

§89.1115. Memorandum of Understanding Concerning Interagency Coordination of Special Education Services to Students with Disabilities in Residential Facilities.

(a) Parties. The state agencies named in this subsection are parties to this memorandum of understanding (MOU) and will be collectively referred to as the "parties." The term "Health and Human Service (HHS) agencies" will refer to all parties except the Texas Education Agency, Texas Juvenile Probation Commission, and Texas Youth Commission.

- (1) Texas Education Agency (TEA);
- (2) Texas Department of Human Services (TDHS);
- (3) Texas Department of Mental Health and Mental Retardation (TDMHMR);
- (4) Texas Department of Health (TDH);
- (5) Texas Department of Protective and Regulatory Services (PRS);
- (6) Texas Interagency Council on Early Childhood Intervention (ECI);
- (7) Texas Commission on Alcohol and Drug Abuse (TCADA);
- (8) Texas Juvenile Probation Commission (TJPC); and
- (9) Texas Youth Commission (TYC) 

(b) Purpose. In accordance with Texas Education Code (TEC), §29.012(d), the purpose of this MOU is to:

- (1) establish the respective responsibilities of school districts and of residential facilities (RFs) for the provision of a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act (IDEA) (20 USC §1400 et seq.) and its subsequent amendments, including each requirement for children with disabilities who reside in those facilities;
- (2) coordinate regulatory and planning functions of the parties;
- (3) establish criteria for determining when a public school will provide educational services;
- (4) provide for appropriate educational space when education services will be provided at the residential facility;
- (5) establish measures designed to ensure the safety of students and teachers; and
- (6) provide for binding arbitration consistent with Texas Government Code, Chapter 2009, and Civil Practice and Remedies Code, §154.027.

(c) Definitions. The following words and terms, when used in this MOU, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Consistent with TEC, §5.001(8), "residential facility" (RF) means:

(A) a facility operated by a state agency or political subdivision, including a child placement agency, that provides 24-hour custody or care of a person 22 years of age or younger, if the person resides in the facility for detention, treatment, foster care, or any non-educational purpose; and

(B) any person or entity that contracts with or is funded, licensed, certified, or regulated by a state agency or political subdivision to provide custody or care for a person under subparagraph (A) of this paragraph. RFs include, but are not limited to:

- (i) child care facilities or institutions;
- (ii) independent foster group homes providing basic, therapeutic or rehabilitative services;
- (iii) independent foster family homes providing basic, therapeutic or rehabilitative services;
- (iv) agency foster family/group homes verified by a child placing agency licensed by PRS;
- (v) intermediate care facilities for the mentally retarded (ICFs-MR);
- (vi) psychiatric treatment centers;
- (vii) therapeutic camps or ranches;
- (viii) residential treatment centers licensed by PRS;
- (ix) nursing facilities;

- (x) TYC halfway houses and contract facilities;
- (xi) emergency shelters;
- (xii) hospitals;
- (xiii) juvenile pre-adjudication detention facilities;
- (xiv) juvenile post-adjudication secure correctional facilities;
- (xv) residential facilities funded and/or licensed by TCADA;
- (xvi) settings other than the student's natural or adoptive home in which residential services are provided in programs authorized by the Social Security Act, §1915(c); and
- (xvii) state hospitals, state schools, and state centers operated by TDMHMR.

(2) "Student with a disability" means an individual who is eligible to receive special education and related services in accordance with IDEA and its implementing regulations, Code of Federal Regulations, Title 34, §§300.1 et seq., and state laws and rules, including, without limitation, TEC, Chapter 29, and Chapter 89 of this title (relating to Adaptations for Special Populations).

(3) Consistent with 20 USC §1401(8), "free appropriate public education" (FAPE) means special education and related services that:

- (A) are provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of TEA;
- (C) include preschool, elementary, or secondary school education; and
- (D) are provided in conformity with the student's individualized education program (IEP).

(4) Consistent with 20 U. S. C. §1401(15), "local educational agency" (LEA) means any public authority, institution, or agency having administrative control and direction of a public elementary or secondary school, including a public charter school that is established as an LEA under state law.

