SCHOOL LAW UPDATE (2018): THE STATUS OF SPECIAL EDUCATION IN TEXAS

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PROFESSIONAL EXPERIENCE

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- Thompson & Horton LLP, *Associate*, August 2012 to October 2015
- Brown & Kornegay LLP, *Associate*, September 2008 to August 2012
- 14th Court of Appeals, *Briefing Attorney for the Honorable John S. Anderson*, September 2007 to August 2008

PUBLICATIONS AND PRESENTATIONS

- Lake Travis ISD Professional Development Conference, February 2018, "Educators and Social Media: The Do's, Don't's and Uh-oh's."
- 29th Annual Advanced Government Law Conference, July 2017, Panel Discussion
- Texas Association of School Administrators / Texas Association of School Boards Convention, September 2016, "Cameras in the Classroom: Everything You Need to Know About the New Requirements."
- 37th Annual LRP's National Institute of Legal Issues of Educating Individuals with Disabilities, April 2016, "Delivering FAPE in the LRE."
- Texas Council of Administrators of Special Education, July 2015, "Avoiding FERPA Faux Pas: A Refresher Course of the Rights and Responsibilities under FERPA."
- 36th Annual LRP's National Institute of Legal Issues of Educating Individuals with Disabilities, April 2015, "Rights and Responsibilities under FERPA"
- Texas Association of School Personnel Administrators / Texas Association for Employment in Education Winter Conference, January 2015, "Using Criminal History Records to Make Personnel Decisions"
- Texas Association of School Personnel Administrators, HR Connection – 4th Quarter Newsletter, December 2014, "Using Criminal History Records to Make Personnel Decisions"
- Cypress-Fairbanks ISD Special Education Legal Conference, October 2014, "A Discussion of Recent Special Education Decisions and Lessons Learned"
- Region 4 Educational Service Center Seminar, September 2014, "Using Criminal History Records to Make Personnel Decisions"
- Texas Council of Administrators of Special Education, July 2014: "IEEs at Your Expense: What to Consider and How to Respond"
- Education Law Association Spring Seminar, March 28, 2014: "A Year in Review: Discussion of 2013 Special Education Hearing Officer Decisions and Lessons Learned"
- Texas Council of Administrators of Special Education, January 2014: "A Year in Review: Discussion of 2013 Special Education Hearing Officer Decisions and Lessons Learned"

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SCHOOL LAW UPDATE (2018): THE STATUS OF SPECIAL EDUCATION IN TEXAS

Special education services in a public school setting is an area not commonly understood in great detail by many. Recently, however, special education in Texas has become a hot topic of discussion, not only within the State itself but throughout the nation. Beginning in September 2016 with an explosive investigative report on special education published in the Houston Chronicle, the question debated, investigated, and widely-reported over the last year and half has been whether Texas public schools have appropriately and adequately identified and evaluated children suspected of having a disability. This paper seeks to provide a brief overview of the Individuals with Disabilities Education Act, an explanation of the Performance-Based Monitoring Analysis System and inclusion of the 8.5% special education representation rate indicator or "cap," a discussion of the Houston Chronicle articles that brought to the public's attention the 8.5% indicator, an explanation of the ensuing investigation and findings by the United States Department of Education, and a discussion of the Texas Education Agency's response and corrective action plan.

I. BRIEF OVERVIEW OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT[1]

In 1975, Congress enacted the Education for All Handicapped Children Act to support states and localities in protecting the rights of and meeting the individual needs of students with disabilities and their families. The law was a response to Congressional concern for two groups of children – "the more than 1 million children with disabilities who were excluded from the education system and the children with disabilities who had only limited access to the education system and were therefore denied an appropriate education." United States Department of Education, Office of Special Education Programs, *History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, https://www2.ed.gov/policy/speced/leg/idea/ history.html (last modified July 19, 2007). The law has undergone several updates over the past 40 years. In the 1990 amendments, this landmark law was renamed as the Individuals with Disabilities Education Act (IDEA). The most recent version of the IDEA was passed by Congress in 2004.

The IDEA oversees how states and public agencies provide early intervention, special education, and related services to more than 6.5 million eligible infants, toddlers, children, and youth with disabilities. Children and youth (ages 3-21) receive special education and related services under IDEA – Part B. Infants and toddlers with disabilities (birth-2) and their families receive early intervention services under IDEA – Part C.

The IDEA's stated purposes include:

- Ensuring all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- Ensuring that the rights of children with disabilities and parents of such children are protected;
- Assisting states, localities, educational service agencies, and federal agencies to provide for the education of all children with disabilities;
- Assisting states in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
- Ensuring that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
- Assessing, and ensuring the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. §1400(d).

A. Free Appropriate Public Education

The IDEA makes available a free appropriate public education (FAPE) to eligible children with disabilities in the United States and ensures special education and related services to those children in conformity with an individualized education program that meets the applicable IDEA requirements. For a school district to meet its FAPE obligation under the IDEA, it must offer an individualized education program reasonably calculated to enable to child to make progress appropriate in light of the child's circumstances. *See Endrew F. v. Douglas County School District RE-1*, 580 U.S. __, 137 S. Ct. 988 (2017). The IDEA requires an individualized approach to special education and directs instruction to be specially designed to meet a student's unique needs. *Id.*

[1] This section is not meant to provide a comprehensive review of the Individuals with Disabilities Education Act, but rather to provide the reader with an understanding of some basic concepts within the IDEA that will assist the reader in better understanding the current controversy surrounding special education services in Texas.

