

Item 17:
Adoption of Proposed Amendment to 19 TAC Chapter
249, Disciplinary Proceedings, Sanctions, and Contested
Cases,
Subchapter B, Enforcement Actions and Guidelines,
§249.17, Decision-Making Guidelines

DISCUSSION AND ACTION

SUMMARY: This item provides the State Board for Educator Certification (SBEC) an opportunity to adopt, subject to State Board of Education (SBOE) review, an amendment to 19 TAC Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, Subchapter B, Enforcement Actions and Guidelines, §249.17, Decision-Making Guidelines. The proposed amendment would clarify that under the SBEC decision-making guidelines, actions that constitute "engaged in" and "solicitation" are distinct grounds for permanent revocation or denial of certification. The proposed amendment would also clarify that fact findings from final orders from other state jurisdictions may also provide the basis for initiating disciplinary proceedings in Texas. No changes are recommended since published as proposed.

STATUTORY AUTHORITY: The statutory authority for 19 TAC §249.17 is the Texas Education Code (TEC), §§21.031(a); 21.041(b)(4) and (7); 21.058(a), (b), and (d); and 21.060; and the Texas Occupations Code, §53.021(a).

EFFECTIVE DATE: The proposed effective date of the proposed amendment to 19 TAC §249.17 would be October 26, 2014 (20 days after filing as adopted with the *Texas Register*). The proposed effective date is also based on the SBEC and SBOE meeting schedules.

PREVIOUS BOARD ACTION: Section 249.17 was adopted effective March 31, 1999, and last amended effective December 23, 2013. The SBEC approved the amendment to 19 TAC §249.17 for filing as proposed at the May 2014 meeting.

BACKGROUND INFORMATION AND SIGNIFICANT ISSUES: The TEC, §21.041(b)(7), authorizes the SBEC to adopt rules that provide for disciplinary proceedings for certificate holders. Section 249.17, Decision-Making Guidelines, reflects several provisions of statutory authority that provide a framework and guidance for the Texas Education Agency (TEA), administrative law judges, and the SBEC in resolving issues dealing with certification.

Section 249.17(d) deals with when permanent revocation or a certification or denial of an applicant for certification should occur. Specifically, subsection (d)(1) currently calls for permanent revocation or permanent denial of an applicant when the certification holder or applicant "engaged in or solicited any sexual contact or romantic relationship with a student or minor as defined in §249.3 of this title (relating to Definitions)". In a recent contested case hearing, an administrative law judge interpreted "engaged in or solicited" as a single action

subject to the same definition rather than as two distinct and separate actions that independently could give rise to permanent revocation or denial.

The proposed amendment to 19 TAC §249.17(d), shown in Attachment II, would clarify the rule to ensure that the actions of "engaged in" and "solicited" are separate and distinct types of conduct that would result in permanent revocation or denial. Current paragraphs (2)-(6) would be renumbered accordingly. No changes are recommended since published as proposed.

Section 249.17(e) deals with how SBEC treats findings of fact contained in final orders from other states. The proposed amendment to 19 TAC §249.17(e), shown in Attachment II, would clarify the rule to make clear that the findings of fact contained in an out-of-state order may provide a factual basis for SBEC action. No changes are recommended since published as proposed.

FISCAL IMPACT: The TEA staff has determined that there is no fiscal impact on state and local governments and there are no additional costs to persons or entities required to comply with the proposed amendment. In addition, there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

PUBLIC AND STUDENT BENEFIT: The public and student benefit anticipated as a result of the proposed amendment to 19 TAC §249.17 would be clarifying the SBEC rule regarding the types of conduct that would result in permanent revocation or denial of a certificate and actions in other states that could result in disciplinary action in Texas.

PROCEDURAL AND REPORTING IMPLICATIONS: The proposed amendment would have no procedural and reporting implications.

LOCALLY MAINTAINED PAPERWORK REQUIREMENTS: The proposed amendment would have no locally maintained paperwork requirements.

