

**November 17, 2016**

**TO THE ADMINISTRATOR ADDRESSED:**

**SUBJECT: Reminder about Important District Responsibilities under the Individuals with Disabilities Education Act**

In recent weeks, the Texas Education Agency (TEA) has received a number of inquiries regarding school districts' child find obligations under the Individuals with Disabilities Education Act (IDEA), the use of Response to Intervention (RTI) strategies, and the policies and procedures designed to prevent the misidentification and disproportionate representation of students for special education services. The purpose of this letter is to clarify these issues and provide an update on related activities that TEA is implementing.

*Child Find Duty*

Central to IDEA and its implementing regulations is the requirement that all states have policies and procedures in place to ensure that all children with disabilities within the state who are in need of special education and related services are "identified, located and evaluated."<sup>1</sup> This duty, referred to as "child find," includes children with disabilities who are homeless, wards of the state, or attending private schools as well as highly mobile children and children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade.<sup>2</sup>

IDEA defines children with disabilities as those children who: (1) have been properly evaluated and determined as having an intellectual disability, a hearing impairment, a speech or language impairment, a visual impairment, a serious emotional disturbance, an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and (2) require special education and related services as a result of the disability.<sup>3</sup> Significantly, a child who has one of the above-mentioned disabilities is not a child with a disability under IDEA if he or she does not require special education and related services due to the disability or if he or she only needs a related service.<sup>4</sup>

A school district's failure to meet the child find requirements is a serious matter as it can result in denying a free appropriate public education (FAPE) to a child who is eligible for special education services. Furthermore, the failure to identify a child may entitle the child to compensatory education or tuition reimbursement.

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<sup>1</sup> 34 CFR § 300.111(a)(i).

<sup>2</sup> 34 CFR § 300.111(a)(i) and (c).

<sup>3</sup> 34 CFR § 300.8.

<sup>4</sup> 34 CFR §§ 300.8(a)(2) and 300.306(b)(2).

### *Misidentification and Disproportionate Representation*

Along with the child find requirements, IDEA also includes provisions designed to prevent the misidentification and the disproportionate representation of children as children with disabilities. For instance, IDEA provides that no child may be determined to be eligible if the determinant factor for that eligibility determination is a lack of appropriate instruction in reading or math or limited English proficiency.<sup>5</sup> IDEA further requires that states adopt "policies and procedures designed to prevent inappropriate over-identification or disproportionate representation by race or ethnicity of children as children with disabilities, including children with disabilities with a particular impairment."<sup>6</sup> Finally, IDEA requires that states monitor school districts using quantifiable indicators to determine the extent to which the disproportionate representation of racial and ethnic groups in special education is the result of inappropriate identification<sup>7</sup> and also requires that states collect and examine data to determine whether significant disproportionality in special education based on race and ethnicity occurs in the state and in school districts.<sup>8</sup>

### *Performance-Based Monitoring (PBM) System*

TEA fulfills its special education monitoring responsibilities, in part, through the PBM system, which includes the Performance-Based Monitoring Analysis System (PBMAS). School districts are evaluated annually through a comprehensive set of student performance and program effectiveness indicators. Each PBMAS indicator includes a range of performance levels (PLs), and each PL range has an established set of cut points. Districts are evaluated in each program area and assigned a stage of intervention that is based on a consideration of districts' performance across all of the PBMAS program-area indicators.<sup>9</sup>

Since 2004, PBMAS has included four special education indicators specifically designed to identify possible over-identification and disproportionate representation in special education programs. One of these indicators, Indicator 10 in the *2016 PBMAS Manual*, measures the percent of enrolled students who receive special education services. The PL ranges for this indicator are: PL 0 (0%-8.5%); PL 1 (8.6%-11.0%); PL 2 (11.1%-15.0%); and PL 3 (15.1% and above).

It has been alleged that some school district personnel and others may have interpreted the PL 0 range to mean that districts are required to achieve a special education enrollment rate of no more than 8.5%. This interpretation is incorrect. Indicator 10 has never been tied to an absolute standard or goal. Rather, Indicator 10 is what is referred to as a *relative* indicator which means that it is based on the distribution of program participation rates across districts. While Indicator

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<sup>5</sup> 34 CFR § 300.306(b)(1).

<sup>6</sup> 34 CFR § 300.173.

<sup>7</sup> 34 CFR § 300.600(d)(3).

<sup>8</sup> 34 CFR § 300.646.

<sup>9</sup> In addition to special education, PBMAS monitors bilingual education/English as a second language, career and technical education, and No Child Left Behind.