The IDEA requires that states have in effect policies and procedures to ensure that FAPE is made available to all children with disabilities residing in the state within the state's mandated age range, which in Texas is ages 3 through 21. 20 U.S.C. §1412(a)(1); 34 C.F.R. §300.101. Local educational agencies (*e.g.*, independent school districts), in providing for the education of children with disabilities within their jurisdiction, must also have policies, procedures, and programs in effect that are consistent with the respective state's policies and procedures as a condition of receiving IDEA funds from the state. 34 C.F.R. §§300.200 - .201.

B. Child Find

Among the many mandates within the IDEA is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction who are in need of special education and related services. 20 U.S.C. §1412(a)(3); 34 CFR §300.111(a)(1)(i). This mandate is referred to as "child find." As a condition of receiving federal assistance under the IDEA, each state must have in effect policies and procedures to ensure that it is meeting its child find obligations. *See id.*

The child find requirements of the IDEA are applicable to all children from birth through age 21, regardless of the severity of the disability, regardless of whether the student is enrolled in a private or public school, and regardless of whether the parent has requested an evaluation. 20 U.S.C. §1412(a)(3); 34 CFR §300.111(a)(1)(i). Furthermore, the child find obligation extends to children who are suspected of being a child with a disability and in need of special education, even though the child is advancing from grade to grade. 34 C.F.R. §300.111(c)(1). A child must meet a two-prong test to meet the IDEA definition of a "child with a disability": (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. 34 C.F.R. §300.8. The IDEA does not limit or restrict the number of children who can be identified as "children with disabilities," provided that the child meets the IDEA's definition of "child with a disability." *See* United States Department of Education, Office of Special Education Programs, *Texas Part B 2017 Monitoring Visit Letter Enclosure*, p. 4,https://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=51539620527 (Jan. 11, 2018) [hereinafter *OSEP Monitoring Letter Enclosure*].

1. Early Intervention

Federal law directs schools to focus on helping all children learn by addressing problems early. *See* 20 U.S.C. §1413(f); 34 C.F.R. §300.226. As a result of the reauthorization of the IDEA in 2004, the new law placed a greater emphasis on the use of pre-referral services to minimize overidentification and prevent unnecessary referrals to special education through the use of coordinated, early intervening services. *See* 20 U.S.C. §1413(f); 34 C.F.R. §300.226. The provisions allow, and sometimes required, local educational agencies to use Part B federal funds to develop and provide coordinated, early intervening services for students not identified as needing special education. *See* 20 U.S.C. §1413(f); 34 C.F.R. §300.226. The rational for use of the funds is based on research showing that the earlier a child's learning problems and difficulties can be addressed, the greater the change the child's problems will be ameliorated or decreased in severity. *See* United States Department of Education, Office of Special Education and Rehabilitative Services, *Memorandum re: Coordinated Early Intervening Services (CEIS) Under Part B of the Individuals with Disabilities Education Act (IDEA)*, p. 2, https://www.isbe.net/Documents/idea_ceis_memo0809.pdf (June 28, 2008). Such services are for students in all grades who have not been identified as needing special education and related services, but need additional academic and behavioral support to succeed in a general education environment. *See id.* This includes services such as professional development for teachers and other school staff to deliver scientifically-based academic and behavioral intervention and providing educational and behavioral evaluations, services, and supports, including scientifically-based literacy instruction. The IDEA further directs States to allow, as a part of their criteria for determining whether a child has a specific learning disability, the use of a process based on the child's response to scientific, research-based intervention. 34 C.F.R. §300.307.

Response to Intervention (RtI) is a general education approach that many schools use as an early intervening service for identifying and helping children who are at risk of not meeting grade-level standards. The basic elements of an RtI approach are: the provision of scientific, research-based instruction and interventions in the general education classroom; monitoring and measurement of the child's progress in response to the interventions; and use of these measures of progress to make educational decisions. Texas Education Agency, *Parent's Guide to the Admission, Review and Dismissal Process*, https://tea.texas.gov/Academics/Special_Student_Populations/Special_Education/Parent_and_Family_Resources/Guidance_on_Admission,_Review,_and_Dismissal_Guide_Production_and_Required_Dissemination/, pp. 1-2 (April 2016). The RtI approach includes a multi-leveled system of interventions in which each level or tier represents an increasingly intense level of services. Interventions provided to a child will be continually adjusted based on progress monitoring until the child is progressing adequately. Children, who do not respond to the initial interventions within a reasonable period of time, as

suggested by research, are referred for more intensive interventions. *Id.*

However, both federal and state entities have stated that a child does not need to advance through each tier of the RtI system before a referral for special education is made. 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. Parents can also request a referral at any time regardless of whether the child is receiving interventions through an RtI system (or some other coordinated, early intervening service). *See id.*; *see also* United States Department of Education, Office of Special Education Programs, *Memorandum to State Directors of Special Education*, https://sites.ed.gov/idea/idea-files/osep-memo-11-01-response-to-intervention-rti-memo/ (January 21, 2011).

