

DMS REPORT

DIFFERENTIATED MONITORING AND SUPPORT OFFICE OF SPECIAL EDUCATION PROGRAMS U.S. DEPARTMENT OF EDUCATION

STATE **NORTH CAROLINA**

DATE **MAY 14, 2021**

IDEA **PART B**

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

May 14, 2021

Honorable Catherine Truitt
Superintendent of Public Instruction
North Carolina Department of Public Instruction
6301 Mail Service Center
Raleigh, North Carolina 27699
catherine.truitt@dpi.nc.gov

Dear Superintendent Truitt:

The purpose of this letter is to provide a summary of the results of the differentiated monitoring and support (DMS) activities conducted by the U. S. Department of Education's (the Department) Office of Special Education Programs (OSEP) during an on-site visit to the State of North Carolina January 27–31, 2020.

As part of the DMS process, OSEP conducts an organizational assessment (OA) of factors to identify States' progress in meeting performance standards and complying with the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations, the Education Department General Administrative Regulations and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. OSEP uses the information from the OA and an Engagement Decision Tree to make decisions about how it will engage with States over the course of the Federal fiscal year (FFY). The FFY 2019 DMS areas were: 1) Results; 2) Compliance; 3) State Systemic Improvement Plan (SSIP); and 4) Fiscal Accountability.

On August 16, 2019, OSEP issued a copy of the North Carolina Department of Public Instruction's (NCDPI's) DMS notice to you. A copy of the DMS notice was also electronically mailed (e-mailed) to Mrs. Sherry Thomas, Director of NCDPI's Exceptional Children (EC) Division. That notice provided a level of engagement of universal, targeted, or intensive for each of the four areas OSEP identified for DMS. The levels of engagement in the notice were based on a snapshot of the most recent available data in the corresponding four areas. Further, the notice identified the monitoring and support activities that would be carried out to address the factors contributing to the elevated need for monitoring and support in each of the areas that were identified for intensive engagement. A copy of the DMS notice is attached for your convenience.

In addition to the intensive areas of engagement identified in the DMS notice, OSEP examined three other areas as part of its monitoring activity: 1) dispute resolution hearing decisions; 2) policies and procedures for the evaluation of students suspected of having a significant learning disability (SLD); and 3) the provision of a free appropriate public education (FAPE) for students

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The Department of Education's mission is to promote student achievement and preparedness for global competitiveness by fostering educational excellence and ensuring equal access.

with disabilities in private psychiatric residential treatment facilities (PRTFs). OSEP has been engaged in ongoing discussions concerning these issues with NCDPI and other stakeholders for several years, and informed NCDPI staff that monitoring of these issues would be incorporated into the DMS visit. Additional details on the background and the findings related to each of these issues is found in the following enclosure.

The enclosure describes the: 1) Background; 2) Monitoring¹ activity for each monitored DMS area, as well as the issues regarding dispute resolution hearings, SLD, and PRTFs; 3) Summary; and 4) OSEP's conclusion including Next Steps and Required Actions. If OSEP made findings of noncompliance with the IDEA requirements, you will find specific details pertaining to the finding of noncompliance, along with the respective citation(s); and the corrective action required to address the identified finding of noncompliance.

OSEP appreciates NCDPI's efforts to improve results for children with disabilities. If you have any questions, please contact Lynne Fairfax, your OSEP State Lead, at 202-245-7337.

Sincerely,

A handwritten signature in cursive script that reads "David Cantrell". The signature is written in black ink on a light-colored background.

David Cantrell, PhD
Acting Director
Office of Special Education Programs

cc: Sherry Thomas
State Director of Special Education

Enclosures

¹ Monitoring is broadly defined as including activities examining both compliance and performance issues and encompasses traditional monitoring reviews and technical assistance activities.

ENCLOSURE

Background

The U. S. Department of Education's (Department's) Office of Special Education Programs (OSEP) has a Differentiated Monitoring and Support (DMS) system, a component of Results Driven Accountability, to improve results for children with disabilities under the Individuals with Disabilities Education Act (IDEA). DMS helps the Department identify potential grantee risks and assists OSEP in effectively using its resources to monitor State grantees. DMS addresses State-specific and Entity²-specific needs in the areas of results, compliance, State Systemic Improvement Plan (SSIP), and fiscal accountability by differentiating levels and types of monitoring and support based on each State's and Entity's unique strengths, progress, and challenges in each area.

During the on-site DMS visit with the North Carolina Department of Public Instruction (NCDPI), OSEP reviewed the State's fiscal and compliance systems under Part B of the IDEA with a focus on the State's implementation of the IDEA Part B requirements.

In examining NCDPI's fiscal, compliance, and dispute resolution systems, OSEP reviewed the following:

- NCDPI's policies and procedures for collecting and reporting data the State submitted for selected indicators in the State's Federal fiscal year (FFY) 2016 and FFY 2017 State Performance Plan/Annual Performance Reports (SPP/APR);
- NCDPI's FFY 2013–2018 IDEA Part B SPP/APRs;
- NCDPI's FFY 2019 annual application for funds under Part B of the IDEA;
- Information on the NCDPI's website related to IDEA Part B, including the Specific Learning Disabilities (SLD) addendum to the *Policies Governing Services for Children with Disabilities* policies and procedures related to SLD; and
- Other pertinent information related to the NCDPI's IDEA Part B fiscal, compliance, dispute resolution systems, and efforts to improve results for children with disabilities.

As a part of its review, OSEP gathered additional information through telephone calls, written correspondence, data, and interviews with:

- The Director of Exceptional Children (EC) Division, Sherry Thomas, and other NCDPI and EC Division staff including Carol Ann Hudgens and Matthew Hoskins;
- State educational agency (SEA) personnel responsible for implementing fiscal compliance including Amanda Byrd, John Keefer, Leigh Ann Kerr, Lydia Prude, and others;
- Eric Snyder, General Counsel, North Carolina State Board of Education;
- North Carolina Department of Health and Human Services (NCDHHS) personnel including Lisa Corbett, Tiffany Lucas, Scott Stradd, and others regarding the provision of

² States include each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico, and Entities include freely associated States, outlying areas, and the Bureau of Indian Education.

a free appropriate public education (FAPE) to students with disabilities assigned and located in out-of-State private psychiatric residential treatment facilities (PRTFs);

- Local educational agency (LEA) and school personnel responsible for providing IDEA services to children and youth with disabilities; and
- Parents and other constituents.

NCDPI's 2019 levels of engagement were intensive in both the fiscal and compliance areas. During the on-site DMS visit, OSEP did not examine the areas of results and SSIP because NCDPI received a universal level of engagement in these areas. However, OSEP will continue to work with NCDPI in these areas through regular calls and virtual engagement. We will provide technical assistance (TA) through national TA calls, webinars and resources posted on our website.

Fiscal Accountability

In the 2019 DMS notice, NCDPI was identified as needing intensive support in the fiscal area due to the following risk factors:

- A change in the State's IDEA Part B Director position within the past two years;
- The State's IDEA Section 611 award for FFY 2019 exceeded \$200,000,000;
- A lapse of 1% or more of funds from the State's FFY 2016 IDEA Part B grant; and
- 32% or more of NCDPI's LEAs are charter schools.

Background

Monitoring activities, as described in both the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) and the Department's Grant Bulletin 14-06, involve a range of activities, including TA activities and other activities that assess whether a grantee is complying with applicable statutory and regulatory requirements, including fiscal requirements for pass-through entities.³ (See 2 C.F.R. § 200.331.) OSEP's fiscal monitoring activity for NCDPI focused on LEA allocations and subrecipient monitoring. These fiscal topics were explored with the State through OSEP's protocols on LEA allocations and subrecipient monitoring, which were provided in advance to the State. OSEP also reviewed relevant documents provided by the SEA in advance of the visit as well as those provided on-site and post-site visit by e-mail.

The fiscal monitoring activity was developed as a result of the intensive level of engagement OSEP identified in the 2019 DMS notice. OSEP's on-site fiscal monitoring activities focused on the State's fiscal policies, procedures, and implementation during the period covered by the FFY

³ Here, the pass-through entity is NCDPI because it is a non-Federal entity that provides a subaward to a subrecipient to carry out part of a Federal program, consistent with 2 C.F.R. § 200.74. Note that the Office of Management and Budget (OMB) recently revised certain provisions of the Uniform Guidance. See 85 FR 49506 (Aug. 13, 2020). For example, effective November 12, 2020, all definitions (with some revisions) are now in 2 C.F.R. § 200.1, instead of the separate sections in which the individual definitions appeared in the prior regulations; and the requirements for pass-through entities, including subrecipient monitoring, have been revised and are now found in 2 C.F.R. § 200.332, instead of § 200.331. For purposes of this letter, the Legal Requirements and Findings sections refer to the prior Uniform Guidance provisions that were in effect at the time of the monitoring visit. However, in the Required Actions/Next Steps sections, we refer to the new provisions because these will apply to grantees moving forward.

