1944).

Comment: One commenter expressed concern that subsections (c) and (d) of the proposed rule place a substantial burden on the free exercise of religion of local resettlement agencies that are

faith-based organizations. Accordingly, the commenter requests that HHSC show subsections (c) and (d) provisions are necessary to achieve a compelling state interest and why a less restrictive means to achieve this interest is not available pursuant to Tex. Civ. Prac. & Rem. Code §110.003.

Response: The commenter did not identify how religious exercise was substantially burdened by the proposed rule. As such, HHSC can only respond generally.

State law prohibits a government agency from substantially burdening a person's free exercise of religion, unless the government agency demonstrates that the application of the burden to the person: 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that interest. Tex. Civ. Prac. & Rem Code §110.003.

The Texas Legislature sought to strengthen the success of placing actual refugees throughout the state by ensuring that local governmental and community input was effectively considered regarding the refugee resettlement program. The state's interest in resettling genuine refugees in communities best prepared to serve and assist them is "paramount" and "of the highest order."

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As stated by many commenters, cooperation and consultation with local communities are important for the success of resettlement programs. In order to provide accurate and targeted input, local governmental entities and community stakeholders may need to discuss or request information regarding refugees or the resettlement process in addition to the information provided in the quarterly meetings required under subsection (b) of the rule. Subsections (c) and (d) will help ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the ever-changing circumstances and challenges associated with worldwide immigration and population displacement. Texas Government Code §531.0411(b), as enacted by S.B. 1928, requires HHSC to ensure that local governmental entities and community stakeholders have such informational access.

The provision of resettlement information to the identified stakeholders is most efficiently and accurately done by requiring the local resettlement agencies to do so directly. Local resettlement agencies contract with both the federal government, to provide services and assistance in the initial resettlement phase, and with HHSC regarding longer term dynamics once refugees are settled within Texas. To give effect to S.B. 1928's directive to "ensure local government and community input in a federal refugee resettlement program" in the state, these stakeholders must have access to timely and accurate information when required. The most effective and least restrictive way to provide such information to these stakeholders is to require local resettlement agencies to provide the information requested directly to the identified stakeholders.

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Response: Subsection (b) sets forth a minimum list of relevant stakeholders that HHSC requires local resettlement agencies to interact with for purposes of subsections (c) and (d). Local resettlement agencies are encouraged to interact with and seek the input of any additional stakeholder that can offer input relevant to the refugee resettlement process.

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Response: HHSC declines to remove subsection (c) from the rule. HHSC agrees that local resettlement agencies interact with community stakeholders through the quarterly meetings already required by federal rules and through ongoing community engagement. However, the purpose of the ability to request additional meetings is to ensure that local community stakeholders have a continual and ongoing mechanism to obtain information as it arises, and to not be limited by the quarterly meetings. This provision simply seeks to formalize what many commenters have identified as an existing ability to provide needed information to community stakeholders.

Comment: One commenter stated that by implementing the proposed rule HHSC failed to distinguish between prescribing by rule and delegating authority to the public. The commenter further stated that in doing so, HHSC exceeded its statutory authority under Texas Government Code Chapters 531 and 752. Specifically, the commenter pointed to HHSC "authoriz(ing) any member of the general public to demand a meeting with a local resettlement agency within 5 days."

Response: To clarify, the proposed rule does not authorize a member of the general public to "demand" a meeting with a local resettlement agency. Rather, the proposed rule requires local resettlement agencies to respond to meeting requests from certain identified local governmental entities and community stakeholders, as described. Local resettlement agencies may decline a request for a meeting, and in such situations the response must be in writing with the reason for the decision clearly stated. A copy of the response is then submitted to HHSC within three business days.

In adopting proposed §376.1001(c), HHSC does not delegate any agency authority to the general public, or exceed the statutory authority provided by S.B. 1928. Texas Government Code §531.0411(b) requires the HHSC Executive Commissioner to "adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information." Subsection (c) seeks to ensure that local governmental entities and community stakeholders have access to timely and comprehensive information, particularly with regard to the rapidly changing circumstances of worldwide immigration and population displacement in the last several months. S.B. 1928 does not prohibit HHSC from ensuring that local governmental entities and community stakeholders have such access. On the contrary, ensuring such access furthers the legislative intent stated under Texas Government Code §531.0411(b).

Comment: Several commenters opposed the inclusion of a mandated maximum time period of five business days to respond to meeting requests from governmental entities and community stakeholders. Specifically, several entities commented that this proposed time restraint would cause an undue burden on staff, interrupt community engagement efforts, and increase administrative costs to the resettlement agency. One commenter suggested that the five business day timeframe be extended to ten business days.

Response: HHSC recognizes that responding to a meeting request, either by agreeing to meet or by declining the request in writing, is only one of a local resettlement agency's many responsibilities. As such, HHSC will modify subsection (c)(1) by extending the period from five business days to ten business days for a local resettlement agency to grant or decline a requested meeting. This edit can be found in the updated rule language below.

§376.1001(d):

Comment: Several commenters opposed the inclusion of a mandated maximum time period of five business days to respond to information requests from governmental entities and community stakeholder. Specifically, several entities commented this proposed time restraint would cause an undue burden on staff, interrupt community engagement efforts, and increase administrative costs to the resettlement agency. One commenter suggested that the five business day timeframe be extended to ten business days.

Response: The five business day response timeframe under subsection (d) of the rule applies to the local resettlement agencies' duty to state whether a request for information will be granted. Local resettlement agencies may decline a request for information, and in such situations the response must be in writing with the reason for the decision clearly stated. A copy of the response is then submitted to HHSC within three business days.

HHSC recognizes that responding to an information request, either by agreeing to provide the information or by declining the request in writing, is only one of a local resettlement agency's many responsibilities. As such, HHSC will modify subsection (d)(1) by extending the period from five business days to ten business days for a local resettlement agency to grant or decline a request for information. This edit can be found in the updated rule language below.

Comment: One commenter stated that the 15 business day period to provide information requested by any member of the public placed a substantial burden on agency resources and staff.

Response: To clarify, the community stakeholders identified under subsection (d) are the same as those listed under subsection (b). HHSC did not intend to give any member of the general public standing to request information from local resettlement agencies about the refugee resettlement process. However, given the extension of the grant/denial period under subsection (d)(1), HHSC will modify the rule to commensurately expand the timeframe in which a local resettlement agency must provide requested information once a request is granted. This has been extended from 15 to 20 business days. The edit can be found in the rule language below.

§376.1001(e):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§376.1001(f):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§376.1001(g):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§376.1001(h):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

§376.1001(i):

HHSC did not receive any public comments regarding this specific section of the proposed rule.

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Government Code §752.004, which authorize HHSC to apply for and distribute funds to agencies responsible for providing services to refugees; and Texas Government Code §531.0411 which requires the Executive Commissioner of HHSC to adopt rules to ensure that local governmental and community input is included in any refugee placement report required under a federal refugee resettlement program and that governmental entities and officials are provided with related information.

§376.1001. Local Governmental and Community Input.

(a) For purposes of this subchapter, the following definitions apply:

(1) Business day--A day that is not a Saturday, Sunday, or federal legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or federal legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or federal legal holiday.

(2) HHSC--Texas Health and Human Services Commission, or its designee.

(3) Local resettlement agency--As defined by 45 C.F.R. §400.2, means a local affiliate or subcontractor of a national voluntary agency that has entered into a grant, contract, or cooperative agreement with the United States Department of State or other appropriate federal agency to provide for the reception and initial placement of refugees in the United States.

(4) National voluntary agency--As defined by 45 C.F.R. §400.2, means one of the national resettlement agencies or a state or local government that has entered into a grant, contract, or cooperative agreement with the United States Department of State or other appropriate federal agency to provide for the reception and initial placement of refugees in the United States.

(b) A local resettlement agency must convene meetings at least quarterly at which representatives of the local resettlement agency have an opportunity to consult with and obtain feedback regarding proposed refugee placement from, at a minimum:

(1) local governmental entities and officials, including:

(A) municipal and county officials;

(B) local school district officials; and

(C) representatives of local law enforcement agencies; and

(2) community stakeholders, including:

(A) major providers under the local health care system; and

(B) major employers of refugees.

(c) In addition to the quarterly meetings held under subsection (b) of this section, local governmental entities and community stakeholders may request to meet with a local resettlement agency regarding refugee placement.

(1) A local resettlement agency must respond within ten business days to a request from a local governmental entity or community stakeholder to meet.

(2) If a request for a meeting is denied, the response must be in writing and the reason for denial must be clearly stated.

(3) A copy of the denial must be submitted to HHSC by the local resettlement agency no later than three business days after it is sent to the local governmental entity or community stakeholder.

(d) To facilitate consultation and effective feedback, local governmental entities and community stakeholders may request information from a local resettlement agency related to the resettlement process.

(1) A local resettlement agency must respond within ten business days as to whether a request for information from a local governmental entity or community stakeholder will be granted.

(2) If the request is granted, the local resettlement agency must provide the requested information no later than twenty business days from the date of the receipt of the request, to the extent not otherwise prohibited by state or federal law.

(3) If a request for information is denied, the response must be in writing and the reason for denial must be clearly stated.

(4) A copy of the denial must be submitted to HHSC by the local resettlement agency no later than three business days after it is sent to the local governmental entity or community stakeholder.

(e) A local resettlement agency must consider all feedback obtained in community consultation meetings under subsections (b) and (c) of this section in reporting annual refugee placement information to the local refugee resettlement agency's national voluntary agency for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(f) A local resettlement agency must provide HHSC, local governmental entities and officials, and community stakeholders described under subsection (b) of this section a copy of proposed annual refugee placement data for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(g) A local resettlement agency must develop and submit a final annual report to the local refugee resettlement agency's national voluntary agency and for HHSC that includes a summary regarding how community stakeholder input contributed to the development of an annual refugee placement report for purposes of 8 U.S.C. Section 1522(b)(7)(E).

(h) A local resettlement agency must provide HHSC with the preliminary number of refugees the local resettlement agencies recommend to the national voluntary agencies for placement throughout the State of Texas.

(i) In addition to applicable requirements specified in Subchapter B of this chapter (relating to Contractor Requirements), a contract with a local resettlement agency to provide Refugee Social Services must comply with the requirements of this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2016.

TRD-201601626
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 1, 2016
Proposal publication date: February 5, 2016
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 30. COMMUNITY DEVELOPMENT

SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

4 TAC §30.52

The Texas Department of Agriculture (Department) adopts amendments to §30.52, relating to match requirements under the Texas Capital Fund Real Estate and Infrastructure Development Programs, without changes to the proposed text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1560).

