Texas Education Agency

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Michael Williams
Commissioner

Special Education Complaint Investigative Report
September 30, 2015

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Local Educational Agency (LEA): Fort Bend ISD Co-Dist: 079-907
FY: 2014-2015
Complaint: 201510713

To the Individuals Addressed:

The attached report is the written decision of the Texas Education Agency (TEA) regarding the above-referenced complaint.

Allegations, Conclusions, and Reasons for TEA's Decision
TEA investigated the following allegations.

Allegation 1: Did the LEA ensure that it identified, located, and evaluated the student for special education services during the 2014-2015 school year? [34 CFR §300.111]

Allegation 2: Does the LEA have policies or procedures that result in delaying or denying the identification and evaluation of students eligible for special education and related services? [34 CFR §300.111]

The following noncompliance was determined, and TEA required corrective actions of the LEA.

The LEA does not always ensure that it identifies, locates, and evaluates students in accordance with 34 CFR §300.111.

If a party to a complaint believes that TEA's written report includes an error that is material to the determination in the report, the party may submit a signed, written request for reconsideration to TEA by mail, hand-delivery, or facsimile within 15 calendar days of the date of the report. The party's reconsideration request must identify the asserted error and include any documentation to support the claim. The party filing a reconsideration request must forward a copy of the request to the other party at the same time that the request is filed with TEA. The other party may respond to the reconsideration request within five calendar days of the date on which TEA received the request. TEA will consider the reconsideration request and provide a written response to the parties within 45 calendar

days of receipt of the request. The filing of a reconsideration request must not delay a public education agency's implementation of any corrective actions required by TEA.

This concludes TEA's investigation. The attached investigative report is TEA's final written decision. Questions regarding this letter or the attached report may be directed to me at (512) 463-9414.

Respectfully,

Keith Swink

Keith Swink
Division of Federal and State Education Policy

enclosure: satisfaction survey

cc:

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Fort Bend ISD **County-District: 079-907**
Investigative Report **FY: 2014-2015**
September 30, 2015 **Complaint No: 201510713**

This report is the written decision of the Texas Education Agency (TEA) regarding the third-party complaint filed on behalf of multiple students, one of whom attended the Fort Bend Independent School District (ISD), herein referred to as the local educational agency (LEA), during the 2014-2015 school year. The complaint alleges violations of federal and state special education laws and the implementing regulations pertaining to the Individuals with Disabilities Education Act (IDEA), Texas Education Code (TEC), and/or the Texas Administrative Code (TAC).

The two specific allegations and TEA's findings of fact and conclusions, together with the reasons for TEA's final decision, are as follows.

Allegation One
Did the LEA ensure that it identified, located, and evaluated the student for special education services during the 2014-2015 school year? [34 CFR §300.111]

Statement of the Complaint for Allegation One
The complaint, which TEA received on June 1, 2015, alleges that the student has never been evaluated for special education services despite having a documented diagnosis of severe attention deficit hyperactivity disorder (ADHD). The complaint further alleges that the student has failed multiple grades and has repeatedly been assigned to disciplinary alternative education programs (DAEPs). The complaint also alleges that the LEA referred the student to the Fort Bend Truancy Court twice during the 2014-2015 school year.

Allegation Two
Does the LEA have policies or procedures that result in delaying or denying the identification and evaluation of students eligible for special education and related services? [34 CFR §300.111]

Statement of the Complaint for Allegation Two
The complaint alleges that the LEA's current policies purposely delay special education evaluations in violation of IDEA. The complaint claims that LEA training materials suggest that students who are in kindergarten or first grade do not have enough educational opportunity to qualify for services. The complaint also alleges that the LEA instructs its staff to wait for fifth grade students to "age up a year" before referring the students for an initial special education evaluation or for a reevaluation.

