

November 2, 2016

Honorable Sue Swenson  
Acting Assistant Secretary  
United States Department of Education (USDE)  
Office of Special Education and Rehabilitative Services (OSERS)  
400 Maryland Avenue, S.W.  
Washington, DC 20202-2600

Dear Assistant Secretary Swenson:

I appreciated the opportunity to discuss, during an October 20, 2016 phone call with several USDE representatives, OSERS' October 3, 2016 letter relating allegations presented in a September 11, 2016 newspaper article regarding special education in Texas. TEA strongly disagrees with statements in the article and with the overall premise of the article that Texas educators have been engaging in concerted, widespread efforts to deny eligible students with disabilities with needed special education services based on the special education representation indicator in the Performance-Based Monitoring Analysis System (PBMAS). Attached to this letter is a document that clarifies some of the inaccurate statements in the September 11, 2016 newspaper article and an October 23, 2016 follow-up article.

Because the many inaccuracies in the newspaper articles may be contributing to confusion throughout the State, TEA intends to send a letter to all school districts (a) reminding them of the child find obligations in IDEA and that Response to Intervention (RTI) strategies may not be used to delay or deny an initial evaluation; and (b) clarifying TEA's monitoring efforts with regard to preventing the over-identification of students with disabilities. TEA will provide OSERS with a copy of this letter once it has been issued. TEA will also evaluate whether any additional information should be added to the *Parent's Guide to the Admission, Review, and Dismissal Process* as well as what additional training and technical assistance the regional education service centers can provide to school districts regarding the child find process, RTI, and PBMAS. Furthermore, TEA will review its monitoring activities with regard to specific school districts discussed in the newspaper articles and follow up with those districts, as appropriate.

In addition, TEA will continue to implement the multi-year transition plan for certain PBMAS special education indicators that began approximately four years ago. To achieve even greater alignment between PBMAS and the State Performance Plan, TEA identified three groups of indicators for this transition: (1) instructional settings; (2) discipline; and (3) representation.<sup>1</sup> TEA completed the transition of the first group of indicators with changes that were implemented in the 2013 and 2014 PBMAS, when five new instructional settings indicators were previewed. Transition of the second group of indicators was implemented with the 2015 PBMAS, which included a new reporting structure for the PBMAS discipline indicators based on disproportionality rates that were designed to align with emerging federal methodologies. TEA

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<sup>1</sup> These special education representation indicators are referred to as SPED Indicators 10, 11, 12, and 13 in the 2016 *PBMAS Manual*.

began another phase of the transition with the 2016 PBMAS when a similar reporting structure was previewed for three of the representation indicators. Information about all of these transitions was shared with stakeholder groups<sup>2</sup>, and each year's PBMAS continued to be adopted annually through the State's rulemaking process.

In the spring of 2017, TEA anticipates the PBMAS rules it proposes will include a continuation of this transition by integrating the four representation indicators into a single indicator that includes additional racial/ethnic groups, disaggregation by disability categories, and calculations of significant disproportionality. Again, information about that transition will continue to be informed by, and shared with, stakeholder groups, including the Continuing Advisory Committee for Special Education and the Texas Continuous Improvement Steering Committee for Special Education.

During the phone call with USDE representatives, TEA addressed five questions in OSERS' letter. Below is a summary of the information TEA provided as well as additional information that was requested by USDE (or that TEA believes is relevant).

*1. Has there been a systematic denial of special education services to children with disabilities?*

TEA does not have any specific evidence indicating there has been a systematic denial of special education services to eligible students with disabilities despite the fact that the article states that several hundred interviews were conducted and records from several school districts were reviewed.<sup>3</sup> Furthermore, TEA has not received any formal or informal complaints demonstrating that specific school districts have engaged in such an effort to deny eligible students with disabilities the services they need based on the special education representation indicator in PBMAS. Anyone with evidence indicating that a school district has denied special education services to an eligible student should file a special education complaint with TEA or request a special education due process hearing.