2018 IDEA grant award (July 1, 2018–June 30, 2019), and, as appropriate, the two prior grant awards.

On November 1, 2019, OSEP provided NCDPI with the list of fiscal and related documents needed for the monitoring activity. On December 6, 2019, NCDPI staff began providing OSEP with fiscal and related documentation for the monitoring activity. On December 17, 2019, OSEP held a follow-up conference call with NCDPI staff to review the list and to discuss the fiscal monitoring agenda; and on December 20, 2019 and January 7, 2020, NCDPI provided additional documentation to OSEP. During, and subsequent to, the on-site DMS visit, NCDPI provided documents to OSEP as requested on January 28, 29, and February 19, 2020.⁴

On-site Interviews

OSEP conducted on-site interviews with NCDPI staff on January 28 and 29, 2020. The interviews included staff from NCDPI's Division of School Business and the EC Division.

LEA Allocations

Legal Requirements

IDEA Part B Section 611 and Section 619 funds are provided to assist States and, through them, LEAs, in the provision of special education and related services to children with disabilities. States are required to distribute any Section 611 and Section 619 funds the State does not reserve for State-level activities to eligible LEAs for use in accordance with the IDEA. States' correct allocation of IDEA Part B funds to LEAs, consistent with the correct formulas, is critical in helping to ensure that those funds are used appropriately for the purposes for which they were intended.

OSEP monitored six specific components of North Carolina's LEA allocations process to ensure that:

1. The SEA distributes both IDEA Section 611 and Section 619 allocations to eligible LEAs based upon the correct formula for calculating base payments. IDEA Sections 611(f)(1) and (2)(A) and 619(g)(1)(A); 34 C.F.R. §§ 300.705(a)-(b)(1), 300.815-300.816(a);
2. The SEA calculates LEA base payment adjustments under Section 611 and under Section 619 consistent with IDEA requirements. 34 C.F.R. §§ 300.705(b)(2), 300.816(b); 34 C.F.R. Part 76 Subpart H; December 2000 Nonregulatory Guidance on 34 C.F.R. Part 76 Subpart H, titled "How Does a State or Local Educational Agency Allocate Funds to Charter Schools That Are Opening for the First Time or Significantly Expanding Their Enrollment?";
3. The SEA allocates remaining Section 611 and Section 619 funds, if any, to LEAs, including charter school LEAs, based on population and poverty, consistent with IDEA

⁴ On May 19, 2020, and April 14, 2021, respectively, the Department received the State's Fiscal Year (FY) 2019 and FY 2020 single State audit reports (Audit Control Numbers 041909494 and 042019130) conducted in accordance with the Single Audit Act of 1984, as amended, and the OMB Uniform Guidance. These audits include findings related to LEA allocations under Part B of IDEA and will be addressed by the Department under separate cover. In addition, the FY 2020 single State audit includes a finding related to "Inadequate Award Communication." OSEP made a similar finding related to the State's failure to meet the requirements under 2 C.F.R. § 200.331 during the on-site DMS visit, and that finding is addressed below under "Subrecipient Monitoring."

requirements. IDEA Sections 611(f)(2)(B) and 619(g)(1)(B); 34 C.F.R. §§ 300.705(b)(3), 300.816(c) and (d);

4. The SEA allocates IDEA Section 611 and Section 619 funds through subgrants to eligible charter school LEAs that open or significantly expand their enrollment. 34 C.F.R. §§ 300.705(b)(2), 300.816(b), and 76.792–76.793; December 2000 Nonregulatory Guidance on 34 C.F.R. Part 76 Subpart H, titled “How Does a State or Local Educational Agency Allocate Funds to Charter Schools That Are Opening for the First Time or Significantly Expanding Their Enrollment?”;
5. The SEA reallocates available IDEA Section 611 and Section 619 funds consistent with IDEA requirements. IDEA Sections 611(f)(3) and 619(g)(2); 34 C.F.R. §§ 300.705(c) and 300.817; and
6. The SEA allocates Section 619 subgrants to eligible LEAs consistent with IDEA requirements, particularly for years in which Section 619 allocations to States were below the 1997 appropriation level. 34 C.F.R. §§ 300.810(b), 300.815, and 300.816.

When subgranting IDEA Section 611 funds, the State must distribute all the funds it does not reserve under 34 C.F.R. § 300.704 to LEAs, including public charter schools that operate as LEAs, that have established their eligibility under IDEA Section 613, even if the LEA is not serving any children with disabilities, as required under 34 C.F.R. § 300.705(a). Similarly, when subgranting IDEA Section 619 funds, the State must distribute all the funds it does not reserve under 34 C.F.R. § 300.812 to LEAs, including public charter schools that operate as LEAs, that have established their eligibility under IDEA Section 613 and that are responsible for providing education to children ages three through five, even if the LEA is not serving any preschool children with disabilities, as required under 34 C.F.R. § 300.815. An LEA’s Section 611 subgrant and Section 619 subgrant each are made up of three components—the base payment, the population payment, and the poverty payment, consistent with 34 C.F.R. §§ 300.705(b)(1) and (3) and 300.816(a) and (c).

Under 34 C.F.R. §§ 300.705(b)(2) and 300.816(b), base payment adjustments must be made in certain situations, including if an LEA had a base payment of zero in its first year of operation because it did not serve children with disabilities, but served children with disabilities (for Section 611 base payments) or children with disabilities ages three through five (for Section 619 base payments) in a subsequent year. In that situation, the SEA must adjust the base payment for the first fiscal year after the first annual child count in which the LEA reports that it is serving any children with disabilities (for Section 611 base payments) or any children with disabilities ages three through five (for Section 619 base payments), consistent with 34 C.F.R. §§ 300.705(b)(2)(iv) and 300.816(b)(4). Specifically, the SEA must divide the base allocations for the LEAs that would have been responsible for serving children with disabilities (for Section 611 base payments) or children with disabilities ages three through five (for Section 619 base payments) now being served by the LEA, among the LEA and affected LEAs based on the relative numbers of children with disabilities ages 3 through 21 (for Section 611 base payments) or ages three through five (for Section 619 base payments) currently provided special education by each of the LEAs.

If the LEA is a charter school LEA that opens for the first time or significantly expands its enrollment, the SEA must allocate IDEA Section 611 and Section 619 funds to the charter school LEA using the base payment adjustment provisions described in 34 C.F.R. §§ 300.705(b)(2)(i)

and 300.816(b)(1) for Section 611 and Section 619 funds, respectively. See 34 C.F.R. §§ 76.791–76.793 and Questions 78–80 of the Department’s December 2000 Nonregulatory Guidance on 34 C.F.R. Part 76 Subpart H, titled “How Does a State or Local Educational Agency Allocate Funds to Charter Schools That Are Opening for the First Time or Significantly Expanding Their Enrollment?” (December 2000 Guidance).

In order to reallocate IDEA Section 611 and/or Section 619 funds, the SEA must first determine that an LEA is adequately providing FAPE to all children with disabilities residing in the area served by that LEA with State and local funds. IDEA Sections 611(f)(3) and 619(g)(2) and 34 C.F.R. §§ 300.705(c) and 300.817. Once this is determined, the SEA may reallocate any portion of the IDEA Section 611 and/or Section 619 funds that are not needed by that LEA to provide FAPE, to other LEAs in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs. The SEA may also retain those funds for use at the State level to the extent NCDPI has not reserved the maximum amount of funds it is permitted to reserve for State-level activities pursuant to 34 C.F.R. §§ 300.704 and 300.812.

If an SEA determines that an LEA has not provided the information needed to establish eligibility for, or elected not to apply for, IDEA Part B funds, the requirement in 34 C.F.R. § 300.227 applies. Under 34 C.F.R. § 300.227(a)(1), the SEA must use the funds that would have otherwise been available to the LEA to provide special education and related services directly to children with disabilities residing in the area served by the LEA that has elected not to apply for IDEA Part B funds. In meeting the requirements in 34 C.F.R. § 300.227(a)(1), the SEA may provide special education and related services directly, by contract, or through other arrangements. 34 C.F.R. § 300.227(a)(2).

