

**ACTION
REQUIRED**

April 10, 2002

TO THE STAKEHOLDER ADDRESSED:

Subject: Dissemination of Adopted Commissioner's Rules for Special Education

During the 77th Texas Legislative Session, 2001, several new sections of special education law were added and other sections were amended. Additionally, requests for clarification were received from both special education stakeholders and the U.S. Department of Education, Office of Special Education Programs, regarding the commissioner of education's intent with implementation of sections of 19 Texas Administrative Code (TAC) Chapter 89 adopted effective September 1, 1996, and March 6, 2001. As a result of the changes to the state law and requests for clarification, Title 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter AA, Commissioner's Rules Concerning Special Education Services, has been amended to reflect new and revised rules resulting from revisions to the Texas Education Code (TEC), clarification of rulemaking intent to align with the Individuals with Disabilities Education Act (IDEA) Amendments of 1997, and additional revisions that clarify current practice as well as the commissioner of education's intent regarding special education issues.

The enclosed documents represent the adopted commissioner's rules for special education. These documents reflect rules previously in effect, revisions that initially were proposed (single underline), and revisions resulting from the public comment period leading to final adoption (double underline). The Texas Education Agency Office of Accountability Reporting and Research will mail an unmarked version of certain documents as part of the TAC update process. Both marked and unmarked versions of the commissioner's rules will be available on the Internet at <http://www.tea.state.tx.us/special.ed/rules>.

The effective date for §89.1151, Due Process Hearings, and §89.1185, Hearing, was December 30, 2001. The effective date for the remainder of the enclosed rules is August 1, 2002, for all sections with the exception of §89.1049. The new §89.1049, Parental Rights Regarding Adult Students, has an effective date of April 18, 2002. For an adult student who is 18 years of age or older as of April 18, 2002, this effective date for §89.1049 will require local education agencies (LEAs) to take immediate action to notify in writing the adult student and parent of the rights which have transferred. This notification must take place no later than the end of the 2001-2002 school year, but, for adult students called upon to exercise their rights prior to the end of the school year, the LEA must ensure that the adult student and parent have received written notice of transfer of parental rights prior to any activities in which the adult student will be called upon to exercise their rights (e.g., provide consent or agree to an individualized education program). LEAs also must establish an appropriate system to ensure that the requirements under the new §89.1049 are met in a timely way for all other impacted students. Additional guidance on this topic will be provided through upcoming training opportunities and agency communications.

The most significant rule adoption contained in this package pertains to the new §89.1053, relating to procedures for use of restraint and time-out. It is critically important that school personnel understand that, effective August 1, 2002, the use of restraint will be limited to emergency situations as defined by the rule. Use of restraint as a recurrent behavior management technique to increase or decrease student

behavior will be prohibited. LEAs and school campuses must immediately begin to plan for activities such as revisions to individualized educational programs (IEPs) that contain restraint as a behavior management technique, implementation of alternatives to the use of restraint, and consideration of which campus and district personnel will attend training provided through the regional educational service centers related to positive behavioral interventions. In addition, districts and campuses will need to establish systems that align with the new rule as it relates to the implementation of time-out as a behavior management technique and the use of restraint in emergency situations.

Other information of note relates to the withdrawal of §89.1054, Seclusion, and §89.1152, Presentment, from the adopted rules package. The Texas Education Agency (TEA) has withdrawn §89.1054 based on a determination that TEC §37.0021 does not give the TEA explicit rulemaking authority on the issue of seclusion, and §89.1152 based on a letter of interpretation to the TEA from the Office of Special Education Programs, U.S. Department of Education.

The adopted commissioner's rules are being sent to a broad group of stakeholders including, but not limited to, school district superintendents and special education administrators, education service centers, charter schools, consumer and advocacy groups, institutions of higher education, and professional organizations.

We appreciate the participation of all stakeholders in the rule revision and adoption process. Your ongoing interest in the education of students with disabilities is appreciated. Please share this information with other interested stakeholders/organizations.

If you have questions, please contact the Division of Special Education at (512) 463-9414.

Sincerely,

Gene Lenz
Senior Director
Division of Special Education

GL:LT:drc

Enclosure

Text of Adopted Amendments to 19 TAC

Chapter 89. Adaptations for Special Populations

Subchapter AA. Commissioner's Rules Concerning Special Education Services

Division 7. Resolution of Disputes Between Parents and School Districts

§89.1151. Due Process Hearings.

- (a) A parent or public education agency may initiate a due process hearing as provided in the Individuals with Disabilities Education Act (IDEA), Part B, as amended, 20 United States Code (USC), §§1401 et seq., and the applicable federal regulations, 34 Code of Federal Regulations (CFR), §§300.1 et seq.
- (b) The Texas Education (TEA) shall implement a one-tier system of due process hearings under the IDEA. The proceedings in due process hearings shall be governed by the provisions of 34 CFR, §§300.507-300.514, and 34 CFR, §300.528, if applicable, and §§89.1151, 89.1165, 89.1170, 89.1180, 89.1185 and 89.1191 of this subchapter.
- (c) Effective with requests for due process hearings filed on or after August 1, 2002, a parent or public education agency must request a due process hearing within one year of the date the complainant knew or should have known about the alleged action that serves as the basis for the hearing request.
- ~~(e) The issues presented in a due process hearing, and any relief requested, are limited to and may be based only upon facts alleged to have occurred not more than one year prior to the date that the request for due process hearing is received by TEA or since the date of the last admission, review, and dismissal committee meeting of the student who is the subject of the hearing, whichever period is longer, but in no event more than two years prior to the date that the request for due process hearing is received by TEA.~~

Source: The provisions of this §89.1151 adopted to be effective March 6, 2001, 26 TexReg 1837; amended to be effective December 30, 2001, 26 TexReg 10536.

