

1 **CHAPTER 800. GENERAL ADMINISTRATION**

2 **PROPOSED RULES WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS***  
3 ***REGISTER*. THIS DOCUMENT WILL HAVE NO SUBSTANTIVE CHANGES BUT IS**  
4 **SUBJECT TO FORMATTING CHANGES AS REQUIRED BY THE *TEXAS REGISTER*.**

5 **ON SEPTEMBER 8, 2020, THE TEXAS WORKFORCE COMMISSION PROPOSED THE**  
6 **RULES BELOW WITH PREAMBLE TO BE SUBMITTED TO THE *TEXAS REGISTER*.**

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8 Estimated Publication Date of the Proposal in the *Texas Register*: **September 25, 2020**  
9 Estimated End of Comment Period: **October 26, 2020**

10 The Texas Workforce Commission (TWC) proposes amendments to the following section of  
11 Chapter 800, relating to General Administration:

12 Subchapter B. Allocations, §800.68

13  
14 TWC proposes the following new section to Chapter 800, relating to General Administration:

15 Subchapter F. Interagency Matters, §800.206

- 16 PART I. PURPOSE, BACKGROUND, AND AUTHORITY
- 17 PART II. EXPLANATION OF INDIVIDUAL PROVISIONS
- 18 PART III. IMPACT STATEMENTS
- 19 PART IV. COORDINATION ACTIVITIES

20 **PART I. PURPOSE, BACKGROUND, AND AUTHORITY**

21 House Bill (HB) 3 and HB 1949, enacted by the 86th Texas Legislature, Regular Session (2019),  
22 require TWC to develop rules to implement that legislation.

23 HB 3 §1.046 adds §48.302 to the Texas Education Code, titled "Subsidy for High School  
24 Equivalency Examination for Certain Individuals." This section requires the Texas Education  
25 Agency (TEA) to enter into a memorandum of understanding (MOU) with TWC when  
26 transferring funds to provide a subsidy for the cost of a high school equivalency exam for  
27 individuals who are 21 years of age or older. It also requires TWC to develop rules addressing  
28 program implementation and eligibility requirements for this subsidy program, which TWC shall  
29 develop in Chapter 805, new Subchapter E, High School Equivalency Subsidy Program.

30 Additionally, HB 1949 amended Texas Labor Code §315.007, "Performance Incentive Funding,"  
31 dedicated to the process for awarding performance-based funds to Adult Education and Literacy  
32 (AEL) grantees, and adds new subsections (c), (d), and (e) to add new performance-based  
33 funding criteria for AEL programs to receive performance-based funds. These new criteria relate  
34 to enrollment and performance benchmarks for enrollment in a high school equivalency program  
35 or postsecondary ability-to-benefit program and achievement measures for AEL students  
36 enrolled in such programs by the end of the program year.

37 Both HB 3 and HB 1949 went into effect September 1, 2019.

1 To implement HB 1949, on October 8, 2019, TWC's three-member Commission (Commission) approved  
2 the performance-based funding criteria for AEL Program Year 2019 - 2020 (PY'19 - '20) and also approved  
3 the performance criteria for performance-based funding in PY'20 - '21. Additionally, the Commission  
4 approved a performance-based measure for grant recipients meeting milestones toward enrollment and the  
5 performance measures required under HB 1949 and requested that rules be developed to address this  
6 measure.

7 For the high school equivalency subsidy program, TEA appropriated \$750,000 each year of the 2020 -  
8 2021 biennium. In early 2020, TEA and TWC worked with the two high school equivalency test publishers  
9 approved to operate in Texas, Pearson for the GED and ETS for the HiSET, to create a process that would  
10 be administratively efficient for programs managing the distribution of the subsidy at the local level to  
11 eligible and test-ready individuals. On February 10, 2020, TEA and TWC entered into an interagency  
12 contract to transfer funds to TWC to implement this program. While TWC moved forward to develop rules,  
13 the COVID-19 pandemic impacted TWC's ability to implement the program.