A. Base Payment Adjustments

Findings

During the on-site fiscal review, the SEA was asked to explain the procedures it uses for making base payment adjustments consistent with 34 C.F.R. §§ 300.705(b)(2), 300.816(b), and 34 C.F.R. Part 76 Subpart H.

Based on the review of documents, analysis of data, and interviews with State personnel, OSEP finds that the State has policies and procedures for making base payment adjustments in accordance with these requirements with two exceptions. Specifically, for LEAs that received a base payment of zero under Section 611 or Section 619 in their first year of operation, the SEA does not, in accordance with 34 C.F.R. §§ 300.705(b)(2)(iv) and 300.816(b)(4), have policies and procedures in place to adjust the base payment for the first fiscal year after the first annual child count in which such LEAs report that they are serving children with disabilities (for Section 611 base payments) or children with disabilities ages three through five (for Section 619 base payments), to ensure that all eligible LEAs that report a child count receive a subsequent base payment under Section 611 and/or Section 619, as appropriate. In addition, the SEA does not have policies and procedures in place to adjust the base payment for a charter school LEA that experiences a significant expansion in its enrollment (as defined in 34 C.F.R. § 76.787) in a subsequent year, in accordance with 34 C.F.R. §§ 300.705(b)(2)(i) and 300.816(b)(1) and

34 C.F.R. Part 76 Subpart H. See Response to Questions 78–80 in the December 2000 Guidance.

Required Actions/Next Steps

Within 90 days from the date of this letter, NCDPI must:

1. Develop and submit to OSEP its revised policies and procedures that demonstrate that NCDPI will adjust the base payment for the first fiscal year after the first annual child count in which an LEA that received a base payment of zero in its first year of operation reports that it is serving any children with disabilities (for Section 611 base payments) or any children with disabilities ages three through five (for Section 619 base payments), in accordance with 34 C.F.R. §§ 300.705(b)(2)(iv) and 300.816(b)(4).
2. Develop and submit to OSEP its revised policies and procedures that demonstrate that NCDPI will adjust the base payment for a charter school LEA that experiences a significant expansion in its enrollment in a subsequent year, in accordance with 34 C.F.R. §§ 300.705(b)(2)(i) and 300.816(b)(1) and 34 C.F.R. Part 76 Subpart H.
3. For any LEA whose Section 611 and/or Section 619 allocation was less than the amount to which it was entitled in FFY 2018, FFY 2019, and/or FFY 2020, because it did not receive a base payment to which it was entitled, determine the difference between the amount the LEA actually received and the amount of the allocation that the LEA should have received.
4. For any LEA that received less than the amount of Section 611 and/or Section 619 funds to which it was entitled in FFY 2018, FFY 2019 and/or FFY 2020, submit documentation demonstrating that the LEA was made whole, in accordance with 34 C.F.R. §§ 300.705(b)(2)(i), 300.705(b)(2)(iv), 300.816(b)(1), and 300.816(b)(4), or a plan outlining how the State will make these LEAs whole during FFY 2020. The State may: (a) use any remaining FFY 2018, FFY 2019, and FFY 2020 Section 611 and/or Section 619 State set-aside funds; (b) use State funds⁵; or (c) make downward adjustments to over-allocated LEAs' future allocations and upward adjustments to under-allocated LEAs' future allocations. If the State chooses either option (b) or (c), the State and affected LEAs must consider the impact on those LEAs' ability to meet the maintenance-of-effort requirement in 34 C.F.R. § 300.203, based on possible changes to those LEAs' expenditures for the education of children with disabilities using State and/or local funds.

B. Reallocation of funds

Findings

During the on-site DMS visit, OSEP staff asked NCDPI about instances when the SEA had reallocated available IDEA Section 611 and/or Section 619 funds to eligible LEAs. NCDPI reported that when an LEA does not accept or apply for Part B funds, the LEA retains its base payment, and any remaining funds are reallocated to all other LEAs based

⁵ If the State uses State funds to make under-allocated LEAs whole, the State must demonstrate that those State funds are funds the under-allocated LEAs would not have otherwise received.

on the formula for allocating population and poverty payments under Section 611 and Section 619.

Based on the review of documents, analysis of data, and interviews with NCDPI personnel, OSEP finds that NCDPI does not have policies and procedures in place to reallocate IDEA Section 611 and/or Section 619 funds in accordance with the requirements in IDEA Sections 611(f)(3) and 619(g)(2) and 34 C.F.R. §§ 300.705(c) and 300.817. The reallocation provisions in 34 C.F.R. §§ 300.705(c) and 300.817 apply only when an LEA has established eligibility and has been determined by the SEA to be adequately providing FAPE to all children with disabilities residing in the area served by the LEA with State and local funds. If an LEA does not accept or apply for IDEA Part B funds, the requirement in 34 C.F.R. § 300.227 applies. Under 34 C.F.R. § 300.227(a)(1) and (a)(2), the SEA must use the funds that would otherwise have been available to the LEA to provide special education and related services (directly, by contract, or through other arrangements) to children with disabilities residing in the area served by the LEA that has elected not to apply for IDEA Part B funds.

Required Actions/Next Steps

Within 90 days of the date of this letter, NCDPI must develop and submit to OSEP its revised policies and procedures that demonstrate the SEA will conduct any reallocations of IDEA Part B funds in accordance with the requirements in IDEA Sections 611(f)(3) and 619(g)(2) and 34 C.F.R. §§ 300.705(c) and 300.817, and will use funds that would otherwise have been available to an LEA that does not accept or apply for IDEA Part B funds to provide direct services in accordance with 34 C.F.R. § 300.227.

Subrecipient Monitoring

Legal Requirement

Under 2 C.F.R. § 200.331(a), the State, because it is a pass-through entity, must ensure that every subaward is clearly identified as a subaward and includes the following information at the time of the subaward:

(1) Federal Award Identification.

- (i) Subrecipient name (which must match the name associated with its unique entity identifier);
- (ii) Subrecipient's unique entity identifier;
- (iii) Federal Award Identification Number (FAIN);
- (iv) Federal Award Date
- (v) Subaward Period of Performance Start and End Date;
- (vi) Amount of Federal Funds Obligated by this action by the pass-through entity to the subrecipient;
- (vii) Total Amount of Federal Funds Obligated to the subrecipient by the pass-through entity including the current obligation;

- (viii) Total Amount of the Federal Award committed to the subrecipient by the pass-through entity;
 - (ix) Federal award project description, as required to be responsive to the Federal Funding Accountability and Transparency Act;
 - (x) Name of Federal awarding agency, pass-through entity, and contact information for awarding official of the pass-through entity;
 - (xi) Catalog of Federal Domestic Assistance (CFDA) number and name; the pass-through entity must identify the dollar amount made available under each Federal award and the CFDA number at time of disbursement;
 - (xii) Identification of whether the award is R&D; and
 - (xiii) Indirect cost rate for the Federal award.
- (2) All requirements imposed by the pass-through entity on the subrecipient so that the Federal award is used in accordance with Federal statutes, regulations and the terms and conditions of the Federal award;
- (3) Any additional requirements that the pass-through entity imposes on the subrecipient in order for the pass-through entity to meet its own responsibility to the Federal awarding agency including identification of any required financial and performance reports;
- (4) An approved federally recognized indirect cost rate negotiated between the subrecipient and the Federal Government or, if no such rate exists, either a rate negotiated between the pass-through entity and the subrecipient (in compliance with this part), or a de minimis indirect cost rate;
- (5) A requirement that the subrecipient permit the pass-through entity and auditors to have access to the subrecipient's records and financial statements as necessary for the pass-through entity to meet the requirements of this part; and
- (6) Appropriate terms and conditions concerning closeout of the subaward.

Findings

During the on-site DMS visit, OSEP staff asked NCDPI how it ensures that each subaward includes the information required under 2 C.F.R. § 200.331, and how that information is provided with subawards to LEAs. NCDPI informed OSEP that it makes grant award information accessible to LEAs in one central location online. Specifically, NCDPI noted that in May of each year, the Division of School Business coordinates with all program offices administering Federal funds to compile and post online for all LEAs information regarding all Federal awards. NCDPI indicated that information includes the program report code, CFDA number, FAIN, program name, description, type of grant, application due date, link, expiration date, term, liquidation period, and contact information. However, NCDPI noted that it does not send this information to each LEA with its IDEA Part B grant award notification (GAN).