C. Evaluations

If a public agency suspects that a child is a child with a disability, it must conduct a full and individual evaluation before the initial provision of special education and related services under the IDEA. 34 C.F.R. §300.301(a). The IDEA defines "evaluation" to mean the procedures used to determine whether a child has a disability and the nature and extent of the child's need for special education and related services. *Id.* §300.301(c)(2). An initial evaluation should answer three questions: (1) does the child have a disability? (2) What is the student's profile as a learner? and (3) Does the child need special education and related services? *See* Region 13 Service Center, *Parent Handbook for Special Education*, p. 23, http://www4.esc13.net/uploads/facilitatingIEPs/docs/SPED_Parent__Handbook.pdf. An evaluation must be conducted in accordance with the procedures and requirements outlined in the IDEA. *See* 34 C.F.R. §300.304-.311.

A parent may also initiate a request for an initial evaluation to determine if his or her child is a child with a disability by submitting a written request to the public agency. *See id.* §300.301(b). In response to a parental request for evaluation, the public agency must review existing data and respond in one of two ways: (1) provide prior written notice of its agreement to evaluate, obtain informed parental consent, and conduct an evaluation of the child within the statutory timeline or (2) determine there is not sufficient data to suspect the child is a child with a disability, deny the request, and provide prior written notice of its decision to deny. *See id.* §§300.300, 300.503.

D. Reporting and Monitoring

States are required to annually provide data to the Secretary of Education and the public on various statistics related to the provision of IDEA services. *See* 20 U.S.C. §1418(a). States are also required to have a general supervision system that ensures that noncompliance with IDEA requirements is identified and corrected in a timely manner. States are required to ensure that the mandates of the IDEA are carried out and that each educational program for children with disabilities administered with the state is under the general supervision of individuals responsible for educational programs for children with disabilities and meets the educational standards of the state's educational agency. *See* 20 U.S.C. §1412(a)(11); 34 C.F.R. §300.149. States are also required to monitor implementation of the IDEA by the local educational agencies (*e.g.*, independent school districts). In exercising its monitoring responsibilities, the state must ensure that when it identifies noncompliance with requirements of IDEA, the noncompliance is corrected as soon as possible, and in no case later than one year after identification of noncompliance. *See* 34 C.F.R. §300.600(e).

At the federal level, the Office of Special Education Programs (OSEP) within the Office of Special Education and Rehabilitative Services (OSERS) in the Department of Education is the principal agency that administers and carries out the IDEA and other programs and activities concerning the education of children with disabilities. OSEP is "dedicated to improving the results for infants, toddlers, children and youth with disabilities ages birth through 21 by providing leadership and financial support to assist states and local districts." United States Department of Education, *About OSEP*, https://www2.ed.gov/about/offices/list/osers/osep/index.html; *see also* 20 U.S.C. §1402. Among its other responsibilities, OSEP is responsible for ensuring that the states are in compliance with the IDEA.

II. TEXAS' PERFORMANCE - BASED MONITORING ANALYSIS SYSTEM

The Performance-Based Monitoring Analysis System (PBMAS) in Texas is a district-level, data-driven monitoring system that reports annually on the performance of school districts and charter schools in selected program areas (*i.e.*, bilingual education/English as a second language, career and technical education, certain federal Title programs, and special education). *See OSEP Monitoring Letter Enclosure* at 2; *see also* Texas Education Agency, *Performance-Based Monitoring Analysis System Manual*, http://tea.texas.gov/pbm/PBMASManuals.aspx (2016) [hereinafter *PBMAS Manual*]. According to the Texas Education Agency (TEA), PBMAS assists school districts in their efforts to improve local performance; reflects critical areas of student performance, program effectiveness, and data integrity; ensures the annual evaluation of all school districts in the state; and is designed to meet statutory requirements. *See PBMAS Manual* at 3. Annually, TEA adopts the PBMAS through the State's rulemaking process.

TEA has used PBMAS since 2004. Based on data collected through PBMAS, TEA assigns each school to a "stage" (or level) of intervention and informs the school of any required actions. TEA assigns a performance level for each indicator to reflect the school's performance relative to the State's established standard. *OSEP Monitoring Letter Enclosure* at 2. From the data, TEA staff produce annual PBMAS district reports. These reports include specific district-level data for each performance indicator. According to TEA, school improvement staff monitors and supports intervention activities within this data-driven and performance-based system using a continuous improvement model. Texas Education Agency, *Performance-Based Monitoring Analysis System (PBMAS) Overview*, https://tea.texas.gov/Student_Testing_and_Accountability/PBMAS/ (last visited June 4, 2018).

Also in 2004, concerned with the high cost of special education services, the Texas House Public Education Committee published an interim report that suggested a "cap" as a means of cost containment for special education. The Committee wrote that, "Another method that states use to control special education costs is to impose a cap either on the number of students who can be identified as eligible for special education services or on the amount of available state dollars." House Committee on Public Education, *Report to the House of Representatives 79th Texas Legislature*, p. 48 (2004). The Committee's recommendation led directly to TEA's adoption of a special education representation indicator in PBMAS to measure the percentage of enrolled children who receive special education and related services under the IDEA. In 2005, TEA assigned a performance level for this indicator. TEA would assign a higher performance level to a school when the percentage of children with disabilities exceeded 8.5% of the total enrolled population. *OSEP Monitoring Letter Enclosure* at 2; *see also PBMAS Manual* at 64. And, in general, the higher the performance level assigned to a school, the lower the school's performance rating.