Furthermore, the allegation that the special education representation indicator is designed to reduce special education enrollment in order to reduce the amount of money the state has to spend on special education is clearly false. As you know, the federal rules for maintenance of effort (MOE) require that states and school districts continue to fund special education year after year at the same or higher level than the previous period. The sole purpose of the special education representation indicator is to promote proper eligibility determinations so that only children with disabilities who require special education services are placed in special education programs. This purpose is entirely consistent with provisions in IDEA that make clear that a child should not be placed in special education unless there is a legitimate academic concern that is directly attributable to a disability described in 34 CFR §300.8. In fact, IDEA recognizes the harm caused to students who are improperly placed in special education and encourages

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<sup>2</sup> Texas' two primary special education stakeholder groups are the Continuing Advisory Committee (CAC) and the Texas Continuous Improvement Steering Committee (TCISC). Both groups are routinely provided with updates and information about TEA's federal monitoring responsibilities during regularly their scheduled meetings, including seven CAC meetings and three TCISC meetings that were held between 2013 and the present.

<sup>3</sup> Since the first article was published, several district personnel and others who were interviewed, and provided statements contradictory to the narrative in the articles, have advised TEA that their statements were not included in the article. See, for example, attached letter from Sowmya Kumar, Houston Independent School District's Assistant Superintendent for Special Education.

states to monitor for potential overrepresentation, which is precisely what this indicator attempts to do.

In addition, the allegations that TEA “quietly devised” PBMAS and kept the federal government, the Texas Legislature, and the public in the dark are simply incorrect. The federal Office of Special Education Programs (OSEP) reviewed PBMAS during two on-site monitoring visits (in 2006 and 2011) and during reviews of the State Performance Plan/Annual Performance Report/State Systemic Improvement Plan. (See, for example, the results of OSEP’s verification visit to Texas, described in its March 16, 2007 letter to then-Commissioner Shirley Neeley, which summarizes in great detail the special education components of the PBMAS—including the special education representation indicator.) With the exception of a call in 2014 with OSEP staff,<sup>4</sup> the October 3, 2016 letter is the first inquiry by OSERS regarding any concerns with State data relevant to this issue.<sup>5</sup> Furthermore, TEA has provided state legislators with detailed information about PBMAS over the years.<sup>6</sup> (In fact, PBMAS was developed in response to legislation passed in 2003 that effectively discontinued the cyclical, compliance-based monitoring system that was in place.) PBMAS was developed in 2004 with significant stakeholder input,<sup>7</sup> and TEA held multiple focus group meetings during the first years of implementation.<sup>8</sup> Finally, each year’s *PBMAS Manual* has undergone the public rulemaking process. This year marked the thirteenth year in a row that the PBMAS has been publicly adopted through that process.

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<sup>4</sup> TEA was contacted in 2014 by the Office of Special Education Programs (OSEP) as follow-up to a conversation OSEP had with Disability Rights Texas about the PBMAS special education representation indicator. During that call, TEA provided information about how PBMAS is fundamentally consistent with the provisions of the Individuals with Disabilities Education Act (IDEA) with regard to determination of eligibility, analyses of over-identification and disproportionality, and state monitoring priorities that have a particular emphasis on quantifiable indicators to improve educational results for all children with disabilities. TEA also shared information with OSEP about the indicator’s performance level ranges and noted that under PBMAS, a district is obligated to identify and provide a free appropriate public education (FAPE) to all children with disabilities who require special education services. OSEP representatives indicated the information TEA provided was responsive to their questions.

<sup>5</sup> Enclosed are relevant excerpts of public comments (and TEA’s response to those comments) received in 2014 and 2016 as part of the annual rulemaking process for PBMAS. These are the only two years since the inception of PBMAS in which comments specifically about 8.5% were received as part of the rulemaking process. As noted several times in these documents, TEA stands ready to investigate any complaint submitted by anyone who has evidence that a district has not initiated referrals because of a concern about any PBMAS indicator.