OSEP made requests to review the IDEA Part B GANs that NCDPI issues to its subrecipients to ensure the GANs are consistent with 2 C.F.R. § 200.331(a). NCDPI provided OSEP with documentation, along with a website link, showing Federal program grant award information generally. The documentation provided by NCDPI consisted of a spreadsheet report titled

“Federal Programs Administered Through DPI,” but the report did not include all of the information required by 2 C.F.R. § 200.331(a). Specifically, the spreadsheet provided by NCDPI did not include the information regarding individual IDEA Part B subgrants awarded to each LEA, as required in subparagraphs (1)(i)-(ii), (iv), (vi)-(ix), (xi)-(xiii), and (2)-(6) of 2 C.F.R. § 200.331(a). NCDPI also provided a link to NCDPI’s Grant Administration webpage, “Allotments — Funding Public School Units,”⁶ which provided allocation information by LEA but did not include the information required in subparagraphs (1)(ii)-(v), (xi)-(xiii), and (2)-(6) of 2 C.F.R. § 200.331(a).

Based on the review of documents and interviews with NCDPI staff during the on-site DMS visit, OSEP finds that NCDPI does not ensure that each IDEA Section 611 and Section 619 subaward it issues is clearly identified to the subrecipient as a subaward and includes the required information at the time of the subaward as specified in 2 C.F.R. § 200.331(a).

Required Actions/Next Steps

Within 90 days of the date of this letter, NCDPI must submit to OSEP a sample GAN template that includes the information as required by 2 C.F.R. § 200.332(a).⁷ NCDPI must also demonstrate that the GAN is provided to each of its LEAs on an annual basis.

Effective Internal Controls

Legal Requirements

As a grantee receiving IDEA Part B funds, the State is responsible for the oversight and administration of the Federal program, including ensuring compliance with fiscal requirements related to financial management, internal controls, and the proper use, accounting, and documentation of expenditures made from IDEA Part B funds, as required by Part B of the IDEA and its implementing regulations, the Education Department General Administrative Regulations, and the Uniform Guidance. Under IDEA Section 612(a)(11)(A)(i) and 34 C.F.R. § 300.149(a)(1), the SEA is responsible for ensuring that the requirements of IDEA Part B are carried out. Under 34 C.F.R. § 76.702, a State and a subgrantee must use fiscal control and fund accounting procedures that ensure proper disbursement of and accounting for Federal funds. Under 2 C.F.R. § 200.302(b)(4), the State’s financial management system must provide for effective control over, and accountability for, all funds, property, and other assets. Further, under 2 C.F.R. § 200.303(a), the State must establish and maintain effective internal control over the Federal award that provides reasonable assurance that it is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award. In addition, the State, because of its own unique combination of staff, facilities, and experience, has the primary responsibility for employing whatever form of sound organization and

⁶ This information is located on NCDPI’s website at: <https://www.dpi.nc.gov/districts-schools/district-operations/financial-and-business-services/allotments-%E2%80%94-funding-public-school-units>.

⁷ As noted *supra* footnote 3, OMB’s recent revisions to the Uniform Guidance included revisions to prior 2 C.F.R. § 200.331, which became 2 C.F.R. § 200.332 effective November 12, 2020. Consistent with these revisions, the information that must be included in every subaward now includes the subaward budget period start and end date (2 C.F.R. § 200.332(a)(1)(vi)) and certain changes to the indirect cost rate (2 C.F.R. § 200.332(a)(4)).

management techniques may be necessary in order to assure proper and efficient administration of the Federal award (2 C.F.R. § 200.400(c)).

Findings

OSEP is not making any findings in this area at this time.

NCDPI informed OSEP that it has been allocating IDEA Part B funds to LEAs using old and complex systems; however, at the time of the on-site DMS visit, NCDPI was in the process of revising and expanding its standard business operating procedures for allocating IDEA Part B funds. The Division of School Business is responsible for calculating and administering LEAs' subgrants and monitoring for LEAs' compliance with requirements under 2 C.F.R. Part 200, and the EC Division is responsible for the oversight of LEAs' compliance with the programmatic and fiscal requirements under Part B of the IDEA. NCDPI further indicated there is overlap in the responsibilities of the two divisions. For example, the EC Division monitors personnel time and effort as related to IDEA, and the Division of School Business looks at personnel time and effort for all Federal programs it administers.

To address these concerns, NCDPI stated on multiple occasions during the on-site DMS visit that it is taking steps to improve its fiscal system processes, including: 1) rebuilding its grant management system to better align with its LEAs' systems; 2) revising its allocations procedures for all Federal programs, including IDEA, for consistency with legal requirements and for clarity; and 3) developing a State fiscal procedures manual.

Required Actions/Next Steps

OSEP is not requiring corrective actions at this time. However, OSEP encourages NCDPI to carefully examine its revised policies and procedures to ensure they are comprehensive, accurate, clear, and consistent to ensure that NCDPI is managing IDEA Part B subgrant awards in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award, as required under 2 C.F.R. Part 200. OSEP is available to provide technical assistance in the development of these policies and procedures as appropriate.

Compliance

In the 2019 DMS notice, NCDPI was identified as needing intensive support in the area of compliance due to the following factors:

- SPP/APR Indicator 11: Timely initial evaluation (90.22%)
- SPP/APR Indicator 12: Individualized education program (IEP) developed and implemented by third birthday (86.03%)
- SPP/APR Indicator 13: Secondary transition (85.45%)
- Timely State Complaint Decisions (92.59%)⁸

⁸ The State's implementation of State complaint decisions and due process hearing decisions is discussed in the "Other Areas Addressed" section below.

Background

To effectively monitor implementation of Part B of the IDEA, as required by IDEA Sections 612(a)(11) and 616, and 20 U.S.C. 1232d(b)(3)(E), the State must have policies and procedures that are reasonably designed to ensure that the State can meet:

1. its general supervisory responsibility in 34 C.F.R. § 300.149;
2. its monitoring responsibilities in 34 C.F.R. §§ 300.600 through 300.602; and
3. its responsibility to annually report on the performance of the State and of each LEA, as provided in 34 C.F.R. § 300.602(b)(1)(i)(A) and (b)(2).

During the on-site DMS visit, OSEP reviewed the data submitted by the State under Indicators 11, 12, and 13 in NCDPI’s IDEA Part B SPP/APR, each of which was identified in the 2019 DMS notice for low levels of compliance.

SPP/APR Indicator 11: Timely Initial Evaluation

This indicator measures the percent of children who were evaluated within 60 days of receiving parental consent for initial evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within that time frame, in accordance with 34 C.F.R. § 300.301.

States’ targets for this compliance indicator are 100%. NCDPI’s reported data for this indicator for FFY 2016–FFY 2018 demonstrates slippage in timely initial evaluations for students with disabilities.

SPP/APR Reporting Period	FFY 2013	FFY 2014	FFY 2015	FFY 2016	FFY 2017	FFY 2018 ⁹
SPP/APR Indicator 11 Data	92.82%	92.52%	91.55%	91.98%	90.22%	88.99%

During the on-site DMS visit, OSEP discussed with NCDPI its mechanisms for collecting data, monitoring, and the reasons for slippage in compliance for this indicator. Under NC 1503-2.2(c), evaluations must be conducted, eligibility determined, and for an eligible child, an IEP developed, and placement completed, within 90 days of the receipt of a written referral.¹⁰ NCDPI reported that its FFY 2018 data were collected for all LEAs through the Comprehensive Exceptional Children Accountability System (CECAS).

In addressing the slippage in its SPP/APR Indicator 11 data, NCDPI indicated that it introduced a new three-module data system, Every Child Accountability Tracking System (ECATS), that links special education, general education, and Medicaid reimbursement, and enables more access to school staff (e.g., general education teachers, Multi-Tiered Systems of Support (MTSS) staff) and others to provide special education and related services more efficiently. Two LEAs

⁹ NCDPI reported the FFY 2018 data in its FFY 2018 SPP/APR, submitted on February 1, 2020, after OSEP’s DMS monitoring visit. However, we included the FFY 2018 data in this chart to include the most recent data available as of the date of this DMS report.

¹⁰ See *Policies Governing Services for Children with Disabilities*, Amended March 2018: <http://www.ncpublicschools.gov/ec/conferences-profdev/march-institute/2018-march-institute-handouts/policy-updates-legal-trends/amendedmarch2018policy.pdf>.

were represented during the on-site DMS visit and shared their experiences with OSEP in ensuring compliance with this indicator. One larger LEA indicated that the district had a system similar to ECATS in place; however, the data merge and the uploading of new data have taken time and created a learning curve for that LEA.¹¹ On the other hand, a medium-sized LEA represented during the visit indicated that the district did not have a similar system; therefore, the transition to ECATS was easier than what that LEA had expected. Both districts shared positive feedback, indicating that ECATS enables staff to understand systems from a compliance perspective. NCDPI also reported that it provides support to LEA-level ECATS teams.

