

Iowa State Board of Education

Executive Summary

May 9, 2024



Agenda Item: Rules: 281 IAC Chapter 31, “Private Instruction and Dual Enrollment” (Notice)

State Board Priority: Eliminating Achievement and Opportunity Gaps

State Board Role/Authority: This rulemaking implements, in whole or in part, Iowa Code section 299A.10.

Presenter(s): Thomas A. Mayes, General Counsel

Attachment(s): One

Recommendation: It is recommended that the State Board adopt a new Chapter 31.

Background: Executive Order 10 review. The Department received over 850 comments. In light of those comments, the Department has modified the noticed rules as follows.

- The word “will” in proposed subrule 31.3(2) is changed to “may,” and conforming changes to subrule 31.7(5).
- Subrule 31.5(4)’s limits on dual enrollment is revised to be based on the district’s course schedule, not an arbitrary fraction.
- The word “competent” is removed from the subrule on driver education (31.7(4)).
- A cross-reference in subrule 31.7(5) is corrected.
- Subrule 31.7(6) is updated to align with other provisions of the chapter.

EDUCATION DEPARTMENT[281]

Adopted and Filed

The State Board of Education rescinds Chapter 31, “Private Instruction and Dual Enrollment,” Iowa Administrative Code, and adopts a new chapter with the same title.

Legal Authority for Rulemaking

This rulemaking is adopted under the authority provided in Iowa Code section 299A.10.

State or Federal Law Implemented

This rulemaking implements, in whole or in part, Iowa Code chapter 299A.

Purpose and Summary

This rulemaking is pursuant to Executive Order 10 review. The Department of Education has removed unduly restrictive rules language, removed inflexible rule language, and incorporated statutory language by reference when available. After public comment, the Department is also providing additional flexibilities to families participating in home instruction.

Public Comment and Changes to Rulemaking

Notice of Intended Action for this rulemaking was published in the Iowa Administrative Bulletin on February 7, 2024, as **ARC 7587C**.

Two public hearings were held on February 27, 2024, at 11:30 a.m. in Room B-100, Grimes State Office Building, Des Moines; and at 3:30 p.m. in Room B-50, Grimes State Office Building, Des Moines. At least fifty people attended the public hearings, with fifteen individuals providing oral comment. The Department received over eight hundred written public comments.

General. The purpose of Executive Order 10 and the notice of intended action was to remove regulatory burdens and unnecessary language; some commentators understood the Department’s notice of intended action as removing rights from parents who choose private instruction as an option. That understanding is incorrect. The Department appreciates the

opportunity to explain the purpose of the proposed rules to many commenters and advocates. The Department looks forward to working with those commenters and advocates in implementing these final rules.

Several commenters recommended restoration of language that do not add legal value, such as language that restates statutory requirements verbatim, including items specifically discussed in the paragraphs that follow. Those changes will not be made; however, an inference that this substantively changes rights, powers, or duties under Iowa Code chapter 299A or this chapter is neither intended nor proper.

Special Education Evaluations. Several commenters requested that the rules retain references to the rights of parents choosing home instruction to refuse consent to special education evaluations or services. This is unnecessary, because that principle is completely addressed in Iowa’s special education rules. Iowa Admin. Code r. 281—41.300(4)“d”. No change is made.

Definition of Adequate Progress. Several commenters requested that the Department provide greater clarity to the definition of adequate progress. The proposed rules incorporate the statutory definition of adequate progress by reference. The commenters are concerned that this would limit the manner in which families could demonstrate their children made the progress required by chapter 299A. The concern is misplaced. The rules and statute retain multiple ways of demonstrating adequate academic progress, and are not limited to performance on standardized tests. No change is made.

Competent Private Instruction by a Privately Retained Practitioner. Several commenters asked the Department to further refine proposed subrule 31.3(1) to make clear that privately retained practitioners have a different set of obligations than practitioners employed by public school districts. The crux of the concern is the obligation to refer children who might be eligible

for special education. The commenters assert that this only applies to public employees. The commenters are incorrect. Under Iowa Code section 299A.9(2), any child receiving competent private instruction who might be eligible for special education must be referred for a special education evaluation. The statute does not distinguish based on the employment status of the supervising teacher. For that reason, the proposed rule is a correct statement of the law. While the public agencies receiving the referral decide whether an evaluation is warranted, and while the parents may refuse their consent to an evaluation (see above), this does not change the duty of practitioners to make necessary referrals. No change is made.