<sup>6</sup> For example, TEA is statutorily required to provide the Texas Legislature with biennial reports on the status of Texas public education. The most recent biennial report, which contains information on PBMAS, is available on TEA’s website at [http://tea.texas.gov/Reports\\_and\\_Data/Legislative\\_Reports/Legislative\\_Reports\\_-\\_84th\\_Session/](http://tea.texas.gov/Reports_and_Data/Legislative_Reports/Legislative_Reports_-_84th_Session/). In addition, on March 27, 2008, TEA provided an overview and update of PBMAS during a public hearing of the Select Committee on Public School Accountability. A handout provided by TEA is available on the Texas Senate’s website at <http://www.senate.state.tx.us/75r/senate/commit/c835/handouts08/0327-Criss-Cloudt-Panel-2.2.pdf>. Finally, in 2015, TEA provided detailed information about special education monitoring, including PBMAS, in a legislative report titled *A Report on the Texas Education Agency’s Efforts in Implementing the Provisions of Rider 70* that is available on TEA’s website at [http://tea.texas.gov/Reports\\_and\\_Data/Legislative\\_Reports/Legislative\\_Reports\\_-\\_84th\\_Session/](http://tea.texas.gov/Reports_and_Data/Legislative_Reports/Legislative_Reports_-_84th_Session/).

<sup>7</sup> See pages 1-5 of the *2004 PBMAS Manual*, available on TEA’s website at <http://tea.texas.gov/pbm/PBMASManuals.aspx>. These pages provide significant background information that led to the development of the PBMAS as well as a description of the process TEA used to gather input on the new system, including holding nine stakeholder meetings.

<sup>8</sup> See, for example, the *2007 PBM Focus Group Report*, available on Education Service Center 2’s website at [http://www.sped.esc2.net/documents/PBM\\_FocusGroupReportFinal2007.pdf](http://www.sped.esc2.net/documents/PBM_FocusGroupReportFinal2007.pdf). The focus group members are listed in this report as well as in the 2009, 2010, 2011, and 2012 *PBMAS Manuals* that can be found on TEA’s website at <http://tea.texas.gov/pbm/PBMASManuals.aspx>.

2. *Does TEA have a cap on the identification of students with disabilities?*

TEA has never set a cap, limit, or policy on the number or percent of students that districts can, or should, serve in special education. The special education representation indicator in PBMAS has never been tied to an absolute standard or goal. Rather, the indicator is what is referred to as a relative indicator, which means that it is based on the distribution of program participation rates across districts. It should be noted that the PBMAS Manual includes a statement reminding districts of their obligation to identify and provide a free appropriate public education to all students with disabilities who require special education services. As a condition of funding, each district's superintendent assures that his or her district will comply with this requirement.

3. *Is the PBMAS special education representation indicator used to determine whether school districts identify more than 8.5% of their student body population as students with disabilities?*

The PBMAS special education representation indicator measures the percent of enrolled students who receive special education services. It reports four different ranges of special education representation: 0-8.5%; 8.6%-11.0%; 11.1%-15.0%; and 15.1%-100%. These ranges are used for reporting purposes to provide districts, TEA, and the public with information about the range of performance at the district, region, and state level on all of the PBMAS indicators in both the current year and longitudinally. This information is used by a variety of individuals and entities to conduct research and data analyses, identify areas of strength and opportunities for improvement, conduct professional development, collaborate across PBMAS program areas<sup>9</sup> (BE/ESL, CTE, NCLB, and SPED), evaluate the effectiveness of local and state initiatives, understand critical areas of student performance and program effectiveness not featured in the state's accountability system, and inform the public about the status of special program areas and the students served by those programs.