NCDPI further explained that there is a shortage of evaluators, teachers, and related services personnel, which contributed to the slippage in timely initial evaluations. Additionally, NCDPI reported that severe weather conditions in recent years have impacted the timeliness of initial evaluations due to delayed referral paperwork or parental consent.

NCDPI indicated that it continues to provide training and TA to LEAs to enhance staff's knowledge and comfort in using the new ECATS data system, build LEA staff capacity in their understanding of SPP/APR Indicator 11 to improve compliance, recruit certified personnel, and provide assistance to districts to improve infrastructures throughout the State. In discussing the continued barriers to meeting the timelines for conducting initial evaluations, NCDPI reported that some larger school districts have challenges in conducting timely initial evaluations due to the large volume of students, while smaller, more rural school districts do not have sufficient qualified school personnel to conduct initial evaluations.

Finally, NCDPI noted that, at the time of the on-site DMS visit, there are 211 LEAs in North Carolina, most of which are charter school LEAs. The continued expansion of charter school LEAs, the need for additional training and staff development within those LEAs, and the high turnover of teachers and staff at smaller charter school LEAs, have contributed to the challenges NCDPI has experienced in ensuring timely initial evaluations of students suspected of having a disability. To address these barriers, NCDPI ensures charter school LEAs are monitored and provided with additional TA in their first year of operation, and that direct technical support is provided to districts as needed.

In OSEP's discussions with LEA and school staff during the visit, LEA personnel shared that the new ECATS data system is a positive shift towards data-based decision making, but that there have also been numerous challenges during implementation, such as systems' misalignment with IEPs, data loss requiring duplicative entries, and the loss of some of the features that aligned with their internal systems. Some school-based staff noted that ECATS appears to be a "compliance tool" rather than a resource to assist in the IEP Team meeting process. Moreover, LEA and school staff informed OSEP that they are not clear as to when the State's 90-day timeline (for conducting initial evaluations, determining eligibility, and, for an eligible child, developing the IEP and completing placement) begins, which may have contributed to the LEA's failure to meet the 90-day timeline. In addition, LEA and school staff noted that the shortage of qualified personnel (specifically, psychologists) to analyze assessment data may have also contributed to the challenges with meeting the 90-day timeline.

While OSEP recognizes the impact on LEAs from the introduction of NCDPI's new data system, personnel shortages, the expansion of charter school LEAs, and severe weather emergencies, we

¹¹ OSEP notes that the issues described in the implementation of ECATS here and below are typical during implementation of any new data system and are to be expected.

remain concerned about the State’s continued slippage in meeting the timeline requirements reported under this indicator. OSEP encourages NCDPI to continue to analyze the causes of the slippage, provide support to its LEAs, and seek assistance from TA providers and OSEP.

SPP/APR Indicator 12: IEP developed and Implemented by Third Birthday (Early Childhood Transition)

This indicator measures the percent of children referred by IDEA Part C¹² prior to age 3, who are found eligible for Part B and who have an IEP developed and implemented by their third birthdays in accordance with IDEA Section 612(a)(9) and 34 C.F.R. § 300.124.

States’ targets for this compliance indicator are 100%. NCDPI’s reported data for this indicator for FFY 2014–FFY 2018 demonstrates slippage in the level of compliance for the indicator.

SPP/APR Reporting Period	FFY 2013	FFY 2014	FFY 2015	FFY 2016	FFY 2017	FFY 2018
SPP/APR Indicator 12 Data	98.09%	98.84%	97.74%	96.48%	86.03%	89.60%

During the on-site DMS visit, OSEP discussed with NCDPI its mechanisms for collecting data, monitoring, and the reasons for slippage in compliance for this indicator. NCDPI reported in its FFY 2018 SPP/APR that the data used to report on this indicator include Statewide data that are inclusive of every school district in the State that provides special education and related services to the preschool-age population. NCDPI also reported that the data for this indicator were not obtained by sampling. NCDPI created Excel spreadsheets with the required data collection fields, which automatically calculated the percentage of timely transitions for the indicator. Each LEA was required to have its EC Director sign an assurance as to the accuracy of the data. The LEAs then submitted the spreadsheets electronically to NCDPI.

As indicated in the table above, NCDPI demonstrated high levels of compliance for this indicator until FFY 2017, when the data dropped by 10% to 86.03%. The data showed a moderate increase in FFY 2018 to 89.60%. In its FFY 2017 SPP/APR and during the DMS visit, NCDPI attributed the slippage in the FFY 2017 data to issues related to a significant increase in the number of required assessments, personnel shortages, and changes in administrative procedures in its two largest LEAs. NCDPI reported that both LEAs showed improvement in their data for the indicator in FFY 2018, demonstrated by the overall increase in compliance levels.

Generally, NCDPI discussed the challenges presented for early childhood transition due to the increase in the number of preschool students served in the State. As reported in the State’s FFY 2018 SPP/APR, in 2007 the State served only 3.2% of all 3-, 4- and Pre-K 5-year-old children (as compared to census data), whereas the State now serves 5.8% of all 3-, 4-, and Pre-K 5-year-old children. The State’s FFY 2018 SPP/APR also noted that, in FFY 2018, programs for children (ages 3, 4, and 5, including 5-year-olds in kindergarten) grew by 8.03% between the December 1, 2018 and April 1, 2019 child counts while the school-aged population of students (ages 6–21) with disabilities grew by only 1.68%. NCDPI reported that the assessment teams

¹² Part C of the IDEA is the program governing early intervention services to eligible children ages birth through two with disabilities and their families.

have been trained and have implemented efficient processes; however, local administrations must carefully analyze the data to ensure the preschool assessment teams are adequately staffed. There are approximately 2,100 preschool classrooms in the State, in addition to a State pre-kindergarten, and Head Start programs in public schools, which NCDPI indicated has contributed to communication barriers at the local level. In addition to the turnover of State personnel, NCDPI reported there was not an adequate number of employees at the local level to handle the increase in the number of preschool-aged students transitioning in the State.

At the time of the on-site DMS visit, NCDPI was in the process of revising its interagency agreement¹³ with the North Carolina Department of Health and Human Services (NCDHHS) to develop a data sharing system with the State's Part C program to improve the early childhood referral process. NCDPI reported that these factors along with monthly data manager meetings are helping to improve the transition process. NCDPI further reported it has case service coordinators, evaluators, as well as an active network of preschool coordinators to review the transition process. NCDPI noted that its Early Childhood Consultants work with new staff and coordinators, and that fall and spring regional meetings are also held to identify systems' gaps and to improve early childhood transition in the State.

OSEP acknowledges the challenges presented by the increase in the number of 3–5 year old students, the communication barriers across districts and Head Start programs, and ongoing personnel turnovers. OSEP also notes the moderate increase reflected in the State's FFY 2018 data for SPP/APR Indicator 12 and appreciates the work NCDPI and its LEAs have completed to date to improve compliance for this indicator. OSEP encourages NCDPI to continue to work with NCDHHS, provide support and guidance to its LEAs, and seek assistance from TA providers and OSEP to restore its compliance levels for this indicator to higher levels as reflected in the State's prior SPP/APRs.

SPP/APR Indicator 13: Secondary transition

This indicator measures the percent of youth with IEPs aged 16 and above with an IEP that includes appropriate measurable postsecondary goals that are annually updated and based upon an age-appropriate transition assessment, transition services, including courses of study, that will reasonably enable the student to meet those postsecondary goals, and annual IEP goals related to the student's transition service needs. There also must be evidence that the student was invited to the IEP Team meeting where transition services are to be discussed and evidence that, if appropriate, a representative of any participating agency was invited to the IEP Team meeting with the prior consent of the parent or student who has reached the age of majority. States' targets for this compliance indicator are 100%. NCDPI's reported data for this indicator for FFY 2014–2018 demonstrates slippage in the level of compliance for this indicator.

¹³ The *Data Sharing Interagency Memorandum of Understanding (MOU) for the NCDPI and NCDHHS Linking Parts C to B 619 Data Committee*, Appendix A of the *North Carolina Interagency Agreement for the provision of services for infants, toddlers, and preschoolers with disabilities under Parts C and B of the Individuals with Disabilities Education Act (IDEA)*, became effective as of April 27, 2020.