There were no comments received on the proposal.

The adoption is made under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 5, 2016.

TRD-201601572
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: April 25, 2016
Proposal publication date: March 4, 2016
For further information, please call: (512) 463-4075

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS

SUBCHAPTER II. COMMISSIONER'S RULES CONCERNING HIGH SCHOOL ALLOTMENT

The Texas Education Agency adopts amendments to §§61.1091, 61.1093, 61.1094, and 61.1099 and the repeal of §61.1100 and §61.1101, concerning the high school allotment for school districts. The amendments and repeals are adopted without changes to the proposed text as published in the January 15, 2016 issue of the *Texas Register* (41 TexReg 561) and will not be republished. The sections implement provisions for the administration of high school allotment funds. The adopted amendments and repeals update the current rules to reflect statutory changes.

REASONED JUSTIFICATION. The Texas Education Code (TEC), §42.2516(b)(3), added by the 79th Texas Legislature, Third Called Session, 2006, and amended by the 80th Texas Legislature, Regular Session, 2007, provided for an allotment of $275 for each student in average daily attendance in Grades 9-12 in a school district. This allotment is known as the high school allotment.

The TEC, §39.113, added by the 79th Texas Legislature, Third Called Session, 2006, authorized the commissioner to adopt rules related to the recognition of high school completion and success and college readiness programs. The TEC, §39.114, also added by the 79th Texas Legislature, Third Called Session, 2006, required the commissioner to adopt rules related to permissible uses of the high school allotment.

House Bill (HB) 3, 81st Texas Legislature, 2009, renumbered the TEC, §39.113, as §39.233, and updated statutory references within the section. The bill also renumbered the TEC, §39.114, as §39.234. In addition, the criteria a district must meet to be able to use high school allotment funds on any instructional program in Grades 6-12 other than an athletic program, found in subsection (b) of the new TEC, §39.234, were revised.

The commissioner exercised rulemaking authority to implement the high school allotment by adopting 19 TAC Chapter 61, Subchapter II, Commissioner's Rules Concerning High School Allotment, effective November 9, 2006, and adopted amendments to the rules effective March 3, 2010, in response to actions from the 2006, 2007, and 2009 legislative sessions.

Subsequently, HB 5, 83rd Texas Legislature, 2013, changed graduation requirements, transitioning from three high school graduation programs to one foundation high school program with endorsement options to increase flexibility for students. HB 5 also changed some accountability indicators. The adopted revisions to 19 TAC Chapter 61, Subchapter II, reflect these statutory changes, as follows.

Section 61.1091, Definitions, removes the criteria related to the Distinguished Achievement High School Program.

Section 61.1093, Use of Funds, removes options related to the Recommended High School Program and the Distinguished Achievement Program.

Section 61.1094, Exceptions for Alternative Uses of Funds, updates and specifies in rule the eligibility criteria for exceptions for alternative uses of the high school allotment funds.

Section 61.1099, School District Annual Performance Review, updates the performance indicators that school districts must use to establish annual performance goals to be implemented with high school allotment funds.

Section 61.1100, Evaluation of Programs, is repealed to minimize duplication as §61.1099 outlines school district performance review protocols.

Section 61.1101, Standards for Selecting and Methods for Recognizing Districts and Campuses Offering Exceptional Programs, is repealed based on the 2015 Sunset Advisory Commission Review Recommendation 4.11 (and TEA's agreement with the recommendation) to eliminate the requirement for TEA to recognize schools' use of high school allotment funds.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began January 15, 2016, and ended February 16, 2016. No public comments were received.

19 TAC §§61.1091, 61.1093, 61.1094, 61.1099

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §39.233, which permits the commissioner of education to adopt rules to recognize high school completion and success and college readiness programs; TEC, §39.234, which requires the commissioner to adopt rules related to the permissible use of funds allocated under the annual high school allotment; and TEC, §42.160, which requires the commissioner to adopt rules to administer the annual high school allotment.

CROSS REFERENCE TO STATUTE. The amendments implement the Texas Education Code, §§39.233, 39.234, and 42.160.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2016.

TRD-201601620
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: April 26, 2016
Proposal publication date: January 15, 2016
For further information, please call: (512) 475-1497

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19 TAC §61.1100, §61.1101

STATUTORY AUTHORITY. The repeals are adopted under the Texas Education Code (TEC), §39.233, which permits the commissioner of education to adopt rules to recognize high school completion and success and college readiness programs; TEC, §39.234, which requires the commissioner to adopt rules related to the permissible use of funds allocated under the annual high school allotment; and TEC, §42.160, which requires the commissioner to adopt rules to administer the annual high school allotment.

CROSS REFERENCE TO STATUTE. The repeals implement the Texas Education Code, §§39.233, 39.234, and 42.160.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: January 15, 2016
For further information, please call: (512) 475-1497

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CHAPTER 129. STUDENT ATTENDANCE
SUBCHAPTER AA. COMMISSIONER'S RULES

19 TAC §129.1029

The Texas Education Agency adopts an amendment to §129.1029, concerning the Optional Flexible Year Program (OFYP). The amendment is adopted without changes to the proposed text as published in the January 15, 2016 issue of the *Texas Register* (41 TexReg 564) and will not be republished. The section implements provisions for the administration of the OFYP. The adopted amendment modifies the rule to reflect changes in statute made by House Bill (HB) 2610, 84th Texas Legislature, 2015.

REASONED JUSTIFICATION. HB 2610, 84th Texas Legislature, 2015, made changes to the Texas Education Code (TEC), §25.081, to modify how a school district counts instructional time for the school year by requiring a minimum of 75,600 minutes of instruction, including intermission and recess, instead of the current minimum of 180 days. It also defines one day of instruction to be equal to 420 minutes.

Before amendment by HB 2610, the TEC, §25.081, required school districts to provide at least 180 days of instruction to students each school year, except if the school district operated on a year-round calendar or offered a flexible year program. The statute allowed the commissioner of education to approve a reduced number of instructional days if an extreme weather event or another calamity caused schools to close.

When schools close due to severe weather and the commissioner does not approve reduced instructional days, schools must make up lost instructional days by adding days to the school calendar and extending the school year into summer. Allowing school districts to count instructional time by minutes instead of days provides for lost instructional time to be added to a regular school day, permitting districts to make up lost time without extending classes into the summer.

In accordance with HB 2610, the commissioner may approve reduced minutes of instruction if certain extreme weather or another calamity causes schools to close. If the commissioner does not approve fewer instructional minutes for a school district, the district may add additional minutes to its normal school hours as necessary, with additional instructional minutes compensating for the time lost due to bad weather or other extraordinary events.

The adopted amendment to 19 TAC §129.1029 incorporates the changes made by HB 2610 as follows.

New subsection (a) was added to establish definitions for the Optional Flexible Year Program (OFYP) and school district.

Subsection (c) was revised to update program criteria, including the addition of new paragraph (7) to require proposed OFYP instructional time to be scheduled before the last approved student assessment testing window of the school year. The TEC, §29.0821, specifies that this program is available to assist students in meeting promotion requirements. New paragraph (7) is intended to ensure that additional instruction takes place prior to the final administration of state assessments since these are required for promotion.

Subsection (d) was revised to update the approval process, including the requirement that a school district submit its instructional calendar that indicates the days and minutes scheduled as OFYP instructional days.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began January 15, 2016, and ended February 16, 2016. No public comments were received.

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §29.0821, which authorizes the commissioner of education to adopt rules necessary for the administration of provisions under the optional flexible year program.

CROSS REFERENCE TO STATUTE. The amendment implements the TEC, §29.0821.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2016.

TRD-201601622
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: April 26, 2016
Proposal publication date: January 15, 2016
For further information, please call: (512) 475-1497

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CHAPTER 150. COMMISSIONER'S RULES CONCERNING EDUCATOR APPRAISAL
SUBCHAPTER AA. TEACHER APPRAISAL

The Texas Education Agency (TEA) adopts the repeal of §§150.1001-150.1007, 150.1009, and 150.1010, and new §§150.1001-150.1008, concerning teacher appraisal. The repeal of §§150.1001-150.1007, 150.1009, and 150.1010 and new §150.1005 and §150.1008 are adopted without changes to the proposed text as published in the December 11, 2015 issue of the *Texas Register* (40 TexReg 8857) and will not be republished. New §§150.1001-150.1004, 150.1006, and 150.1007 are adopted with changes to the proposed text as published in the December 11, 2015 issue of the *Texas Register* (40 TexReg 8857). Sections 150.1001-150.1007, 150.1009, and 150.1010 reflect the state-recommended appraisal system for teachers. The adopted repeal and new rules reflect changes to the state-recommended teacher appraisal system by replacing the current state-recommended teacher appraisal system, the Professional Development Appraisal System (PDAS), effective July 1, 2016, with a new state-recommended teacher appraisal

system, the Texas Teacher Evaluation and Support System (T-TESS).

REASONED JUSTIFICATION. The rules in 19 TAC Chapter 150, Subchapter AA, capture the commissioner's current state-recommended appraisal system for teachers, the PDAS, which has been in place since 1997.

Since the fall of 2013, the TEA has worked with stakeholders, including teachers, principals, district administrators, higher education representatives, and regional education service centers, to build and refine a new state-recommended teacher appraisal system that can be utilized more effectively for educator development. The new system, the T-TESS, was piloted in approximately 57 districts during the 2014-2015 school year and refined throughout the year based on educator feedback. During the 2015-2016 school year, the T-TESS is being piloted in 232 districts, which have adopted the system as a locally developed appraisal option.

The T-TESS will replace the PDAS as the state-recommended teacher appraisal system beginning July 1, 2016. The adopted rule actions in this item repeal the rules for the PDAS and replace them with the new rules for the T-TESS. Besides describing and detailing the process for the T-TESS, the adopted new rules also clarify statutory language in the Texas Education Code (TEC), §21.351(a)(2), that requires the use of the performance of teachers' students as a measure of student growth at the individual teacher level.

Although statute requires the use of "the performance of teachers' students" in both the state-recommended teacher appraisal system and any locally adopted teacher appraisal system, the term "the performance of teachers' students" is not defined in the statute, nor does the statute prescribe what type of performance should be considered in a teacher's appraisal results. The commissioner has, by rule, clarified that term to mean student growth at the individual teacher level for the following reasons.