(d) Terms of MOU. The parties agree to the following terms:

(1) The responsibilities of LEAs and RFs related to the provision of a FAPE to students with disabilities who reside in RFs are established as follows.

- (A) LEAs must provide or ensure the provision of a FAPE to students with disabilities residing in RFs in accordance with IDEA, applicable federal regulations, and state laws and rules.
 - (i) Except as provided in paragraph (2) of this subsection, an LEA must provide or ensure the provision of a FAPE for a student with a disability residing in an RF located in the geographical area served by that LEA.
 - (ii) If an LEA places a student with a disability in an RF for educational purposes, the placing LEA must provide or ensure the provision of a FAPE to the student.

(B) Not later than the third day after the date a person 22 years of age or younger is placed in an RF, the RF must provide notification in accordance with TEC, §29.012(a), as follows:

- (i) if the person placed in the RF is three years of age or older, the RF must notify the LEA in which the RF is located, unless the RF is an open-enrollment charter school or the RF has been designated as an LEA (e.g., TYC correctional facilities, Texas School for the Deaf, the University of Texas Medical Branch); or
- (ii) if the person placed in the RF is younger than three years of age, the RF must notify a local early childhood intervention program in the area in which the RF is located.

(2) Regulatory and planning functions of the parties are coordinated as follows.

- (A) The parties will require LEAs and RFs to:
 - (i) share, within a reasonable period of time and to the extent permitted by applicable statutes and regulations, all appropriate records and relevant information relating to a student with a disability. This subsection does not authorize the LEA to modify requirements for admission and enrollment into an LEA as set forth in TEC, Chapter 25. The records and information to be shared may include, but are not limited to:

- (I) birth certificate or other identifying document that proves the student's age;
- (II) medical history and medical records, including current immunization records and a history of infectious disease (e.g., Hepatitis B, tuberculosis), including a description of any behavioral characteristics related to the transmission of such disease;
- (III) social history;
- (IV) vision and hearing screening and evaluation;
- (V) evaluation reports, including psychological, educational, related service, assistive technology and vocational evaluations, and behavioral assessments;
- (VI) treatment plan of care or service;
- (VII) educational history (e.g., previous educational placement information);
- (VIII) any relevant court orders (e.g., orders related to placement in an RF, guardianship or conservatorship, or court-ordered services);
- (IX) information regarding a student's movement from an RF to a subsequent residence, including but not limited to the date the student left the RF and the location of the student's subsequent residence; and
- (X) name and phone number of contact persons representing the RF and the LEA; and

(ii) coordinate a student's individualized education program (IEP) and treatment plan of care or service. Coordination between an LEA and RF includes but is not limited to communication about responsibilities and timelines related to the development and implementation of the IEP and treatment plan, including permanency planning.

(B) TEA will require LEAs to provide:

- (i) the name and phone number of the contact person representing the RF to the surrogate parent, upon assignment of the surrogate parent;
- (ii) the name and phone number of the surrogate parent, upon assignment of the surrogate parent, to the contact person representing the RF; and
- (iii) designation and training of surrogate parents in accordance with §89.1047 of this title (relating to Procedures for Surrogate and Foster Parents).

(C) TYC and the HHS agencies will provide the following notifications to TEA.

(i) TYC and the HHS agencies, other than PRS, will notify TEA when an RF opens, closes, expands, or reduces its capacity to provide services, if the notifying agency expects such action will have a significant effect on one or more LEAs. The notice will be provided to TEA before the RF opens, closes, expands, or reduces its capacity to provide services, or as soon thereafter as the notifying agency becomes aware of the action. If an RF is closing, the notifying TYC or HHS agency will request that the RF attempt to obtain any consent necessary to release to TEA and an LEA, information about a student with a disability residing in the RF, including the student's name, date of birth, social security number, disability, and name of the LEA to which the student will be moving. TEA will notify the affected LEA of the expected action so the LEA can adjust its capacity to serve students with disabilities.

(ii) PRS will provide TEA with a copy of the notice required by Texas Human Resources Code, §42.0461(a)(2). Additionally, PRS and TEA will explore possible use of PRS' Child Care Licensing Automation Support Services management system to generate information that may assist TEA in its effort to notify LEAs when an RF opens, closes, expands, or reduces its capacity to provide services.