Findings of Fact for Allegations One and Two
1. The student has never been evaluated for special education eligibility.
2. The student's health record reflects that she was diagnosed with ADHD in 2010 and has taken medicine for ADHD. This record also indicates that the LEA has not implemented a Section 504 plan based on the student's ADHD diagnosis.
3. The student's disciplinary record reflects that she has exhibited problem behaviors for multiple school years, including inappropriate physical contact, disruptive behavior, insubordination, cursing at teachers and peers, and fighting with peers.
4. During the 2012-2013 school year, the student was in 7th grade and was placed in a DAEP for almost three months for assaulting a student in the gym.
5. The student failed all three portions of the 7th grade state assessment.

6. During the 2013-2014 school year, the student was in 8th grade. The student's disciplinary record reflects persistent misbehavior during the school year. The student was sent to detention and received in-school and out-of-school suspensions for various types of misconduct, including disruptive behavior in the classroom and the cafeteria, hitting and slapping students in the face, hitting a student with her boot, and using profanity toward teachers and students. The student also began having attendance problems.
7. On January 22, 2014, the LEA convened a Section 504 committee meeting to determine whether the student's persistent misconduct was a manifestation of her disability. The student's guardian participated in the meeting by phone. Notes from the meeting reflect that the committee determined that the student's behavior did not have a direct or substantial relationship to her ADHD and was not a result of the LEA's failure to implement her Section 504 plan. The notes, however, do not explain the reasons for the committee's determinations. The committee recommended a 45-day DAEP placement for the student.
8. The LEA did not provide a copy of the student's Section 504 plan for the 2013-2014 school year or any records reflecting the accommodations or interventions the student received for her ADHD.
9. The student's DAEP placement began on February 6, 2014.
10. The student's discipline record reflects that the student engaged in misconduct while at the DAEP. She received out-of-school suspensions seven times for conduct such as attempting to provoke fights with students, hitting a student, using profanity, and being disruptive in class.
11. Before the student was assigned to the DAEP, she was taking seven classes. At the end of the first semester, she was failing two classes, barely passing three classes, and had a 90 average in physical education (PE) and a 76 average in literacy.
12. The student had five classes at the DAEP, and her grades were similar to the grades she received at the middle school campus the first semester.
13. The student's academic record for the 2013-2014 school year reflects that the student failed English language arts, barely passed math, science, and history, and that she passed PE.
14. The student failed all five portions of the 8th grade state assessment. Under state law, she was required to retake the math and reading portions of the assessment.[1] She ultimately passed the math portion, but did not pass the reading portion.
15. Because the student failed the reading portion of the 8th grade state assessment, she was not eligible for promotion to the 9th grade. The student presumably was promoted to 9th grade on the basis of a grade placement committee decision.[2]
16. At the beginning of the 2014-2015 school year, the student enrolled in a different school district. The student withdrew from that district on October 31, 2014. A withdrawal form includes the classes that the student was taking and some of her grades. The student had failing grades in science, art, and geography and passing grades in English I and team sports. The withdrawal form does not include grades for Spanish and Algebra I.

[1]TEX. EDUC. CODE §28.0211(b).
[2]TEX. EDUC. CODE §28.0211(a)(2), (c) and (e).