14 On May 8, 2020, TWC submitted a letter to the Legislative Budget Board requesting any  
15 unexpended and unobligated funds for the subsidy program from the current fiscal year be  
16 transferable to the next fiscal year beginning September 1, 2020. In this request, TWC noted that  
17 the reasons it had been unable to expend funding for this program were the lack of remote testing  
18 options from Pearson and ETS, (both of which were in early stages of implementing remote  
19 testing guidelines) and the closures of most high school equivalency testing centers and their  
20 unknown future reopening status. Additionally, TWC noted that all appropriated funds for the  
21 subsidy program would be fully obligated by the end of the biennium.

22 On March 31, 2020, the Commission approved a policy concept for the required rule development for both  
23 the performance-based funding criteria and the high school equivalency subsidy program. This policy  
24 concept included proposed rule language for the Commission's future consideration and was posted in the  
25 *Texas Register* for 30 days for public comment. TWC received comments from two commenters.

## 26 **PART II. EXPLANATION OF INDIVIDUAL PROVISIONS**

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

29 The comments noted in this section reflect those received from one of two commenters during  
30 the policy concept comment period of April 10, 2020, to May 11, 2020.

### 31 **SUBCHAPTER B. ALLOCATIONS**

#### 32 **TWC proposes the following amendments to Subchapter B:**

##### 33 **§800.68. Adult Education and Literacy**

34 Section 800.68 is amended to add criteria for performance-based funding benchmarks for high  
35 school equivalency and postsecondary ability-to-benefit enrollment and achievements in new  
36 §800.68(g) and includes a definition for "postsecondary ability-to-benefit program." New  
37 language allows grant recipients that meet milestones toward the performance measures outlined  
38 in HB 1949 to receive performance-based funding. It further clarifies that the Commission will  
39 approve the award of AEL grant funds, as is required under HB 1949 and other guidance  
40 received from the legislature. Additionally, two technical edits are made to change an outdated

1 reference from Workforce Investment Act to the Workforce Innovation and Opportunity Act  
2 (WIOA) and to correct a misspelled word.

3 As the definition of "postsecondary ability-to-benefit program" in HB 1949 does not align with  
4 the federal definition for "Pell Grant Ability-to-Benefit," the rule emphasizes that this definition  
5 relates to performance-based funding criteria for AEL programs and is modified to align with  
6 federal AEL performance measure definitions under WIOA.

7 The performance funding benchmarks require that 25 percent of all participants served in the  
8 program year be enrolled in a high school equivalency subsidy program or a postsecondary  
9 ability-to-benefit program, and at least 70 percent of those participants who exited to achieve a  
10 high school equivalency or recognized postsecondary credential.

11 **Comments:** One commenter stated that the true legislative intent of HB 1949 was not to  
12 tie the criteria for high school equivalency and postsecondary ability-to-benefit  
13 enrollment and performance measures to performance-based funding but, instead, to  
14 federal, state, Temporary Assistance for Needy Families (TANF), and EL Civics AEL  
15 funding. The commenter provided the context for how these intended measures would  
16 positively impact the unmet need for high school equivalency credentials in the  
17 commenter's region. The commenter further suggested that the language in HB 1949 be  
18 amended to move the performance criteria to Texas Labor Code §315.006, titled "State  
19 Funding," and that the criteria should be added to §800.68 as a requirement for training  
20 providers receiving AEL funds, and not as a performance-based incentive.

21 Additionally, this commenter proposed that TWC modify the proposed definition to  
22 match HB 1949 and change "postsecondary education or training program" to  
23 "postsecondary certificate program" and "results in a recognized postsecondary  
24 credential" to "results in a recognized postsecondary certificate."

25 **Response:** HB 1949 explicitly states that criteria for the high school equivalency program  
26 and the postsecondary ability-to-benefit enrollment and performance measures amends  
27 Texas Labor Code §315.007. TWC rules must reflect the legislation as codified in statute  
28 and does not have the authority to move the HB 1949 criteria into a new subsection of the  
29 Texas Labor Code.