SPP/APR Reporting Period	FFY 2013	FFY 2014	FFY 2015	FFY 2016	FFY 2017	FFY 2018
SPP/APR Indicator 13 Data	85.07%	88.42%	88.14%	85.35%	85.45%	80.84%

During the on-site DMS visit, OSEP discussed with NCDPI its mechanisms for collecting data, monitoring, and the reasons for the low compliance for this indicator. NCDPI reported that it collects data for this indicator through a five-year monitoring cycle of on-site program reviews, which means the data only reflect the LEAs monitored in that year.

Additionally, NCDPI reported that it developed a new training model a few years ago, which included a transition toolkit. NCDPI staff provided training through a train-the-trainer model in each of the State’s eight regions. Trainers were expected to train staff within their districts, and districts were expected to develop monitoring plans that identified their specific needs regarding compliance with the secondary transition requirements. NCDPI’s EC Division evaluated the training and its impact on transition outcomes and determined it did not have enough of a positive impact on transition outcomes. NCDPI indicated this was partially because training was not initially implemented with fidelity, there was high staff turnover following the initial training of trainers provided in the eight regions of the State, and there was a lack of, or limited, LEA monitoring plans developed by the LEAs to identify their needs regarding compliance, which may have also contributed to slippage and fluctuation of data.

In addressing the barriers to improving compliance for this indicator, NCDPI noted that, because the data is collected through monitoring, ensuring correction of identified noncompliance in one year does not have a direct impact on the SPP/APR data for the next year. NCDPI identified staff turnover and inconsistent implementation of current training practices as additional challenges in improving compliance for this indicator.

NCDPI reported that it is working with LEAs to improve local monitoring and training. NCDPI will continue to utilize the transition toolkit as a comprehensive resource for LEAs that includes information on IDEA requirements, transition assessments, and goals. Through pilot training, LEAs have also developed self-monitoring tools to target areas of need. NCDPI will use the results of the pilot training to update its long-term training plan in collaboration with the State’s Career and Technical Education Division and Vocational Rehabilitation Services Division.

Additionally, NCDPI reported that a focus on appropriate transition services will lead to an improvement in post-school outcomes, and that the implementation of ECATS will allow the State to capture real-time data, which will enable greater staff access to data in a timelier manner to address areas of deficiency.

OSEP remains concerned about the low levels of compliance for this indicator. We encourage NCDPI to continue to analyze its data to determine patterns in noncompliance (e.g., specific elements of secondary transition that LEAs are not meeting, regional trends, etc.), enhance its TA to LEAs, ensure consistent implementation of training models, and seek assistance from TA centers and OSEP as appropriate.

Other Areas Addressed

A. Specific Learning Disability Eligibility Determinations

Background

In a correspondence to OSEP on May 5, 2016, the Learning Disabilities Association (LDA) of North Carolina raised concerns that certain changes made by the State on February 4, 2016, to its policies regarding specific learning disability (SLD) eligibility determinations were inconsistent with Part B of the IDEA.¹⁴ Specifically, the LDA of North Carolina raised questions regarding:

1. the manner in which NCDPI uses information comparing a student's performance to that of a similar comparison group when determining whether the student has an SLD;
2. how the State- and district-wide assessment information is used in the SLD eligibility determination process; and
3. the State's definition of SLD.

In our August 22, 2017 response to the association's questions, OSEP determined, based on the review of documents, interviews with NCDPI personnel, and NCDPI's written response to OSEP's questions, that NCDPI's revised policies were not inconsistent with IDEA. However, OSEP noted that "it is critical that NCDPI fulfill its general supervisory responsibilities by: 1) providing guidance and technical assistance to its local educational agencies (LEAs) to support proper implementation of the State's Policies; and 2) monitoring its LEAs to ensure the Policies are implemented properly."

Since then, a group of parents representing students with disabilities in North Carolina have contacted OSEP with concerns about the implementation of those policies. Specifically, the parents have suggested that some LEAs are delaying the identification and evaluation of children who are suspected of having an SLD. OSEP has heard from these parents that NCDPI's approach of using a response to intervention (RTI)¹⁵ model is implemented in a manner that could result in children receiving interventions for extended periods of time that are not effective in addressing a struggling learner's needs and in delaying evaluations to determine eligibility for special education and related services.

As a follow-up to OSEP's August 22, 2017 letter, and to further address the concerns raised by parents and stakeholders regarding NCDPI's process for determining whether a student has an SLD, OSEP examined the pending implementation of the State's revised policies in discussions with NCDPI and local staff during the DMS visit. In addition to interviews with NCDPI, OSEP conducted on-site visits with three traditional LEAs, which included three elementary schools, one middle school, one Pre-K–8 school, two high schools, and one charter school LEA. Summaries of these discussions appear below.

Subsequent to OSEP's on-site DMS visit, an advocacy group of parents of students with dyslexia filed a series of State complaints related to NCDPI's alleged failure "to effectively exercise its

¹⁴ The State made further changes to its policies regarding SLD eligibility determinations on June 6, 2020. The policies became effective July 1, 2020.

¹⁵ RTI is a multi-tiered research-based approach for identifying and addressing the specific academic needs of struggling students under the multi-tiered systems of support (MTSS) framework. MTSS is much broader in that it addresses academic, social emotional, behavior and other factors that impede a child's learning experience.

general supervisory responsibility to identify and correct noncompliance related to the Districts' and LEAs' implementation of MTSS/[Response to Intervention (RTI)] and Child Find requirements, NCDPI is unable to ensure that FAPE has been made available to all eligible children within North Carolina in accordance with 34 C.F.R. § 300.101.”¹⁶ The complaints and the conclusions reached by NCDPI in the written decisions relate to the State's child find and evaluation policies and procedures, specifically whether NCDPI's policies and procedures may result in a delay or denial of a child's right to an initial evaluation for special education and related services under IDEA. Accordingly, in the sections below we address the substance of the parent advocacy group's complaint, NCDPI's decision, and OSEP's conclusions.

Legal Requirements

FAPE must be made available to all children with disabilities residing in the State between the ages of three and 21, as required by IDEA Section 612(a)(1) and its implementing regulation at 34 C.F.R. § 300.101.

Under IDEA Section 614(a) and 34 C.F.R. § 300.301, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or, if the State establishes a timeframe within which the evaluation must be conducted, within that timeframe.¹⁷

Additionally, under IDEA Section 614(b)(6) and 34 C.F.R. § 300.307, a State must adopt, consistent with 34 C.F.R. § 300.309, criteria for determining whether a child has an SLD as defined in IDEA Section 602(30) and 34 C.F.R. § 300.8(c)(10).¹⁸ In addition, the criteria adopted by the State:

1. must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has an SLD;
2. must permit the use of a process based on the child's response to scientific, research-based intervention; and
3. may permit the use of other alternative research-based procedures for determining whether a child has an SLD. 34 C.F.R. § 300.307(a).

In accordance with 34 C.F.R. § 300.309, the public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services (1) if, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction as described in 34 C.F.R. § 300.309(b)(1) and (b)(2); and (2) whenever a child is referred for an evaluation.

¹⁶ The initial State complaint (Complaint No. 20-043) was filed against NCDPI on September 28, 2020. OSEP is aware of three additional State complaints that the parent advocacy group filed with NCDPI related to this issue, including a complaint raising concerns about how NCDPI had resolved the initial complaint (Complaint No. 20-082, filed Dec. 13, 2020), and a complaint raising child-specific allegations (Complaint No. 20-078, filed Dec. 7, 2020). OSEP will address these concerns under separate cover.

¹⁷ Under NC 1503-2.2(c)(1), evaluations must be conducted, eligibility determined, and, for an eligible child, the IEP developed, and placement completed within 90 days of receipt of a written referral, unless an exception under NC 1503-2.2(d)-(e) applies.

¹⁸ SLD means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. 34 C.F.R. § 300.8(c)(10).

Under IDEA Section 612(a)(3) and 34 C.F.R. § 300.111, an SEA is required to have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated.

In addition, under 34 C.F.R. § 300.311(a)(7), for a child suspected of having an SLD, if the child has participated in a process that assesses the child's response to scientific, research based intervention, the documentation of the determination of eligibility must contain: (i) the instructional strategies used and the student-centered data collected; and (ii) the documentation that the child's parents were notified about – (A) the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; (B) strategies for increasing the child's rate of learning; and (C) the parents' right to request an evaluation.