First, when considering the purpose of appraisal is to determine whether or not a teacher's pedagogical choices have proven to be effective for the students enrolled in the teacher's courses, the measure of student performance should be based on student growth rather than student proficiency. Student proficiency measures a student's ability to reach a predetermined academic standard without consideration of what level of knowledge and skill a student possessed when entering the teacher's course. When measuring student proficiency, a student who moves from three years behind grade level to one year behind grade level in a single year still counts as a student who failed to meet the predetermined academic standard. For the purposes of a teacher appraisal process, this type of measure could lead to false diagnostic conclusions about the effectiveness of a teacher's pedagogical decisions and diminish the accuracy and value of the appraisal process. In the example above, the proficiency data would suggest that the teacher's practices were ineffective even though the student improved two grade levels in a single year.

Student growth measures how much a student progresses academically during his or her time with a particular teacher. It takes into consideration a student's entering knowledge and skill level when measuring how much the student grew over time, and, as opposed to measuring student proficiency, student growth is not concerned with whether or not a student reaches a predetermined and uniform benchmark. It tailors growth expectations to each student's context. Measuring student growth in a teacher's appraisal process furthers the statutory requirement to allow for diagnostic results (TEC, §21.351(d)) that help determine areas of deficiency (TEC, §21.352(c)).

Second, when considering a measure of student growth at an individual versus a collective level (e.g., grade-level teams, subject teams, or entire campuses), an appraisal process that is required by statute to be diagnostic and to identify areas of deficiency for the individual teacher must look at how the individual teacher's students improved academically during the students' time with that teacher. Any student growth measure that is solely based on a group of teachers with different students and/or teaching assignments will not provide diagnostic, prescriptive feedback about the effectiveness of the pedagogy of the teacher being appraised. A collective student growth measure by itself does not provide specific, diagnostic feedback to the individual teacher on the impact of his or her instructional practices and decisions on the students enrolled in the teacher's courses.

More technically, prior attempts of individuals and groups to clarify the term "the performance of teachers' students" to mean solely a collective measure of student performance fall short of both grammatical and statutory standards. First, "teachers' students" is a plural possessive phrase, and plural possessive phrases do not indicate that what is possessed (students) can only be viewed as possessed by all collectively. Second, the Texas Government Code, §312.003(b), states that "the singular includes the plural and the plural includes the singular unless expressly provided otherwise," indicating that an interpretation of "teachers'" as plural without the ability to view it as singular does not follow the rules of statutory construction.

In addition to clarifying in rule the term "the performance of teachers' students" as student growth at the individual teacher level, the commissioner has defined the term to include the four broad ways to measure student growth for individual teachers while not requiring any one measure to be chosen over another due to the teacher's grade and subject assignment. These four broad ways are listed with the intent of capturing the entirety of the practical possibilities to measure student growth for an individual teacher.

The inclusion of the four broad measures of student growth in the rule without the requirement that a district choose any one particular measure in its locally adopted appraisal system is consistent with the commissioner's acknowledgement to the United States Department of Education (USDE) that the commissioner of education could not require "the performance of teachers' students" as narrowly as a value-added measures based on state assessment results for teachers who teach certain state tested grades and subjects. While the terms "student growth measure" and "value-added measures" are sometimes mistakenly used interchangeably, the latter is a narrow subset of the former. Such a narrow definition of that phrase and the mandate of a single measure that would only apply to approximately 20% of classroom teachers would exceed what is reasonable and permissible in clarifying an ambiguous term while supporting the statutory purposes of a teacher appraisal process, i.e., one that provides diagnostic and prescriptive feedback and identifies a teacher's areas of deficiency. In addition, the USDE required an enforcement regime beyond TEA's authority. By allowing school districts to measure the "performance of teachers' students" through four different possible student growth measures, the rules preserve the school districts' discretion and ability to tailor locally developed performance criteria to reflect accurately the performance of each individual teacher.

While the term "performance of teachers' students" is undefined, the commissioner does not find that the term is ambiguous in

TEC, §21.351. Statutory interpretation requires that words be given their ordinary meaning unless a different or more precise definition is apparent from the term's use in the context of the statute. Here the context of the statute is the use of the "performance of teachers' students" in the appraisal of an individual teacher, making it apparent that the term requires a teacher to be evaluated based on his or her own students' performance. However, even if the term were ambiguous, the commissioner of education has statutory authority to clarify ambiguous statutory terms that appear in TEC, §21.351, the section of statute that requires the commissioner to develop a state-recommended appraisal system. The term in question, "the performance of teachers' students," appears only in TEC, §21.351. The statutory provision that allows school districts to develop locally adopted appraisal systems, TEC, §21.352, simply refers back to TEC, §21.351, with a citation to TEC, §21.351(a) and (b). By statute, the locally developed appraisal system is derivative of the criteria developed by the commissioner under TEC, §21.351, and, therefore, subject to the commissioner's interpretation of the statutory terms in TEC, §21.351(a) and (b).

The commissioner has modified the rules at adoption to clarify the statutory requirements for the state-recommended and locally adopted teacher appraisal systems in §150.1001(f)(1) and (2).

The following additional changes were made to the rule since published as proposed in response to public comment, to provide clarification, and to incorporate technical edits.

In §150.1001, new subsection (f) was added to further clarify two statutory requirements of teacher appraisal systems, one on discipline procedures and one on student performance. The clarification on discipline procedures was added as new subsection (f)(1). The clarification on student performance, added as new subsection (f)(2), was moved from §150.1002(d). Technical edits were also made throughout the adopted rules to reflect the new subsection in which the clarifications can be found.

In §150.1003(b)(1)(A), the phrase "or for teachers new to the district" was added to clarify who completes a Goal-Setting and Professional Development Plan at the beginning of the school year.

In §150.1003(b)(2), the phrase "or for teachers new to the district" was added to clarify who participates in a Goal-Setting and Professional Development Plan conference.

In §150.1003(b)(4), language was added to clarify that additional observations and walk-throughs do not require post-conferences, but if the additional observations and walk-throughs will impact summative appraisal ratings, then they do require a written summary to be shared with the teacher within 10 working days.

In §150.1003(b)(6), the phrase "as described in subsection (f) of this section" was added to link the term "cumulative data" to an explanation of the term in subsection (f).

In §150.1003(d)(1), a technical edit was made by replacing the word "three" with "two" to indicate the number of weeks that must pass between a T-TESS orientation and an observation, as indicated in §150.1006(a).

In §150.1003(g), the word "written" was added to indicate that the mutual consent necessary to allow observations to be conducted in less than 45-minute segments should be written consent.

In §150.1004(f), the phrase "the second appraiser shall appraise the teacher in all domains" was deleted, as it was inaccurate and contradicted language in another subsection.

In §150.1004(f), language was added to indicate that the Goal-Setting and Professional Development Plan could be reviewed in a second appraisal as evidence of goal attainment and professional development activities.

In §150.1006(b), language was added to clarify that teacher orientation must be done in a face-to-face setting during a district's first year of T-TESS implementation.

In §150.1007(a), the phrase "Texas Teacher Evaluation and Support System" was replaced with "appraisal system" to clarify that districts that already had a locally adopted system approved by their school board did not need to go through the adoption process again simply because of the statewide rollout of T-TESS.

In §150.1007(a)(2)(A) and (b)(2)(A), the phrase "or less frequently if in accordance with TEC, §21.352(c)" was added to clarify that locally adopted appraisal systems can appraise a teacher less than annually if in accordance with statute.

In §150.1007(a)(2)(C)(ii) and (b)(2)(C)(ii), the phrase "beginning with the 2017-2018 school year" was added to clarify that the requirement to include student growth in locally adopted appraisal systems will not begin until the 2017-2018 school year.

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began December 11, 2015, and ended January 11, 2016. Following is a summary of public comments received on the proposal and corresponding agency responses.

Comment: The Texas State Teachers Association (TSTA) commented that proposed new §150.1001(e) should be amended to indicate that districts using locally adopted teacher appraisal systems should, at a minimum, match the procedural rules of T-TESS.

Agency Response: The agency disagrees. The TEC, §21.352, governs the required procedures of locally adopted teacher appraisal systems.

Comment: The Association of Texas Professional Educators (ATPE) commented that the domains and dimensions listed in proposed new §150.1002(a) should not necessarily be tied to the teacher standards captured in 19 TAC §149.1001.

Agency Response: The agency provides the following clarification. The domains and dimensions listed in new §150.1002(a) reflect the domains and dimensions of the T-TESS rubric. Although the practices captured in the T-TESS rubric are aligned with the teacher standards in 19 TAC §149.1001, they are also aligned with recent research and vetted rubrics used in variety of districts throughout the state and nation.

Comment: The Texas Classroom Teachers Association (TCTA) commented that language should be added to proposed new §150.1002(b) to indicate that each domain should be scored independently, in accordance with TEC, §21.351(d).

Agency Response: The agency disagrees. TEC, §21.351(d), indicates that the appraisal process should detail ratings by "category of professional skill and characteristic." In T-TESS, the dimensions of the rubric and student growth are the categories that capture professional skill and characteristic. In the T-TESS

process, teachers do receive ratings for each dimension and for student growth.

Comment: One individual commented that the pre-conference and post-conference, as indicated in §150.1002(b) and §150.1003(b)(3) and (5), should be left as optional components in T-TESS.

Agency Response: The agency disagrees. During stakeholder meetings with both the teacher steering committee that built T-TESS and districts that piloted T-TESS, educators uniformly agreed that required conferences were a necessary component of an appraisal system designed both to provide formative feedback to teachers and to foster positive, collaborative campus cultures. The local discretion to waive conferences under the current state recommended teacher appraisal system was widely recognized during these meetings as one of the largest flaws of the current system.

Comment: TSTA commented that the performance levels listed in proposed new §150.1002(c) should be limited to four instead of five.

Agency Response: The agency disagrees. The agency along with two different steering committees of educators determined that five performance levels allow for better differentiation on an appraisal rubric and a more accurate determination of where a teacher is with his or her practice.

Comment: ATPE commented that the performance levels listed in proposed new §150.1002(c) should not be based on the assumption that the majority of teachers will be rated in the "developing" category, as that is equivalent to "below expectations" as captured in proposed new §150.1002(f).

Agency Response: The agency provides the following clarification. Appraiser training for T-TESS makes clear that the default rating for teacher practices is "proficient" until the weight of evidence suggests otherwise. In addition, the term "below expectations" is not meant to clarify the term "developing" but is the term used for a particular performance level of value-added measures, as that student growth measure is based on a group of students' performance relative to their expected performance based on past assessment performance.

Comment: TCTA commented that the commissioner does not have statutory authority to include student growth as a measure in the state-recommended teacher appraisal system.

Agency Response: The agency disagrees. TEC, §21.351(a)(2), requires the commissioner to include in the state-recommended teacher appraisal system a measure of student performance. Not only does a measure of student growth satisfy this statutory requirement, it does so in a way that is the most instructionally valuable for teachers. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. Technical edits were also made throughout the adopted rules to reference new §150.1001(f)(2).