30 Regarding the proposed definition, TWC used the term "recognized postsecondary  
31 credential" to ensure that the rule would pertain to all entities eligible to receive funding  
32 under WIOA Title II, which is the primary funding source for adult education in Texas.  
33 The term "recognized postsecondary credential" includes "certificates," which is the term  
34 used by junior, community, and technical colleges for awards under the Texas Higher  
35 Education Coordinating Board Guidelines for Instructional Programs in Workforce  
36 Education (GIPWE). The WIOA term also includes a wide variety of credentials awarded  
37 in recognition of an individual's attainment of measurable technical or industry or  
38 occupational skills necessary to obtain employment or advance within an industry or  
39 occupation. These include industry-recognized certificates or certifications, certificates of  
40 completion of an apprenticeship, licenses recognized by state or federal governments, and

1 degrees. Each credential recognizes industry or occupational skills based on standards  
2 developed or endorsed by employers or industry associations.

3 TWC maintains that the proposed rule language sufficiently captures HB 1949 language  
4 but includes the variety of other credentials of value available to participants in Texas  
5 AEL programs and reported in state and WIOA federal performance measures. The  
6 broader definition ensures that the measure pertains to the widest number of entities  
7 eligible for AEL funds under federal law and ensures that the measure captures the  
8 broadest number of recognized credentials, thereby reaching the greatest number of  
9 participants. Because the broader definition applies to all entities eligible for AEL funds,  
10 it encourages the greatest possible range of increases in performance related to the HB  
11 1949 measure under federal law and ensures that non-college providers that offer high  
12 school equivalency and workforce training programs are not excluded from or  
13 disadvantaged in earning performance-based funding.

14 **SUBCHAPTER F. INTERAGENCY MATTERS**

15 **TWC proposes the following new section to Subchapter F:**

16 **§800.206. Interagency Contract with the Texas Education Agency for High School**  
17 **Equivalency Subsidy Program**

18 New §800.206 adopts by reference the terms of an interagency contract entered into with the  
19 TEA, as required by Texas Education Code §48.302, relating to the transfer of funds to  
20 implement a high school equivalency subsidy program, set out in TWC Chapter 805, Subchapter  
21 E, §§805.71 - 805.73.

22 **PART III. IMPACT STATEMENTS**

23 Chris Nelson, Chief Financial Officer, has determined that for each year of the first five years the  
24 rules will be in effect, the following statements will apply:

25 There are no additional estimated costs to the state and to local governments expected as a result  
26 of enforcing or administering the rules.

27 There are no estimated cost reductions to the state and to local governments as a result of  
28 enforcing or administering the rules.

29 There are no estimated losses or increases in revenue to the state or to local governments as a  
30 result of enforcing or administering the rules.

31 There are no foreseeable implications relating to costs or revenue of the state or local  
32 governments as a result of enforcing or administering the rules.

33 There are no anticipated economic costs to individuals required to comply with the rules.

34 There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural  
35 communities as a result of enforcing or administering the rules.

1 Based on the analyses required by Texas Government Code §2001.024, TWC has determined  
2 that the requirement to repeal or amend a rule, as required by Texas Government Code  
3 §2001.0045, does not apply to this rulemaking.

4 Takings Impact Assessment

5 Under Texas Government Code, §2007.002(5), "taking" means a governmental action that  
6 affects private real property, in whole or in part or temporarily or permanently, in a manner that  
7 requires the governmental entity to compensate the private real property owner as provided by  
8 the Fifth and Fourteenth Amendments to the United States Constitution or the Texas  
9 Constitution, §17 or §19, Article I, or restricts or limits the owner's right to the property that  
10 would otherwise exist in the absence of the governmental action, and is the producing cause of a  
11 reduction of at least 25 percent in the market value of the affected private real property,  
12 determined by comparing the market value of the property as if the governmental action is not in  
13 effect and the market value of the property determined as if the governmental action is in effect.  
14 The Commission completed a Takings Impact Analysis for the proposed rulemaking action  
15 under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking  
16 action, as discussed elsewhere in this preamble, is to:

17  
18 -- outline new performance-based funding criteria as required under HB 1949 enacted by the  
19 86th Legislative Session, Regular Session (2019), for high school equivalency and ability-to-  
20 benefit enrollment and performance benchmarks; and

21  
22 -- describe the interagency agreement between TEA and TWC for transferring funds  
23 appropriated for a high school equivalency subsidy program.