§89.1185. Hearing.

- (a) The hearing officer shall afford the parties an opportunity for hearing after reasonable notice of not less than ten days, unless the parties agree otherwise.
- (b) Each hearing shall be conducted at a time and place that are reasonably convenient to the parents and child involved.
- (c) All persons in attendance shall comport themselves with the same dignity, courtesy, and respect required by the district courts of the State of Texas. All argument shall be made to the hearing officer alone.
- (d) Except as modified or limited by the provisions of 34 Code of Federal Regulations (CFR), §§300.507-300.514, 300.521, or 300.528, or the provisions of §§89.1151-89.1191 of this subchapter, the Texas Rules of Civil Procedure shall govern the proceedings at the hearing and the Texas Rules of Evidence shall govern evidentiary issues.
- (e) Before a document may be offered or admitted into evidence, the document must be identified as an exhibit of the party offering the document. All pages within the exhibit must be numbered, and all personally identifiable information must be redacted from the exhibit.
- (f) The hearing officer may set reasonable time limits for presenting evidence at the hearing.
- (g) Upon request, the hearing officer, at his or her discretion, may permit testimony to be received by telephone.
- (h) Granting of a motion to exclude witnesses from the hearing room shall be at the hearing officer's discretion.
- (i) Hearings conducted under this subchapter shall be closed to the public, unless the parent requests that the hearing be open.

- (j) The hearing shall be recorded and transcribed by a reporter, who shall immediately prepare and transmit a transcript of the evidence to the hearing officer with copies to each of the parties. The hearing officer shall instruct the reporter to delete all personally identifiable information from the transcription of the hearing.
- (k) Filing of post-hearing briefs shall be permitted only upon order of the hearing officer and only upon a finding by the hearing officer that the legal issues involved in the hearing are novel or unsettled in the State of Texas or the Fifth Circuit. Any post-hearing briefs permitted by the hearing officer shall be limited to the legal issues specified by the hearing officer.
- (l) The hearing officer shall issue a final decision, signed and dated, no later than 45 days after a request for hearing is received by the Texas Education Agency, unless the deadline for a final decision has been extended by the hearing officer as provided in subsection (o) ~~(m)~~ of this section. A final decision must be in writing and must include findings of fact and conclusions of law separately stated. Findings of fact must be based exclusively on the evidence presented at the hearing. The final decision shall be mailed to each party by the hearing officer. The hearing officer, at his or her discretion, may render his or her decision following the conclusion of the hearing, to be followed by written findings of fact and written decision.
- (m) At the request of either party, the hearing officer shall include, in the final decision, specific findings of fact regarding the following issues:
 - (1) whether the parent or the school district unreasonably protracted the final resolution of the issues in controversy in the hearing; and
 - (2) if the parent was represented by an attorney, whether the parent's attorney provided the school district the appropriate information in the due process complaint in accordance with 34 CFR, §300.507(c).
- (n) In making a finding regarding the issue described in subsection (m)(1) of this section, the hearing officer shall consider the extent to which each party had notice of, or the opportunity to resolve, the issues presented at the due process hearing prior to the date on which the due process hearing was requested. If, after the date on which a request for a due process hearing is filed, either the parent or the school district requests that a meeting of the admission, review, and dismissal (ARD) committee of the student who is the subject of the due process hearing be convened to discuss the issues raised in the request for a due process hearing, the hearing officer shall also consider the extent to which each party participated in the ARD committee meeting in a good faith attempt to resolve the issue(s) in dispute prior to proceeding to a due process hearing.
- (o) A hearing officer may grant extensions of time for good cause beyond the 45-day period specified in subsection (l) of this section at the request of either party. Any such extension shall be granted to a specific date and shall be stated in writing by the hearing officer to each of the parties.
- (p) The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the due process hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 20 United States Code (USC), §1415(i)(2), and 34 CFR, §300.512. Effective with hearing officer decisions issued on or after August 1, 2002, a [A] civil action brought in a court of competent jurisdiction under 20 USC, §1415(i)(2), and 34 CFR, §300.512, must be initiated no more than 90 days after the date the hearing officer issued his or her written decision in the due process hearing.
- (q) In accordance with 34 CFR, §300.514(c), a school district shall implement any decision of the hearing officer that is, at least in part, adverse to the school district in a timely manner within ten school days after the date the decision was rendered. School districts must provide services ordered by the hearing officer, but may withhold reimbursement during the pendency of appeals.

Source: The provisions of this §89.1185 adopted to be effective March 6, 2001, 26 TexReg 1837; amended to be effective December 30, 2001, 26 TexReg 10536.

ATTACHMENT II
Text of Adopted Amendments to 19 TAC

Chapter 89. Adaptations for Special Populations

Subchapter AA. Commissioner's Rules Concerning Special Education Services

Division 2. Clarification of Provisions in Federal Regulations and State Law

§89.1049. Parental Rights Regarding Adult Students.

[Unless parental rights have been terminated by judicial decree, the parent and student with a disability shall begin to share parental rights under the Individuals with Disabilities Education Act (IDEA) when the student reaches 18 years of age. Beginning at least one year before a student reaches 18 years of age, the student's individualized education program must include a statement that the student has been informed of his or her rights under IDEA, Part B, that will be shared with his or her parents.]

§89.1049. Parental Rights Regarding Adult Students.