10 is designed to promote proper eligibility determinations, it does not include a “cap” on special education enrollment. Furthermore, services for children with disabilities who need them cannot be limited in any way by districts’ anticipated, or actual, PL assignments on Indicator 10, or any PBMAS indicator. As stated in the *2016 PBMAS Manual*, “[a] district is obligated to identify and provide a free appropriate public education to all students with disabilities who require special education services.”<sup>10</sup>

TEA is also aware of claims that it has subjected school districts whose special education representation rates have exceeded 8.5% to sanctions, including requiring districts to develop corrective action plans (CAPs) outlining how they will reduce their rates. These claims are inaccurate. No district has ever been required to develop a CAP based on its PBMAS special education representation rate.<sup>11</sup>

With regard to Indicator 10, only the PL 3 range (15.1% and above) has been used by TEA as a sole determinant for districts’ interventions staging. Furthermore, interventions staging should not be regarded as a sanction. On the contrary, districts that are staged for intervention engage in activities locally through a continuous improvement model. That model has evolved over time to better support districts in their local improvement efforts. TEA’s current continuous improvement model is the Texas Accountability Interventions System (TAIS). As part of TAIS, districts conduct a data analysis to determine what, if any, problems exist that may be contributing to an ineffective program. Districts identify root causes for the problem statements they identified through data analysis and develop a targeted improvement plan to address any areas of low performance and program ineffectiveness. Districts subsequently implement and monitor their plans. Districts in lower stages of intervention retain their plans and evidence of implementation locally. Only districts with significant and/or multiple areas of performance concern are required to submit the targeted improvement plan to TEA. This submission requirement is not punitive; rather, it provides districts with the most significant performance concerns an additional level of support.

Approximately four years ago, TEA began implementing a multi-year transition plan for certain PBMAS special education indicators, including the special education representation indicators, in order to achieve greater alignment between PBMAS and the State Performance Plan. It has been TEA’s plan to propose PBMAS rules in 2017 that integrate the four representation indicators into a single indicator that includes additional racial/ethnic groups, disaggregation by disability categories, and calculations of significant disproportionality. TEA will move forward with this next phase of the transition plan, which will continue to be informed by, and shared with, stakeholders. In addition, TEA ensured that no district’s performance on Indicator 10 adversely affected its special education intervention stage for the 2016-2017 school year.

### *Response to Intervention (RTI)*

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<sup>10</sup> *2016 PBMAS Manual* at p. 64.

<sup>11</sup> CAPs are only required when school districts or TEA identify noncompliance with a special education requirement.

There have been reports that some school districts may be delaying or denying special education referrals in order to complete RTI strategies. As stated in the *Parent's Guide to the Admission, Review, and Dismissal Process*, a child does not need to advance through each tier of the RTI system before a referral for special education is made.<sup>12</sup> Furthermore, OSEP has advised that it would be inconsistent with the evaluation provisions of IDEA for a school district to reject a referral and delay an initial evaluation on the basis that a student has not participated in an RTI framework.<sup>13</sup> Once it is apparent that general education interventions are not sufficient, school personnel should suspect that the child has a disability and should initiate a referral.<sup>14</sup>

Districts are reminded that parents can also request a referral at any time regardless of whether the child is receiving interventions through an RTI system.<sup>15</sup> OSEP has advised that unless the district believes there is no reason to suspect that a child has a disability and is in need of special education services, an evaluation must be conducted within the applicable timeline.<sup>16</sup> If, however, the district does not suspect that the child is a child with a disability and denies the request for an initial evaluation, the district must provide written notice to parents explaining why the district declines to conduct an initial evaluation and the information that was used as the basis for that decision.<sup>17</sup> The parent can then challenge this decision by requesting a due process hearing under 34 CFR §300.507 or filing a complaint under 34 CFR §300.153 to resolve the dispute regarding the child's need for an evaluation.

TEA understands the complexities that school districts address as they appropriately differentiate between students whose academic problems are due to a qualifying disability under IDEA and those who are struggling due to other reasons. To expand our support to districts, TEA is establishing a new unit within the Division of IDEA Support dedicated to providing additional technical assistance to districts and education service centers (ESCs). Information about the additional support services will be provided at a later date. TEA will also work with ESCs to evaluate what additional training and technical assistance the ESCs can provide to districts and parents regarding the child find process, RTI, and PBMAS. We welcome your suggestions regarding these efforts.

I hope this information is helpful. **Thank you for your continued commitment to academic success for all students in Texas.**

Sincerely,

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<sup>12</sup> *Parent's Guide to the Admission, Review, and Dismissal Process* at p. 2 located at [https://framework.esc18.net/Documents/ARD\\_Guide\\_ENG.pdf](https://framework.esc18.net/Documents/ARD_Guide_ENG.pdf).

<sup>13</sup> *Memo to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011).

<sup>14</sup> See footnote 12.

<sup>15</sup> 34 CFR § 300.301(b).

<sup>16</sup> See footnote 13.

<sup>17</sup> 34 CFR § 300.503(a) and (b).

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