24 The proposed rulemaking action will not create any additional burden on private real property.

25 The proposed rulemaking action will not affect private real property in a manner that would  
26 require compensation to private real property owners under the United States Constitution or the  
27 Texas Constitution. The proposal also will not affect private real property in a manner that  
28 restricts or limits an owner's right to the property that would otherwise exist in the absence of the  
29 governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas  
30 Government Code, Chapter 2007.

31 Government Growth Impact Statement

32 TWC has determined that during the first five years the proposed amendments will be in effect:

33  
34 --the proposed amendments will not create or eliminate a government program;

35  
36 --implementation of the proposed amendments will not require the creation or elimination of  
37 employee positions;

38  
39 --implementation of the proposed amendments will not require an increase or decrease in future  
40 legislative appropriations to TWC;

41  
42 --the proposed amendments will not require an increase or decrease in fees paid to TWC;

43

- 1 --the proposed amendments will not create a new regulation;
- 2
- 3 --the proposed amendments will not expand, limit, or eliminate an existing regulation;
- 4
- 5 --the proposed amendments will not change the number of individuals subject to the rules; and
- 6
- 7 --the proposed amendments will not positively or adversely affect the state's economy.

8 Economic Impact Statement and Regulatory Flexibility Analysis

9 TWC has determined that the proposed rules will not have an adverse economic impact on small  
10 businesses or rural communities, as the proposed rules place no requirements on small businesses  
11 or rural communities.

12 Mariana Vega, Director of Labor Market and Career Information, has determined that there is no  
13 significant negative impact upon employment conditions in the state as a result of the rules.

14 Courtney Arbour, Director, Workforce Development Division, has determined that for each year  
15 of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing  
16 the proposed rules will be to provide clarity to AEL grant recipients on how to implement new  
17 legislation for accessing performance-based funding.

18 TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be  
19 within TWC's legal authority to adopt.

20 **PART IV. COORDINATION ACTIVITIES**

21 In the development of these rules for publication and public comment, TWC sought the  
22 involvement of Texas' 28 Local Workforce Development Boards (Boards), AEL grant recipients,  
23 and AEL service providers. TWC provided the concept paper regarding these rule amendments  
24 to the Boards for consideration and review on March 31, 2020. TWC also conducted a  
25 conference call with AEL grant recipients and providers on April 2, 2020, and May 7, 2020, and  
26 then on April 10, 2020, with Board executive directors and Board staff to discuss the concept  
27 paper and comment period. Additionally, information on the concept paper and comment period  
28 were posted on the TWC rules web page and on the Texas Center for the Advancement of  
29 Literacy & Learning website, which is the website managed by Texas' AEL professional  
30 development organization. During the rulemaking process, TWC considered all information  
31 gathered in order to develop rules that provide clear and concise direction to all parties involved.

32 Comments on the proposed rules may be submitted to [TWCPolicyComments@twc.state.tx.us](mailto:TWCPolicyComments@twc.state.tx.us).  
33 Comments must be received no later than 30 days from the date this proposal is published in the  
34 *Texas Register*.

35 The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide  
36 TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the  
37 effective administration of TWC services and activities.

38 The proposed rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302.  
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(1) 100 percent will be based on:

- (A) the relative proportion of individuals residing within each workforce area who are at least 18 years of age, do not have a secondary school diploma or its recognized equivalent, and are not enrolled in secondary school, during the most recent period for which statistics are available;
- (B) an equal base amount; and
- (C) the application of a hold-harmless/stop-gain procedure.

(2) No more than 15 percent of the funds expended as part of this workforce area allocation shall be used for administrative costs, as defined by Commission policy.

(3) No more than 10 percent of this allocation shall be available for expenditure within each workforce area on the basis of the achievement of performance benchmarks, as set forth in subsection (f) of this section.