- (a) In accordance with 34 Code of Federal Regulations (CFR), §300.347(c) and §300.517, and Texas Education Code (TEC), §29.017, beginning at least one year before a student reaches 18 years of age, the student's individualized education program (IEP) must include a statement that the student has been informed that, unless the student's parent or other individual has been granted guardianship of the student under the Probate Code, Chapter XIII, Guardianship, all rights granted to the parent under the Individuals with Disabilities Education Act (IDEA), Part B, other than the right to receive any notice required under IDEA, Part B, will transfer to the student upon reaching age 18. After the student reaches the age of 18, except as provided by subsection (b) of this section, the school district shall provide any notice required under IDEA, Part B, to both the adult student and the parent.
- (b) In accordance with 34 CFR, §300.517(a)(2), and TEC, §29.017(a), all rights accorded to a parent under IDEA, Part B, including the right to receive any notice required by IDEA, Part B, will transfer to an 18-year-old student who is incarcerated in an adult or juvenile, state or local correctional institution, unless the student's parent or other individual has been granted guardianship of the student under the Probate Code, Chapter XIII, Guardianship.
- (c) In accordance with 34 CFR, §300.517(a)(3), a school district must notify in writing the adult student and parent of the transfer of parental rights, as described in subsections (a) and (b) of this section, at the time the student reaches the age of 18. This notification is separate and distinct from the requirement that the student's IEP include a statement relating to the transfer of parental rights beginning at least one year before the student reaches the age of 18. This notification is not required to contain the elements of notice referenced in 34 CFR, §300.503, but must include a statement that parental rights have transferred to the adult student and provide contact information for the parties to use in obtaining additional information.
- (d) A notice under IDEA, Part B, that is required to be given to an adult student and parent does not create a right for the parent to consent to or participate in the proposal or refusal to which the notice relates. For example, a notice of an admission, review, and dismissal (ARD) committee meeting does not constitute invitation to, or create a right for, the parent to attend the meeting. However, in accordance with 34 CFR, §300.344(a)(6), the adult student or the school district may invite individuals who have knowledge or special expertise regarding the student, including the parent.
- (e) Nothing in this section prohibits a valid power of attorney from being executed by an individual who holds rights under IDEA, Part B.

§89.1050. The Admission, Review, and Dismissal (ARD) Committee.

- (a) Each school district shall establish an admission, review, and dismissal (ARD) committee for each eligible student with a disability and for each student for whom a full and individual initial evaluation is conducted pursuant to §89.1011 of this title (relating to Referral for Full and Individual Initial Evaluation). The ARD committee shall be the individualized education program (IEP) team defined in federal law and regulations, including, specifically, 34 Code of Federal Regulations (CFR), §300.344. The school district shall be responsible for all of the functions for which the IEP team is responsible under federal law and regulations and for which the ARD committee is responsible under state law, including, specifically, the following:
- (1) 34 CFR, §§300.340-300.349, and Texas Education Code (TEC), §29.005 (Individualized Education Program);
 - (2) 34 CFR, §§300.400-300.402 (relating to placement of eligible students in private schools by a school district);
 - (3) 34 CFR, §§300.452, 300.455, and 300.456 (relating to the development and implementation of service plans for eligible students in private school who have been designated to receive special education and related services);
 - (4) 34 CFR, §§300.520, 300.522, and 300.523, and TEC, §37.004 (Placement of Students with Disabilities);
 - (5) 34 CFR, §§300.532-300.536 (relating to evaluations, re-evaluations, and determination of eligibility);
 - (6) 34 CFR, §§300.550-300.553 (relating to least restrictive environment);
 - (7) TEC, §28.006 (Reading Diagnosis);
 - (8) TEC, §28.0211 (Satisfactory Performance on Assessment Instruments Required; Accelerated Instruction);
 - (9) TEC, Chapter 29, Subchapter I (Programs for Students Who Are Deaf or Hard of Hearing);
 - (10) TEC, §30.002 (Education of Children with Visual Impairments);
 - (11) TEC, §30.003 (Support of Students Enrolled in the Texas School for the Blind and Visually Impaired or Texas School for the Deaf);
 - (12) TEC, §33.081 (Extracurricular Activities);
 - (13) TEC, Chapter 39, Subchapter B (Assessment of Academic Skills); and
 - (14) TEC, §42.151 (Special Education).
- (b) For a child from birth through two years of age with visual and/or auditory impairments, an individualized family services plan (IFSP) meeting must be held in place of an ARD committee meeting in accordance with 34 CFR, §§303.340-303.346, and the memorandum of understanding between the Texas Education Agency (TEA) and Texas Interagency Council on Early Childhood Intervention. For students three years of age and older, school districts must develop an IEP.
- (c) At least one general education teacher of the student (if the student is, or may be, participating in the general education environment) shall participate as a member of the ARD committee. The special education teacher or special education provider that participates in the ARD committee meeting in accordance with 34 CFR, §300.344(a)(3), must be certified in the child's suspected areas of disability. When a specific certification is not required to serve certain disability categories, then the special education teacher or special education provider must be qualified to provide the educational services that the child may need. Districts should refer to §89.1131 of this title (relating to Qualifications of Special Education, Related Service, and Paraprofessional Personnel) to ensure that appropriate teachers and/or service providers are present and participate at each ARD committee meeting.