Options under Section 299A.3. Several commenters objected to proposed subrule 31.3(2), which purports to require parents providing private instruction to meet three requirements that, by statute (Iowa Code section 299A.3), are optional. These concerns are valid. While the option is laid out in another rule (proposed subrule 31.7(5)), the word “will” in proposed subrule is change to “may.” The Department will make conforming changes to subrule 31.7(5).

Annual Achievement Evaluations. Several commenters requested additional language and clarification in proposed rule 31.4. This additional language is duplicative of statutory texts and is unnecessary. No change is made.

Dual Enrollment. Several commenters requested additional language on concurrent enrollment in community college courses. The concerns are valid; however, they will be addressed in that rules chapter, which will be presented to the State Board on the same May 2024 meeting date. The commenters also requested removing the requirement that children may dual enroll for no more than three-quarters of the school day. The commenters suggested that the current language is arbitrary and the rule ought to reflect the language in the Department’s Declaratory Order # 44 (1993), which states that a child may not use dual enrollment to access all courses but

one. The Department concurs in this suggestion. The seventy-five percent rule was an attempt to approximate typical course schedules; however, what constitutes a course and the number offered by a school are matters of local decision-making. For some dual enrolled students, this will result in the ability to enroll in more courses; for others, less. This is properly a matter of local governance. Subrule 31.5(4) will be revised accordingly.

Home School Assistance Programs (HSAPs). Several commenters asked for substantial revisions to this rule. The rule has already been streamlined by incorporating statutory requirements by reference. The remaining rules are necessary to ensure a minimum level of quality instruction from HSAPs. The commenters also suggest that the language provided in proposed subrule 31.3(1) is more appropriately located here. Licensed practitioners may provide services through a HSAP, but they also may provide services through public schools but not through a HSAP, or they may provide services through unaccredited “schools.” The current rule structure accurately reflects the law. No change is made.

Miscellaneous Provisions. Several commenters made helpful suggestions for improvement. The Department is striking the word “competent” from the subrule on driver education (31.7(4)), correcting a cross-reference in subrule 31.7(5), and updating subrule 31.7(6) to align with other provisions of the chapter.

Several commentators requested that subrule 31.7(1) contain a reference to Iowa Code chapter 256B. Since that Code chapter is referenced in section 299A.9, which is referenced in the proposed subrule, the requested reference would not add value. No change is made.

Several commenters requested access to teacher editions and answer keys for tests under proposed subrule 31.7(3), based on the assertion that a textbook is not useful without the teacher edition and a test is not useful without the answer key. The current and proposed rule requires

instructional materials that are “available” be offered to home schooling families, which is a fact-specific and context-specific inquiry. The textbook adoption agreement with a publisher may limit who has access to teacher editions and answer keys, and test security concerns may provide additional constraints on availability. If those concerns are adequately addressed in a particular case, those materials become available for purposes of this rule. Because this is fact and context dependent, the Department is unable to make the change requested.

Several commenters requested that a new subrule be added to rule 31.7 to address concurrent enrollment in community college coursework. The suggested change will be made in a simultaneous rulemaking under the Chapter 281—22. No change is made.

Other comments. Any comment not specifically addressed is beyond the statutory authority of the Department to adopt, is addressed by the changes already made, is not germane to the rulemaking, or was a diatribe against the Department, Department staff, or public education. No changes were made in light of any of these comments.

Adoption of Rulemaking

This rulemaking was adopted by the State Board on May 9, 2024.

Fiscal Impact

This rulemaking has no fiscal impact to the state of Iowa.

Jobs Impact

After analysis and review of this rulemaking, no impact on jobs has been found.

Waivers

Any person who believes that the application of the discretionary provisions of this rulemaking would result in hardship or injustice to that person may petition the State Board for a waiver of the discretionary provisions, if any, pursuant to 281—Chapter 4.