PUBLIC COMMENTS: Following the May 2014 SBEC meeting, the proposed amendment to 19 TAC §249.17 was filed with the *Texas Register*, initiating the official public comment period. At the time this item was prepared, no comments had been received. Any public comments received will be provided to the SBEC under separate cover prior to the August 2014 meeting.

ALTERNATIVES: None.

OTHER COMMENTS AND RELATED ISSUES: None.

ASSOCIATE COMMISSIONER'S RECOMMENDATION: I recommend that the State Board for Educator Certification:

Approve for adoption, subject to State Board of Education review, the proposed amendment to 19 TAC Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, Subchapter B, Enforcement Actions and Guidelines, §249.17, Decision-Making Guidelines, with an effective date of 20 days after filing the adoption notice with the *Texas Register*.

Respectfully submitted,

Ryan Franklin
Interim Associate Commissioner
Educator Leadership and Quality

Staff Members Responsible: Merle Dover, Associate Deputy Counsel
Legal Services

Von Byer, Deputy General Counsel
Legal Services

Attachments: I. Statutory Citations
II. Text of Proposed Amendment to 19 TAC Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, Subchapter B, Enforcement Actions and Guidelines, §249.17, Decision-Making Guidelines

ATTACHMENT I**Statutory Citations Relating to Proposed Amendment to 19 TAC Chapter 249, Disciplinary Proceedings, Sanctions, and Contested Cases, Subchapter B, Enforcement Actions and Guidelines, §249.17, Decision-Making Guidelines****Texas Education Code, §21.031, Purpose (excerpt):**

- (a) The State Board for Educator Certification is established to recognize public school educators as professionals and to grant educators the authority to govern the standards of their profession. The board shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators.

Texas Education Code, §21.041, Rules; Fees (excerpt):

- (b) The board shall propose rules that:
- (4) specify the requirements for the issuance and renewal of an educator certificate;
 - (7) provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code;

Texas Education Code, §21.058, Revocation of Certificate and Termination of Employment Based on Conviction of Certain Offenses (excerpts):

- (a) The procedures described by Subsections (b) and (c) apply only:
- (1) to conviction of a felony offense under Title 5, Penal Code, or an offense on conviction of which a defendant is required to register as a sex offender under Chapter 62, Code of Criminal Procedure; and
 - (2) if the victim of the offense is under 18 years of age.
- (b) Notwithstanding Section 21.041(b)(7), not later than the fifth day after the date the board receives notice under Article 42.018, Code of Criminal Procedure, of the conviction of a person who holds a certificate under this subchapter, the board shall:
- (1) revoke the certificate held by the person; and
 - (2) provide to the person and to any school district or open-enrollment charter school employing the person at the time of revocation written notice of:
 - (A) the revocation; and
 - (B) the basis for the revocation.
- (d) A person whose certificate is revoked under Subsection (b) may reapply for a certificate in accordance with board rules.

Texas Education Code, §21.060, Eligibility of Persons Convicted of Certain Offenses:

The board may suspend or revoke the certificate or permit held by a person under this subchapter, impose other sanctions against the person, or refuse to issue a certificate or permit to a person under this subchapter if the person has been convicted of a felony or misdemeanor offense relating to the duties and responsibilities of the education profession, including:

- (1) an offense involving moral turpitude;

- (2) an offense involving a form of sexual or physical abuse of a minor or student or other illegal conduct in which the victim is a minor or student;
- (3) a felony offense involving the possession, transfer, sale, or distribution of or conspiracy to possess, transfer, sell, or distribute a controlled substance, as defined by Chapter 481, Health and Safety Code, or by 21 U.S.C. Section 801 et seq.;
- (4) an offense involving the illegal transfer, appropriation, or use of school district funds or other district property; or
- (5) an offense involving an attempt by fraudulent or unauthorized means to obtain or alter a professional certificate or license issued under this subchapter.