- (d) The ARD committee shall make its decisions regarding students referred for a full and individual initial evaluation within 30 calendar days from the date of the completion of the written full and individual initial evaluation report. If the 30th day falls during the summer and school is not in session, the ARD committee shall have until the first day of classes in the fall to finalize decisions concerning the initial eligibility determination, the IEP, and placement [and the IEP], unless the full and individual initial evaluation indicates that the student will need extended school year (ESY) services during that summer.
 - (e) The written report of the ARD committee shall document the decisions of the committee with respect to issues discussed at the meeting. The report shall include the date, names, positions, and signatures of the members participating in each meeting in accordance with 34 CFR, §§300.344, 300.345, 300.348, and 300.349. The report shall also indicate each member's agreement or disagreement with the committee's decisions. In the event TEC, §29.005(d) (1), applies, the district shall provide a written or audiotaped copy of the student's IEP, as defined in 34 CFR, §300.346 and §300.347. In the event TEC, §29.005(d)(2), applies, the district shall make a good faith effort to provide a written or audiotaped copy of the student's IEP, as defined in 34 CFR, §300.346 and §300.347.
 - (f) For a student who is new to a school district:
 - (1) when a student transfers within the state, the ARD committee may, but is not required to, meet when the student enrolls and a copy of the student's IEP is available, the parent(s) indicate in writing that they are satisfied with the current IEP, and the district determines that the current IEP is appropriate and can be implemented as written; or
 - (2) if the conditions of subsection (f)(1) of this section are not met, then the ARD committee must meet when the student enrolls and the parents verify that the student was receiving special education services in the previous school district, or the previous school district verifies in writing or by telephone that the student was receiving special education services. At this meeting, the ARD committee must do one of the following:
 - (A) the ARD committee may determine that it has appropriate evaluation data and other information to develop and begin implementation of a complete IEP for the student; or
 - (B) the ARD committee may determine that valid evaluation data and other information from the previous school district are insufficient or unavailable to develop a complete IEP. In this event, the ARD committee may authorize the provision of temporary special education services pending receipt of valid evaluation data from the previous school district or the collection of new evaluation data by the current school district. In this situation, a second ARD committee meeting must be held within 30 school days from the date of the first ARD committee meeting to finalize or develop an IEP based on current information.
 - (3) In accordance with TEC, §25.002, the school district in which the student was previously enrolled shall furnish the new school district with a copy of the student's records, including the child's special education records, not later than the 30th calendar day after the student was enrolled in the new school district. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C., §1232g, does not require the student's current and previous school districts to obtain parental consent before requesting or sending the student's special education records if the disclosure is conducted in accordance with 34 CFR, §99.31(a)(2) and §99.34.
- ~~(f) For a student who is new to a school district, the ARD committee may meet when the student enrolls and the parents verify that the student was receiving special education services in the previous school district, or the previous school district verifies in writing or by telephone that the student was receiving special education services. Special education services that are provided prior to receipt of valid evaluation data from the previous school district or collection of new evaluation data are temporary and contingent upon either receipt of valid evaluation data from the previous~~

- ~~school district or the collection of new evaluation data. In any event, an ARD committee meeting must be held within 30 school days from the date of the first ARD committee meeting in the district to finalize or develop an IEP based on the evaluation data. The student's current and previous school districts are not required to obtain parental consent before requesting or sending the student's special education records if the disclosure is conducted in accordance with 34 CFR §99.31(a)(2) and §99.34. In accordance with TEC, §25.002, the school district in which the student was previously enrolled shall furnish the new school district with a copy of the student's records, including the child's special education records, not later than the 30th calendar day after the student was enrolled in the new school district.]~~
- (g) All disciplinary actions regarding students with disabilities shall be determined in accordance with 34 CFR, §§300.121 and 300.519-300.529 (relating to disciplinary actions and procedures) , ~~[and]~~ the TEC, Chapter 37, Subchapter A (Alternative Settings for Behavior Management) , ~~and~~ §89.1053 of this title (relating to Procedures for Use of Restraint and Time-Out) ~~[and §89.1054 of this title (relating to Seclusion)]~~ .
 - (h) All members of the ARD committee shall have the opportunity to participate in a collaborative manner in developing the IEP. A decision of the committee concerning required elements of the IEP shall be made by mutual agreement of the required members if possible. The committee may agree to an annual IEP or an IEP of shorter duration.
 - (1) When mutual agreement about all required elements of the IEP is not achieved, the party (the parents or adult student) who disagrees shall be offered a single opportunity to have the committee recess for a period of time not to exceed ten school days. This recess is not required when the student's presence on the campus presents a danger of physical harm to the student or others or when the student has committed an expellable offense or an offense which may lead to a placement in an alternative education program (AEP). The requirements of this subsection (h) do not prohibit the members of the ARD committee from recessing an ARD committee meeting for reasons other than the failure of the parents and the school district from reaching mutual agreement about all required elements of an IEP.
 - (2) During the recess the committee members shall consider alternatives, gather additional data, prepare further documentation, and/or obtain additional resource persons which may assist in enabling the ARD committee to reach mutual agreement.
 - (3) The date, time, and place for continuing the ARD committee meeting shall be determined by mutual agreement prior to the recess.
 - (4) If a ten-day recess is implemented as provided in paragraph (1) of this subsection and the ARD committee still cannot reach mutual agreement, the district shall implement the IEP which it has determined to be appropriate for the student.
 - (5) When mutual agreement is not reached, a written statement of the basis for the disagreement shall be included in the IEP. The members who disagree shall be offered the opportunity to write their own statements.
 - (6) When a district implements an IEP with which the parents disagree or the adult student disagrees, the district shall provide prior written notice to the parents or adult student as required in 34 CFR, §300.503.
 - (7) Parents shall have the right to file a complaint, request mediation, or request a due process hearing at any point when they disagree with decisions of the ARD committee.

§89.1052. Discretionary Placements in Juvenile Justice Alternative Education Programs (JJAEP).

- (a) This section will expire on September 1, 2003.
- (b) In a county with a JJAEP, a local school district ~~[or charter school]~~ shall invite the administrator of the JJAEP or the administrator's designee to an admission, review, and dismissal (ARD) committee meeting convened to discuss a student's expulsion under the provisions listed in Texas

Education Code (TEC), §37.004(e), relating to offenses for which a school district may expel a student. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating to Time Line for All Notices), and a copy of the student's current individualized education program (IEP) must be provided to the JJAEP administrator or designee with the notice. If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's placement in the JJAEP and implementation of the student's current IEP in the JJAEP.

