2222 W. Braker Lane
Austin, Texas 78758
MAIN OFFICE 512.454.4816
TOLL-FREE 800.315.3876
FAX 512.454.3999

August 30, 2019

Commissioner of Education
Texas Education Agency
1701 North Congress Avenue,
Austin, Texas 78701-1494

Re: Petition for Adoption of a Rule; Create appointment procedure pursuant to 34 C.F.R. § 300.520 (b) and 20 U.S.C. § 1415 (m)(2)

Dear Commissioner of Education,

Disability Rights Texas (DRTx) is petitioning for the amendment of 19 Tex. Admin. Code § 89.1049 in accordance with the Texas Government Code, Section 2001.021. The proposed amendment would implement a procedure for appointing a parent or appropriate individual to represent the educational interests of a child with a disability who has reached the age of majority and who has been determined not to have the ability to provide informed consent with respect to his or her education. This procedure is necessary for compliance with the Individuals with Disabilities Education Act (IDEA).[1]

1. Prerequisites - Petition for Adoption of a Rule

The Texas Government Code, Section 2001.021, provides that any interested person may petition an agency to request the adoption of a rule. DRTx is the federally mandated protection and advocacy agency for people with disabilities in the state of Texas. Our mission is to help people with disabilities understand and exercise their rights under the law, ensuring their full and equal participation in society.[2] DRTx is a private organization located in Texas and is not a state agency and thus, it is an "interested person" per the requirements of Texas Government Code, Section 2001.021 (d)(4). As an interested person, DRTx may petition a state agency to request the adoption of a rule.[3]

2. Necessity of the Rule Change

The IDEA is a federal law that makes a free appropriate public education available to children with disabilities and ensures special education and related services to those children. The IDEA governs how states and public agencies provide services to eligible children with disabilities.[4] In order for a state, like Texas, to be eligible to receive its annual IDEA grant, it

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[1] 34 C.F.R. § 300.520; 20 U.S.C. § 1415 (m).
[2] To learn more about DRTx, visit our website at https://www.disabilityrightstx.org/en/home/ .
[3] Texas Government Code § 2001.021 (a).
[4] IDEA https://sites.ed.gov/idea/about-idea/ (accessed June 26, 2019).

must provide assurances that it has, or will have, in effect the policies and procedures needed to meet the eligibility conditions in Part B of the IDEA.[5]

Among other things, the IDEA describes the procedure by which parental rights are transferred when a child with disabilities reached the age of majority.[6] Specifically, the IDEA regulations mandate that:

> A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.[7]

However, *Texas has not established the procedures required by IDEA regulations*.[8] Without such procedures in place, Texas is not compliant with IDEA and children with disabilities are left without a federally mandated processes to determine that they do not have the ability to provide informed consent and to obtain representatives of their educational interests. This deficit affects children with disabilities who are not incompetent but "possess a lesser degree of diminished capacity that still prevents them from providing informed consent with respect to their education."[9]

Currently, 19 Tex. Admin. Code § 89.1049 stipulates that unless the student's parent or other individual has been granted guardianship of the student, all rights granted to the parent under IDEA, other than the right to receive any notice required under IDEA, will transfer to the student upon reaching age 18. It also notes that it does not prohibit a supported decision-making agreement or a valid power of attorney from being executed by an individual who holds rights under IDEA. These state regulatory provisions do not constitute the representative appointment process mandated by IDEA. Texas will not be in compliance with the law until this process is created. This is a particularly important time to ensure compliance with the IDEA since Texas is currently under scrutiny for its longstanding non-compliance, which resulted in the U.S. Department of Education determining that Texas has failed to appropriately identify, evaluate, and serve eligible children.[10]

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[5] TEA; Annual State Application under IDEA Part B and IDEA Eligibility Documentation; https://tea.texas.gov/Academics/Special_Student_Populations/Special_Education/Programs_and_Services/Annual_State_Application_under_IDEA_Part_B_and_IDEA_Eligibility_Documentation/ (accessed on June 26, 2019).
[6] 34 C.F.R. § 300.520; 20 U.S.C. § 1415 (m).
[7] 34 C.F.R. § 300.520 (b).
[8] *Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251, 255 (5th Cir. 2017).
[9] *Id*.
[10] U.S. Department of Education; U.S. Department of Education Issues Findings in Texas Individuals with Disabilities Education Act Monitoring; https://www.ed.gov/news/press-

3. Proposed Rule

We propose changes to 19 Tex. Admin. Code § 89.1049 (a) and (b), and the creation of 19 Tex. Admin. Code § 89.1049 (f). **The proposed subsection (f) consists of four broad elements: the requirement of a written request for the appointment of an educational representative, certification that the student does not have the ability to provide informed consent with respect to the student's educational program, the authorization and appointment of the educational representative, and the right of the student to challenge the certification and appointment.**

Changes to § 89.1049 (a)

> (a) In accordance with 34 Code of Federal Regulations (CFR), §300.320(c) and §300.520, 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, or unless the student's parent or other individual has been appointed as an educational representative for a student pursuant to §89.1049 (f), 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. Beginning with the 2018-2019 school year, the IEP must also state that the student has been provided information and resources regarding guardianship, alternatives to guardianship, including a supported decision-making agreement under Texas Estates Code, Chapter 1357, and other supports and services that may enable the student to live independently. 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.