17. The student reenrolled in the LEA on November 11, 2014. The LEA has four nine-week grading periods. The student began attending a high school in the LEA approximately three weeks into the second grading period.
18. The student was pregnant at the time of her reenrollment, but the record reflects that the LEA was not advised of her pregnancy until several months later. The student suspended taking medicine for her ADHD when she was pregnant.
19. Records from the 2014-2015 school year reflect that the LEA identified the student as a "student at risk of dropping out of school." The reasons for this designation were the student's: (1) placement in a DAEP in 7th grade; (2) failure to maintain an average of 70 in two or more courses; (3) failure to pass the 7th grade state assessment; and (4) failure to advance to the next grade level in 4th grade.[3]
20. A record that the LEA provided to the complainants reflects that an individual accommodation plan (IAP) was developed for the student on September 15, 2011, and that the student did not have an IAP during the 2014-2015 school year. This record also reflects that the student's ADHD did not affect a major life activity.
21. The student's progress report for the second grading period reflects that she had a 95 average in PE, a 70 average in geography, and was failing her other five classes.
22. Not long after reenrolling in the LEA, the student began having attendance problems. The student was caught skipping classes, was tardy to some classes, and had both excused and unexcused absences.
23. On December 9, 2014, the LEA sent the student's guardian a "warning letter" stating that the student had three unexcused absences. On December 16, 2014, the LEA sent the student's guardian a second letter stating that the student and a parent or guardian were required to attend a Truancy Diversion Program meeting on February 11, 2015, because the student had three additional unexcused absences.
24. The LEA filed a truancy complaint against the student on December 16, 2014.
25. The second grading period (and the first semester) ended on December 19, 2014. During this grading period, the student received failing grades in all classes except art. The student's absences from each class varied from 7 to 12. Some of the absences were excused. The student was tardy to several of her classes from 1 to 3 times.
26. On January 26, 2015, the LEA filed a second truancy complaint against the student based on 10 more unexcused absences.
27. The student's progress report for the third grading period reflects that the student had a 90 average in art, an 81 average in English I, and was failing all of her other classes.
28. The student's school health record contains a February 9, 2015 entry reflecting that the student was pregnant and went to the school clinic because she felt lightheaded. The student was given a medical referral. The referral was returned and stated that the student should eat small frequent meals and stay hydrated.
29. The LEA filed a third truancy complaint against the student on March 3, 2015, as a result of the student's accumulation of 10 more unexcused absences.
30. On March 10, 2015, the student's doctor recommended homebound instruction for the student due to frequent nausea.
31. The third grading period ended on March 20, 2015. During this grading period, the student received failing grades in all of her classes. The student's absences from each class varied. The most she was absent from a class was 43 times, and the least she was absent from a class was 22 times. Some of the absences were excused. The student was also tardy to some of her classes from 2 to 13 times.

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[3]This record has not been updated to reflect that the student was placed in a DAEP in 8th grade and failed to pass four out of five portions of the 8th grade state assessment.

32. The student's disciplinary record for the 2014-2015 school year reflects three referrals for skipping classes, one referral for walking out of ISS, and one referral for excessive tardies. The entry for one of the referrals includes a comment stating, "never wants to listen when asked to return to class and is always disrespectful."
33. The student began receiving homebound services on March 23, 2015.
34. On March 27, 2015, the LEA notified the student's guardian of an upcoming Attendance Intervention Team meeting to address the student's truancy. However, the notification does not include the date or time of the meeting. The student was on bedrest and receiving homebound instruction when the notice was sent.
35. The LEA filed a fourth truancy complaint against the student on March 30, 2015.
36. The student gave birth on April 28, 2015.
37. The student continued to receive homebound services through the end of the 2014-2015 school year. The student's grades improved in most subject areas while she received homebound instruction. During the fourth grading period, the student received passing grades in all classes but Algebra I.
38. The student's grade report for the 2014-2015 school year reflects that the student passed art, just barely passed English I, reading, and geography, and failed Algebra I and Integrated Physics and Chemistry. The student failed a PE class during the first semester and just barely passed a PE class during the second semester.
39. The evidence in the record does not reflect whether the student took the English I and Algebra I end-of-course assessments during the 2014-2015 school year.
40. The LEA states in its response to the complaint that it provided the student with "support services, which included, but are not limited to, a 504 Plan and related evaluations, conferences, and services such as a behavior intervention plan [from the Section 504 manifestation determination] and homebound services." However, the LEA did not provide a copy of a Section 504 plan or a BIP, and the record reflects that homebound services were provided to the student based on her pregnancy.
41. The LEA did not provide any documentation reflecting that any academic or behavioral interventions were implemented for the student under the LEA's response to intervention (RtI) procedures during the 2014-2015 school year.
42. The only documentation that the LEA provided regarding truancy prevention measures are the letters notifying the student's guardian of the student's unexcused absences and of the requirement to attend meetings.
43. The record does not reflect that the student's guardian requested that the LEA evaluate the student for special education eligibility during the 2014-2015 school year.
44. There is no evidence in the record reflecting that the student's doctors advised the LEA that the student needed special education services.
45. The LEA provided copies of its most recent Response to Intervention (RtI) training materials and its policies and procedures regarding students who have learning difficulties or who need special education services. These policies and procedures do not reflect any practices that would delay referrals for special education evaluations in violation of IDEA.
46. The November 2013 training materials referenced in the complaint contain a page that reads:

    - Be careful about ESL referrals
    - Got one through last year—4th grader and finally they ruled out language problem.