- (c) In accordance with TEC, §37.004(f), when the JJAEP administrator or designee provides written notice of specific concerns to the school district [or charter school] from which a student was expelled under one of the provisions listed in TEC, §37.004(e), relating to offenses for which a school district may expel a student, an ARD committee meeting must be convened to reconsider placement of the student in the JJAEP. The reasonable notice of the ARD committee meeting must be provided consistent with 34 CFR, §300.345 and §300.503, and §89.1015 of this title (relating to Time Line for All Notices). If the JJAEP representative is unable to attend the ARD committee meeting, the representative must be given the opportunity to participate in the meeting through alternative means including conference telephone calls. The JJAEP representative may participate in the meeting to the extent that the meeting relates to the student's continued placement in the JJAEP.

§89.1053. Procedures for Use of Restraint and Time-Out.

- (a) Requirement to implement. In addition to the requirements of 34 Code of Federal Regulations (CFR), §300.346(a)(2)(i) and (c), school districts and charter schools must implement the provisions of this section regarding the use of restraint and time-out. In accordance with the provisions of Texas Education Code (TEC), §37.0021 (Use of Confinement, Restraint, Seclusion, and Time-Out), it is the policy of the state to treat all students with dignity and respect.
- (b) Definitions.
- (1) Emergency means a situation in which a student's behavior poses a threat of:
- (A) imminent, serious physical harm to the student or others; or
- (B) imminent, serious property destruction [that would constitute a felony under Texas Penal Code, §28.03] .
- (2) Restraint means the use of physical force or a mechanical device to restrict the free movement of all or a portion of the student's body.
- (3) Time-out means a behavior management technique in which, to provide a student with an opportunity to regain self-control, the student is separated from other students for a limited period in a setting:
- (A) that is not locked; and
- (B) from which the student is not physically prevented from leaving.
- (c) Use of restraint. A school employee, volunteer, or independent contractor may use restraint only in an emergency as defined in subsection (b) of this section and with the following limitations.
- (1) Restraint shall be limited to the use of such reasonable force as is necessary to address the emergency.
- (2) Restraint shall be discontinued at the point at which the emergency no longer exists.
- (3) Restraint shall be implemented in such a way as to protect the health and safety of the student and others .
- (4) Restraint shall not deprive the student of basic human necessities.

(d) Training on use of restraint. Training for school employees, volunteers, or independent contractors shall be provided according to the following requirements.

- (1) Not later than April ~~January~~ 1, 2003, a core team of personnel on each campus must be trained in the use of restraint, and the team must include a campus administrator or designee and any general or special education personnel likely to use restraint.
- (2) After April ~~January~~ 1, 2003, personnel called upon to use restraint in an emergency and who have not received prior training must receive training within 30 school days following the use of restraint.
- (3) Training on use of restraint must include prevention and de-escalation techniques and provide alternatives to the use of restraint.
- (4) All trained personnel shall receive instruction in ~~must have~~ current ~~knowledge of~~ professionally accepted practices and standards regarding behavior management and the use of restraint.

(e) Documentation and notification on use of restraint. In a case in which restraint is used, school employees, volunteers, or independent contractors shall implement the following documentation requirements.

- (1) On the day restraint is utilized, the campus administrator or designee must be ~~verbally~~ notified verbally or in writing regarding the use of restraint.
- (2) On the day restraint is utilized, a good faith effort ~~an attempt~~ shall be made to verbally notify the parent(s) regarding the use of restraint.
- (3) Written notification of the use of restraint must be placed in the mail or otherwise provided to the parent within one school day of the use of restraint.
- (4) Written documentation regarding the use of restraint must be placed in the student's special education eligibility folder in a timely manner so the information is available to the ARD committee when it considers the impact of the student's behavior on the student's learning and/or the creation or revision of a behavioral intervention plan (BIP) ~~within one school day of the use of restraint~~ .
- (5) Written notification to the parent(s) and documentation to the student's special education eligibility folder shall include the following:
 - (A) name of the student;
 - (B) name of the staff ~~member~~ member(s) administering the restraint;
 - (C) date of the restraint and the time the restraint began and ended;
 - (D) location of the restraint;
 - (E) nature of the restraint;
 - (F) a description of the activity in which the student was engaged immediately preceding the use of restraint;
 - (G) the behavior that prompted the restraint;
 - (H) the efforts made to de-escalate the situation and alternatives to restraint that were attempted; and
 - (I) information documenting parent contact and notification.

(f) Clarification regarding restraint. For the purposes of subsections (c)-(e) of this section, restraint does not include the use of:

- (1) physical contact or appropriately prescribed adaptive equipment to promote normative body positioning and/or physical functioning; ~~or~~

- (2) limited physical contact with a student to promote safety (e.g., holding a student's hand) , ~~[or]~~ prevent a potentially harmful action (e.g., running into the street) , teach a skill, or provide comfort; [.]
- (3) limited physical contact or appropriately prescribed adaptive equipment to prevent a student from engaging in ongoing, repetitive self-injurious behaviors; or
- (4) seat belts and other safety equipment used to secure students during transportation.
- (g) Use of time-out. A school employee, volunteer, or independent contractor may use time-out in accordance with subsection (b)(3) of this section with the following limitations.

 - (1) Physical force or threat of physical force shall not be used to place a student in time-out.
 - (2) Time-out may only be used in conjunction with an array of positive behavior intervention strategies and techniques and must be included in the student's individualized education program (IEP) and/or BIP ~~[behavior intervention plan (BIP)]~~ if it is utilized on a recurrent basis to increase or decrease a targeted behavior.
 - (3) Use of time-out shall not be implemented in a fashion that precludes the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.
- (h) Training on use of time-out. Training for school employees, volunteers, or independent contractors shall be provided according to the following requirements.