Comment: Eighty-six individuals and TCTA commented that student performance or growth, as indicated in proposed new §150.1002(d), should not be included as a measure in a teacher appraisal process.

Agency Response: The agency provides the following clarification. Many of the comments received about student performance or growth described a process that is a measure of student proficiency rather than a measure of student growth, which is what T-TESS requires. A measure of student proficiency is not a required component of either the state-recommended teacher appraisal process or a locally developed teacher appraisal process.

Student growth measures how much academic progress a student makes during his or her time with a particular teacher. It takes into consideration a student's entering skill level when measuring how much the student grew over time, and, as opposed to measuring student proficiency on an assessment, student growth is not concerned with whether or not a student passes a particular test or reaches a predetermined and uniform benchmark. Student growth focuses on progress over time, and student growth expectations are tailored to the context of the individual student.

As the comments relate to the inclusion of a true student growth measure in a teacher appraisal process, the agency disagrees. In a formative appraisal process focused on diagnosing strengths, weaknesses, and areas for professional development, feedback and data on how an individual teacher's students respond to the teacher's instructional decision forms an integral piece of information in a multiple measure system.

Student growth measured at the individual teacher level provides the most instructionally valuable measurement of student performance for a teacher appraisal process. A measure that looks at a student's ability to reach a predetermined benchmark (proficiency) often does not take into consideration where a student is academically when entering the teacher's class, and measuring student proficiency exclusively can yield inaccurate or incomplete feedback on the efficacy of a teacher's instruction. A measure that uses collective team or campus student performance data fails to provide as valuable data as a growth measure at the individual teacher level. Collective measures do not provide specific feedback to an individual teacher that indicates which practices of that individual teacher were effective, which were not, and what the individual teacher should target for professional development.

In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. Technical edits were also made throughout the subchapter to reference new §150.1001(f)(2).

Comment: One individual commented that they were in favor of including student growth, as indicated in proposed new §150.1002(d), as one measure in a teacher appraisal process.

Agency Response: The agency agrees. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption.

Comment: TSTA and TCTA commented that proposed new §150.1002(d)(3), which would allow districts to use district-level pre- and post-tests in a measure of student growth, be eliminated.

Agency Response: The agency disagrees. The use of assessments tied to appropriate learning standards for the purposes of determining how students are responding to the pedagogical decisions that teachers make can have significant formative value in a teacher appraisal process. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d), including the provision regarding pre- and post-test results on district-level assessments, to new §150.1001(f)(2) at adoption.

Comment: One hundred twenty-seven individuals, TSTA, ATPE, TCTA, the Texas American Federation of Teachers (Texas AFT), and Texans Advocating for Meaningful Student Assessment commented that the results of state assessments should not be used to measure a teacher's performance in either a state or local appraisal system.

Agency Response: The agency provides the following clarification. State assessment results are not a required component of student growth for either the state-recommended appraisal system or a locally developed appraisal system under new rule. Districts are free to use student growth measures that do not include or consider state assessment results, as indicated in new §150.1001(f)(2).

Additionally, any district that chooses to use state assessment results in a measure of student growth would not be dependent on 19 TAC Chapter 150 to grant it that authority, as it would be allowed to do so consistent with the statutory option to create a locally developed appraisal system in TEC, §21.352.

Comment: Twenty individuals, TSTA, ATPE, and TCTA commented that student growth should not count as at least 20% of a teacher's appraisal rating for the state-recommended appraisal system.

Agency Response: The agency provides the following clarification. As indicated in new §150.1002(e), which references new §150.1001(f)(2), as it relates to the state-recommended appraisal system, a district may choose to keep summative appraisal ratings disaggregated at the dimension level. In those instances, teachers would only receive 16 separate ratings for each dimension of the T-TESS rubric and an additional rating for student growth. Each of those ratings would not be weighted, as the district would not apply a weighted formula to determine a single overall rating.

Comment: TSTA commented that the phrase "whenever possible" should be eliminated from proposed new §150.1003(a) so that teachers could only ever be appraised based on an assignment for which he or she is certified.

Agency Response: The agency disagrees. The term "whenever possible" places the burden on appraisers to conduct appraisals for teaching assignments for which the teacher is certified, if at all possible. In instances where the teacher is working entirely outside of his or her certification area, an appraiser should not be categorically barred from working with that teacher through a formative appraisal process.

Comment: One individual commented that T-TESS should not include a Goal-Setting and Professional Development Plan, as indicated in proposed new §150.1003(b)(1).

Agency Response: The agency disagrees. T-TESS was designed by teachers and other educators to be a system that mirrors the habits of effective educators, who consistently pinpoint areas for improvement and strive to continuously grow in their practice. The Goal-Setting and Professional Development Plan is a tool that allows all teachers, regardless of ratings, to translate appraisal data into the improvement of practice and demonstrate their commitment to honing their craft.

Comment: ATPE commented that an appraiser should not have final approval of what a teacher's goals are within the Goal-Setting and Professional Development Plan, as indicated in proposed new §150.1003(b)(1).

Agency Response: The agency disagrees. An appraiser, through his or her supervisory duties, is tasked with ensuring that the components of the appraisal process are implemented appropriately and accurately. In that sense, the appraiser should have the final responsibility of ensuring that appraisal data is accurately translated into professional growth goals and activities.

Comment: The Texas Association of School Boards (TASB) and the Texas Association of School Administrators (TASA) commented that proposed new §150.1003(b)(1)(A) should clarify that the six-week timeline for teachers to return their Goal-Setting and Professional Development Plan to appraisers should apply to teachers new to the district, not just teachers new to T-TESS.

Agency Response: The agency agrees and has modified new §150.1003(b)(1)(A) at adoption accordingly.

Comment: One individual commented that the required Goal-Setting and Professional Development Plan conference for first-year teachers, as indicated in proposed new §150.1003(b)(2), should be optional.

Agency Response: The agency disagrees. The Goal-Setting and Professional Development Plan is one of the pieces of T-TESS that ensures the system has recurring developmental value for teachers. This plan is most effective when it is established collaboratively between an appraiser and teacher and becomes a central resource in translating appraisal data into goals and professional development activities. The teacher steering committee and pilot district stakeholders uniformly recognized that for the plan to have value, it must be established and/or solidified during conferences between appraisers and teachers, whether during a Goal-Setting and Professional Development Plan conference in a teacher's first year or during the end-of-year conference each year thereafter.

Comment: TASB and TASA commented that proposed new §150.1003(b)(2) should clarify that the requirement for a Goal-Setting and Professional Development Plan conference should also apply to teachers who are new to the district.

Agency Response: The agency agrees and has modified new §150.1003(b)(2) at adoption accordingly.

Comment: TSTA commented that proposed new §150.1003(b)(3) should require the pre-conference to be conducted no earlier than 10 working days before the observation.

Agency Response: The agency disagrees. A significant portion of the value of a pre-conference is derived from an appraiser's and teacher's discussion of how the teacher approaches planning in the general sense--how a teacher works through the decision-making process to plan any lesson, not just a single lesson within an entire school calendar. In that sense, valuable pre-conferences can occur prior to 10 working days before the lesson observed.

Comment: ATPE commented that proposed new §150.1003(b)(3) should both require the pre-conference in year one of T-TESS implementation and for unannounced observations.

Agency Response: The agency disagrees. Although the agency recognizes the value of the pre-conference, the effort required to implement a new teacher appraisal system in a district's first year and the time management adjustment that many appraisers will have to make when conducting conferences were of pri-

mary concern in allowing districts a year of implementation before they are required to conduct pre-conferences. Additionally, the requirement of a pre-conference prior to an unannounced observation announces the observation and potentially negates what a district perceives as the value of an unannounced observation.

Comment: TSTA commented that proposed new §150.1003(b)(3) should require a pre-conference for all announced observations.

Agency Response: The agency provides the following clarification. New §150.1003(b)(3) does require a pre-conference for all announced observations.

Comment: TSTA commented that proposed new §150.1003(b)(4) should require one formal observation and one informal observation, and that any observation be the length of the lesson.

Agency Response: The agency disagrees. Although the agency does recommend informal walk-throughs and observations in addition to one formal observation, the agency recognizes that time management limitations exist for campus leaders and the requirement of a second observation could often lead to diminished quality for the sake of increasing quantity. The agency also ensures that T-TESS is not a process focused on a snapshot in time, as both the Goal-Setting and Professional Development Plan and student growth are measures designed to engage the teacher in self-assessment, reflection, and adjustment throughout the school year. Additionally, new §150.1003(g) allows for shorter than 45-minute observations if the context of the teacher's assignment dictates that a single 45-minute segment is not appropriate. In response to other comments, however, new §150.1003(b)(4) was modified at adoption to address additional observations and walk-throughs.

Comment: TASB and TASA commented that proposed new §150.1003(b)(4) and (5) should clarify that additional walk-through observations do not require an observation post-conference and written report.

Agency Response: The agency agrees in part and has modified new §150.1003(b)(4) at adoption as it applies to a post-conference following an additional observation or walk-through.

The agency disagrees in part and has modified new §150.1003(b)(4) at adoption to clarify that a written summary shall be required for an additional observation or walk-through if the additional observation or walkthrough will impact the teacher's summative appraisal ratings.

Comment: TSTA commented that the post-conference, as indicated in proposed new §150.1003(b)(5), should be required to be conducted within two working days after the observation.

Agency Response: The agency disagrees. Although best practices would dictate that a post-conference should be conducted as close to the observed lesson as possible, the agency acknowledges that campus timelines and demands do not constantly allow for both appraisers and teachers to be available for a post-conference within two days after an observation.

Comment: ATPE commented that proposed new §150.1003(b)(5) should clarify when observation results must be shared with the teacher.

Agency Response: The agency disagrees. New §150.1003(b)(5)(A) clearly indicates that observation results must be shared with the teacher at the conclusion of a post-conference, which must be held "within 10 working days after the conclusion of an observation."

Comment: Texas AFT commented that the term "including as to student growth" should be added to the end of proposed new §150.1003(b)(5).

Agency Response: The agency disagrees. Although the agency agrees that conferences and conversations about any aspect of T-TESS should primarily focus on the diagnostic value of data, the term "is diagnostic and prescriptive in nature" in new §150.1003(b)(5)(B) already applies to the post-observation conference in general, including any discussion of student growth that may occur.

Comment: Texas AFT commented that the term "refinement" in proposed new §150.1003(b)(5)(C) and (D) is unclear and should be more plainly stated.

