



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

October 3, 2016

Honorable Mike Morath
Commissioner
Texas Education Agency
1701 N. Congress Ave
Austin, Texas 78701

Dear Commissioner Morath:

The Office of Special Education and Rehabilitative Services (OSERS) was recently provided with a copy of an investigative report on special education in Texas published in the September 11, 2016 edition of the *Houston Chronicle* (*Chronicle*). The report, titled *Denied: How Texas Keeps Tens of Thousands of Children Out of Special Education*, states that there has been a systematic denial of special education services to children with disabilities in Texas and that the State's identification rate for children with disabilities has declined significantly in the last ten years.¹ The report raises serious concerns about the State's compliance with a number of requirements of Part B of the Individuals with Disabilities Education Act (IDEA), including the child find requirements under section 612(a)(3) and the requirement under section 612(a)(1) to make a free appropriate public education available to all eligible children with disabilities residing in the State.

Specifically, the report states that since the Texas Education Agency (TEA) began using the Performance Based Monitoring Analysis System (PBMAS) to monitor school districts, Texas's identification rate for students with disabilities has declined by more than three percentage points – from 11.67 percent in 2004 to 8.5 percent in 2015. SPED (special education) Indicator 10 in the PBMAS – Special Education Representation – is used to determine whether school districts identify more than 8.5 percent of their student body population as students with disabilities. The report states that a district that exceeds the 8.5 percent monitoring standard receives an elevated PBMAS Performance Level (PL) score, and is required to take steps to reduce its students with disabilities identification rate in order to meet the 8.5 percent monitoring standard. The report also states that “more than a dozen teachers and administrators from across the State told the *Chronicle* that they have delayed or denied special education to disabled students in order to stay below the 8.5 percent benchmark” resulting in a “systematic denial of services by school districts to tens of thousands of families of every race and class across the state.”

In response to an August 2014 email message to the Department from Disability Rights Texas on a related issue, OSERS contacted Mr. Gene Lenz, Director of TEA's Division of Federal and State Education Policy, to discuss concerns about the use of the 8.5 percent monitoring standard in Indicator 10 of the PBMAS. Mr. Lenz explained that this indicator was established to address the State's concern that some districts were inappropriately over identifying students as students with disabilities. He further

¹ Data reported by the Texas Education Agency to the US Department of Education verify that the State's child count for children with disabilities aged three through 21 under IDEA was 11.8 percent of enrolled students in SY (school year) 2003-2004 and has declined to 8.6 percent in SY 2013-2014.

explained that an elevated PL was not necessarily indicative of district noncompliance, but that if a district exceeded the 8.5 percent monitoring standard, the State examined that district's policies, procedures and practices more closely to ensure that students were not being inappropriately identified as students with disabilities. If noncompliance was identified through this monitoring process, the district was required to correct the noncompliance. Mr. Lenz also assured staff from OSERS that the State monitors to ensure that districts carry out their child find responsibilities to identify, locate and evaluate all children with disabilities who are in need of special education and related services in the State.

However, the information presented in the *Chronicle's* investigative article raises serious questions about Texas's compliance with fundamental IDEA requirements, as well as the implementation of the approaches Texas described to OSERS in 2014. According to the information in the article, some districts view the 8.5 percent PBMAS monitoring standard as a cap on the number of children with disabilities that may be identified in a district, and in some instances if a district exceeds the cap, the district will be required to develop a corrective action plan demonstrating how it will reduce its special education identification rate. Therefore, it appears that the State's approach to monitoring local educational agency compliance under the PBMAS Indicator 10 may be resulting in districts' failure to identify and evaluate all students suspected of having a disability and who need special education and related services, and to provide a free appropriate public education to those students who should have been found eligible.

Therefore, OSERS is requiring that, within 30 days of the date of this letter, TEA provide a written response to OSERS regarding the allegation that TEA's use of the 8.5 percent special education monitoring standard in the PBMAS has resulted in districts' failure to identify and evaluate all students suspected of having a disability and who need special education and related services, and to provide a free appropriate public education to those students who should have been found eligible. In addition, TEA must include in its response a detailed description of the steps the State has taken and will take to:

1. Discontinue the use of any cap on the identification of children with disabilities under IDEA, including SPED Indicator 10 in the PBMAS, unless the State can provide evidence that the Indicator has not resulted in practices that have led to districts not referring and evaluating students suspected of having a disability and who need special education and related services.
2. Ensure that districts identify, locate and evaluate all children suspected of having a disability who need special education and related services, in accordance with section 612(a)(3) of the IDEA, and make a free appropriate public education available to all eligible children with disabilities in accordance with section 612(a)(1) of the IDEA.
3. Determine which districts may have discouraged or refused to act upon referrals for evaluations from staff or parents of children suspected of having disabilities and who need special education and related services, in order to reduce the districts' special education identification rate, and in such districts, the specific steps the State will take to remedy the effect of such past practices.
4. Inform all districts that they may not violate the rights of children with disabilities by delaying or denying referrals, evaluations or the provision of special education and related services in order to meet the State-imposed 8.5 percent monitoring standard.
5. Require all districts to inform their staff and the parents of students enrolled in the district's schools of the steps TEA is taking to ensure that all children suspected of having a disability and who need special education and related services are identified, located and evaluated.

Based on TEA's response, OSERS, in coordination with other appropriate offices in the Department, will determine whether additional monitoring activities or other administrative enforcement or corrective actions are necessary. We will also be examining other indicators related to the identification of children with disabilities. Specifically, based on our initial review of the PBMAS indicators, we note that other indicators may also be problematic. For example, SPED Indicators 11, 12 and 13 may lead to denial of identification of children with disabilities from specific racial/ethnic or language groups. We will be following up with you on these indicators as well.

In addition, OSERS is informing Catherine Lhamon, Assistant Secretary for Civil Rights, and Ann Whalen, Delegated the Authority to Perform the Functions and Duties of Assistant Secretary for Elementary and Secondary Education, of this issue, so that those offices can also determine any implications for the programs and statutes administered by those offices.

OSERS staff are available to discuss this letter and to provide technical assistance to help ensure that all eligible students with disabilities and their families in the State are afforded their rights under IDEA.

Sincerely,

/s/

Sue Swenson
Acting Assistant Secretary

cc: Catherine Lhamon
Assistant Secretary for Civil Rights

Ann Whalen
Delegated the Authority to Perform the Functions and
Duties of Assistant Secretary for Elementary and Secondary Education