Ten years after the inception of PBMAS and the special education representation indicator, the advocacy group Disability Rights Texas, joined by the Texas Council on Developmental Disabilities and The Arc of Texas, commented on the special education representation indicator during the rule-making comment period for the 2014 PBMAS. The groups claimed that as a result of the indicator every school district and charter school is expected to identify no more than 8.5% of its enrollment as children with disabilities, and the larger the score the more scrutiny the school was subject to by TEA. *See Texas Education Agency Response to Performance-Based Monitoring Analysis System Rule Comments, 2014*, p. 1, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listeningsessions/index.html#_letter-tea-osers-response. The commenters further stated that they had witnessed an accelerating gap in the trend between the school population and students with disabilities in Texas during the past decade, which appeared inconsistent with Census Bureau and Centers for Disease Control and Prevent data, which did not suggest a drop in the incidences of physical, intellectual, and mental and emotional disabilities in the school-age population. *Id.* The commenters noted that, regardless of their TEA score, schools still had a duty to strictly adhere to the child find requirements of the IDEA. *Id.* TEA responded to the comments disagreeing that every school was expected to identify no more than 8.5% of its enrollment as students with disabilities and stating that 8.5% continued to serve as an appropriate starting point for the range of performance level assignments used in the special education representation indicator. *Id.* TEA acknowledged and agreed that all Texas school districts and charter schools were required to adhere to the requirements of the applicable state and federal laws, including the IDEA. *Id.*

That same year, TEA was contacted by OSEP as follow-up to a conversation OSEP had with Disability Rights Texas about the PBMAS special education representation indicator. TEA provided to OSEP information about how PBMAS was fundamentally consistent with the provisions of the 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. According to TEA, it also shared information with OSEP about the special education representation indicator's performance level ranges and noted that under PBMAS, a district is obligated to identify and provide FAPE to all children with disabilities who require special education services. OSEP representatives indicated the information TEA provided was responsive to their questions. *See Texas Education Agency Response to OSERS Letter*, p. 3, n. 4, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html#letter-tea-osers-response, (Nov. 2, 2016) (hereinafter *TEA November 2016 Response*).

In June 2016, Disability Rights Texas, The Arc of Texas and the Texas Charter Schools Association again provided comments during the rule-making process claiming there was no authority for TEA to include the special education representation indicator in PBMAS and that it was contrary to the requirements of the law. *See Texas Education Agency Response to Performance-Based Monitoring Analysis System Rule Comments, 2016*, pp. 1-3, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html#letter-tea-osers-response. The Arc of Texas commented that the

indicator had a significant impact on the number of students enrolled and that enrollment mirrored the national average at 11.5% in 2006 but quickly dropped to 8.5% after the performance level was implemented, which to The Arc indicated schools were using it as a hard line determinate for the number of students permitted to be enrolled in special education. *Id.* at 3. TEA responded that the special education representation indicator did not set a "target" or suggest to schools that they should only aim for an 8.5% enrollment rate. *See id.* at 1-3. TEA stated that, in additional to a wide range of state and federal authority authorizing the agency to monitor districts' special education programs, the IDEA required states to have a process in place to prevent not only the disproportionate representation of children by race and ethnicity, but also the over-identification of children with disabilities.[2] *Id.* at 1. Therefore, the indicator was consistent with both federal and state law. *See id.* at 1.

III. HOUSTON CHRONICLE SERIES

In September 2016, Houston Chronicle investigative writer Brian Rosenthal published the first in a seven-part series of articles called "Denied." The article brought to the public's attention what Rosenthal described as an 8.5% "cap" implemented by TEA in 2004 through the PBMAS. Rosenthal reported that, after implementation of the cap, the rate of Texas kids receiving special education services went from near the national average of 12 percent and eventually declined to the lowest in the country. *See* Brian Rosenthal, *Denied: How Texas Keeps Tens of Thousands of Children out of Special Education*, Houston Chronicle (Sept. 10, 2016). According to the article, in 2015, for the first time, the rate fell to exactly 8.5%. *See id.* Rosenthal asserted that the significant percentage drop of special education enrollment in the State was a direct result of TEA's implementation of the cap. *See id.* The article contained stories from parents across the state recounting difficult experiences they had in trying to receive special education services for their children and reports from teachers and administrators from across the state that they had been instructed to delay or deny special education to students with disabilities in order to stay below the 8.5% benchmark. *See id.*

Over the following months, the Houston Chronicle published the remaining six parts of the "Denied" series detailing what it described as a systematic denial of special education services to children with disabilities in Texas. According to the *About this Series* webpage, Rosenthal's articles reported that:

> TEA required many school districts above 8.5 percent to file "Corrective Action Plans," describing the steps they would take to get below the magic number. Some required multiple rounds of meetings before an evaluation could take place. Others offered disabled kids cheaper alternatives called Section 504 plans that provided accommodations, such as a seat in the front of the class, but no additional instruction. Still others removed clearly disabled children from special education programs and returned them to regular classrooms.

About this Series, Houston Chronicle, https://www.houstonchronicle.com/denied/about/ (last visited June 5, 2018).