Agency Response: The agency disagrees. The term "refinement" is used consistently throughout all T-TESS training, orientation, and support materials and is not ambiguous to those implementing T-TESS. In addition, "refinement," a word that is a derivative of "refine," has a clear dictionary definition that reinforces its intended use in T-TESS.

Comment: Texas AFT commented that cumulative data, as referenced in proposed new §150.1003(b)(6), should include a linking phrase to indicate that it is further described in proposed new §150.1003(f).

Agency Response: The agency agrees and has modified new §150.1003(b)(6) at adoption accordingly.

Comment: TSTA and TCTA commented that proposed new §150.1003(b)(7) should not include language that indicates the end-of-year conference include a discussion of previous years' appraisal data.

Agency Response: The agency disagrees. Appraisal is a recursive process and is best conducted when teachers and appraisers discuss the evolution of a teacher's practice over time. New §150.1003(b)(7) does not indicate that past data already captured in previous appraisal ratings should be used again to rate a teacher's performance but that discussions about a teacher's progress and growth goals should take into consideration as much information as possible, including data from prior years.

Comment: ATPE commented that proposed new §150.1003(b)(7) should clarify the deadline to share final summative appraisal ratings with a teacher.

Agency Response: The agency disagrees. New §150.1003(i) explicitly states that the "written summative annual appraisal report shall be shared with the teacher...no later than 15 working days before the last day of instruction."

Comment: Texas AFT commented that the phrase "when available" is problematic as it exists in proposed new §150.1003(b)(7) in reference to the inclusion of student growth data in end-of-year conferences.

Agency Response: The agency disagrees. For certain student growth measures, data may not be available at the time an end-of-year conference is conducted. In those instances, an end-of-year conference cannot include a discussion of student growth data that is not yet available. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new

§150.1001(f)(2) at adoption. A technical edit has been made in new §150.1003(b)(7)(C) to reference new §150.1001(f)(2).

Comment: TSTA commented that proposed new §150.1003(c) should indicate that all observations should be announced.

Agency Response: The agency disagrees. The agency believes that districts should have the flexibility to conduct announced and/or unannounced observations based on the context of the district, campus, and teacher.

Comment: TSTA commented that proposed new §150.1003(d) should indicate that a district observation calendar should eliminate the possibility for observations during a week where a state assessment is given, the instructional day prior to or after a holiday, or on any day where an alternative schedule is used, such as a day with pep rallies or early dismissal.

Agency Response: The agency disagrees. The days listed by TSTA in the public comment still have an expectation that student learning occurs, and as such, those days can be an opportunity for appraisers and teachers to determine the efficacy of a teacher's instructional choices and determine areas for reinforcement and refinement.

Comment: Texas AFT commented that the word "written" be added to proposed new §150.1003(g) to allow for clear documentation that both teacher and appraiser consented to observations conducted in less than 45-minute increments.

Agency Response: The agency agrees and modified new §150.1003(g) at adoption accordingly.

Comment: TSTA commented that proposed new §150.1003(i) should clarify the timeline for the end-of-year conference and should allow for teachers to respond to summative appraisal results in a timely manner.

Agency Response: The agency provides the following clarification. New §150.1003(i) requires summative appraisal results to be returned to teachers by the 15th day from the last day of instruction, and teachers have the customary 10 days to respond to summative appraisal results, just as they do under the repealed rule. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. A technical edit has been made in new §150.1003(i) to reference new §150.1001(f)(2).

Comment: Texas AFT commented that proposed new §150.1003(k) should indicate that documentation received after the conclusion of the end-of-year conference that may impact a teacher's appraisal results for that specific contract year may only be used for that specific contract year.

Agency Response: The agency disagrees. The agency believes that the language is clear as written as proposed. The language already clearly indicates that the documentation received after the conclusion of the end-of-year conference that may impact a teacher's appraisal results for that specific contract year may only be used for that specific contract year.

Comment: TCTA commented that to be eligible for less-than-annual appraisals, proposed new §150.1003(l) should indicate that a teacher can be "Improvement Needed" in one dimension and still meet the definition of "proficient" that allows them to be appraised less than annually.

Agency Response: The agency disagrees. First, a stakeholder group of educators who are implementing T-TESS determined the appropriate definition of "proficient" for the purposes of less-than-annual appraisals. Second, the term "Improvement Needed" indicates that a teacher needs the structure of a full appraisal process in order to have access to the support and feedback necessary to move to a higher level of performance as captured on the T-TESS rubric.

Comment: ATPE and TCTA commented that proposed new §150.1003(l) should include student growth only during a teacher's full appraisal year.

Agency Response: The agency disagrees. Student growth measures within T-TESS should parallel and examine the pedagogical decision-making processes teachers deploy every year. In that sense, student growth processes should not be different from effective teaching and should have significant value for student learning. In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. A technical edit has been made in new §150.1003(l) to reference new §150.1001(f)(2).

Comment: Texas AFT commented that language in proposed new §150.1003(l)(1)(D) should clarify that cumulative data is not an intended source of data that could place a teacher back on a traditional appraisal cycle.

Agency Response: The agency provides the following clarification. The language in new §150.1003(l)(1)(D) does intend to indicate that cumulative data can be a source of data that could place a teacher back on a traditional appraisal cycle, just as in the repealed rule.

Comment: TCTA commented that the student growth process should be like the cumulative data provision, as indicated in proposed new §150.1003(l)(1)(D), in that appraisers should be required to share information from the student growth process within 10 days of the information being available rather than at the conclusion of the student growth process.

Agency Response: The agency disagrees. The student growth process is a cumulative process that informs appraisal ratings until the conclusion of the process, at which time the appraiser has an obligation to share ratings with a teacher in a timely manner. Requiring an appraiser to share data with a teacher every time an appraiser encounters student learning or a lack thereof over the course of a school year is impractical.

Comment: One individual commented that there should not be any required components of T-TESS for teachers that are not experiencing a "full-appraisal," as indicated in proposed new §150.1003(l)(3).

Agency Response: The agency disagrees. During stakeholder meetings with both the teacher steering committee that built T-TESS and districts that piloted T-TESS, educators uniformly agreed that a successful appraisal system needed to facilitate timely and ongoing activities designed to improve practice and student performance. The required activities in new §150.1003(l)(3) both keep the concept of development continuous and not something addressed less than annually and maintain educator focus on pedagogical strategies and adjustments to improve student academic growth.

In response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. A technical edit has been made in new §150.1003(l)(3) to reference new §150.1001(f)(2).

Comment: TSTA, ATPE and TCTA commented that proposed new §150.1004 should not differentiate when and to what a teacher may respond during the appraisal process.

Agency Response: The agency disagrees. Teachers have an opportunity to respond to appraisal data when it is first provided to them. The differentiation in new §150.1004 simply indicates that a teacher does not have a second opportunity at the end of the year to respond to the same data that was already provided to them earlier in the year and to which they already had an opportunity to respond.

Comment: TCTA commented that proposed new §150.1004(a) and (b) should indicate that an appraiser may extend the time by which a teacher's response or rebuttal is due.

Agency Response: The agency disagrees. New §150.1004 does not disallow appraisers from accepting responses or rebuttals at a time beyond their due date. In that sense, the inclusion of the commenter's suggested language would be redundant.

Comment: TASB and TASA commented that the language in proposed new §150.1004(f) contradicts itself and indicates that a second appraisal shall both always include all domains and at times not include all domains.

Agency Response: The agency agrees and modified new §150.1004(f) at adoption to clarify that a second appraisal does not necessarily require an appraisal in all domains.

Comment: TCTA commented that the Goal-Setting and Professional Development Plan, as indicated in proposed new §150.1003(b)(1), should be included in proposed new §150.1004(f).

Agency Response: The agency agrees and has modified new §150.1004(f) at adoption accordingly.

Comment: Texas AFT commented that proposed new §150.1004(g) should indicate that districts need to create local policy on the use of second appraisers and second appraisals.

Agency Response: The agency disagrees. Adding language indicating this is redundant, as its exclusion already places the burden on local policy.

Comment: TCTA commented that certification rules in proposed new §150.1005 should clarify that an appraiser that has not completed training and certification cannot conduct formal or informal observations.

Agency Response: The agency disagrees. New §150.1005(b) clearly indicates that an appraiser must have completed training and passed the certification examination prior to conducting an appraisal. Observations and walk-throughs that do not impact appraisal or are not a part of the appraisal process are outside the scope of rulemaking as it relates to teacher appraisal.

Comment: TCTA commented that proposed new §150.1005(b) should not allow non-classroom teacher supervisory staff whose job description includes the appraisal of teachers to appraise teachers.

Agency Response: The agency disagrees. TEC, §21.351(c), indicates that a teacher appraiser can be a teacher's supervisor or a person approved by the board of trustees. New §150.1005 clearly indicates that the appraisers about which TCTA commented are supervisors of teachers.

Comment: TSTA commented that requirements for periodic recertification should be spelled out in proposed new §150.1005(c).

Agency Response: The agency disagrees. Recertification requirements need to be flexible so that recertification requirements can be aligned to implementation feedback.

Comment: TSTA commented that criteria should be added to proposed new §150.1005(d) to facilitate identification of who could be an appraiser in T-TESS beyond the campus administrators defined in proposed new §150.1005(b).

Agency Response: The agency disagrees. TEC, §21.351(c), indicates that a district's board of trustees should approve who an appraiser should be when not a teacher's supervisor. The agency believes this level of local control should not be restricted for appraiser selection, provided all appraisers are appropriately trained and certified in T-TESS.

Comment: TCTA commented that proposed new §150.1006(a) should increase the amount of time between a teacher's orientation and when an observation can be conducted to three weeks instead of the two weeks.

Agency Response: The agency disagrees. The agency cannot find and has not been presented with any evidence that would suggest that observations conducted two weeks after an orientation rather than three weeks after an orientation are less accurate, reliable, or valuable.

Comment: TASB and TASA commented that language should be added to proposed new §150.1007(a)(2)(A) and (b)(2)(A) to clarify that under a locally adopted appraisal system, a teacher can be appraised less than annually in accordance with the TEC, §21.352(c).

Agency Response: The agency agrees and has modified new §150.1007(a)(2)(A) and (b)(2)(A) at adoption for clarification.

Comment: TASB and TASA commented that proposed new §150.1007(a) should clarify that a district that was already using a locally developed and adopted teacher appraisal system does not need to go through the adoption process again due to the implementation of T-TESS.

Agency Response: The agency agrees and has modified new §150.1007(a) at adoption to indicate that the statewide implementation of T-TESS does not require districts that have already developed and adopted a local teacher appraisal system to go through the local adoption process again.