Texas Education Code, §22.0831, National Criminal History Record Information Review of Certified Educators:

- (a) In this section, "board" means the State Board for Educator Certification.
- (b) This section applies to a person who is an applicant for or holder of a certificate under Subchapter B, Chapter 21, and who is employed by or is an applicant for employment by a school district, open-enrollment charter school, or shared services arrangement.
- (c) The board shall review the national criminal history record information of a person who has not previously submitted fingerprints to the department or been subject to a national criminal history record information review.
- (d) The board shall place an educator's certificate on inactive status for failure to comply with a deadline for submitting information required under this section.
- (e) The board may allow a person who is applying for a certificate under Subchapter B, Chapter 21, and who currently resides in another state to submit the person's fingerprints and other required information in a manner that does not impose an undue hardship on the person.
- (f) The board may propose rules to implement this section, including rules establishing:
 - (1) deadlines for a person to submit fingerprints and photographs in compliance with this section; and
 - (2) sanctions for a person's failure to comply with the requirements of this section, including suspension or revocation of a certificate or refusal to issue a certificate.
- (g) Expired.

Texas Education Code, §22.087, Notification to State Board for Educator Certification:

The superintendent of a school district or the director of an open-enrollment charter school, private school, regional education service center, or shared services arrangement shall promptly notify the State Board for Educator Certification in writing if the person obtains or has knowledge of information showing that an applicant for or holder of a certificate issued under Subchapter B, Chapter 21, has a reported criminal history.

Texas Occupations Code, §53.021, Authority to Revoke, Suspend, or Deny License (excerpt):

- (a) A licensing authority may suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of:
- (1) an offense that directly relates to the duties and responsibilities of the licensed occupation;
 - (2) an offense that does not directly relate to the duties and responsibilities of the licensed occupation and that was committed less than five years before the date the person applies for the license;
 - (3) an offense listed in Section 3g, Article 42.12, Code of Criminal Procedure; or
 - (4) a sexually violent offense, as defined by Article 62.001, Code of Criminal Procedure.

Texas Occupations Code, §53.022, Factors in Determining Whether Conviction Relates to Occupation:

In determining whether a criminal conviction directly relates to an occupation, the licensing authority shall consider:

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for requiring a license to engage in the occupation;
- (3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and
- (4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

Texas Occupations Code, §53.023, Additional Factors for Licensing Authority to Consider:

- (a) In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person who has been convicted of a crime, the licensing authority shall consider, in addition to the factors listed in Section 53.022:
- (1) the extent and nature of the person's past criminal activity;
 - (2) the age of the person when the crime was committed;
 - (3) the amount of time that has elapsed since the person's last criminal activity;
 - (4) the conduct and work activity of the person before and after the criminal activity;
 - (5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and
 - (6) other evidence of the person's fitness, including letters of recommendation from:
 - (A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

- (B) the sheriff or chief of police in the community where the person resides;
and
 - (C) any other person in contact with the convicted person.
- (b) The applicant has the responsibility, to the extent possible, to obtain and provide to the licensing authority the recommendations of the prosecution, law enforcement, and correctional authorities as required by Subsection (a)(6).
 - (c) In addition to fulfilling the requirements of Subsection (b), the applicant shall furnish proof in the form required by the licensing authority that the applicant has:
 - (1) maintained a record of steady employment;
 - (2) supported the applicant's dependents;
 - (3) maintained a record of good conduct; and
 - (4) paid all outstanding court costs, supervision fees, fines, and restitution ordered in any criminal case in which the applicant has been convicted.

Texas Occupations Code, §53.024, Proceedings Governed by Administrative Procedure Act:

A proceeding before a licensing authority to establish factors required to be considered under this subchapter is governed by Chapter 2001, Government Code.