4. *If a district exceeds 8.5%, is it required to take steps to reduce its students with disabilities rate in order to meet an 8.5% expectation?*

As explained above, the PBMAS special education representation rate indicator includes four ranges. Only one of those ranges (15.1% and above) is ever used by TEA as a sole determinant for districts' interventions staging.<sup>10</sup>

Interventions staging is not a TEA sanction. On the contrary, districts engage in interventions 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<sup>11</sup> to address any areas of low

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<sup>9</sup> The PBMAS is comprised of four program areas: Bilingual Education/English as a Second Language (BE/ESL), Career and Technical Education (CTE), Title I, Part A and Title I, Part C (NCLB), and Special Education (SPED).

<sup>10</sup> Districts with special education representation rates in the 11.1%—15.0% range may also be considered for interventions staging, but only if their performance on other PBMAS special education indicators indicates a high degree of concern.

<sup>11</sup> Prior to 2013-2014, this plan was called a continuous improvement plan (CIP).

performance and program ineffectiveness.<sup>12</sup> 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.

Allegations that TEA issued fines, conducted on-site monitoring visits, required the hiring of consultants, etc. when districts provided special education services to more than 8.5% of their students are entirely false. Furthermore, the article's description of TEA's interactions with the Laredo Independent School District (ISD) does not accurately represent either the purpose of TEA's on-site visit to the district nor the district's required response to that visit. Laredo ISD had various ongoing issues with its special education program for multiple years. It was assigned a Stage 2 level of intervention for the 2004-2005 school year, a Stage 3 level of intervention for the 2005-2006 school year, and a Stage 4 level of intervention for the 2006-2007 school year. One of the original concerns specific to Laredo ISD had to do with disproportionality in English Language Learners represented in special education. Data on Laredo ISD's special education representation rate for English Language Learners (ELLs) from 2004 to 2016 is publicly available <https://rptsvr1.tea.texas.gov/pbm/distrpts.html>. As shown on the district's 2004-2005 PBMAS Report, ELLs comprised 62.07% of the district's enrollment and 80.94% of its special education enrollment. Specifics to the additional inaccuracies listed in the article can be found in item number 23 of the associated attachment.

In January 2007, TEA sent Laredo ISD a letter notifying it that it would receive an on-site monitoring visit as a result of having continuing noncompliance specific to initial evaluations and reevaluations. The special education representation indicator in PBMAS (SPED Indicator #14 in the *2007 PBMAS Manual*) was not the reason for TEA's visit, which was conducted during the week of March 26-29, 2007. During the visit, the TEA team identified three areas of noncompliance that continued from the 2004-2005 and 2005-2006 school years. For this reason, TEA required the district to seek outside technical assistance to correct the issues of continued noncompliance.

In a preliminary report dated February 26, 2008, TEA notified the district of its findings and provided strategies for improvement in state assessment performance, state assessment participation, least restrictive environment, and potential over-representation of limited English proficient (LEP) students. While the report notes that Laredo ISD's overall special education representation rate was greater than 8.5%, TEA's specific concern related to the rate of students with limited English Proficiency (LEP) placed into special education programs without proper identification. TEA's report notes that district administrators expressed concerns during the visit that students from Mexico may have been placed in special education solely as a result of language barriers or a lack of educational opportunity. District leadership reviewed TEA's report, acknowledged the findings, and has since worked to address the issues. Copies of TEA's letters and preliminary report are attached.

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<sup>12</sup> If noncompliance is identified, districts develop a corrective action plan (CAP). A CAP addresses the strategies and actions that will be taken to correct all noncompliance with statute or regulations. No district has ever been required to develop a CAP based on its PBMAS special education representation rate.

In addition to misrepresenting TEA's interactions with individual districts, the article's allegation that TEA has engaged in widespread "targeting" of districts with special education representation rates higher than 8.5% is not borne out by the facts. In the most recent year (2015) for which district special education determination statuses<sup>13</sup> were issued by TEA as required by IDEA, it is clear that there is neither a penalty nor reward for districts based on their special education representation rates in PBMAS. For example, some districts with special education determination statuses of *Needs Substantial Intervention* had special education representation rates in the 0% to 8.5% range. Likewise, some districts with special education determination statuses of *Meets Requirements* had rates in the 15.1% and above range.