 - (1) Not later than April ~~[January]~~ 1, 2003, general or special education personnel who implement time-out based on requirements established in a student's IEP and/or BIP must be trained in the use of time-out.
 - (2) After April ~~[January]~~ 1, 2003, newly-identified personnel called upon to implement time-out based on requirements established in a student's IEP and/or BIP must receive training in the use of time-out within 30 school days of being assigned the responsibility for implementing time-out.
 - (3) Training on the use of time-out must ~~[not]~~ be provided as part of a program which addresses a full continuum ~~[separate and distinct training, must include information regarding the scope]~~ of positive behavioral intervention ~~[behavior interventions and strategies]~~, and must address the impact of time-out on the ability of the student to be involved in and progress in the general curriculum and advance appropriately toward attaining the annual goals specified in the student's IEP.
 - (4) All trained personnel shall receive instruction in ~~[must have]~~ current ~~[knowledge of]~~ professionally accepted practices and standards regarding behavior management and the use of time-out.
- (i) Documentation on use of time-out. Necessary documentation or data collection regarding the use of time-out, if any, must be addressed in the IEP or BIP. The admission, review, and dismissal (ARD) committee must use any collected data to judge the effectiveness of the intervention and provide a basis for making determinations regarding its continued use.
- (j) Student safety. Any behavior management technique and/or discipline management practice must be implemented in such a way as to protect the health and safety of the student and others . No discipline management practice may be calculated to inflict injury, cause harm, demean, or deprive the student of basic human necessities.
- (k) Data collection requirement. Beginning with the 2003-2004 school year, with the exception of actions covered by subsection (f) of this section, cumulative data regarding the use of restraint must be reported through the Public Education Information Management System (PEIMS).

§89.1054. Seclusion.

- ~~[(a) Pursuant to Texas Education Code (TEC), §37.0021(b)(2), seclusion means a behavior management technique in which a student is confined in a locked box, locked closet, or locked room that:~~
- ~~[(1) is designed solely to seclude a person; and]~~
 - ~~[(2) contains less than 50 square feet of space.]~~
- ~~[(b) In accordance with TEC, §37.0021(c), a school district employee or volunteer or an independent contractor of a district may not place a student in seclusion. This subsection does not apply to the use of seclusion in a facility to which the following law, rules, or regulations apply:]~~
- ~~[(1) the Children's Health Act of 2000, Public Law No. 106-310, any subsequent amendments to that Act, any regulations adopted under that Act, or any subsequent amendments to those regulations;]~~
 - ~~[(2) 40 Texas Administrative Code (TAC) §§720.1001-720.1013, rules adopted by the Texas Department of Protective and Regulatory Services relating to behavior intervention; or]~~
 - ~~[(3) 25 TAC §412.308(e), a rule adopted by the Texas Department of Mental Health and Mental Retardation relating to the use of restraint and seclusion.]~~
- ~~[(c) Neither TEC, §37.0021(c), nor this section governs seclusion or confinement of a student that does not fall within the definition of seclusion set out in subsection (a) of this section. However, school districts must at all times comply with local fire and safety codes.]~~

§89.1070. Graduation Requirements.

- (a) Graduation with a regular high school diploma under subsection (b) or (d) of this section terminates a student's eligibility for special education services under this subchapter and Part B of the Individuals with Disabilities Education Act (IDEA), 20 United States Code, §§1400 ~~§§14.01~~ et seq. In addition, as provided in Texas Education Code (TEC), §42.003(a), graduation with a regular high school diploma under subsection (b) or (d) of this section terminates a student's entitlement to the benefits of the Foundation School Program.
- (b) A student receiving special education services may graduate and be awarded a high school diploma ~~[only]~~ if:
 - (1) the student has satisfactorily completed the state's or district's (whichever is greater) minimum curriculum and [academic] credit requirements for graduation applicable to students in general education, including satisfactory performance on the exit level assessment instrument; or
 - (2) the [The] student has satisfactorily completed the state's or district's (whichever is greater) minimum curriculum and [academic] credit requirements for graduation applicable to students in general education and has been exempted from the exit-level assessment instrument under TEC, §39.027(a)(2)(B). [because modifications and accommodations provided during instruction would render the result of the assessment invalid.]
- ~~(c) A student receiving special education services may also graduate and receive a regular high school diploma when the student's admission, review, and dismissal (ARD) committee has determined that the student has successfully completed:~~
 - ~~(1) the student's individualized education program (IEP) and met one of the following conditions:~~
 - ~~(A) full-time employment, based on the student's abilities and local employment opportunities, in addition to sufficient self-help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district;~~