As explained in detail in OSEP Memorandum 11-07,¹⁹ issued on January 21, 2011, the use of RTI strategies cannot be used to delay or deny the provision of a full and individual evaluation to a child suspected of having a disability under 34 C.F.R. § 300.8.

Further, under its general supervision responsibilities, an SEA must ensure each educational program for children with disabilities in the State, including each program administered by any other State or local agency, is under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities, and meets the educational standards of the SEA, including the requirements of IDEA. IDEA Sections 612(a)(11)(A) and 616(a)(1)(C), and 34 C.F.R. §§ 300.149(a) and 300.600.

Summary of Discussion with NCDPI

During the on-site DMS visit, NCDPI informed OSEP that, consistent with the State's revised policies which OSEP had reviewed in its August 22, 2017 letter to LDA of North Carolina, the State no longer uses a discrepancy model to score and collect data about how to meet the individual needs of students based on cognitive responses. NCDPI indicated that the revised policies, which became effective July 1, 2020, serve as an instructional model for identifying and evaluating students suspected of having an SLD, and determining their eligibility for special education and related services based on a scientific, evidence-based approach. During the visit, NCDPI explained that it is providing on-going training and technical assistance for LEA and school staff to build capacity and ensure the new policies are implemented with fidelity.

Since that time, the State made additional amendments to its policies on June 6, 2020,²⁰ which also became effective July 1, 2020. OSEP reviewed those additional amendments and found no changes that appeared to be substantive changes to the policies that OSEP had previously

¹⁹ This document can be located at: <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>.

²⁰ The State's amendments in 2020 to its *Policies Governing Services for Children with Disabilities* included amendments to the *Addendum: Specific Learning Disabilities*, which was implemented on July 1, 2020. In March 2021, the State further amended its *Policies Governing Services for Children with Disabilities*, consistent with the corrective actions that the SEA implemented in response to Complaint No. 20-043, as noted below. The March 2021 amendments included changing the language of NC 1503-3.3(c) to be consistent with 34 C.F.R. § 300.309 and incorporating the SLD provisions in the *Policies Governing Services for Children with Disabilities* instead of placing them in a separate addendum. See <https://ec.ncpublicschools.gov/policies/nc-policies-governing-services-for-children-with-disabilities/2021policies04192021.pdf>.

reviewed.²¹

The discussion below focuses on the State's oversight of the implementation of the SLD eligibility determination policies, followed by a review of the allegations made in the initial State complaint brought by the parent advocacy group and NCDPI's investigation and corrective actions that were taken as a result of the investigation.

Summary of Discussion with LEA and School Staff

As referenced above, during the DMS visit, OSEP conducted interviews with staff from four LEAs (including one charter school LEA), including district and school staff. These interviews were designed to gain additional information on the implementation of the State's policies related to its SLD eligibility determination process; its oversight and technical assistance to LEAs and were not conducted for the purpose of monitoring LEAs' or schools' compliance with IDEA. Below is a summary of the information gathered on the perspectives of local staff.

In OSEP's discussions with LEA and school-level staff, some staff reported that some LEAs are well-resourced, have already invested much effort to prepare for "SLD 2020,"²² and believe in the approach and philosophy behind the State's revised policies. However, local personnel identified a continued need for training and support on the implementation of the policies. Local staff indicated that there is a particular need to support new teachers and other staff on evaluation procedures and to support struggling learners in the classroom through the MTSS process. Local staff also informed OSEP that, from their perspectives, there are gaps in the implementation of SLD 2020, partly due to lack of training; and staff feel the SEA should have a stronger role in standardizing the protocols used to implement the policies. Additionally, the staff expressed a need for more appropriate intervention resources/options aligned with progress monitoring (e.g., hands-on, especially at the secondary level) to improve interaction between students and teachers. Consistently, all the local staff raised concerns regarding the severe shortage of school psychologists. LEA and school personnel explained that experienced staff do not have sufficient time to train other staff members; and while training modules have been helpful, there needs to be more training and support from NCDPI to support implementation at the LEA and school levels. Moreover, the local staff informed OSEP that, while NCDPI has been responsive to some of the needs at the local levels, it lacks personnel to be fully supportive to LEAs and schools.

In response to OSEP's inquiry regarding effective implementation of MTSS, LEA and school personnel shared that staffing choices have an impact on the effectiveness of the implementation of MTSS and that the success of the framework varies based on commitment of school leadership. Staff also asserted that there are unequal resources (e.g., staffing, professional development, and funding) across the State to implement MTSS and provide support to students in an appropriate manner, particularly for LEAs with fewer resources. When asked about the amount of time a student may remain in Tier 2²³ of MTSS, staff indicated to OSEP that there is inconsistency among districts regarding the amount of time students are in Tier 2 before a

²¹ Since that time, OSEP was made aware of the State complaints brought by the parent advocacy group. In light of the State's corrective actions in response to the complaints, OSEP is requiring additional corrective actions as noted below.

²² LEA and school staff explained that "SLD 2020" refers to the July 1, 2020 implementation of the State's revised policies regarding SLD.

²³ MTSS is a three-tiered interventional model of instruction. Tier 1 includes instruction for all students (i.e., core instruction); Tier 2 involves additional, or supplemental, instruction/intervention to students not meeting established benchmarks; and Tier 3 includes the most intensive level of instruction/intervention for individual or small groups of students with significant barriers to learning.

determination that additional interventions are needed. Further, school psychologists interviewed by OSEP frequently expressed an interest in participating in MTSS data reviews and intervention planning processes; however, they stated that their role in student evaluations/reevaluations and school mental health needs absorbs much of their time.

NCDPI's Subsequent Identification of Noncompliance and Corrective Actions

As noted above, subsequent to OSEP's on-site DMS visit, an advocacy group of parents of students with dyslexia filed a series of State complaints. In the initial complaint against the SEA (Complaint 20-043, filed September 28, 2020), the parent advocacy group alleged that NCDPI failed to effectively exercise its general supervisory responsibility to identify and correct noncompliance related to LEAs' implementation of MTSS/RTI and child find requirements, and that NCDPI therefore did not ensure FAPE was made available to students with disabilities in the State in accordance with 34 C.F.R. § 300.101. In its November 25, 2020 complaint investigation report, resolving the September 28, 2020 complaint, NCDPI identified two issues that were investigated:

1. Whether the general supervision system of the SEA is aligned with the IDEA, specifically, to ensure LEAs' policies and procedures meet child find requirements; and
2. Whether the SEA has policies and procedures in place to identify and correct noncompliance with child find requirements, specifically the practice of requiring interventions through MTSS before a disability can be suspected.

As a result of its complaint investigation, NCDPI concluded that "a finding of noncompliance with its Policies and its Technical Assistance required as part of its system of General Supervision. NCDPI is out of compliance for both Issue One and Issue Two in this complaint. Therefore, corrective action is warranted."

Specifically, NCDPI required the following corrective actions for the SEA:

- Develop and deliver the necessary technical assistance to LEAs to address the noncompliance identified in its report by July 1, 2021.
- Issue a statewide communication to LEAs regarding the findings of the complaint and include:
 - 1) An overview of the SEA's corrective action and timeline for completion;
 - 2) A requirement that all problem-solving teams must include an explicit question regarding whether or not a disability is suspected as part of each tier of intervention;
 - 3) A requirement for problem-solving teams to meet to discuss any child currently served in Tier 3 of intervention and served in Tier 3 at the time of school building closures (March 16, 2020) and whether a disability is suspected based on the information available to the team at the time of school building closures or any child participating in any tier of intervention that has spanned across academic school years;
 - 4) A parent letter that includes: (a) documentation about the performance data that would be collected and the general education services that would be provided; (b) strategies for increasing the child's rate of learning; and (c) a parent's right to request

- an evaluation that must be provided at each tier of the local intervention plan; and
- 5) Notification of the identification of children with specific learning disabilities as a statewide priority monitoring area beginning with the 2021-2022 EC Division Program Monitoring cycle and continuing until each LEA is monitored.
- Initiate the process to amend its *Policies Governing Services for Children with Disabilities* to correct the reference to 34 C.F.R. § 300.309²⁴ through the SEA's Rules Committee and Executive Summary for the State Board of Education.
 - Develop and disseminate the required procedures, specific to the complaint, that must be included in all state and local MTSS practices, procedures, handbooks, webpages, or other locations that printed materials are otherwise displayed or distributed.
 - Ensure all technical assistance materials posted to the NCDPI website include the required technical assistance materials.
 - Ensure that a parent information component is added to the MTSS LiveBinder posted on the NCDPI website.
 - Collect a written assurance from each LEA that affirms completion of the required statewide technical assistance activities specific to the complaint.