5. *Has Texas' identification rate for students with disabilities declined since TEA began using PBMAS to monitor school districts?*

Texas' special education representation rate, as represented by the PBMAS indicator, actually began declining in 2000, four years before the implementation of PBMAS. The representation rate was 12.2% in 2000 and decreased between 2000 and 2003 as reflected in the enclosed table. More recently, between 2013 and 2015, the rate did not change at all, and in 2016, it increased 1.2%. Since a district must serve all eligible students, each individual district's special education percentage should reflect the effective implementation of multiple requirements related to eligibility and enrollment as required by the IDEA.

The slowing and eventual decreases in Texas' special education representation rates over the past decade are attributable to multiple factors. For instance, the changes have closely corresponded with major state initiatives specifically designed to help struggling students, such as the Texas Reading Initiative and the development of high quality professional development in reading specific to struggling readers. There were also several factors that contributed to the changes: first, the provision in IDEA that was added in 1997 to ensure that a lack of instruction in reading or math or limited English proficiency were not determinant factors for eligibility determinations prevented low performance as a result of insufficient access to the curriculum from being a reason for special education identification and was instead an issue of school improvement; second, Texas (like many states), made changes to the state accountability system related to inclusion of students with disabilities so that special education student performance on state assessments would be counted for the purposes of accountability (the year after which is when the noticeable decline in special education rates began); and finally, improved policy and practice at the district-level with regard to understanding the basis for special education eligibility. For example, Texas was an early adopter of tiered interventions for struggling readers, which evolved into Response to Intervention methodology in 2003. This early application of what has proven to be an effective program when implemented with fidelity, has had strong, positive benefits to students due to the targeted and differentiated instruction it provides.

It should also be noted that the changes in Texas' special education child count rates have corresponded with changes in the national child count rates. Specifically, the national child count rate dropped by approximately 6% between 2004, the year that IDEA was reauthorized,

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<sup>13</sup> In Texas, special education determination status is also referred to as "intervention stage."

and 2011. Between 2012 and 2014, the national child count rate has increased slightly, and Texas' child count rates for the last three years have also showed increases.

Finally, Indicator 10 is one indicator among many, but we do not think it is the most influential. Special education services are critical for eligible students, but it would be inappropriate to identify students for special education who should be able to access the full curriculum without supports. Indicator 10 has brought a tremendous amount of good for students in the State of Texas. If some district staff erroneously viewed the indicator's lowest performance range as a target rather than a data point and felt discouraged to initiate special education referrals, we believe the actions that we outline in this letter will address that. As noted above, TEA has been engaged in consistent conversations over the last four years to adjust and eventually eliminate this indicator. We would like to highlight again that TEA will send a letter to all school districts in the state reminding them of the requirements of IDEA. In addition, TEA will expand the amount of technical support available at TEA and not use Indicator 10 for the purposes of interventions staging moving forward.

I hope this information is helpful. If you have additional questions, please do not hesitate to reach out, and we will be happy to provide further information.

Sincerely,



Penny Schwinn  
Deputy Commissioner of Academics

Enclosures:

Letter from Sowmya Kumar, Houston ISD  
Special Education State Rates, 2000—2016 (as Represented by the PBMAS Indicator)  
IDEA Child Count Rates (Texas and National Rates)  
TEA Responses to Public Comments Received during the PBMAS Rulemaking Process 2014  
TEA Responses to Public Comments Received during the PBMAS Rulemaking Process 2016  
Laredo ISD February 26, 2008 Preliminary Findings Report  
Laredo ISD January 5, 2007 Current Status in the PBM System  
Laredo ISD February 28, 2007 On-site Notification Letter  
TEA Responses to Articles' Inaccuracies