- (B) demonstrated mastery of specific employability skills and self-help skills which do not require direct ongoing educational support of the local school district; or
 - (C) access to services which are not within the legal responsibility of public education, or employment or educational options for which the student has been prepared by the academic program;
- (2) the state's or district's (whichever is greater) minimum credit requirements for students without disabilities; and
 - (3) the state's or district's minimum curriculum requirements to the extent possible with modifications/substitutions only when it is determined necessary by the ARD committee for the student to receive an appropriate education.
- ~~[(c) — A student receiving special education services may also graduate and receive a regular high school diploma when the student's admission, review, and dismissal (ARD) committee has determined that the student has successfully completed the student's individualized education program (IEP), including the district's minimum credit requirements for students without disabilities. Successful completion of an IEP occurs when one of the following conditions has been met:]~~
- ~~[(1) — full time employment, based on the student's abilities and local employment opportunities, in addition to sufficient self help skills to enable the student to maintain the employment without direct and ongoing educational support of the local school district;]~~
 - ~~[(2) — demonstrated mastery of specific employability skills and self help skills which do not require direct ongoing educational support of the local school district; or]~~
 - ~~[(3) — access to services which are not within the legal responsibility of public education, or employment or educational options for which the student has been prepared by the academic program.]~~
- (d) A student receiving special education services may also graduate and receive a regular high school diploma upon the ARD committee determining that the student no longer meets age eligibility requirements and has completed the requirements specified in the IEP.
 - (e) When considering a student's graduation under subsection (c) of this section, the student shall be evaluated ~~[ARD committee shall conduct an evaluation]~~ prior to graduation as required by 34 CFR, §300.534(c), and the ARD committee shall consider the evaluation, the views of the parent and/or student as appropriate, and , when appropriate, seek in writing and consider written recommendations from ~~[appropriate]~~ adult service agencies ~~[and the views of the parent and, when appropriate, the student]~~ .
 - (f) Students who ~~[are allowed to]~~ participate in graduation ceremonies but who are not graduating under subsection (c) of this section and who will remain in school to complete their education do not have to be evaluated in accordance with subsection (e) of this section.
 - (g) ~~[(f)]~~ Employability and self-help skills referenced under subsection (c) of this section are those skills directly related to the preparation of students for employment, including general skills necessary to obtain or retain employment.
 - (h) ~~[(g)]~~ Students with disabilities who are eligible to take the exit level assessment instrument but have not performed satisfactorily are eligible for instruction in accordance with the TEC, §39.024.
 - (i) ~~[(h)]~~ For students who receive a diploma according to subsection (c) of this section, the ARD committee shall determine needed educational services upon the request of the student or parent to resume services, as long as the student meets the age eligibility requirements.

Division 5. Special Education and Related Service Personnel

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

- (a) All special education and related service personnel shall be certified, endorsed, or licensed in the area or areas of assignment in accordance with 34 Code of Federal Regulations (CFR), §300.23 and §300.136; the Texas Education Code (TEC), §§21.002, 21.003, and 29.304; or appropriate state agency credentials.
- (b) A teacher who holds a special education certificate or an endorsement may be assigned to any level of a basic special education instructional program serving eligible students 3-21 years of age, as defined in §89.1035(a) of this title (relating to Age Ranges for Student Eligibility), in accordance with the limitation of their certification, except for the following.
 - (1) Persons assigned to provide speech therapy instructional services must hold a valid Texas Education Agency (TEA) certificate in speech and hearing therapy or speech and language therapy, or a valid state license as a speech/language pathologist.
 - (2) Teachers holding only a special education endorsement for early childhood education for children with disabilities shall be assigned only to programs serving infants through Grade 6.
 - (3) Teachers assigned full-time to teaching students who are orthopedically impaired or other health impaired with the teaching station in the home or a hospital shall not be required to hold a special education certificate or endorsement as long as the personnel file contains an official transcript indicating that the teacher has completed a three-semester-hour survey course in the education of students with disabilities and three semester hours directly related to teaching students with physical impairments or other health impairments.
 - (4) Teachers certified in the education of students with visual impairments must be available to students with visual impairments, including deaf-blindness, through one of the school district's instructional options, a shared services arrangement with other school districts, or an education service center (ESC). A teacher who is certified in the education of students with visual impairments must attend each admission, review, and dismissal (ARD) committee meeting or individualized family service plan (IFSP) meeting of a student with a visual impairment, including deaf-blindness.
 - (5) Teachers certified in the education of students with auditory impairments must be available to students with auditory impairments, including deaf-blindness, through one of the school district's instructional options, a regional day school program for the deaf, a shared services arrangement with other school districts, or an ESC. A teacher who is certified in the education of students with auditory impairments must attend each ARD committee meeting or IFSP meeting of a student with an auditory impairment, including deaf-blindness.
 - (6) The following provisions apply to physical education.
 - (A) When the ARD committee has made the determination and the arrangements are specified in the student's individualized education program (IEP), physical education may be provided by the following personnel:
 - (i) special education instructional or related service personnel who have the necessary skills and knowledge;
 - (ii) physical education teachers;
 - (iii) occupational therapists;
 - (iv) physical therapists; or
 - (v) occupational therapy assistants or physical therapy assistants working under supervision in accordance with the standards of their profession.

- (B) When these services are provided by special education personnel, the district must document that they have the necessary skills and knowledge. Documentation may include, but need not be limited to, inservice records, evidence of attendance at seminars or workshops, or transcripts of college courses.
- (7) Teachers assigned full-time or part-time to instruction of students from birth through age two with visual impairments, including deaf-blindness, shall be certified in the education of students with visual impairments. Teachers assigned full-time or part-time to instruction of students from birth through age two who are deaf, including deaf-blindness, shall be certified in education for students who are deaf and severely hard of hearing. Other certifications for serving these students shall require prior approval from TEA.
- (8) Teachers with secondary certification with the generic delivery system may be assigned to teach Grades 6-12 only.
- (c) Paraprofessional personnel must be certified and may be assigned to work with eligible students, general and special education teachers, and related service personnel. Aides may also be assigned to assist students with special education transportation, serve as a job coach, or serve in support of community-based instruction. Aides paid from state administrative funds may be assigned to the Special Education Resource System (SERS), the Special Education Management System (SEMS), or other special education clerical or administrative duties.
- (d) Interpreting services for students who are deaf shall be provided by an interpreter who is certified in the appropriate language mode(s), if certification in such mode(s) is available. If certification is available, the interpreter must be certified by the Registry of Interpreters for the Deaf or the Texas Commission for the Deaf and Hard of Hearing, unless the interpreter has been granted an emergency permit by the commissioner of education to provide interpreting services for students who are deaf. The commissioner shall consider applications for the issuance of an emergency permit to provide interpreting services for students who are deaf on a case-by-case basis in accordance with requirements set forth in 34 CFR, §300.136, and standards and procedures established by the TEA. In no event will an emergency permit allow an uncertified interpreter to provide interpreting services for more than a total of three school years to students who are deaf.
- (e) Orientation and mobility instruction must be provided by a certified orientation and mobility specialist (COMS) who is certified by the Academy for Certification of Vision Rehabilitation and Education Professionals ~~[or by the Association for Education and Rehabilitation of the Blind and Visually Impaired]~~ .

