



State of New Jersey

DEPARTMENT OF HEALTH AND SENIOR SERVICES

DIVISION OF FAMILY HEALTH SERVICES

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July 6, 2011

Alexa Posny, Assistant Secretary
Office of Special Education and Rehabilitative Services
United States Department of Education
400 Maryland Ave. S.W.
Washington, DC 20202-2600

Dear Assistant Secretary Posny:

This letter constitutes a formal request by the New Jersey Department of Health and Senior Services (DHSS) to review the U.S. Department of Education's June 20, 2011 determination that the DHSS "needs assistance" in meeting the requirements of Part C of the Individuals with Disabilities Education Act (IDEA). The determination letter states that the specific factor affecting the Office of Special Education Program' (OSEP's) determination of needs assistance was that New Jersey's FFY 2009 data for Indicator 9, reflected "88.89% compliance and for this reason, they were unable to determine that New Jersey met requirements for FFY 2009 under IDEA sections 616(d) and 642.

OSEP further noted in NJ's determination letter that other areas reflected "a high level of performance, including that New Jersey reported valid and reliable data for all indicators and a high level of compliance for Indicators 7 (97.89%), 8A (100%), 8B (100%), 10 (100%) and 14 (100%)".

New Jersey, Part C received a determination of "meets requirements for the past three years and has continued to implement its general supervision responsibility effectively. The DHSS strongly disagrees with this determination of "needs assistance".

Indicator 9 measures the timely correction of findings of noncompliance within twelve months of the state issuing a finding to an agency. Based on the document "How the Department Made Determinations under Sections 616(d) and 642 of the Individuals with Disabilities Education Act in 2011: Part C" This document states that "If a state did not meet standards for substantial compliance for only one compliance indicator (including Indicators 9 and 14) and there were no other factors, we considered the state to "meet requirements" if the compliance level for that indicator was high (generally at or above 90%). Therefore, since New Jersey's compliance percentage for this indicator is 88.89%, the state was placed in a needs assistance determination.

The percentage of 88.89% was determined using the OSEP Indicator 9 Worksheet, which was required to be completed in this Annual Performance Report (APR) for FFY 2009 submission. It is NJ's opinion that the use of the worksheet to determine a percentage of compliance for this indicator is problematic and does not adequately reflect the state's performance in addressing this indicator.

New Jersey's 88.89% was the result of eight (8) out of nine (9) findings of noncompliance not corrected within 12 months. There are inherent issues with using only a percentage with this indicator in making a determination of "needs assistance". States that have more findings (larger denominator) have the advantage of performing better in this indicator even if they have the same or more noncompliance (numerator) than previous years. States that have overall improvement within individual indicators (i.e. indicator 1, 7 or 8) and are able to decrease the total number of findings (denominator) are at a disadvantage for having a small n of total noncompliance findings. This is documented by New Jersey's performance with this indicator over the past two years.

In the FFY 2008 APR, New Jersey reported two (2) agencies unable to correct within 12 months which resulted in a compliance percentage of 93.1% (27 out of 29 findings). Although the total non-compliance reported in the FFY 2009 APR was less compared to FFY 2008 (29 down to 9) and 1 less noncompliance that went past 12 months (2 down to 1), NJ's percentage slipped from 93.1% to 88.89%.

NJ has also implemented the option provided in the OSEP issued document "Frequently asked Questions Regarding Identification and Correction of Non-Compliance and Reporting on Correction in the State Performance Plan (SPP)/ Annual Performance Report (APR)" dated September 3, 2008 which states that "If the LEA or EIS program immediately (i.e., before the State issues a finding) corrects noncompliance and provides documentation of such correction, the State may choose not to make a finding." In FFY 2008, NJ identified five (5) instances of non-compliance that were verified as corrected and had no findings issued. If these identified instances of non-compliance were issued a finding, the compliance percentage would be 92.86% (13 out of 14 findings corrected timely). This demonstrates that if a state becomes more effective in identifying noncompliance, correcting timely and reducing the number of findings issued, a statistical result may be a penalty under the percentage process.

