UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

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TO : Chief State School Officers
Lead Agency Directors

FROM : William W. Knudsen
Acting Director
Office of Special Education Programs

SUBJECT : Reporting on Correction of Noncompliance in the Annual Performance Report Required under Sections 616 and 642 of the Individuals with Disabilities Education Act.

Introduction

Pursuant to sections 616(d) and 642 of the Individuals with Disabilities Education Act (IDEA), the Department reviews each State's Annual Performance Report (APR) and, based on data provided in the State's APR, information obtained through monitoring visits, including verification visits, and any other public information, determines if the State: Meets Requirements, Needs Assistance, Needs Intervention, or Needs Substantial Intervention. In making determinations in 2007 and 2008, the Office of Special Education Programs (OSEP) considered, among other factors, whether a State demonstrated substantial compliance on all compliance indicators either through reporting a very high level of performance (generally 95% or better) or correction of noncompliance.[1]

The purpose of this memorandum is twofold. First, the memorandum reiterates the steps a State must take in order to report that the previously identified noncompliance has been corrected. Second, the memorandum describes how we will factor evidence of correction into our analysis of whether the State has demonstrated substantial compliance for purposes of determinations under sections 616 and 642 of the IDEA (beginning with the Department's 2010 determinations based on a review of the FFY 2008 APRs). This memorandum also addresses concerns

[1] For Indicators B-15 and C-9, which measure timely correction of noncompliance, the only way for States to demonstrate substantial compliance is by demonstrating timely correction.

identified in our review of States' FFY 2005 and FFY 2006 APRs about identification and correction of noncompliance and low performance in compliance areas.

Issue 1 –Demonstrating Correction

As noted in OSEP's prior monitoring reports and verification visit letters, in order to demonstrate that previously identified noncompliance has been corrected, a State must:

(1) Account for all instances of noncompliance, including noncompliance identified: (a) through the State's on-site monitoring system or other monitoring procedures such as self-assessment; (b) through the review of data collected by the State, including compliance data collected through a State data system; and (c) by the Department;

(2) Identify where (in what local educational agencies (LEAs) or early intervention services (EIS) programs) noncompliance occurred, the percentage level of noncompliance in each of those sites, and the root cause(s) of the noncompliance;[2]

(3) If needed, change, or require each LEA or EIS program to change, policies, procedures and/or practices that contributed to or resulted in noncompliance; and

(4) Determine, in each LEA or EIS program with identified noncompliance, that the LEA or EIS program is correctly implementing the specific regulatory requirement(s). This must be based on the State's review of updated data such as data from subsequent on-site monitoring or data collected through a State data system.

If an LEA or EIS program did not correct identified noncompliance in a timely manner (within one year from identification), the State must report on whether the noncompliance was subsequently corrected. Further, if an LEA or EIS program is not yet correctly implementing the statutory/regulatory requirement(s), the State must explain what the State has done to identify the cause(s) of continuing noncompliance, and what the State is doing about the continued lack of compliance including, as appropriate, enforcement actions taken against any LEA or EIS program that continues to show noncompliance.

Regardless of the specific level of noncompliance, if a State finds noncompliance in an LEA or EIS program, the State must notify the LEA or EIS program in writing of the noncompliance, and of the requirement that the noncompliance be corrected as soon as possible, but in no case more than one year from identification (i.e., the date on which the State provided written notification to the LEA or EIS program of the noncompliance). In determining the steps that the LEA or EIS program must take to correct the noncompliance and to document such correction, the State may consider a variety of factors, including whether the noncompliance: (1) was extensive or found in only a small percentage of files; (2) resulted in the denial of a basic right under the IDEA (e.g., an extended delay in an initial evaluation with a corresponding delay in the child's receipt of a free appropriate public education or early intervention services, or a failure to provide services in accordance with the individualized education program or individualized family service plan); and (3) represents an isolated incident in the LEA or EIS program, or reflects a long-standing failure to meet the IDEA requirements. Thus, while a State may

[2] Please note that while we are not requesting that States provide, in the APR, lists of specific LEAs or EIS programs found out of compliance, we may review documentation of correction that the State required of the LEA or EIS program when we conduct a verification visit or other monitoring activity in a State.

determine the specific nature of the required corrective action, the State must ensure that any noncompliance is corrected as soon as possible, but in no case more than one year from identification.