Changes to § 89.1049 (b)

> (b) In accordance with 34 CFR, §300.520(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 Texas Estates Code, Title 3, or unless the student's parent or other individual has been appointed as an educational representative for a student pursuant to §89.1049 (f).

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releases/us-department-education-issues-findings-texas-individuals-disabilities-education-act-monitoring (accessed June 26, 2019).

Creation of § 89.1049 (f)

(f) In accordance with 34 CFR, §300.520(b), an educational representative for a student who has reached the age of majority, but has not been determined to be incompetent, may be appointed if the student has been determined not to have the ability to provide informed consent with respect to the student's educational program. This determination and subsequent appointment shall comply with the following requirements.

(1) A school district shall appoint an educational representative for a student who has reached the age of eighteen (18) only after the following documents have been submitted:

(A) A written request for the appointment of an educational representative signed by the parent, legal guardian, or other interested adult, and made on a form, developed by the Texas Education Agency (TEA), and made available on the TEA's website, the school district website or, upon request, in hard copy;

(B) The identification of the requested educational representative of the student, as part of the written request for the appointment of an educational representative. The representative may be the student's parent or legal guardian, or, if the parent or legal guardian is not available, another appropriate individual with significant knowledge of the student and knowledge of the student's strengths, opportunities and post educational transitional goals; and

(C) A signed professional certification of a licensed medical doctor, or a physician assistant, if authorized by a supervising licensed medical doctor, that meets all of the requirements of this section.

(2) The school district shall provide written confirmation that all submission requirements have been met and, absent extenuating circumstances, shall appoint an educational representative within ten (10) business days of the school district's receipt of a complete written request with all required information and certification. A written request shall not be considered complete unless all requested information has been provided in the required manner.

(3) The professional certification shall be completed by a licensed medical doctor or a physician assistant, if authorized by a supervising licensed medical doctor.

(4) The professional certification of the licensed medical doctor, or physician assistant, if authorized by a supervising licensed medical doctor, shall meet the following requirements:

(A) The licensed medical doctor or physician assistant, if authorized by a supervising licensed medical doctor, has conducted a personal

examination of, or interview with, the student within one (1) calendar year of the certification;

(B) Based on the licensed medical doctor or authorized physician assistant's knowledge and expertise and upon clear and convincing evidence, the licensed medical doctor or physician assistant, if authorized by a supervising licensed medical doctor, determines that the appointment of an educational representative for the student is necessary because the student is unable to provide informed consent regarding the student's educational program as described in this section provided, however, that a finding that the student is unable to provide informed consent regarding the student's educational program shall not be based solely on the fact that the student has been voluntarily or involuntarily hospitalized for a mental illness or has a diagnosis of an intellectual disability;

(C) The licensed medical doctor, or physician assistant, if authorized by a supervising licensed medical doctor, has informed the student in writing of the determination; and

(D) Confirmation that the licensed medical doctor or physician assistant, if authorized by a supervising licensed medical doctor, does not have a personal conflict of interest with the student or the adult seeking appointment as the student's educational representative. A personal conflict of interest includes, without limitation, being related by blood or marriage to the student or adult seeking appointment as the educational representative.

(5) A student shall be deemed unable to provide informed consent with respect to the student's educational program if the licensed medical doctor or physician assistant, if authorized by a supervising licensed medical doctor, determines that the student is unable to utilize an alternative to guardianship, including a supported decision-making agreement under Texas Estates Code Chapter 1357 or a valid power of attorney, for educational decision-making. The licensed medical doctor or physician assistant, if authorized by a supervising licensed medical doctor, may also make a determination that the student is unable to provide informed consent based upon the following considerations:

(A) The student is unable to understand even with appropriate support, on a continuing or consistent basis, the nature, extent, and probable consequences of an educational decision or proposed educational program;

(B) The student is unable to evaluate even with appropriate support, on a continuing or consistent basis, the benefits or disadvantages of an educational decision or a proposed educational program as compared with alternative options; or

(C) The student is unable to communicate even with appropriate support verbally, in writing, or in the mode of communication used by the student to communicate his or her decisions, an understanding of or an evaluation of the benefits or disadvantages of an educational decision or proposed educational program.

(6) A parent, legal guardian, or other interested adult who has submitted a written request for the appointment of an educational representative may also request a reevaluation of the student under 34 CFR §300.303 to obtain the certification required by paragraph (1) (C).