In response to the Houston Chronicle's investigation, TEA officials disagreed that they had kept disabled students out of special education and said that the guideline calling for enrollments of 8.5% was not a cap or a target but an "indicator" of performance by school districts. *Texas Education Agency Responses to Articles' Inaccuracies*, p. 1, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html#letter-tea-osers-response. According to TEA, the special education representation indicator in PBMAS did not indicate what percentage of students *should* get special education services. Rather, it was an indicator designed to report four different ranges that capture the various rates of special education representation among districts (0-8.5%, 8.6%-11.0%, 11.1%-15.0% and 15.1%-100%). *See id.* TEA said state-by-state comparisons were inappropriate and attributed the state's decline in special education enrollment to a number of factors including early interventions, positive behavioral supports, professional development, and a change in the State's student population. *See id.*

IV. DEPARTMENT OF EDUCATION'S INVESTIGATION AND RESPONSE

A. OSEP's October 3, 2016 Letter

The Houston Chronicle articles not only caught the attention of the public but also caught the attention of the United States Department of Education, Office of Special Education Programs. On October 3, 2016, OSEP issued a letter to TEA Commissioner Mike Morath acknowledging the Houston Chronicle report and indicating the information in the report raised "serious questions about Texas's compliance with

[2] 20 U.S.C. §1418(d) requires States to provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the local educational agencies with respect to the identification of children as children with disabilities; the placement in particular educational settings of such children; and the incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

fundamental IDEA requirements." United States Department of Education, Office of Special Education Programs, *Letter to Commissioner Morath*, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html#letter-tea-osers-response (Oct. 3, 2016). OSEP stated, "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." *Id.* at 2. OSEP noted that, according to the article, dozens of teachers and administrators acknowledged delaying or denying special education to students with disabilities in order to stay below the 8.5% benchmark. *Id.*at 1. Moreover, OSEP stated that a TEA official conceded that when a district failed to meet that target, the state would examine the district's policies and procedures to ensure it wasn't over-identifying students. *Id.* at 2.

OSEP required, within 30 days, that TEA provide a written response to the allegations and provide a detailed description of the actions the State would take to ensure compliance. *Id.* OSEP outlined five questions for TEA: (1) Has there been a systematic denial of special education services to children with disabilities?, (2) Does TEA have a cap on the identification of students with disabilities?, (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?, (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?, and (5) Has Texas' identification rate for students with disabilities declined since TEA began using PBMAS to monitor school districts? *See id.*

B. TEA's November 2, 2016 Response

TEA responded to OSEP on November 2, 2016, strongly disagreeing with the statements and overall premise of the Houston Chronicle article. TEA stated it had no specific evidence of a systematic denial of special education services to eligible students with disabilities, and had not received any formal or informal complaints demonstrating that specific school districts had engaged in such an effort to deny eligible students. *See TEA November 2016 Response* at 2. TEA called the article's allegation that the special educator representation indicator was designed to reduce enrollment in order to reduce the amount of money "clearly false," and stated that the sole purpose of the indicator was "to promote proper eligibility determinations so that only children with disabilities who require special education services are placed in special education programs." *See id.*

According to TEA, the purpose of the indicator was entirely consistent with the provisions in the IDEA that make clear 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 the IDEA. *See id.* TEA also explained to OSEP that allegations that TEA issued fines, conducted on-site monitoring visits, and required the hiring of consultants when districts provided special education services to more than 8.5% of their students were entirely false. *See id*. at 5. According to TEA, no district had ever been required to develop a corrective action plan based on its PBMAS special education representation rate. *See id.* at n.12.

TEA went on to address in detail the remainder of OSEP's questions. It also outlined a number of activities it planned to do to clarify inaccuracies or confusion including sending a letter to all school districts to remind them of their duties under child find, evaluating whether any additional information needed to be included in the *Parent's Guide to the Admission, Review, and Dismissal Process*, and evaluating what additional training and technical assistance could be provided to school districts. *See id*. at 1. TEA indicated that it had already been engaging in consistent conversations over the last four years to adjust and eventually eliminate this indicator. *See id*. at 7. TEA said it would expand the amount of technical support available at TEA and would not use the indicator for the purpose of interventions staging moving forward. *See id*.

C. Listening Sessions in December 2016

Despite TEA's response, OSEP decided to conduct a series of listening sessions throughout the State. During the week of December 12, 2017, representatives from OSEP and TEA conducted a series of sessions that provided members of the public an opportunity to comment on the timely identification and evaluation of students with disabilities, as well as the delivery of special education and related services to all eligible children under the IDEA. The listening sessions were held in five locations – Dallas, Houston, El Paso, Edinburg, and Austin. OSEP also set up a blog for interested parties to submit written comments. The blog was open for comments from December 5, 2016 through January 6, 2017. *See* United States Department of Education, Office of Special Education and Rehabilitative Services, *Texas Listening Sessions*, https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html#letter-tea-osers-response (last visited June 4, 2018).

The sessions and the blog attracted significant interest, with hundreds of community members attending the listening sessions and 423 individuals providing comments on the blog. *See* United States Department of Education, Office of Special Education

Programs, *Letter to Commissioner Morath*, pp. 1-2, https://tea.texas.gov/WorkArea/DownloadAsset.aspx?id=51539620527 (Jan. 11, 2018) [hereinafter *OSEP's January 2018 Letter to Morath*]. Through the sessions and the blog, parents and parent advocates described the steps they had to take to obtain services for their children who were struggling to learn. Comments received during the listening sessions and on the blog raised questions about the State's compliance with the child find requirements of the IDEA and the requirements to make available a FAPE to all eligible children with disabilities residing in the State. *Id.*

D. Onsite Visits by OSEP

As a result of the comments and feedback OSEP received during the listening sessions and on its blog, OSEP subsequently performed onsite monitoring visits in February 2017 to twelve independent school districts[3] and 24 schools to collect more information on the issue. OSEP visits were selected based on trends in the percentages of students identified as students with disabilities, comments received during the listening sessions and the blog, and location of the districts (representing 6 out of the 20 regions in Texas). *See* United States Department of Education, Office of Special Education, *Statement on the US Department of Education Monitoring Visit to Texas*, https://www.esc20.net/page/open/47705/0/USDepartmentOf EducationVisitsUpdate.pdf (2017). OSEP staff generally visited two schools at each ISD and conducted interviews with two teams of teachers, a team of administrators, and an interview with district administrators in each ISD. *See OSEP's January 2018 Letter to Morath* at 3.