(d) At least 82.5 percent of the federal funds provided to the eligible agency from amounts under AEFLA §243 for EL/Civics will be allocated by the Commission among the workforce areas according to the established federal formula, as follows:

(1) The relative proportion based on:

- (A) 65 percent of the average number of legal permanent residents during the most recent 10-year period, available from U.S. Citizenship and Immigration Services data; and
- (B) 35 percent of the average number of legal permanent residents during the most recent three-year period, available from U.S. Citizenship and Immigration Services data;

(2) a base amount of 1 percent for each workforce area; and

(3) the application of a hold-harmless/stop-gain procedure.

(4) No more than 5 percent of the funds expended as part of this workforce area allocation shall be used for administrative costs, as defined by AEFLA.

(5) No more than 10 percent of this allocation shall be available for expenditure within each workforce area on the basis of the achievement of performance benchmarks, as set forth in subsection (f) of this section.

1 (e) At least 80 percent of federal TANF funds associated with the AEL program--  
2 together with any state general revenue funds appropriated as TANF maintenance-  
3 of-effort--will be allocated by the Commission to the workforce areas according to a  
4 need-based formula, as follows:

5  
6 (1) 100 percent will be based on:

7  
8 (A) the relative proportion of the unduplicated number of TANF adult  
9 recipients with educational attainment of less than a secondary diploma  
10 during the most recently completed calendar year;

11  
12 (B) an equal base amount; and

13  
14 (C) the application of a hold-harmless/stop-gain procedure.

15  
16 (2) No more than 15 percent of the funds expended as part of this workforce area  
17 allocation shall be used for administrative costs, as defined by federal  
18 regulations and Commission policy.

19  
20 (3) No more than 10 percent of this allocation shall be available for expenditure  
21 within each workforce area on the basis of the achievement of performance  
22 benchmarks, as set forth in subsection (f) of this section.  
23

24 (f) AEL performance accountability benchmarks shall be established to coincide with  
25 performance measures and reports, or other periods, as determined by the  
26 Commission. Levels of performance shall, at a minimum, be expressed in an  
27 objective, quantifiable, and measurable ~~measureable~~ form, and show continuous  
28 improvement.

29 (g) Performance accountability benchmarks shall:

30 (1) include measures for high school equivalency program or ability-to-benefit  
31 program enrollment and achievement, as outlined in paragraph (2) of this  
32 subsection. A postsecondary ability-to-benefit program, as outlined in  
33 paragraphs (2) and (3) of this subsection, is a postsecondary education or  
34 training program that:

35 (A) results in a recognized postsecondary credential; and

36 (B) enrolls AEL eligible participants who:

37 (i) do not have a high school diploma or recognized equivalency;

38 (ii) qualify for federal student financial aid eligibility under the federal  
39 Ability-to-Benefit provisions enacted in §484(d) of the Higher  
40 Education Act of 1965; and

1                    (iii) demonstrate on an assessment instrument that the participant can  
2                    pass college-level courses with some support;

3                    (2) include measures that require:

4                    (A) at least 25 percent of all participants served in the program year to be  
5                    enrolled in a high school equivalency or postsecondary ability-to-benefit  
6                    program; and

7                    (B) at least 70 percent of participants who were in a high school equivalency  
8                    or postsecondary ability-to-benefit program during the program year and  
9                    exited during the program year to achieve either a high school  
10                   equivalency or a recognized postsecondary credential; and

11                   (3) be approved by the Commission each program year for milestones toward  
12                   meeting high school equivalency program or postsecondary ability-to-benefit  
13                   program enrollment and achievement as outlined in paragraph (2) of this  
14                   subsection.  
15

16 **SUBCHAPTER F. INTERAGENCY MATTERS**

17                   **§800.206. Interagency Contract with the Texas Education Agency.**

18                   The Texas Workforce Commission adopts by reference the terms of an interagency  
19                   contract entered into with the Texas Education Agency, as required by Texas Education  
20                   Code, §48.302, relating to the transfer of funds to implement a high school equivalency  
21                   subsidy program set out in Chapter 805, Subchapter E, §§805.71 - 805.73 of this title  
22                   (relating to High School Equivalency Subsidy Program).