(7) Upon confirming receipt of the required licensed medical doctor or authorized physician assistant certification, the school district shall appoint the person identified as educational representative in the request.

(8) In representing the educational interests of the student, the educational representative shall consult with the student before providing informed consent or making educational decisions on behalf of the student, and consider the student's interest, preferences, and goals. The educational representative shall notify the student when the educational representative has provided informed consent or made any educational decisions. If the student expresses disagreement with the informed consent or educational decision provided by the educational representative on the student's behalf, the school district shall include in the student's IEP a statement that notes the student's disagreement.

(9) Subject to paragraph (13), the term of appointment for an educational representative shall expire when the student is no longer eligible for special education services, or graduates with a regular high school diploma, whichever occurs first.

(10) A determination that a student is unable to provide informed consent with respect to the student's educational program shall not be construed as a finding of incompetence or incapacity for any other purpose or as relevant or precedential evidence in any future court or legal action seeking to remove decision-making authority for the student. The appointment of an educational representative under this section is limited to representing the educational interests of the student.

(11) The school district shall provide notice of the appointment to the educational representative, the parent, and the student and deliver a hard copy of the appointment to the student and inform the student of the appointment verbally, or in the manner of communication with which the student is most comfortable. The notice shall include the steps a student may take to challenge the appointment of an educational representative.

(12) The student may challenge the certification of the student as unable to provide informed consent with respect to the student's educational program or appointment of an educational representative in accordance with this section at any time, in accordance with the following requirements:

(A) A challenge made under this section shall be made in writing to the school district, except that the school district shall assist a student who is unable to provide a written challenge to document a verbal challenge in writing and may refer the student to a legal organization for assistance; and

(B) The school district shall notify the student, any current appointed educational representative, and the person who submitted the request for the appointment of an educational representative (if different), of any such challenge in writing no later than two (2) business days from the receipt of the challenge.

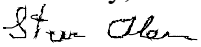
(13) If the certification of a student is challenged by the student, the existing certification is invalidated, and all educational rights transfer back to the student. If the person appointed as the education representative is challenged by the student, the appointment of the educational representative is invalidated and all educational rights transfer back to the student, and the school district shall notify the parent, legal guardian, or other interested adult who submitted the original request for appointment of the removal of the educational representative at the student's request. The notified parent, legal guardian, or other interested adult may submit a renewed written request for appointment of another individual as an educational representative.

(14) The written request for appointment of an educational representative, the professional certification, the appointment and notification of appointment of an educational representative, and any challenge and notification of challenge of certification or appointment, shall be confidential and subject to 34 CFR Part 99.

4. Conclusion

Thank you for your attention to this matter. Please send acknowledgement of receipt and if you have any questions or would like to schedule a meeting, please contact me.

Sincerely,



Steven Aleman, Policy Specialist
512.454.4816
saleman@disabilityrightstx.org

cc: Dr. Justin Porter, State Director of Special Education

Texas Education Agency

Commissioner Mike Morath

1701 North Congress Avenue • Austin, Texas 78701-1494 • 512 463-9734 • 512 463-9838 FAX • tea.texas.gov

Steven Aleman, Disability Rights Texas
2222 West Braker Lane
Austin, Texas 78758

October 24, 2019

Dear Mr. Aleman,

Thank you for your petition for adoption of rule changes, requesting that the Texas Education Agency amend 19 Texas Administration Code (TAC)§ 89.1049. In accordance with Texas Government Code § 2001.021 and 19 TAC§ 30.1001, I am writing to inform you that the petition is denied at this time.

Under Texas state law, once a student reaches the age of majority, all rights afforded a parent under the Individuals with Disabilities Act (IDEA) transfer to the student. IDEA provides a special rule at 34 Code of Federal Regulations (CFR) §300.520(b) that if state law creates a legal basis for determining that an adult student who has not been deemed incompetent may nevertheless be deemed to lack the ability to provide informed consent, then the state must also "establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interest of the child throughout the period of the child's eligibility under [IDEA]." The U.S. Department of Education's comments to rule explain that 34 CFR §300.530(b) recognizes that some states have such a legal basis in place and that the special rule applies to those states, requiring those states to "establish procedures for appointing the parent (or, if the parent is not available, another appropriate individual) to represent the educational interests of the child throughout the remainder of the child's eligibility under [IDEA]." Federal Register Vol. 71, No. 156 at p. 46713 (Aug. 14, 2006).

Currently there is no law in Texas by which to determine that an adult student who has not been deemed incompetent may be found to lack the ability to provide informed consent. Until the legislature provides the legal basis for such a determination, the agency cannot establish an appointment procedure.

Sincerely,

Dr. Justin Porter
Director
Special Education

Cc Von Byer, TEA General Counsel
Mike Morath, Commissioner of Education