Review by Administrative Rules Review Committee

The Administrative Rules Review Committee, a bipartisan legislative committee which oversees rulemaking by executive branch agencies, may, on its own motion or on written request by any individual or group, review this rulemaking at its regular monthly meeting or at a special meeting. The Committee’s meetings are open to the public, and interested persons may be heard as provided in Iowa Code section 17A.8(6).

Effective Date

This rulemaking will become effective on July 17, 2024.

The following rulemaking action is adopted:

ITEM 1. Rescind 281—Chapter 31 and adopt the following **new** chapter in lieu thereof:

TITLE V
NONTRADITIONAL STUDENTS
CHAPTER 31
PRIVATE INSTRUCTION AND DUAL ENROLLMENT

281—31.1(299,299A) General. Any parent, guardian, or legal custodian of a child of compulsory attendance age may place the child under competent private instruction or independent private instruction in adherence to all provisions within Iowa Code chapter 299A. This includes any child identified as requiring special education under Iowa Code chapter 256B. If a child’s performance indicates a need for special education, the child will be referred and evaluated as indicated in Iowa Code section 299A.9.

281—31.2(299,299A) Definitions. For purposes of this chapter:

The following terms apply as defined in Iowa Code section 299A.1:

“Competent private instruction.”

“Independent private instruction.”

“Private instruction.”

The following term applies as defined in Iowa Code section 299A.6:

“Adequate progress.”

281—31.3(299,299A) Competent private instruction.

31.3(1) *By licensed practitioner.* Competent private instruction by a licensed practitioner complies with this chapter.

a. Instruction under this subrule may include a home school assistance program. A home school assistance program is provided by instructional assistance and supervision to a parent, guardian, or legal custodian providing instruction to a child through an accredited nonpublic school or public school district by an appropriately certified or licensed educator.

b. If instruction is provided through a public school district:

(1) The child will be enrolled and included in the basic enrollment of the school district.

(2) Iowa Code sections 299A.3 through 299A.7 do not apply in this circumstance with the exception of the reporting provision in Iowa Code section 299A.3(1).

c. If a person is a privately retained licensed practitioner (who possesses a valid Iowa teaching certificate or practitioner license, including a substitute teacher's license or a substitute authorization that is appropriate to the grade level of the student), that practitioner may provide competent private instruction.

(1) The duties of a licensed teacher who instructs or provides instructional supervision of a student include the following:

1. Contact with the student and the student's parent, guardian, or legal or actual custodian at least twice per 45 days of instruction, during which time the teacher practitioner fulfills the duties described below. One of every two contacts will be face-to-face with the student.

2. Consulting with and advising the student's parent, guardian, or legal or actual custodian as requested by the student's parent, guardian, or legal or actual custodian or as deemed necessary in the professional judgment of the practitioner.

3. Providing formal and informal assessments of the student's progress to the student and the student's parent, guardian, or legal or actual custodian.

4. Annually maintaining a diary, record, or log of visitations and assistance provided.

5. Referring to the child's district of residence for evaluation of a child who the practitioner has reason to believe may need special education.

(2) A licensed Iowa practitioner who is employed under this rule will not serve in that capacity on behalf of more than 25 families, or more than 50 children of compulsory attendance age, in an academic year unless the service is provided pursuant to the teacher's employment with a nonaccredited nonpublic entity.

A licensed practitioner may seek exemption from the above limitation by submitting a written request to the director of the department of education. Exemptions will be granted when the director is satisfied that the limitation will pose a substantial hardship on the person or the school providing instruction or instructional supervision and that the best interests of all children being served by the practitioner will continue to be met.

31.3(2) *By parent, guardian, or legal custodian.* A parent, guardian, or legal custodian without a current Iowa teaching license providing competent private instruction for any child of compulsory age may:

a. Provide a report to the school district of residence of the child within 30 days of commencing instruction under this rule, which report demonstrates compliance with Iowa Code chapter 299A and this chapter.

b. Annually evaluate the child to determine whether the child is making adequate progress.

c. Report the child's annual evaluation to the school district of residence of the child and to the department of education by August 1.

281—31.4(299,299A) Annual achievement evaluations.