Comment: Thirty individuals and TCTA commented that annual appraisals for all teachers should not be a requirement of teacher appraisal systems.

Agency Response: The agency provides the following clarification. Consistent with the TEC, §21.352(c), a teacher may be appraised less than annually by mutual consent of the district and the teacher if the result of the teacher's most recent appraisal was at least proficient or its equivalent. In those instances, a teacher must be appraised at least once in a five-year period.

For the state-recommended appraisal process, new §150.1003(l) defines what conditions must be met for a teacher to rate as proficient for the purposes of less than annual full appraisals. The new rule does not define what conditions must be met for a teacher to rate as proficient for a locally developed system, and it would be the obligation of a district using a locally developed system to clarify those conditions in local policy.

Comment: Texas AFT commented that language should be added to proposed new §150.1007 to indicate that alleged violations of district or campus appraisal systems may be grieved and appealed in accordance with TEC, §7.057.

Agency Response: The agency disagrees. Any right that exists in statute does not need to be copied into rule.

Comment: TASB, TASA, and Texas AFT commented that proposed new §150.1007(a)(2)(C)(ii) and (b)(2)(C)(ii) should be clarified to indicate that the requirement to include student growth in locally adopted teacher appraisal systems does not begin until the 2017-2018 school year.

Agency Response: The agency agrees and has modified new §150.1007(a)(2)(C)(ii) and (b)(2)(C)(ii) at adoption accordingly for clarification. Additionally, in response to public comment and to provide clarification, the agency has moved the definition of student performance from proposed §150.1002(d) to new §150.1001(f)(2) at adoption. Technical edits have been made in new §150.1007(a)(2)(C)(ii) and (b)(2)(C)(ii) to reference new §150.1001(f)(2).

Comment: One individual commented in favor of annual appraisals for all teachers.

Agency Response: The agency provides the following clarification. Consistent with the TEC, §21.352(c), a teacher may be appraised less than annually by mutual consent of the district and the teacher if the result of the teacher's most recent appraisal was at least proficient or its equivalent. In those instances, a teacher must be appraised at least once in a five-year period.

Comment: Six individuals, Texas AFT, and TCTA commented that the commissioner does not have authority to make a rule for locally developed teacher appraisal systems or to clarify ambiguous statutory terms when they relate to locally adopted teacher appraisal systems.

Agency Response: The agency disagrees. While the term "performance of teachers' students" is undefined, the commissioner does not find that the term is ambiguous in TEC, §21.351. Statutory interpretation requires that words be given their ordinary meaning unless a different or more precise definition is apparent from the term's use in the context of the statute. Here the context of the statute is the use of the "performance of teachers' students" in the appraisal of an individual teacher, making it apparent that the term requires a teacher to be evaluated based on his or her own students' performance. However, even if the term were ambiguous, the commissioner of education has statutory authority to clarify ambiguous statutory terms that appear in TEC, §21.351, the section of statute that requires the commissioner to develop a state-recommended appraisal system. The term in question, "the performance of teachers' students," appears only in TEC, §21.351. The statutory provision that allows school districts to develop locally adopted appraisal systems, TEC, §21.352, simply refers back to TEC, §21.351, with a citation to TEC, §21.351(a) and (b). By statute, the locally developed appraisal system is derivative of the criteria developed by the commissioner under TEC, §21.351, and, therefore, subject to the commissioner's interpretation of the statutory terms in TEC, §21.351(a) and (b).

Comment: Two individuals commented that districts should be able to create their own locally adopted appraisal systems.

Agency Response: The agency provides the following clarification. Districts are able to create their own locally adopted appraisal systems, as captured in TEC, §21.352, and in new §150.1007.

Comment: Eight individuals commented that either appraisal results or student test scores should not be the determination of how much teachers are paid.

Agency Response: The agency offers the following clarification. Neither the repealed teacher appraisal rules nor the new teacher appraisal rules require teacher pay to be tied to any aspect of teacher appraisal, including student test scores or student growth. This rule action does not contain any stipulation that addresses teacher pay at all.

Comment: Three individuals commented that T-TESS would take too much time to do.

Agency Response: The agency disagrees. Although the agency acknowledges that T-TESS does require conversations and conferences between educators that may not have been required in past state-recommended teacher appraisal systems, T-TESS is a system designed to foster positive, collegial relationships between appraisers and teachers and to facilitate campus-wide efforts for growth and development. To do that, conversations and conferences between educators have to occur so that appraisal can be a tool for accurate diagnosis and improvement of practice.

In addition, the agency has consistently worked with educators, from a steering committee that built T-TESS to educators implementing during pilot and refinement years, and has based process rules on the consensus recommendations of these educators.

Comment: One individual commented that T-TESS should not be for librarians.

Agency Response: The agency agrees and provides the following clarification. T-TESS was designed for the various categories of classroom teachers as captured in 19 TAC Chapter 233, not for the categories of educators as captured in 19 TAC Chapter 239, which includes school librarians. Although districts could choose to use the T-TESS process and components in the appraisal of educators captured in 19 TAC Chapter 239, modifications may need to be made to cover those specific job descriptions.

Comment: Five individuals commented that T-TESS would not work well for special education teachers or teachers with unique assignments or schedules.

Agency Response: The agency disagrees. Although appraisers in T-TESS do need to ensure that teacher context is taken into consideration when working with teachers, T-TESS was designed to provide a process that allowed appraisers and teachers to accurately diagnose practice strengths and areas for improvement and to guide teachers in processes of self-assessment, reflection, and adjustment. The process itself can have value for all teachers, regardless of assignment. Context matters when applying the T-TESS rubric to various teaching assignments, but T-TESS's purpose--a formative process designed to encourage habits of self-assessment and adjustment--and general process benefit teachers in all assignments.

Comment: One individual commented that T-TESS would not work well for teachers in alternative school settings.

Agency Response: The agency disagrees. Although appraisers in T-TESS do need to ensure that teacher context is taken into consideration when working with teachers, T-TESS was de-

signed to provide a process that allowed appraisers and teachers to accurately diagnose practice strengths and areas for improvement and to guide teachers in processes of self-assessment, reflection, and adjustment. The process itself can have value for all teachers, regardless of assignment. Context matters when applying the T-TESS rubric to various teaching assignments, but T-TESS's purpose--a formative process designed to encourage habits of self-assessment and adjustment--and general process benefit teachers in all assignments.

Comment: Three individuals commented that the proposed rules would not guarantee the effective implementation of T-TESS.

Agency Response: The agency provides the following clarification. No single set of rules written at the state level necessarily guarantees uniform and appropriate implementation across the state. Although T-TESS is designed to be objective through the rubric and the articulation of what are effective teaching practices and to be evidence-based through all components, implementation of any system or process in education is dependent on the educators who implement and the culture in which implementation occurs. Required T-TESS training strives, however, to reinforce the objective nature of the rubric, the evidentiary nature of the process, and the value of appraiser calibration across campuses and districts.

Comment: One individual commented that he was against the new teacher appraisal system in general.

Agency Response. The agency disagrees. Because the comment is not about any specific aspect of T-TESS, the agency is unable to respond outside of indicating that it believes that T-TESS was appropriately designed based on successful, proven practices that improve campus culture, instruction, and student performance.

Comment: Twelve individuals commented that what teachers have to contend with in general is making teaching more and more difficult.

Agency Response: The agency is unable to respond to these comments as they do not relate specifically to the proposed rules for teacher appraisal.

19 TAC §§150.1001 - 150.1007, 150.1009, 150.1010

STATUTORY AUTHORITY. The repeal is adopted under the Texas Education Code (TEC), §21.351, which requires the commissioner of education to adopt a state-recommended appraisal process for teachers. In addition, TEC, §21.352, details the local role for school districts as it relates to teacher appraisal, including locally adopted appraisal processes that must include the teachers' implementation of discipline management procedures and the performance of teachers' students set out in TEC, §21.351(a), and appraisal timelines and frequency.

CROSS REFERENCE TO STATUTE. The repeal implements the TEC, §21.351.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2016.

TRD-201601617

Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: December 11, 2015
For further information, please call: (512) 475-1497

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19 TAC §§150.1001 - 150.1008

STATUTORY AUTHORITY. The new sections are adopted under the Texas Education Code (TEC), §21.351, which requires the commissioner of education to adopt a state-recommended appraisal process for teachers. In addition, TEC, §21.352, details the local role for school districts as it relates to teacher appraisal, including locally adopted appraisal processes that must include the teachers' implementation of discipline management procedures and the performance of teachers' students set out in TEC, §21.351(a), and appraisal timelines and frequency.

CROSS REFERENCE TO STATUTE. The new sections implement the TEC, §21.351.

§150.1001. General Provisions.

(a) All school districts have two choices in selecting a method to appraise teachers: a teacher appraisal system recommended by the commissioner of education or a local teacher appraisal system.

(b) The commissioner's recommended teacher appraisal system, the Texas Teacher Evaluation and Support System (T-TESS), was developed in accordance with the Texas Education Code (TEC), §21.351.

(c) The superintendent of each school district, with the approval of the school district board of trustees, may select the T-TESS. Each school district or campus wanting to select or develop an alternative teacher appraisal system must follow the TEC, §21.352, and §150.1007 of this title (relating to Alternatives to the Commissioner's Recommended Appraisal System).

(d) The commissioner may designate a regional education service center to serve as the T-TESS certification provider for the state. The designated regional education service center may collect appropriate fees under the TEC, §8.053, from school districts and open-enrollment charter schools for training and certification.

(e) Sections 150.1002 through 150.1006 of this title apply only to the T-TESS and not to local teacher appraisal systems.

(f) The statutorily required components of teacher appraisal are defined as follows.

(1) The implementation of discipline management procedures is the teacher's pedagogical practices that produce student engagement and establish the learning environment.

(2) The performance of teachers' students is how the individual teacher's students progress academically in response to the teacher's pedagogical practice as measured at the individual teacher level by one or more of the following student growth measures:

(A) student learning objectives;

(B) student portfolios;

(C) pre- and post-test results on district-level assessments; or

(D) value-added data based on student state assessment results.

§150.1002. Assessment of Teacher Performance.

(a) Each teacher shall be appraised on the following domains and dimensions of the Texas Teacher Evaluation and Support System (T-TESS) rubric that is aligned to the Texas Teacher Standards in Chapter 149 of this title (relating to Commissioner's Rules Concerning Educator Standards).

(1) Domain I. Planning, which includes the following dimensions:

(A) standards and alignment;

(B) data and assessment;

(C) knowledge of students; and

(D) activities.