V. INVESTIGATION PROMPTS LEGISLATIVE CHANGES

In direct response to OSEP's investigation and the concerns raised, the Texas Legislature passed two State laws during the 85th Legislative Session. Texas Senate Bill 160 added a provision to the Education Code that expressly prohibits the adoption or implementation of a performance indicator in any agency monitoring system, including PBMAS, that solely measures a school district's or open-enrollment charter school's aggregated number or percentage of enrolled students who receive special education. *See* Tex. Educ. Code §29.0011. In other words, the law now expressly prohibits TEA from including a percentage "cap" or "target" or "indicator" measuring the number of special education students enrolled in Texas public schools. The bill was passed and signed on May 22, 2017, and went into effect immediately.

Texas Senate Bill 1153, which went into effect June 12, 2017, requires each school district to notify parents if their child receives assistance through the use of intervention strategies. *See* Tex. Educ. Code §26.0081(d). An "intervention strategy" is defined in the law as "a strategy in a multi-tiered system of supports that is above the level of intervention generally used in that system with all children." *Id.* §26.004. RtI is included within this term. The notice parents receive must contain a description of the assistance being provided and any intervention strategies employed, as well as an estimate of how long the child will receive assistance through the use of intervention strategies. *See Id.* §26.0081(d).

VI. OSEP'S INVESTIGATION REPORT

OSEP released an official summary of the results of its investigation in a Letter to Commissioner Morath on January 1, 2018. Through its interviews with TEA officials and ISD and school staff, an extensive document review, the listening sessions with parents, comments on the OSEP blog, and its review of TEA's policies and procedures and guidance documents, OSEP concluded that TEA failed to ensure that its ISD's properly implemented IDEA child find requirements; failed to ensure that FAEP was made available to all eligible children with disabilities residing in the State; and failed to fulfill its general supervisory and monitoring responsibilities as required by the IDEA to ensure that ISDs throughout the state properly implemented the IDEA child find and FAPE requirements. *See OSEP's January 2018 Letter to Morath* at 3-4. OSEP identified a number of practices statewide that contributed to these failures and, thus, to the decline in the number of children with disabilities eligible for special education and related services under the IDEA.

A. Actions Specifically Designed to Decrease the Percentage of Students Identified for Special Education and Related Services

Through its investigation, OSEP learned that some ISDs would analyze trend data based on the 8.5% indicator and, in some cases, included specific actions that the ISD would take to decrease the percentage of children in the ISD identified as eligible for special education and related services under the IDEA. *OSEP Monitoring Letter Enclosure* at 3. According to OSEP, ISDs took these actions even though there was no evidence to indicate that students were improperly referred and found eligible for special education and related services. By taking such actions, staff in certain ISDs indicated there was an expectation that the ISD

[3] OSEP visited Aldine ISD, Austin ISD, Ector County ISD, Everman ISD, Del Valle ISD, Ft. Bend ISD, Harlandale ISD, Houston ISD, Laredo ISD, Leander ISD, North East ISD, and United ISD.

would receive less monitoring, at least on this particular indicator, from TEA. OSEP found that noncompliance with the IDEA child find and FAEP requirements occurred to the extent that ISD efforts to decrease the percentage of children who were eligible for special education and related services under the IDEA caused delays or denials of evaluations. *Id.* OSEP's summary report included examples illustrating ISD's actions to reduce the percentage. *See id.* This caused OSEP to conclude that TEA's use of the 8.5% indicator resulted in a decline in the State's overall special education identification rate from 11.6% in 2004 to 8.6% in 2016.

B. Misunderstanding Regarding the Use of Early Intervention Strategies / RtI

As a result of the voluminous comments and allegations parents raised regarding the use of RtI to delay or deny their children timely evaluations, OSEP asked targeted questions to district and school staff during its investigation about the implementation of RtI. *Id.* at 7. OSEP determined, based on the information collected and analyzed, there was a general understanding among teachers and parents in Texas that completing all tiers of RtI was required prior to a referral for special education, particularly for children with a specific learning disability. *Id.* Staff expressed a lack of clarity as to how long children should be served in RiI and when children move from one tier to another. *Id.* According to OSEP, this lack of clarity contributed to the delay or denial in the identification and evaluation of students suspected of having a disability and needing special education and related services. *Id.* OSEP stated that interview data indicated that staff in many schools and ISDs appeared to view special education under the IDEA as a "last resort," which should be avoided whenever possible to ensure that the child is instructed in the general education environment, even though children with disabilities can and do receive special education and related services in the general education environment. *Id.* at 12.[4]