31.4(1) *General.* Each child receiving competent private instruction will be evaluated annually by May 31 through the use of:

a. A nationally recognized standardized achievement evaluation; or

b. Other assessment tool selected by parent, guardian, or legal custodian from an approved list provided by the department of education, which will include:

(1) The costs and administration time of listed evaluations, and

(2) A process to approve new or alternate assessments that meet the provisions of Iowa Code chapter 299A.

31.4(2) *Duties of educational agencies.* The director of the department of education, or the director's designee, which may include a school district or an area education agency (AEA), will:

a. Conduct annual evaluations at a time and place determined by the person responsible for conducting the evaluation, which includes but is not limited to purchasing of evaluation materials, giving the evaluations, scoring and interpreting the evaluations, and reporting the evaluation results; and

b. Provide for the parent, guardian, or legal custodian of the child to be present when the child is evaluated.

31.4(3) *Additional testing.* If requested, the school district or AEA will conduct annual evaluations at no cost to the parent, guardian, or legal custodian. Further:

a. The parent, guardian, or legal custodian under competent private instruction is not required to reimburse any of the evaluation costs; and

b. The annual achievement evaluation does not meet dual enrollment purposes under Iowa Code section 299A.8.

31.4(4) *Additional evidence of progress.* A parent, guardian, or legal custodian of a child may submit, as evidence of adequate academic progress, completed assessment evaluations, other than the annual achievement evaluation, if assessment evaluations are administered as part of the competent private instruction.

a. A parent, guardian, or legal or actual custodian of a child subject to the annual assessment requirement may arrange to have an appropriately licensed Iowa practitioner review a portfolio of evidence of the child's progress annually by May 31.

(1) A single evaluator will be designated by the parent, guardian, or legal or actual custodian who has selected the portfolio evaluation option for annual assessment. The evaluator so identified will be approved by the superintendent of the local school district or the superintendent's designee and will hold a valid Iowa practitioner license or teacher certificate appropriate to the ages and grade levels of the children whose portfolios are being assessed.

(2) The child's portfolio will contain evidence of academic progress in the minimum curriculum areas of reading, language arts, and mathematics if the child is in grades 1 through 5. For children in grades 6 through 12, the portfolio will contain evidence in the minimum curriculum areas of reading, language arts, mathematics, science, and social studies.

b. For a child subject to annual assessment under this rule who is enrolled as a student of a correspondence school that is a member of an accrediting association recognized by the federal Department of Education and accredited for elementary and secondary education, the district of residence and the department will accept the annual report of progress (report card) sent by the correspondence school to the child's parent, guardian, or legal or actual custodian if the annual report of progress includes a listing of subjects taken and grades received. A passing grade in all content areas for which annual assessment is required is deemed evidence of adequate progress for the purpose of annual assessment.

31.4(5) *Reporting of evaluation results.* Evaluation results will be handled pursuant to Iowa Code section 22.7(1) and reported by the evaluation administrator to the child's parent, guardian, or legal custodian; the school district of residence of the child; and the department of education.

31.4(6) *Failure to make adequate progress—notice to parents.* If annual evaluation results indicate the child has not made adequate progress:

a. The director of the department of education, or the director's designee, will notify the

parent, guardian, or custodian of the child that the child is required to attend an accredited public or nonpublic school.

b. The child will attend an accredited public or nonpublic school at the start of the next school year until evaluation results indicate the child has made adequate progress, unless, before the beginning of the next school year, the director or director's designee grants approval for competent private instruction to continue under a plan for remediation.

31.4(7) Rules of construction.

a. Nothing in this section requires or prohibits testing in any way other than what is set forth in Iowa Code section 256.7(21) "b"(2).

b. The parent, guardian, or custodian of students who are receiving independent private instruction are responsible for the cost of annual assessment if requested, through the local school district or AEA.

c. The parent, guardian, or legal or actual custodian of a child subject to this rule and who has a physical or mental disability so significant that the results of a standardized test would not yield relevant results for assessment purposes may request the department's approval of an alternative evaluation.

281—31.5(299,299A) Dual enrollment.

31.5(1) If a parent, guardian, or legal custodian submits a request, the child will be registered in a public school for dual enrollment purposes and included in the public school's basic enrollment under Iowa Code section 257.6.