(3) Criteria for determining when a public school will provide educational services are established as follows.

(A) TEA will ensure that the local school district provides a FAPE to all eligible students with disabilities, in the least restrictive environment (LRE), to the maximum extent appropriate, to

meet the individual educational needs of the student as determined by a duly-constituted admission, review, and dismissal (ARD) committee, and in accordance with §89.1001 of this title (relating to Scope and Applicability).

(B) The student's ARD committee must determine the appropriate educational placement for the student, considering all available information regarding the educational needs of the student, and including the non-educational needs that may restrict the ability of the LEA to serve the student on a public school campus or other instructional setting. These non-educational needs could include the student's health and safety (e.g. substance abuse), and/or the student's placement in a restrictive RF program (e.g., juvenile incarceration or restrictive court-ordered placements). The ARD committee's determination must be individualized based on student need and not made on a categorical basis, such as the student's disability or residence in an RF. Further, ARD committees must not determine educational placement on the basis of what is most convenient to LEAs or RFs.

(4) When educational services will be provided at an RF, appropriate educational space will be determined as follows.

(A) The ARD committee must determine whether space available at the RF is appropriate for the provision of a FAPE. This determination must be based on the individual student's needs and the RF's available space.

(B) An ARD committee must find alternative locations for providing educational services if the ARD committee or RF determines that the RF has no appropriate available space.

(5) Measures designed to ensure the safety of students and teachers are established as follows.

(A) The parties will require RFs and LEAs to agree in writing to the staffing levels that will be maintained by both the RF and the LEA to ensure the safety of students and teachers while educational services are provided at an RF.

(B) TYC, TJPC, and HHS agencies will require RFs to communicate to LEA staff applicable safety, emergency, and security procedures to be followed while educational services are provided at an RF.

(6) Disputes concerning the implementation of this MOU will be resolved as follows.

(A) Local disputes. Resolution of disputes concerning implementation of this MOU between LEAs or between an LEA and an RF shall first be attempted at the local level. The specific issues involved in the dispute and possible solutions shall be identified and referred to local personnel authorized to make decisions necessary to resolve the dispute. If resolution is not reached after a reasonable period of time (not to exceed 45 calendar days unless the disputing entities agree otherwise), the LEA shall refer (and the RF may refer) the dispute to TEA for further negotiations toward a mutually agreeable resolution. TEA will contact the disputing entities and set up a meeting for this purpose. Local entities referring disputes to TEA shall identify:

- (i) the nature of the dispute;
- (ii) any resolutions agreed upon;
- (iii) the issues that remain unresolved; and
- (iv) the contact persons representing the disputing entities.

(B) State agency disputes. Resolution of disputes concerning implementation of this MOU between two or more parties must first be attempted at the staff level. If resolution is not reached after a reasonable period of time (not to exceed 45 calendar days unless the disputing parties agree otherwise), the disputing parties will refer the dispute to their respective executive officers, or their designees for further negotiation. The appropriate state officials shall meet to seek resolution of the dispute.

(i) Mediation. If the chief executive officers of the disputing parties determine that the dispute cannot be resolved at their level, the disputing parties may pursue resolution through the use of mediation pursuant to the Governmental Dispute Resolution Act, Texas Government Code, Chapter 2009.

(ii) Arbitration. If the disputing parties do not agree to pursue resolution of their dispute through mediation, or if mediation does not result in a resolution of their dispute, the disputing parties will participate in binding arbitration consistent with Texas Government Code, Chapter 2009, and Texas Civil Practice and Remedies Code, §154.027.

(7) Other terms of this MOU.

(A) This MOU shall be signed by the executive officers of the participating agencies and shall be effective upon signature by all.

(B) This MOU may be considered for expansion, modification, or amendment upon mutual agreement of the executive officers of the participating agencies.

(C) In the event that federal and/or state laws should be amended, federally interpreted, or judicially interpreted so as to render continued implementation of this MOU unreasonable or impossible, the participating agencies may agree to amend or terminate this MOU.

Source: The provisions of this §89.1115 adopted to be effective August 6, 2002, 27 TexReg 6851.