- Was still a beginner, even though the family never spoke to any of the children in a foreign language. But they wrote it on the HLS, so...
- Hard to qualify K/1 students.
- Not enough access to education opportunities.

47. The November 2013 training materials also contain a page that reads:

- What to do about students who are flat liners—IQ of 70, 2-4 years behind in their DRA level or can't add and subtract and they are in 5th grade.
- Give them everything you can in Tier III.
- Let them age up at least a year.
- Retest before they head to Middle School.
- Pass everything on to Middle School where the adaptive behavior is done by the teacher, not the parent!!
- Give all your paperwork on these kinds of kids to the Middle School counselor and beg them to retest—often we have them qualify!!

Conclusions and Reasons for TEA's Final Decision for Allegations One and Two
Authority: 34 CFR §300.111

34 CFR §300.111 places an affirmative duty on the State and LEAs to have policies and procedures to ensure that all students with disabilities residing in the State and who are in need of special education and related services, are identified, located, and evaluated. This "child find" provision applies to, among others, students who are suspected of being a student with a disability and in need of special education, even though they are advancing from grade to grade. LEAs are responsible for conducting child find and identifying all IDEA-eligible students that reside in their jurisdiction. Because the child find duty is an affirmative one, a parent is not required to request that an LEA evaluate a student.[4] The child find duty is triggered when the LEA has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability.[5] The threshold for "suspicion" is relatively low. The inquiry is not whether the student actually qualifies for special education services, but rather, whether the student should be referred for an evaluation.[6]

The student who is the subject of this complaint has ADHD, a history of behavioral problems, and a history of not meeting state academic standards. The record contains little information regarding the student's ADHD. The record reflects that the student was diagnosed with ADHD in 2010 and that she has taken medicine for her ADHD, but lacks

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[4]*See C.C. Jr. v. Beaumont Indep. Sch. Dist.*, 65 IDELR 109 (E.D. Tex. 2015, unpublished).
[5]*See El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008), *vacated in part on other grounds*, 591 F.3d 417 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3467(citing *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001)).
[6]*See Cari Rae S.*, 158 F. Supp. 2d at 1195; *Orange Unified Sch. Dist. v. C.K.*, 2012 U.S. Dist. LEXIS 92423 59 IDELR 74 (C.D. Cal. June 4, 2012).

information regarding how the student's ADHD manifests itself. Though the LEA claims in its response to the complaint that the student had a Section 504 plan and a BIP during the 2014-2015 school year, it did not provide copies of the plans, and the record contains conflicting information regarding whether the student received any accommodations or interventions based on her ADHD.

When the student reenrolled in the LEA in November of 2014, the LEA was aware of the student's ADHD, history of behavioral problems, and academic concerns. The LEA identified the student as a student who was at risk of dropping out of school based on some of her disciplinary issues and academic deficiencies. Within the first month of the student's reenrollment, she was exhibiting behavioral problems. She was caught skipping a class and was sent to ISS. She then walked out of ISS without permission and was suspended for three days. Shortly thereafter, she was again caught skipping classes and was disrespectful to a school staff member, which resulted in her being suspended again. The first progress report the student received reflects that the student was also struggling academically. She had failing grades in five out of seven classes. By the end of the first semester on December 19, 2014, the student had failing grades in all classes except art.