31.5(2) A child who is dual-enrolled will:

a. Be permitted to participate in any academic activities in the district;

b. Be permitted to participate in any extracurricular activities on the same basis as any public school child; and

c. Be counted under Iowa Code section 257.6(1) "a"(6); or

d. In the case of a child in grades 9 through 12, be counted in the same manner as a shared-time pupil under Iowa Code section 257.6(1) "a"(3).

31.5(3) Enrollment of a child solely for purposes of accessing the annual achievement evaluation does not constitute dual enrollment.

31.5(4) A child under competent private instruction will not be able to access all courses except one in a district's academic schedule.

281—31.6(299,299A) Home school assistance program. The board of directors of a school district will expend funds received pursuant to Iowa Code section 257.6(1) "a"(5), and amounts designated from the school district's flexibility account under Iowa Code section 298A.2(2), for providing a home school assistance program. Funds will be expended for intended purposes identified in Iowa Code sections 299A.12(2) through 299A.12(4). A district will not employ as a home school assistance program instructor a person who currently holds only a substitute authorization. A home school assistance program teacher will have contact with the student and the student's parent, guardian, or legal or actual custodian at least four times per 45 days of instruction. One of every two contacts will be face-to-face with the student.

281—31.7(299,299A) Miscellaneous provisions.

31.7(1) Special education. Special education services to students in competent private instruction, including dual enrollment for special education services, are governed by Iowa Code section 299A.9.

31.7(2) *Open enrollment.* Open enrollment for a student under this chapter is governed by Iowa Code section 282.18. A receiving district may only bill a resident district if the receiving district complies with the provisions of this chapter.

31.7(3) *Instructional materials.*

a. A school district will not make monetary payments, including cash and cash equivalents, or give publicly funded resources, directly or indirectly, to the parent, guardian, or legal or actual custodian or to a child receiving competent private instruction. A school district will not purchase texts or supplementary materials for or on behalf of a child receiving competent private instruction if such texts or supplementary materials are not appropriate for use by regularly enrolled students of the school district.

b. A district may provide to children receiving competent private instruction available texts or supplementary materials on the same basis as they are provided to enrolled students and will provide available texts or supplemental instructional materials on the same basis as they are provided to enrolled students when a child is under dual enrollment or in a home school assistance program. If a fee, such as a textbook or towel rental fee, is charged to regularly enrolled students for participation in a class or extracurricular activity, that fee may also be charged to dual-enrolled students on the same basis as it is charged to enrolled students, but only for the specific class or extracurricular activity.

c. The parent, guardian, or legal or actual custodian who provides competent private instruction to a child of compulsory attendance age may access the services and materials available from the AEA by requesting assistance through the school district of residence. The AEA will make services and materials available to the child on the same basis as they are available to regularly enrolled students of the district if the child is dual enrolled or enrolled in a home school assistance program. The district of residence will act as liaison between the parent, guardian, or legal or actual custodian of a child who is receiving competent private instruction and the AEA.

31.7(4) *Driver education.* The public school district will offer or make available to all resident students, including those receiving private instruction on an equal basis with students enrolled in the district, an approved course in driver education pursuant to Iowa Code section 321.178(1) “c.”

31.7(5) *Private instruction reporting exemption.* The options provided in subrule 31.3(2) are not available to any parent, guardian, or legal or actual custodian who requests services from a school district or AEA under this chapter, including the provision of instructional materials, assistance from a home school assistance program, dual enrollment, open enrollment, or special education services. Parents who elect the reporting option under this subrule and who request testing assistance under or an approved course in driver education under subrule 31.7(4) need not complete any particular form, but must demonstrate that the child is receiving competent private instruction pursuant to this chapter.

31.7(6) *Independent private instruction: services available.* For students under independent private instruction, only the following services are available: an approved course in driver education, annual achievement testing under subrule 31.4(7), paragraph “b,” and concurrent enrollment programs, also known as district-to-community college sharing, subject to the terms of Iowa Code section 261E.8.

31.7(7) *Student records confidential.* Personal information in records pursuant to this chapter will be kept confidential in compliance with district student directory policy in accordance with Iowa Code section 22.7(1).

These rules are intended to implement Iowa Code chapters 299 and 299A.