C. Inconsistent Understandings of When an IDEA Evaluation is Warranted for a Student Served Under Section 504

OSEP determined through staff interviews and parent input that some children in Texas who were suspected of having a disability and needing special education and related services under the IDEA were not referred for an evaluation under the IDEA because they instead received services under Section 504 of the Rehabilitation Act of 1973 (Section 504). *Id.* at 8. OSEP learned that parents, teachers, and other school staff have an inconsistent understanding of when an evaluation under the IDEA may be warranted for a student served under Section 504. *Id.* at 10. While some teachers noted that such decisions are individualized based on the needs of each child, it was unclear what criteria teachers use to inform such decisions. *Id.* Information from parents collected during the listening sessions indicated parents' frustration with not understanding the differences between Section 504 and the IDEA. *Id.* Moreover, data collected also demonstrated that a growing number of children with disabilities in Texas received related aids and services under Section 504 in order to access the general education curriculum. *Id.* at 9. OCR concluded that the data, taken into consideration along with the evidence collected during the monitoring visits, raised concerns about the interactions between Section 504 and the IDEA, and the possibility that Section 504 related aids and services were used to delay or deny the identification and evaluation of children needing IDEA services. *Id.*

D. Confusion Over Identification of Students With Dyslexia

Dyslexia is a condition that could qualify a child as a child with a specific learning disability under the IDEA. During its investigation, parents described situations to OSEP in which students with dyslexia received services under Section 504 through the State's dyslexia program, rather than through special education and related services under the IDEA. *Id.* at 10. While this is a permissible practice, parents described situations where they believed their student needed

[4] To the extent such a misunderstanding does exist, it may partially be explained by a lack of clarity in our own state rules. Texas Administrative Code Chapter 19, section 89.1011 addresses full individual and initial evaluations for special education and provides, "Referral of students for a full individual and initial evaluation for possible special education services must be a part of the district's overall, general education referral or screening system. *Prior to referral*, students experiencing difficulty in the general classroom should be considered for all support services available to all students, such as tutorial; remedial; compensatory; response to evidence-based intervention; and other academic or behavior support services. *If the student continues to experience difficulty in the general classroom after the provision of interventions*, district personnel must refer the student for a full individual and initial evaluation. This referral for a full individual and initial evaluation may be initiated by school personnel, the student's parents or legal guardian, or another person involved in the education or care of the student." 19 T.A.C. § 89.1011(a) (emphasis added). Thus, the State's rules seem to indicates educators should not refer students for special education evaluations until they experience difficulty in general education; are first considered for all supports available; and then, if students continue to experience difficulty, refer students for an evaluation.

special education services, and they requested an evaluation, yet the student was not referred for an evaluation under the IDEA. *Id.* This prompted OSEP to investigate further and ultimately determine that practices for referring children with dyslexia are inconsistent across the State. ISD staff interviews indicated differences and confusion over the evaluation process and when a student with dyslexia should be served under the IDEA or under Section 504. *See id*. at 11-12. For example, some ISD staff indicated that a student with dyslexia must present with a second potentially disabling condition to be considered for eligibility under the IDEA. *See id.*

E. Corrective Action Required

As a result of its findings, OSEP required the State to provide the following:

1. Documentation that the State's system of general supervision requires that each ISD identifies, locates and evaluates all children suspected of having a disability who need special education and related services and makes FAPE available to all eligible children with disabilities.
2. A plan and timeline by which TEA will ensure that each ISD will (i) identify, locate, and evaluate children enrolled in the ISD who should have been referred for an initial evaluation under the IDEA, and (ii) require IEP Teams to consider, on an individual basis, whether additional services are needed for children previously suspected of having a disability who should have been referred for an initial evaluation and were later found eligible for special education and related services under the IDEA, taking into consideration supports and services previously provided to the child.
3. A plan and timeline by which TEA will provide guidance to ISD staff in the State, including all general and special education teachers, necessary to ensure that ISDs (i) ensure that supports provided to struggling learnings in the general education environment through RtI, Section 504, and the State's dyslexia program are not used to delay or deny a child's right to an initial evaluation for special education and related services under the IDEA; (ii) are provided information to share with parents of children suspected of having a disability that describes the differences between RtI, the State dyslexia program, Section 504 and the IDEA, including how and when school staff and parents of children suspected of having a disability may request interventions and/or services under these programs; and (iii) disseminate such information to staff and the parents of children suspected of having a disability enrolled in the ISD's schools.
4. A plan and timeline by which TEA will monitor ISDs' implementation of the IDEA requirements described above when struggling learnings suspected of having a disability and needing special education and related services under the IDEA are receiving services and supports through RtI, Section 504, and the State's dyslexia program.

The same day OSEP released its report, Governor Greg Abbott issued a letter to Commissioner Morath expressing "deep concern" over the monitoring letter and stating, "The past dereliction of duty on the part of many school districts to serve our students and the failure of TEA to hold districts accountable are worthy of criticism." Greg Abbott, *Letter to Commissioner Morath* (Jan. 11, 2018), https://gov.texas.gov/uploads/files/press/ TEA_LETTER_1_11_18.pdf. The Governor ordered TEA to take immediate steps to prepare an initial corrective plan within seven days. He further ordered the agency to share the draft with parent groups, special education advocacy groups, administrators and educators throughout the State in order to solicit meaningful input before the final plan was put into action. *Id.*

Governor Abbott's harsh statement regarding the "past dereliction of duty on the part of many school districts" prompted responses by groups such as the Texas School Alliance and Texas Council of Administrators of Special Education expressing strong disagreement with his description of the controversy. TSA and TCASE responded claiming, "The truth is that caps on special education identification was a cost-saving idea pushed by the State of Texas. School districts have continued to work to identify and serve students needing special education, even when doing so put districts at odds with the State." Terry Faucheux, Moak, Casey & Associates, *TSA Responds to SPED Cap Issues* (Jan. 20, 2018).