Another issue with using only the percentage derived from the worksheet is that it does not reflect the state's general supervision performance in working with the local agency that exceeded the 12 months timely correction. Short of terminating the contract with the agency and potentially disrupting service coordination for over 1000 families, the state consistently imposed enforcement actions on this agency that increased over time. It is also the high expectation of attaining and maintaining 100% compliance that can make it difficult to correct in 12 months.

New Jersey strongly objects to the implication that the state failed in its general supervision responsibility by the determination of "needs assistance". The use of the percentage does not adequately reflect the state performance in meeting its general supervision requirements or progress the local agency made in moving toward the required 100% compliance.

The DHSS-NJEIS did its due diligence to ensure identification and correction. The DHSS-NJEIS did everything short of terminating the agency's grant in order to correct the noncompliance. Enforcement actions included corrective action plans with monthly data review; required technical assistance, designation of at-risk contract status, designation of high-risk contract status, and contract addendum providing notice of pending loss of contract if the noncompliance was not corrected within six months. A summary of the correction and enforcement actions imposed by the state is enclosed.

In summary, NJ strongly disagrees with the determination and is respectfully requesting reconsideration of the determination and the ongoing use of a percentage measurement to determine performance for Indicator 9. NJ was placed in a "Needs Assistance" determination based on one agency's performance in one indicator. The determination is more a result of the percentage formula than it is on NJ's performance in effectively exercising its general supervision responsibility.

Sincerely,



Gloria M. Rodriguez, D.S.W.
Assistant Commissioner
Family Health Services



Terry Harrison, M.Ed.
Part C Coordinator
New Jersey Early Intervention System

Enclosure

- c Christina Tan, Acting Commissioner
- Melody Musgrove, Director, OSEP
- Ruth Ryder, Deputy Director, OSEP
- Gregg Corr, Director, MSIP
- Alma McPherson, Associate Division Director, MSIP
- Jennifer Miley, Education Program Specialist, MSIP

**Department of Health and Senior Services
New Jersey Early Intervention System
FFY 2009 Determinations**

Indicator 9 Summary of Corrective Actions and Enforcements Imposed on the Agency

The agency (one out of 9) which did not correct timely and caused the determination of needs assistance has had a long history of coming in and out of correction.

- Agency was initially found noncompliant for indicator 7 on March 31, 2005 and compliance verified within 8 months on December 22, 2005.
- On July 17, 2006, the agency was again issued a finding for indicator 7 and found to be a repeat offender. Due to noncompliance past 12 months, the agency was placed in At-Risk grantee/contract status on November 14, 2007.
- Compliance was verified as of July 16, 2008 (24 months). However, the state did not remove the agency's at-risk status due to ongoing concerns regarding the agency's ability to maintain adequate personnel.
- The NJEIS Monitoring Team conducted periodic desk audits on the agency's ability to recruit and maintain adequate personnel which was found to be a root cause of the noncompliance.
- When the agency continued to have difficulty maintaining compliance for indicator 7, the lead agency upgraded the grantee/contract status to High Risk on February 17, 2009.
- On June 16, 2010 this agency was placed under special conditions due to ongoing unsatisfactory performance and current High Risk grantee/contract status and an addendum was issued with their SFY 2011 contract which required the agency to successfully complete correction of outstanding noncompliance issues by December 31, 2010 or the Lead Agency would begin the process to move the contract to a new agency.
- The monitoring team did an onsite data verification visit on November 3, 2010 and found 86 out of 88 records to be compliant. The DHSS-NJEIS issued a letter in December 2010 to the agency noting their significant progress in correcting the C7 finding (98% compliance). As a result, the agency's grant/contract status was downgraded from High Risk to At Risk.
- On January 4, 2011, the monitoring team did another onsite data verification visit and found all noncompliance was corrected (100% compliance) and the finding and At-Risk status was closed on March 23, 2011.

The DHSS-NJEIS did not close the finding for this agency until there was assurance that the compliance was sustained. Due to the monitoring team's technical assistance, persistence and the issuing of increased sanctions, this agency did successfully correct their non-compliance and continues to meet compliance for indicator 7.