For any noncompliance concerning a child-specific requirement that is not subject to a specific timeline requirement (State Performance Plan (SPP)/APR Indicators B-9, B-10, B-13, C-8A and C-8B), in addition to the steps above, the State also must ensure that the LEA or EIS program has corrected each individual case of noncompliance, unless the child is no longer within the jurisdiction of the LEA or EIS program. Similarly, for any noncompliance concerning a child-specific timeline requirement (SPP/APR Indicators B-11, B-12, C-1, C-7, and C-8C), in addition to the steps enumerated above, the State must ensure that the LEA or EIS program has completed the required action (e.g., the evaluation or initiation of services), though late, unless the child is no longer within the jurisdiction of the LEA or EIS program. In ensuring that each individual case of noncompliance has been corrected, the State does not need to review each child's record in the LEAs or EIS programs where the noncompliance occurred, but rather may review a reasonable sample of the previously noncompliant files to verify that the noncompliance was corrected.

Issue 2 – Factoring Correction into Evaluation of Substantial Compliance

For purposes of the Department's IDEA section 616 determinations issued since June 2007, we considered a State to be in substantial compliance relative to a compliance indicator if the State's data indicate a very high level of compliance (generally 95% or above), or if the State nonetheless demonstrated correction of identified noncompliance related to that indicator. In the interest of fairness to all States, we will evaluate whether a State demonstrated correction of identified noncompliance related to an indicator when we make our 2009 determinations based on the FFY 2007 APRs, and will use the same approach we used in 2007 and 2008. However, some States are reporting very low levels of compliance year after year, while also reporting that they have corrected previously identified noncompliance. This concerns us because it indicates that systemic correction of noncompliance did not occur. Thus, in the interest of improving LEA and EIS program performance and ultimately improving results for infants, toddlers, children and youth with disabilities, beginning with our 2010 determinations:

(1) We will no longer consider a State to be in substantial compliance relative to a compliance indicator based on evidence of correction of the previous year's noncompliance if the State's current year data for that indicator reflect a very low level of compliance (generally 75% or below); and

(2) We will credit a State with correction relative to a child-specific compliance indicator only if the State confirms that it has addressed each instance of noncompliance identified in the data for an indicator that was reported in the previous year's APR, as well as any noncompliance identified by the Department more than one year previously. The State must specifically report for each compliance indicator whether it has corrected all of the noncompliance identified in its data for that indicator in the prior year's APR as well as that identified by the Department more than one year previously.

For example --

- Reporting correction of noncompliance identified in on-site monitoring findings alone will not be sufficient to demonstrate correction if the data reported in a State's prior year's APR showing noncompliance were collected through the State's data system, and the monitoring findings do not include all of the instances of noncompliance identified through the prior year's data.
- In order to report correction of noncompliance identified in data based on a statewide sample, the State would need to track the noncompliance identified in the sample data reported in its prior year's APR back to the specific LEAs or EIS programs with noncompliance and report correction for those LEAs or EIS programs.

In other words, a State's demonstration of correction needs to be as broad in scope as the noncompliance identified in the prior year's data.

We hope that you find the information in this memorandum helpful in collecting and reporting data for your future SPP/APR submissions. OSEP is committed to supporting your efforts to improve results for infants, toddlers, children and youth with disabilities and looks forward to working with your State over the next year. If you have any questions, would like to discuss this further, or would like to request technical assistance, please do not hesitate to call your OSEP State Contact.

cc: Part B State Directors

Part C Coordinators