(2) Domain II. Instruction, which includes the following dimensions:

(A) achieving expectations;

(B) content knowledge and expertise;

(C) communication;

(D) differentiation; and

(E) monitor and adjust.

(3) Domain III. Learning Environment, which includes the following dimensions:

(A) classroom environment, routines, and procedures;

(B) managing student behavior; and

(C) classroom culture.

(4) Domain IV. Professional Practices and Responsibilities, which includes the following dimensions:

(A) professional demeanor and ethics;

(B) goal setting;

(C) professional development; and

(D) school community involvement.

(b) The evaluation of each of the dimensions identified in subsection (a) of this section shall consider all data generated in the appraisal process. The data for the appraisal of each dimension shall be gathered from pre-conferences, observations, post-conferences, end-of-year conferences, the Goal-Setting and Professional Development Plan process, and other documented sources.

(c) Each teacher shall be evaluated on the 16 dimensions in Domains I-IV identified in subsection (a) of this section using the following categories:

(1) distinguished;

(2) accomplished;

(3) proficient;

(4) developing; and

(5) improvement needed.

(d) Beginning with the 2017-2018 school year, each teacher appraisal shall include the performance of teachers' students, as defined in §150.1001(f)(2) of this title (relating to General Provisions).

(e) If calculating a single overall summative appraisal score for teachers, the performance of teachers' students, as defined in §150.1001(f)(2) of this title, shall count for at least 20% of a teacher's summative score.

(f) Each teacher shall be evaluated on the performance of teachers' students using one of the terms from the following categories:

(1) distinguished or well above expectations;

(2) accomplished or above expectations;

(3) proficient or at expectations;

(4) developing or below expectations; or

(5) improvement needed or well below expectations.

§150.1003. Appraisals, Data Sources, and Conferences.

(a) Each teacher must be appraised each school year, except as provided by subsection (l) of this section. Whenever possible, an appraisal shall be based on the teacher's performance in fields and teaching assignments for which he or she is certified.

(b) The annual teacher appraisal, or full appraisal, shall include:

(1) a completed and appraiser-approved Goal-Setting and Professional Development Plan that shall be:

(A) submitted to the teacher's appraiser within the first six weeks from the day of completion of the Texas Teacher Evaluation and Support System (T-TESS) orientation, as described in §150.1006 of this title (relating to Teacher Orientation), for teachers in their first year of appraisal under the T-TESS or for teachers new to the district; or

(B) initially drafted in conjunction with the teacher's end-of-year conference from the previous year, revised as needed based on changes to the context of the teacher's assignment during the current school year, and submitted to the teacher's appraiser within the first six weeks of instruction; and

(C) maintained throughout the course of the school year by the teacher to track progress in the attainment of goals and participation in professional development activities detailed in the approved plan;

(D) shared with the teacher's appraiser prior to the end-of-year conference; and

(E) used after the end-of-year conference in the determination of ratings for the goal setting and professional development dimensions of the T-TESS rubric;

(2) for a teacher in the first year of appraisal under the T-TESS or for teachers new to the district, a Goal-Setting and Professional Development Plan conference prior to the teacher submitting the plan to the teacher's appraiser;

(3) after a teacher's first year of appraisal under the T-TESS within the district, an observation pre-conference conducted prior to announced observations;

(4) at least one classroom observation of a minimum of 45 minutes, as described in subsection (g) of this section, with additional walk-throughs and observations conducted at the discretion of the certified appraiser and in accordance with the Texas Education Code, §21.352(c-1). Additional observations and walk-throughs do not require an observation post-conference. Additional observations and walk-throughs do require a written summary if the data gathered during the additional observation or walk-through will impact the teacher's summative appraisal ratings, in which case the written summary shall be shared within 10 working days after the completion of the additional observation or walk-through. Section 150.1004 of this title (relating to

Teacher Response and Appeals) applies to a written summary of an additional observation or walk-through that will impact the teacher's summative appraisal ratings;

(5) an observation post-conference that:

(A) shall be conducted within 10 working days after the completion of an observation;

(B) is diagnostic and prescriptive in nature;

(C) includes a written report of the rating of each dimension observed that is presented to the teacher only after a discussion of the areas for reinforcement and areas for refinement; and

(D) can allow for, at the discretion of the appraiser, a revision to an area for reinforcement or refinement based on the post-conference discussion with the teacher;

(6) cumulative data, as described in subsection (f) of this section, from written documentation collected regarding job-related teacher performance in addition to formal classroom observations;

(7) an end-of-year conference that:

(A) reviews the appraisal data collected throughout the current school year and previous school years, if available;

(B) examines and discusses the evidence related to the teacher's performance on the four dimensions of Domain IV of the T-TESS rubric, as described in §150.1002(a)(4) of this title (relating to Assessment of Teacher Performance);

(C) examines and discusses evidence related to the performance of teachers' students, as defined in §150.1001(f)(2) of this title (relating to General Provisions), when available; and

(D) identifies potential goals and professional development activities for the teacher for the next school year; and

(8) a written summative annual appraisal report to be provided to the teacher within 10 working days of the conclusion of the end-of-year conference.

(c) A teacher may be given advance notice of the date or time of an observation, but advance notice is not required.

(d) Each school district shall establish a calendar for the appraisal of teachers and provide that calendar to teachers within three weeks from the first day of instruction. The appraisal period for each teacher must include all of the days of a teacher's contract. Observations during the appraisal period must be conducted during the required days of instruction for students during one school year. The appraisal calendar shall:

(1) exclude observations in the two weeks following the day of completion of the T-TESS orientation in the school years when an orientation is required, as described in §150.1006 of this title; and

(2) indicate a period for end-of-year conferences that ends no later than 15 working days before the last day of instruction for students.

(e) During the appraisal period, the certified appraiser shall evaluate and document teacher performance specifically related to the domain criteria, as identified in §150.1002(a) of this title, and the performance of teachers' students, as defined in §150.1001(f)(2) of this title.

(f) The certified appraiser is responsible for documentation of the cumulative data identified in subsection (b)(6) of this section. Any third-party information from a source other than the certified appraiser that the certified appraiser wishes to include as cumulative data shall be verified and documented by the certified appraiser. Any documentation that will influence the teacher's summative annual appraisal report must be shared in writing with the teacher within 10 working days of the certified appraiser's knowledge of the occurrence. The principal shall also be notified in writing of the cumulative data when the certified appraiser is not the teacher's principal.

(g) By written, mutual consent of the teacher and the certified appraiser, the required minimum of 45 minutes of observation may be conducted in shorter time segments. The time segments must aggregate to at least 45 minutes.

(h) A written summative annual appraisal report shall be shared with the teacher no later than 15 working days before the last day of instruction for students. The written summative annual appraisal report shall be placed in the teacher's personnel file by the end of the appraisal period.

(i) An end-of-year conference shall be held within a time frame specified on the school district calendar, no later than 15 working days before the last day of instruction for students. The end-of-year conference shall focus on the data and evidence gathered throughout the appraisal year; the teacher's efforts as they pertain to Domain IV, as identified in §150.1002(a) of this title; the results of the performance of teachers' students, when available, as defined in §150.1001(f)(2) of this title; and the potential goals and professional development plans, as identified in subsection (b) of this section, for the following year. The written summative annual appraisal report shall be shared with the teacher within 10 working days following the conclusion of the end-of-year conference but no later than 15 working days before the last day of instruction.

(j) In cases where the certified appraiser is not an administrator on the teacher's campus, as defined in §150.1005(b) of this title (relating to Appraiser Qualifications), either the principal, assistant principal, or another supervisory staff member designated as an administrator on the campus must participate in the end-of-year conference.

(k) Any documentation collected after the end-of-year conference but before the end of the contract term during one school year may be considered as part of the appraisal of a teacher. If the documentation affects the teacher's evaluation in any dimension, another summative report shall be developed to inform the teacher of the change(s).

(l) Except as otherwise provided by this subsection, a full appraisal must be done at least once during each school year. A teacher may receive a full appraisal less frequently if the teacher agrees in writing and the teacher's most recent full appraisal resulted in the teacher receiving summative ratings of at least proficient on nine of the sixteen dimensions identified in §150.1002(a) of this title and did not identify any area of deficiency, defined as a rating of Improvement Needed or its equivalent, on any of the sixteen dimensions identified in §150.1002(a) of this title or the performance of teachers' students, as defined in §150.1001(f)(2) of this title. A teacher who receives a full appraisal less than annually must receive a full appraisal at least once during each period of five school years.

(1) District policy may stipulate:

(A) whether the option to receive a full appraisal less frequently than annually is to be made available to teachers;

(B) whether the option to receive a full appraisal less frequently than annually is to be adopted districtwide or is to be campus specific;

(C) if the appraisal accompanying a teacher new to a district or campus meets the option as specified in this subsection,

whether the appraisal is to be accepted or whether that teacher is to be appraised by the new campus administrator; and

(D) whether a certified appraiser may place a teacher on the traditional appraisal cycle as a result of performance deficiencies documented in accordance with subsections (b)(6) and (f) of this section.

(2) A school district may choose annually to review the written agreement to have less frequent full appraisals with the teacher. However, at the conclusion of the school year, the district may modify appraisal options through board policy and may make changes to expectations for appraisals that apply to all teachers regardless of a teacher's participation in the appraisal option in the previous year(s).

(3) In a year in which a teacher does not receive a full appraisal due to meeting the requirements identified in this subsection, a teacher shall participate in:

(A) the Goal-Setting and Professional Development Plan process, as identified in subsection (b)(1) of this section;

(B) the performance of teachers' students, as defined in §150.1001(f)(2) of this title; and

(C) a modified end-of-year conference that addresses:

(i) the progress on the Goal-Setting and Professional Development Plan;

(ii) the performance of teachers' students, as defined in §150.1001(f)(2) of this title; and

(iii) the following year's Goal-Setting and Professional Development plan.

§150.1004. Teacher Response and Appeals.

(a) A teacher may submit a written response or rebuttal at the following times:

(1) for Domains I, II, and III, as identified in §150.1002(a) of this title (relating to Assessment of Teacher Performance), after receiving a written observation summary or any other written documentation related to the ratings of those three domains; or

(2) for Domain IV, as identified in §150.1002(a) of this title, and for the performance of teachers' students, as defined in §150.1001(f)(2) of this title (relating to General Provisions, after receiving a written summative annual appraisal report.

(b) Any written response or rebuttal must be submitted within 10 working days of receiving a written observation summary, a written summative annual appraisal report, or any other written documentation associated with the teacher's appraisal. A teacher may not submit a written response or rebuttal to a written summative annual appraisal report for the ratings in Domains I, II, and III, as identified in §150.1002(a) of this title, if those ratings are based entirely on observation summaries or written documentation already received by the teacher earlier in the appraisal year for which the teacher already had the opportunity to submit a written response or rebuttal.