The LEA asserts that it had no duty to evaluate the student because there was no indication of an educational need for special education due to her ADHD and that the student made meaningful academic progress with her accommodations. The LEA further asserts that the student's low academic performance was attributable to her attendance issues and her eventual pregnancy, not to her ADHD or lack of special education services. The LEA's arguments are not persuasive for several reasons. First, the record contains no information regarding how the student's ADHD affects her. While ADHD is not a specific disabling condition under the IDEA, a student with ADHD may be eligible under one of the specific disability categories by reason of his or her ADHD. ADHD can make it difficult for individuals to maintain focus or control their impulses. It can also involve difficulty with organizational skills, maintaining focus across settings, and difficulty controlling impulses across settings. It can manifest in behavior problems, including disruption in class and aggression. Therefore, it is possible that the student requires special education services based on her ADHD.

Second, the record does not demonstrate that the student in fact received accommodations for her ADHD. If she did, it appears that the accommodations were not very effective. In addition to having a history of behavioral problems, the student has a history of not meeting grade-level standards. She failed all portions of the 7th grade and the 8th grade state assessments. While she was ultimately able to pass the math portion of the 8th grade state assessment, she was never able to pass the reading portion. In 8th grade, the student failed English language arts, and barely passed math, science, and history. The student was not eligible for promotion based on her failure to pass the reading portion of the 8th grade state assessment and presumably advanced to 9th grade as the result of a grade placement committee decision. The student had many failing grades throughout her 9th grade year and ended up failing two core courses and just barely passing three others.

Third, the student's history of academic deficiencies makes it difficult to attribute her low performance during the 2014-2015 school year entirely to her attendance problems and pregnancy. Chronic absenteeism can involve many factors, including an undiagnosed disability, emotional disturbance, academic difficulties, bullying, home problems, social

maladjustment, drug problems, economic issues, and even boredom. The record reflects that the LEA has done little to determine the underlying reasons for the student's attendance problems. During the 2014-2015 school year, some of the student's absences were likely due to pregnancy-related illness. However, given that the student skipped classes and had excessive unexcused absences during the previous school year, when she was not pregnant, there are likely other factors that contributed to her attendance issues. There is no evidence reflecting that a Section 504 committee met to discuss whether the student's attendance problems were related to her ADHD or an undiagnosed disability, that any teachers implemented any RtI interventions to address the student's truant behavior, or that school staff investigated the reasons for the student's attendance problems. The student's attendance issues appear to have been addressed solely through disciplinary referrals and truancy procedures. While the LEA argues that the student's improved grades when she received homebound instruction demonstrate that her academic struggles were related to her absences, it is also very possible that the student's progress was the result of having one-on-one instruction in a setting with few distractions.

Based on the evidence in the record, TEA concludes that the LEA had reason to suspect that the student had a disability and might need special education services to address that disability. The student had a long-standing ADHD diagnosis and documented behavioral issues. Even if the LEA implemented accommodations and interventions to address the student's ADHD, the student's history of behavioral problems and poor academic performance indicate that those interventions have been ineffective. The student's ADHD, failing grades, behavioral problems, and worsening attendance problems should have prompted the LEA to refer the student for a special education evaluation after the first semester of the 2014-2015 school year.[7] Therefore, Allegation One is substantiated.

With regard to Allegation Two, TEA concludes that the LEA's policies, procedures, and training materials do not reflect that the LEA purposely delays special education evaluations in violation of IDEA. The complainants' allegation that the LEA's training materials suggest that students in kindergarten or first grade do not have enough educational opportunity to qualify for special education services is not entirely accurate. The page of the training materials referred to in the complaint addresses special education referrals for students who are English language learners. The point being made in the training is that teachers must be cautious when initiating referrals for these students because limited English proficiency must be ruled out as a factor when determining a student's eligibility for special education. The complainants' allegation that the LEA instructs staff to wait for fifth grade students to age up a year before referring them for a special education evaluation is also not entirely accurate. The page of the training materials referred to in the complaint addresses students who have previously been found ineligible for special education but continue to struggle academically. The materials state that RtI interventions should be continued and the students should be "retested before they head to middle school." The materials also advise teachers to "[g]ive all your paperwork on these kinds of kids to the Middle School counselor and beg them to retest."

Allegation Two is not substantiated.

