



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

September 23, 2009

David Anderson, Esq.
General Counsel
Texas Education Agency 1701
North Congress Avenue Austin,
Texas 78701-1494

Dear Mr. Anderson:

This letter is in response to your April 9, 2009 letter to me, as Acting Director of the Office of Special Education Programs (OSEP). Your letter requested guidance regarding whether Part B of the Individuals with Disabilities Education Act (IDEA) requires students with disabilities who are incarcerated in certain correctional facilities to participate in Statewide assessments. Your letter seeks guidance regarding two specific circumstances. We summarize and address each of these below.

1. Does section 612(a)(16) and 34 CFR §300.160 require that IDEA-eligible youth with disabilities who are adjudicated and committed to the Texas Youth Commission (TYC) participate in statewide assessments?

Yes. Pursuant to 34 CFR §300.2(b)(1)(iv), the requirements of IDEA Part B apply to all political subdivisions of the State that are involved in the education of children with disabilities, including State and local juvenile and adult correctional facilities. As stipulated under 34 CFR §300.160(a), "[a] State must ensure that all children with disabilities are included in all general State and district-wide assessment programs, including assessments described under section

1111 of ESEA, 20 USC 6311, with appropriate accommodations and alternate assessments, if necessary, as indicated in their respective LEPs [individualized education programs]." See also Section 612(a)(1)(6)(A). As you note in your letter, OSEP has found at least one State out of compliance with the requirements of Part B for not ensuring that students with disabilities in juvenile correctional facilities participate in statewide assessments.

Part B of the IDEA and its implementing regulations have consistently required that a free appropriate public education (FAPE) be available to all eligible children with disabilities, including eligible youth with disabilities in correctional facilities. This requirement has been included in the regulations under the IDEA, and its predecessor, the Education of the Handicapped Act, since 1975. Federal courts have been enforcing this requirement since 1981. See, *Green v Johnson*, 513 F.Supp. 965, 976 (D. Mass. 1981); see also *Donnell C. v. Ill. State Bd. of Educ.*, 829 F.Supp. 1016, 1020 (N.D.Ill. 1993); and *Alexander S. v. Boyd*, 876 F.Supp. 773, 800-801 (D.S.C. 1995). The 1997 Amendments to the IDEA first provided an exception to the FAPE requirement to include all students with disabilities in statewide and district-wide

assessments. Section 614(d)(6) (1997). Currently section 614(d)(7) and 34 CFR §300.324(d) provide that for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons, the requirement to be included in statewide and district-wide assessments does not apply. Under the first scenario you describe, this exception does not apply because juveniles housed in TYC facilities are neither convicted as adults nor incarcerated in adult prisons.

According to its webpage, for fiscal years 2004 to 2008, the TYC reported an average of 2357 new commitments per year. For 2008, 36% of new commitments, or 570, were identified as eligible for special education services. For Federal fiscal years 2004 to 2007, Texas reported to the Department an average of 1678 children and youth with disabilities ages 6 to 21 whose educational setting was in a correctional facility.

Your letter references those juveniles who "remain in the custody of the TYC and attend schools operated by TYC until they are discharged from TYC or released under supervision." You also indicate that "the TYC determined that it would only administer State assessments when they are determined to be of direct benefit to individual students." Your letter does not define direct benefit. However, it appears that TYC is limiting its definition of direct benefit to youth who need to pass the "Exit exams" in order to receive their diploma. For all other students, it appears that TYC has predetermined that it will not administer "lengthy group assessments" such as the statewide assessment. The failure to include such youth with disabilities in the statewide assessment is inconsistent with the requirements of Part I-3.

2. Are youth with disabilities who receive "determinate sentencing" under Texas Law and are court-ordered to adult prisons before their 19th birthday exempt from participation in statewide assessments?

Whether or not these youth are to be included in the statewide assessment will depend on whether the procedures by which they are court-ordered to an adult prison constitutes a conviction as an adult under State law. As noted above, 34 CFR §300.324(d) provides for an exception to the assessment requirements for children with disabilities who are convicted as adults under State law and incarcerated in adult prisons. This exception includes the requirements set out in section 612(a)(16) of the Act and 34 CFR §300.320(a)(6). If a youth with a disability is incarcerated, but is not convicted as an adult under State law and is not incarcerated in an adult prison, the requirements of Part 13 apply. Part B and its implementing regulations do not define the term "convicted as adults." Rather, the statute and regulation specifically reference State law as the controlling standard for what constitutes a conviction as an adult. In general, the Department will defer to a reasonable interpretation of State law.

You write that the law allows juvenile offenders committed to TYC to be referred to the juvenile court for judicial approval of the youth's transfer to an adult prison overseen by the Texas Department of Criminal Justice. When transferred to an adult prison, the offender is treated as an adult inmate and is subject to adult parole laws. Juvenile offenders transferred to adult prisons attend schools operated at the facilities operated by a local educational agency (LEA). The LEA develops IEPs for eligible students, but does not administer statewide assessments to those students. Therefore, to the extent that under State law, the court-ordered transfer to an adult prison constitutes a conviction as an adult, the exception in 34 CFR §300.324(d) would apply.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have questions, please do not hesitate to contact Marion Crayton at 202-245-6474 or by email at Marion.Crayton@ed.gov, or Deborah Morrow at 202-245-7456 or by email at Deborah.Morrow@ed.gov.

Sincerely,

A handwritten signature in black ink that reads "Patricia J. Guard". The signature is written in a cursive style.

Patricia J. Guard
Acting Director
Office of Special Education Programs

cc: Gene Lenz
Deputy Associate Commissioner Kathy
Clayton
Division of IDEA Coordination