VII. TEA CORRECTIVE ACTION PLAN

On January 18, 2018, TEA published its initial corrective action plan regarding the support and delivery of special education services in Texas' public schools. The initial draft addressed the issues identified in OSEP's report. Throughout the month of February 2018, TEA sought feedback on the initial draft of the corrective action plan from a wide variety of stakeholders including agency staff from each of the twenty education service centers, parents, educators, and students currently receiving special education services. *See* Texas Education Agency, *Improving Special Education – Input and Feedback*,

https://tea.texas.gov/TexasSPED/ (last visited June 8, 2018). TEA also developed and posted a survey on its website that members of the public could use to provide feedback on the initial corrective action plan. In total, TEA's outreach efforts included more than 100 focus group meetings, more than 4,000 responses from special education teachers and district administrators to a needs assessment survey, more than 7,000 responses to TEA's online survey regarding the special education strategic action plan draft, and more than 1,000 emails sent to TEA. *See* Texas Education Agency, *Corrective Action Response Submitted to OSEP*, p. 1, https://tea.texas.gov/TexasSPED/ (April 23, 2018).

On April 23, 2018, TEA submitted its final plan as ordered by OSEP. TEA's Special Education Strategic Plan (the "Plan") identifies essential corrective actions in the following areas: state monitoring; identification, evaluation, and placement (including immediate short-term corrective actions and ongoing action steps); training, support, and development; student, family, and community engagement; and networks and structures. The entire Plan can be viewed at https://tea.texas.gov/TexasSPED/.

Some of the significant actions that are included in the Plan include:

- A large-scale statewide special education professional development system, including multiple opportunities for follow-up support for all educators (general education, special education, and others).
- A suite of resources intended to be shared with the parents of children suspected of having a disability to help fully inform them of their rights to a free and appropriate public education and accompany those resources with a large outreach effort.
- For students who are found to have needed services that did not receive them, the school system is responsible for providing compensatory services. TEA has identified $65 million to assist school systems in the effective delivery of services.
- Creation of a Review and Support team with three primary responsibilities: (1) to monitor LEAs related to IDEA and federal and state statutes using a risk assessment index and holistic student-centered practices; (2) to provide targeted technical assistance and support for LEAs related to special education; and (3) to escalate support for LEAs experiencing significant challenges as well as to highlight those LEAs that demonstrate clear success. The Review and Support team will be split into two units. One unit will conduct annual desk reviews of 1/3 of the LEAs in the state and onsite reviews of up to 20% of the LEAs. The other unit will be an escalation unit comprised of special education specialists. This small and flexible unit will be used for LEAs that are significantly out of compliance, and/or for those LEAs that require or request intensive support.
- Further strengthen of TEA staffing and resources devoted to special education, allowing for greater oversight as well as additional on-site support to local school districts.

See The Strategic Plan at https://tea.texas.gov/TexasSPED/; *see also* Texas Education Agency, Agency News, *TEA completes work on comprehensive strategic action plan for special education* (April 24, 2018), http://www.tassp.org/assets/images/Announcements/04.24.18%20SPED%20Plan%20Submission_FINAL.PDF.

The Plan highlights the State's approach to the need for differentiation and meets the needs outlined in the US Department of Education's corrective action requirements. "In the next five years, the State plans to spend $90 million on professional development, $65 million on compensatory services, and nearly $20 million on new monitoring staff. Penny Schwinn, the State's Deputy Commissioner of Academics, said the corrective action plan is only a starting point in overhauling special education in Texas. She said TEA will continue to meet with parents, advocacy groups and students to ensure schools are meeting their academic needs." Alejandra Matos, *In plan to fix special education, Texas Education Agency will spend $212 million*, Houston Chronicle (April 24, 2018).

VIII. WHERE DO WE GO FROM HERE?

As school districts being to digest the requirements of the Plan and prepare for implementing its requirements, many questions remain. The most impactful piece of the Plan on local school districts is the requirement that schools locate students enrolled in the district who should have been referred for an initial evaluation and the requirement that ARD committees consider, on an individual basis, whether compensatory services are needed for children previously suspected of having a disability who were not evaluated in a timely manner and were later found eligible to receive services. In TEA's own words "this is an exceptionally complicated process." Although TEA has identified $65 million to assist in this endeavor, school districts are still greatly concerned about the cost of these efforts. According to the Texas Council of Administrators of Special Education, which represents more than 1,000 administrators, "Directing districts to use existing appropriations for a plan such as this means services will be cut in other areas," Aliyya Swaby, *Texas school*

administrators warn they need money for likely spike in special education, The Texas Tribune (April 1, 2018).

TEA, however, believes that the Plan "has been designed so that it can be sustained with existing appropriations." In response to the sizeable amount of stakeholder feedback related to funding, TEA indicated that it "cannot legally commit additional funds outside of those that are appropriated by the Texas Legislature and the US Congress" and while the feedback may warrant additional action, "any recommendations for action are most appropriately heard by state and federal legislators." *See* The Strategic Plan at https://tea.texas.gov/TexasSPED/, at 3. As we approach the 2019 Legislative Session, we will see if special education services and implementation of the Plan takes priority and whether the Legislature will recognize and address Texas public school districts' need for financial help.