(c) A teacher may request a second appraisal by another certified appraiser at the following times:

(1) for Domains I, II, and III, as identified in §150.1002(a) of this title, after receiving a written observation summary with which the teacher disagrees; or

(2) for Domain IV, as identified in §150.1002(a) of this title, and for the performance of teachers' students, as defined in §150.1001(f)(2) of this title, after receiving a written summative annual appraisal report with which the teacher disagrees.

(d) The second appraisal must be requested within 10 working days of receiving a written observation summary or a written summative annual appraisal report. A teacher may not request a second appraisal by another certified appraiser in response to a written summative annual appraisal report for the ratings of dimensions in Domains I, II, and III, as identified in §150.1002(a) of this title, if those ratings are based entirely on observation summaries or written documentation already received by the teacher earlier in the appraisal year for which the teacher already had the opportunity to request a second appraisal.

(e) A teacher may be given advance notice of the date or time of a second appraisal, but advance notice is not required.

(f) The second appraiser shall make observations and walk-throughs as necessary to evaluate the dimensions in Domains I-III or shall review the Goal-Setting and Professional Development Plan for evidence of goal attainment and professional development activities, when applicable. Cumulative data may also be used by the second appraiser to evaluate other dimensions.

(g) Each school district shall adopt written procedures for determining the selection of second appraisers. These procedures shall be disseminated to each teacher at the time of employment and updated annually or as needed.

§150.1006. Teacher Orientation.

(a) A school district shall ensure that a teacher is provided with an orientation of the Texas Teacher Evaluation and Support System (T-TESS) no later than the final day of the first three weeks of school and at least two weeks before the first observation when:

(1) the teacher is new to the district;

(2) the teacher has never been appraised under the T-TESS; or

(3) district policy regarding teacher appraisal has changed since the last time the teacher was provided with an orientation to the T-TESS.

(b) The teacher orientation shall be conducted in a face-to-face setting during a district's first year of T-TESS implementation and include all state and local appraisal policies and the local appraisal calendar. In addition to the orientation, campuses may hold other sessions sufficient in length allowing teachers to actively participate in a discussion of the T-TESS specifics and to have their questions answered.

§150.1007. Alternatives to the Commissioner's Recommended Appraisal System.

(a) District option. A school district that does not choose to use the commissioner's recommended appraisal system must develop its own teacher appraisal system supported by locally adopted policy and procedures and by the processes outlined in the Texas Education Code (TEC), §21.352.

(1) The school district-level planning and decision-making committee shall:

(A) develop an appraisal process;

(B) develop evaluation criteria, including discipline management and performance of the teacher's students; and

(C) consult with the campus planning and decision-making committee on each campus in the school district.

(2) The appraisal process shall include:

(A) at least one appraisal each year, or less frequently if in accordance with the TEC, §21.352(c);

(B) a conference between the teacher and the appraiser that is diagnostic and prescriptive with regard to remediation needed in overall performance by category; and

(C) criteria based on observable, job-related behavior, including:

(i) the teacher's implementation of discipline management procedures, as defined in §150.1001(f)(1) of this title (relating to General Provisions); and

(ii) beginning with the 2017-2018 school year, the performance of teachers' students, as defined in §150.1001(f)(2) of this title.

(3) The school district-level planning and decision-making committee shall submit the appraisal process and criteria to the superintendent, who shall submit the appraisal process and criteria to the school district board of trustees with a recommendation to accept or reject. The school district board of trustees may accept or reject an appraisal process and performance criteria, with comments, but may not modify the process or criteria.

(b) Campus option. A campus within a school district may choose to develop a local system as provided in this subsection.

(1) The campus planning and decision-making committee shall:

(A) develop an appraisal process;

(B) develop evaluation criteria, including discipline management and performance of the teacher's students; and

(C) submit the process and criteria to the district-level planning and decision-making committee.

(2) The appraisal process shall include:

(A) at least one appraisal each year, or less frequently if in accordance with the TEC, §21.352(c);

(B) a conference between the teacher and the appraiser that is diagnostic and prescriptive with regard to remediation needed in overall performance by category; and

(C) criteria based on observable, job-related behavior, including:

(i) the teacher's implementation of discipline management procedures, as defined in §150.1001(f)(1) of this title; and

(ii) beginning with the 2017-2018 school year, the performance of teachers' students, as defined in §150.1001(f)(2) of this title.

(3) Upon submission of the appraisal process and criteria to the school district-level planning and decision-making committee, the committee shall make a recommendation to accept or reject the appraisal process and criteria and transmit that recommendation to the superintendent.

(4) The superintendent shall submit the recommended campus appraisal process and criteria, the school district-level planning and decision-making committee's recommendation, and the superintendent's recommendation to the school district board of trustees. The school district board of trustees may accept or reject, with comments, an appraisal process and performance criteria, but may not modify the process or criteria.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TRD-201601619
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: July 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 475-1497

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 17. TEXAS STATE SOIL AND WATER CONSERVATION BOARD

CHAPTER 519. TECHNICAL ASSISTANCE

SUBCHAPTER A. TECHNICAL ASSISTANCE PROGRAM

31 TAC §519.8

The Texas State Soil and Water Conservation Board (State Board) adopts an amendment to 31 TAC Chapter 519, §519.8, Eligible Pay Rates, without changes to the proposed text as published in the February 12, 2016, issue of the *Texas Register* (41 TexReg 1081). The amendment changes the current maximum pay rate that is eligible for reimbursement from the State Board. The current pay rate of $15.00 is being increased to $20.00 per hour.

No comments were received regarding the amendment.

The amendment is adopted under the Texas Agriculture Code, Title 7, Chapter 201, §201.020, which authorizes the State Board to adopt rules that are necessary for the performance of its functions under the Agriculture Code.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2016.

TRD-201601616
Mel Davis
Special Projects Coordinator
Texas State Soil and Water Conservation Board
Effective date: May 1, 2016
Proposal publication date: February 12, 2016
For further information, please call: (254) 773-2250 x252

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.355

The Comptroller of Public Accounts adopts amendments to §3.355, concerning insurance services, without changes to the proposed text as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7571). This section is amended to implement House Bill 1841, 84th Legislature, 2015, which amended Tax Code, §151.0039(b)(2) to exclude services performed by a public insurance adjuster from the scope of taxable insurance services. House Bill 1841 is effective October 1, 2015. The section is also amended to make clerical edits and to update rule references.

Subsection (a)(8) is added to define a public insurance adjuster as set out in, and by reference to, Insurance Code, §4102.001(3). Subsequent paragraphs are renumbered accordingly.

Subsection (c)(4) is added to state that services performed on behalf of an insured by a public insurance adjuster on or after October 1, 2015, are not taxable insurance services. This subsection also provides that the date the services are performed, and not the date billed or paid, determines the taxability of the services.

Subsection (i) is amended to correct a typographical error.

Subsection (k) is amended to refer to §3.334 Local Sales and Use Taxes and to delete references to previous rules which were repealed with the adoption of §3.334.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code 111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of provisions of Tax Code, Title 2, and taxes, fees, or other charges or refunds which the comptroller administers under other law.

The amendment implements amendments to Tax Code, §151.0039 (Insurance Service).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 11, 2016.

TRD-201601668
Lita Gonzalez
General Counsel
Comptroller of Public Accounts
Effective date: May 1, 2016
Proposal publication date: October 30, 2015
For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §90.3 and new §90.44 in Chapter 90, Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions, without changes to the proposed text as published in the January 8, 2016, issue of the *Texas Register* (41 TexReg 466).

The amendment and new section are adopted to implement House Bill 2789 of the 84th Legislature, Regular Session, 2015, which added new §161.088 to the Texas Human Resources Code. The adoption requires an intermediate care facility for individuals with an intellectual disability or related conditions to ensure that an employee who is hired on or after May 1, 2016, completes trauma-informed care training before working directly with a resident. The adoption provides that an employee works directly with a resident if the employee serves on a resident's interdisciplinary team or otherwise works with a resident to implement the resident's individual program plan. The adoption also updates the definition for "facility" and adds a definition for "individual program plan."

DADS received written comments from Providers Alliance for Community Services of Texas and one individual. A summary of the comments and the responses follows.

Comment: Two commenters requested more flexibility in the delivery of the trauma-informed care training. The commenters stated that accessing an online course may be burdensome for some facilities. The commenters requested curriculum that can be administered without a computer, and an option for more than one person to watch the online course in one sitting.

Response: The agency will make training content available in other formats for facilities to access. Specific information will be provided in a provider letter from the agency. The costs associated with these formats will be minimal because the agency will provide the content of the training. No changes were made in response to the comments.

SUBCHAPTER A. INTRODUCTION

40 TAC §90.3

The amended section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 7, 2016.

TRD-201601628
Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Effective date: April 27, 2016
Proposal publication date: January 8, 2016
For further information, please call: (512) 438-2264

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §90.44

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
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PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER C. TAX PROVISIONS

40 TAC §815.111

The Texas Workforce Commission (Commission) adopts amendments to the following section of Chapter 815, relating to Unemployment Insurance, *without* changes to the text as published in the December 4, 2015, issue of the *Texas Register* (40 TexReg 8742): Subchapter C. Tax Provisions, §815.111

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of amending Subchapter C, Chapter 815, Unemployment Insurance rules, is to facilitate implementation of House Bill (HB 1251), 84th Texas Legislature, Regular Session (2015), relating to the joint application following certain partial transfers of compensation experience.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER C. TAX PROVISIONS

The Commission adopts the following amendments to Subchapter C:

§815.111. Partial Transfer of Compensation Experience

Section 815.111(b) is amended to clarify that with regard to mandatory partial transfers of compensation experience required under the Texas Unemployment Compensation Act (the Act) §204.083, the successor and predecessor employing units may jointly file with the Agency information necessary to establish a contribution rate pursuant to §204.085 of the Act. The section is further amended to clarify that for acquisitions that occurred prior to September 1, 2015, the effective date of HB 1251, the deadline for submitting the information remains one year following the acquisition. For all other acquisitions, the Agency shall use the deadlines stipulated in §204.085(a-1) of the Act.

No comments were received on the proposed rule.

The rule is adopted under Texas Labor Code §301.0015, which provides the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The adopted rule affects Texas Labor Code, Title 4.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 6, 2016.

TRD-201601606
Patricia Gonzalez
Deputy Director, Workforce Development Division Programs
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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