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[7] *See M.M. and I.F. v. New York City Dep't of Educ.*, 63 IDELR 156 (S.D.N.Y. 2014)(The student's prolonged absence, coupled with her failure to earn enough credits to move on to the next grade, should have prompted the LEA to find her eligible for special education.).

Identified Noncompliance
Based on the evidence and current state and federal requirements, the following noncompliance was cited.

The LEA does not always ensure that it identifies, locates, and evaluates students in accordance with 34 CFR §300.111.

For the student subject to this complaint:
Within 10 calendar days of the date of this report, the LEA must provide the student's parent/guardian with prior written notice of its proposal to evaluate the student, a copy of the *Notice of Procedural Safeguards*, and a consent for evaluation form.

If the parent/guardian provides the LEA with written consent to evaluate the student, the LEA must complete an expedited full individual and initial evaluation that includes a psychological evaluation. The evaluation must include the assessments and other measures needed for determining eligibility under categories including, but not limited to, other health impairment (OHI) and emotional disturbance (ED). The LEA must provide the parent/guardian with a written report of the evaluation as soon as possible and not later than 30 calendar days following the date on which the LEA received consent, unless the parent/guardian agrees to a different timeline.

The LEA and must convene an admission, review, and dismissal (ARD) committee meeting to review the evaluation and to determine if the student is eligible for special education and related services as soon as possible and no later than 10 school days from the date of the completion of the evaluation report, unless the parent/guardian agrees to a different timeline.

If the ARD committee determines that the student is eligible for special education and related services, the ARD committee must develop an individualized education program (IEP) for the student for the 2015-2016 school year. If determined eligible, the student is also entitled to appropriate relief to compensate for the LEA's failure to identify the student during the spring semester of the 2014-2015 school year. One-on-one educational tutoring must be made available to the student through the end of the 2015-2016 school year in an amount and frequency to be determined by the ARD committee, considering the student's schedule and tolerance for additional services and the fact that the student was denied special education and related services for approximately five months during the last school year and did not have an IEP in place at the beginning of this school year. The tutoring can be provided during or after school, but it must be in addition to the student's educational program. The ARD committee must determine the appropriate credentials for the tutor. The ARD committee must also consider whether other types of compensatory education, compensatory counseling, or compensatory related services must be made available to the student.

For all students with disabilities in the LEA:
The LEA administration must review the district and campus child find policies, operating procedures, and guidelines to determine whether revisions are needed.

If the LEA revises its policies, operating procedures, and guidelines, it must provide written notice of the revisions to LEA staff who may be affected by the revisions.

The LEA must provide focused technical assistance to all special education, general education, and administrative personnel on the campus subject to the complaint to address the noncompliance cited in this report. Specifically, personnel must receive training on identifying when a student's behavioral issues, academic problems, and excessive absenteeism can trigger child find obligations.

By **October 30, 2015**, the LEA must provide TEA with a proposed timeline for completing the corrective actions or must provide TEA with the following documentation to TEA to show completion of the corrective actions.

- A copy of the prior written notice given to the parent, a copy of the written consent signed by the parent giving the LEA permission to evaluate the student, and copy of the student's initial evaluation report.
- A copy of the ARD committee report documenting the eligibility and compensatory services determination.
- A copy of service logs or other documentation showing the implementation of the compensatory services.
- A copy of any revised portions of policies, operating procedures, and guidelines.
- A copy of any relevant memoranda and/or guidance letters issued to staff.
- A copy of the training agenda describing the information presented in the staff development and a listing of the individuals, indicating their positions, who participated in the staff development.

Further intervention by TEA may result if the LEA does not provide the requested information or respond within the required timeline. In accordance with 34 CFR §300.600(e), TEA must ensure that the LEA corrects identified noncompliance "as soon as possible, and in no case later than one year after the State's identification of the noncompliance." Therefore, all required corrective actions must be completed no later than **September 30, 2016**. Failure to correct the cited noncompliance by this date will result in an additional finding of noncompliance under 34 CFR §300.600(e) and may result in additional sanctions against the LEA as outlined in 19 TAC §89.1076.

This concludes TEA's investigation of the complaint.