Division 6. Regional Education Service Center Special Education Programs

~~§89.1141. Regional Education Service Center Special Education Programs Component.~~

- ~~[(a) Each regional education service center (ESC) shall have a special education program component.]~~
- ~~[(b) Each ESC shall provide activities and services related to special education based on an annual region-wide needs assessment that includes, but is not limited to, the following priority areas:]~~
 - ~~[(1) implementation of, and compliance with, state and federal law and regulations;]~~
 - ~~[(2) follow up technical assistance to local education agencies being monitored;]~~
 - ~~[(3) program planning, including personnel development and long-range planning;]~~
 - ~~[(4) support to school districts in instructional program and curriculum development;]~~
 - ~~[(5) development of alternatives to private residential placements;]~~
 - ~~[(6) technical assistance and training for school district staff in the selection and use of instructional materials and adaptive assistive technology;]~~

- ~~[(7) — technical assistance and inservice training in support of local district direct service providers, such as assessment and related service personnel;]~~
- ~~[(8) — direct and/or supportive services to programs for students with visual impairments; and]~~
- ~~[(9) — direct and/or supportive services to preschool programs for children with disabilities.]~~
- ~~[(c) — Each ESC shall maintain a child find/serve program including:]~~
 - ~~[(1) — referral and tracking of previously unserved students between birth and 21 years of age;]~~
 - ~~[(2) — follow through of students referred;]~~
 - ~~[(3) — resource identification; and]~~
 - ~~[(4) — interagency coordination.]~~
- ~~[(d) — Regional ESCs may serve as fiscal agents for those school districts which choose to receive such services through the ESCs.]~~
- ~~[(e) — A minimum of one staff member certified in the education of students with visual impairments shall be employed by each ESC.]~~
- ~~[(f) — The ESC shall not charge school districts for those services for which the ESC has been funded.]~~
- ~~[(g) — Each ESC shall provide school districts with technical assistance and, based on identified needs, a comprehensive system of personnel development.]~~
- ~~[(h) — For the purposes of this subchapter, ESCs shall be considered to be intermediate educational units as defined in federal regulations.]~~

§89.1141. Education Service Center Regional Special Education Leadership.

- ~~(a) — Each regional education service center (ESC) will provide leadership, training, and technical assistance in the area of special education for students with disabilities in accordance with the Texas Education Agency's (TEA) focus on increasing student achievement and Texas Education Code (TEC), §8.051(d)(2) and (5), and will assist TEA in the implementation of 34 Code of Federal Regulations (CFR) §300.382 and §300.555 . [ESCs will work with the TEA to promote and implement leadership and information dissemination activities to school districts, charter schools, parents, and communities.]~~
- ~~(b) — Each regional ESC will provide technical assistance, support, and training in the area of special education to school districts [general and special education and related service personnel, administrators, paraprofessionals, and parents of students with disabilities] based on the results of a comprehensive needs assessment process. Each regional ESC will continue to serve as first point of contact for school districts, parents, and other community stakeholders, and will, in accordance with 34 CFR §300.382(j), provide for the joint training of parents and special education, related services, and general education personnel.~~
- ~~(c) — Regional ESC activities and responsibilities will be in accordance with current instructions, program guidelines, and program descriptions included in the ESC Performance Contract and Application, which will be made accessible to the public through the TEA website.~~
- ~~(d) — The ESC must utilize available TEA funding to implement activities and address needs identified under subsections (a)-(c) of this section [and Texas Education Code (TEC), §8.051(d)(5)] . If additional funding is needed to implement supplementary or enhanced activities identified through the regional needs assessment process, ESCs may access and utilize alternate sources of funding. Any charges must be determined only after priorities have been established through input from affected school districts, including data collected from parents and communities through partnerships with school districts [stakeholders] .~~
- ~~(e) — When an ESC provides leadership, training, and support pertaining to education and related services for students with visual impairments, directly or through contract, the personnel providing such services must be appropriately certified as identified in current program guidelines included~~

- in the ESC Performance Contract and Application, regardless of the fund source used to fund the service/personnel.
- ~~(e) Personnel assignments through State Supplemental Visually Impaired funds require appropriate certification as identified in current program guidelines included in the ESC Performance Contract and Application.~~
- ~~(f) Regional ESCs may serve as fiscal agent for shared services arrangements in accordance with procedures established under §89.1075(e) of this title (relating to General Program Requirements and Local District Procedures).~~
- ~~(g) For the purposes of this subchapter, ESCs shall be considered to be educational service agencies as defined in federal regulations.~~

[Division 7. Resolution of Disputes Between Parents and School Districts]

[§89.1152. Presentment.]

- ~~(a) This section will take effect on August 1, 2003.~~
- ~~(b) Pursuant to the policy to encourage and support the resolution of any dispute at the lowest level possible, and in a prompt, efficient, and effective manner, no issue may be raised at a due process hearing unless it was first raised at an admission, review, and dismissal (ARD) committee meeting. Hearing officers shall dismiss any hearing request upon satisfactory proof that the issues raised in the hearing were not first presented to the ARD committee.~~