Texas Occupations Code, §53.025, Guidelines:

- (a) Each licensing authority shall issue guidelines relating to the practice of the licensing authority under this chapter. The guidelines must state the reasons a particular crime is considered to relate to a particular license and any other criterion that affects the decisions of the licensing authority.
- (b) A state licensing authority that issues guidelines under this section shall file the guidelines with the secretary of state for publication in the Texas Register.
- (c) A local or county licensing authority that issues guidelines under this section shall post the guidelines at the courthouse for the county in which the licensing authority is located or publish the guidelines in a newspaper having countywide circulation in that county.
- (d) Amendments to the guidelines, if any, shall be issued annually.

Texas Occupations Code, §53.051, Notice:

A licensing authority that suspends or revokes a license or denies a person a license or the opportunity to be examined for a license because of the person's prior conviction of a crime and the relationship of the crime to the license shall notify the person in writing of:

- (1) the reason for the suspension, revocation, denial, or disqualification;
- (2) the review procedure provided by Section 53.052; and
- (3) the earliest date the person may appeal the action of the licensing authority.

ATTACHMENT II
Text of Proposed Amendment to 19 TAC

Chapter 249. Disciplinary Proceedings, Sanctions, and Contested Cases

Subchapter B. Enforcement Actions and Guidelines

§249.17. Decision-Making Guidelines.

- (a) Purpose. The purpose of these guidelines is to achieve the following objectives:
- (1) to provide a framework of analysis for the Texas Education Agency (TEA) staff, the presiding administrative law judge (ALJ), and the State Board for Educator Certification (SBEC) in considering matters under this chapter;
 - (2) to promote consistency in the exercise of sound discretion by the TEA staff, the presiding ALJ, and the SBEC in seeking, proposing, and making decisions under this chapter; and
 - (3) to provide guidance for the informal resolution of potentially contested matters.
- (b) Construction and application. This section shall be construed and applied so as to preserve SBEC members' discretion in making final decisions under this chapter. This section shall be further construed and applied so as to be consistent with §249.5(b) of this title (relating to Purpose; Policy Governing Disciplinary Proceedings) and this chapter, the Texas Education Code (TEC), and other applicable law, including SBEC decisions and orders.
- (c) Consideration. The following factors may be considered in seeking, proposing, or making a decision under this chapter:
- (1) the seriousness of the violation;
 - (2) whether the misconduct was premeditated or intentional;
 - (3) attempted concealment of misconduct;
 - (4) prior misconduct;
 - (5) whether the sanction will deter future violations; and
 - (6) any other relevant circumstances or facts.
- (d) Permanent revocation or denial. Notwithstanding subsection (c) of this section, the SBEC shall permanently revoke the teaching certificate of any educator or permanently deny the application of any applicant if, after a contested case hearing, it is determined that the educator or applicant:
- (1) engaged in [~~or solicited~~] any sexual contact or romantic relationship with a student or minor [~~as defined in §249.3 of this title (relating to Definitions)~~];
 - (2) solicited any sexual contact or romantic relationship with a student or minor;
 - (3) [~~(2)~~] possessed or distributed child pornography;
 - (4) [~~(3)~~] was registered as a sex offender;
 - (5) [~~(4)~~] committed criminal homicide;
 - (6) [~~(5)~~] transferred, sold, distributed, or conspired to possess, transfer, sell, or distribute any controlled substance, the possession of which would be at least a Class A misdemeanor under the Texas Health and Safety Code, Chapter 481, on school property; or
 - (7) [~~(6)~~] committed any offense described in the TEC, §21.058.
- (e) Sanctioned misconduct in another state. The findings of fact [~~SBEC shall give full faith and credit to the fact findings~~] contained in final orders from any [~~of all~~] other state jurisdiction may provide the factual basis for SBEC disciplinary action [~~jurisdictions~~]. If the underlying conduct for the administrative sanction

of an educator's certificate or license issued in another state is a violation of SBEC rules, the SBEC may initiate a disciplinary action regarding ~~shall sanction~~ the educator's Texas educator certificate and impose a sanction as provided under this chapter ~~[SBEC rules]~~ .