NCDPI, through its complaint investigation, made a finding of noncompliance that its child find policies and procedures may have created a risk that interventions may delay or deny the provision of full and individual evaluations to children suspected of having a disability under 34 C.F.R. § 300.8.

OSEP appreciates the corrective actions undertaken by NCDPI in response to this State complaint. OSEP believes that NCDPI's finding regarding the ambiguity NCDPI found in NC 1503-3.3(c) is reasonable, and that NCDPI's corrective action in response to that finding is reasonably designed to ensure correction consistent with 34 C.F.R. 300.309(c) and IDEA requirements.

However, OSEP is concerned that NCDPI limited the required review to "children currently served in Tier 3 of intervention and served in Tier 3 at the time of school building closures (March 16, 2020) and whether a disability is suspected based on the information available to the team at the time of school building closures or any child participating in any tier of intervention that has spanned across academic school years." Given the conclusions reached by NCDPI, we believe that a review is required of all children in any tier of intervention and without the limitation that the intervention span across school years. As a result, we conclude that the additional actions described below are necessary to adequately address NCDPI's failure to fulfill its general supervisory and monitoring responsibilities to ensure that LEAs throughout the State properly implement the IDEA child find and FAPE requirements in accordance with IDEA Sections 612(a)(1), 612(a)(11), and 616(a)(1)(C), and their implementing regulations at 34

²⁴ In the State's decision, the State explained that "the NC Policy referenced 34 C.F.R. § 300.309 when citing the public agency's obligation to request consent for an evaluation in NC 1503-3.3; however, by combining it with the referral process and the option of a parent referral, it introduced a level of ambiguity between the obligation to just refer and the obligation to evaluate by the public agency. The absence of the explicit requirements of the regulations noted above within one of the NC policies and the written procedures for implementing a MTSS creates a risk that interventions may delay or deny an evaluation..." NCDPI Final Report on Complaint No. 20-043, at 12. As noted in Footnote 21, the State amended NC 1503-3.3 in March 2021 to be consistent with 34 C.F.R. § 300.309.

C.F.R. §§ 300.101, 300.149, and 300.600, along with 20 U.S.C. 1232d(b)(3)(A).

Required Actions/Next Steps

In light of the findings of noncompliance NCDPI identified and the corrective actions NCDPI required in its resolution of Complaint 20-043, OSEP requires the following additional corrective actions. Within 90 days of the date of this letter, NCDPI must provide the following information to OSEP:

1. A report detailing the status of the implementation of the corrective actions identified in NCDPI's written decision on Complaint 20-043, with quarterly updates thereafter until NCDPI demonstrates that the revised policies and procedures ensure compliance with the IDEA child find and FAPE requirements in accordance with IDEA Sections 612(a)(1), 612(a)(11) and 616(a)(1)(C), and their implementing regulations at 34 C.F.R. §§ 300.149 and 300.600, along with 20 U.S.C. 1232d(b)(3)(A);
2. Policies and procedures that demonstrate that the NCDPI-imposed requirement for "problem-solving teams to meet to discuss any child currently served in Tier 3 at the time of school building closures (March 16, 2020) and [to determine] whether a disability is suspected based on the information available to the team at the time of school building closures," applies to any child currently in any tier of intervention, regardless of which tier or the length of time he or she has been receiving interventions in the tier; and
3. Policies and procedures that demonstrate that, if the child's parent has not been provided an opportunity to participate in the problem-solving team's discussion, NCDPI ensures that the LEA has informed the parent: (1) of the problem-solving team's discussion and decision of whether a referral for an initial evaluation of the child is appropriate; and (2) their right to request an initial evaluation of their child if the parent suspects their child may be a child with a disability under IDEA.

B. General Supervision: Implementation of Dispute Resolution Decisions

Background

As discussed above, prior to the on-site DMS visit, OSEP received communication from a group of parents of children with disabilities in North Carolina associated with the LDA of North Carolina. In addition to the concerns discussed above related to SLD, the parents also raised concerns alleging NCDPI did not ensure the implementation of corrective actions required as a result of the State complaint decisions. In response, OSEP staff held a telephone call prior to the on-site DMS visit with the group of parents to gather more information regarding the issues raised in their communication. To further address the parents' allegations, OSEP held a call with NCDPI on January 23, 2020. In addition, this issue was discussed during the on-site DMS visit.

Legal Requirements

The SEA must ensure that the public agency involved in a State complaint implements the written decision on the complaint in a timely manner. Under 34 C.F.R. § 300.152(b)(2), the State's complaint procedures must include procedures for effective implementation of the SEA's final decision, if needed, including TA activities, negotiations, and corrective actions to achieve

compliance. To ensure corrective action and pursuant to its general supervisory responsibilities in 34 C.F.R. §§ 300.149 and 300.600, the SEA must inform the public agency that is involved in the complaint of any findings of noncompliance and the required corrective action, and ensure that the corrective action is completed as soon as possible and within the timeframe specified in the SEA's written decision, and in no case later than one year of the State's identification of the noncompliance, as required under 34 C.F.R. § 300.600(e).

Under IDEA Section 615(f) and 34 C.F.R. §§ 300.511–300.514, due process hearing decisions must be implemented within the timeframe prescribed by the hearing officer, or if there is no timeframe prescribed by the hearing officer, within a reasonable timeframe set by the State. The SEA, pursuant to its general supervisory responsibility under IDEA Sections 612(a)(11) and 616(a) and 34 C.F.R. §§ 300.149 and 300.600, must ensure that the public agency involved in the due process hearing implements the hearing officer's decision in a timely manner, unless either party appeals the decision.

Findings

During the telephone interview, OSEP asked NCDPI to describe the mechanisms used to ensure State complaint and due process hearing decisions are implemented in a timely manner. The mechanisms were different for the two processes.

For State complaints, NCDPI indicated that, within 30 days of issuing the complaint decision, the written decision is sent to the LEA and a conference call or in-person meeting is held with the IEP Team and/or district leadership involved in the violation. As described by NCDPI, the written decision includes required corrective actions and timelines. NCDPI holds an in-depth discussion with the LEA concerning procedural noncompliance and provides necessary training to mitigate future noncompliance. NCDPI follows up with the LEA to ensure the corrective action is completed. If compensatory education is required, NCDPI reviews logs to ensure the education provided is in conformity with a student's IEP, and the LEA is required to communicate with parents about provision of the required compensatory education. Once NCDPI has appropriate documentation indicating that the LEA completed the corrective action, the dispute resolution coordinator conferences with the complaint investigator to review and ensure the corrective actions were developed and implemented in the manner prescribed. Once NCDPI agrees the violation has been corrected, the appropriate parties are notified, and the activity is closed.

As for due process hearing decisions, NCDPI stated that it does not have a formal mechanism in place to ensure that hearing decisions are implemented in a timely manner. NCDPI noted that it may hear from a parent if the hearing decision was not implemented. NCDPI further explained that if it becomes aware that a hearing decision has not been implemented, NCDPI staff follows up with the LEA to address the issue as appropriate.

The process NCDPI described appears to be reasonably designed to ensure corrective actions related to State complaint decisions are implemented in a timely manner. However, as to due process hearing decisions, it is not sufficient to rely on parents to report an LEA's failure to implement a hearing decision. Therefore, OSEP finds that, based on the information provided by NCDPI during the conference call interview, NCDPI does not have mechanisms in place to ensure due process hearing decisions are implemented within the timeframe prescribed by the

hearing officer, or if there is no timeframe prescribed by the hearing officer, within a reasonable time set by the State as required under IDEA.

Required Actions/Next Steps

Although the process NCDPI described appears to be reasonably designed to ensure corrective actions related to State complaint decisions that are implemented in a timely manner, without collecting additional data, OSEP cannot determine whether NCDPI's State complaint system is fully effective. OSEP is not requiring any actions as to State complaints at this time.

However, with regard to hearing decisions, within 90 days of the date of this letter, NCDPI must develop and submit to OSEP its revised policies and procedures that demonstrate that the SEA has a mechanism to ensure due process hearing decisions are implemented within the timeframe prescribed by the hearing officer, or if there is no timeframe prescribed by the hearing officer, within a reasonable timeframe set by the State in accordance with the requirements in 34 C.F.R. §§ 300.511–300.514, 300.149, and 300.600.

C. FAPE to Eligible Students with Disabilities in Private Psychiatric Residential Treatment Facilities (PRTFs)

Background

During a monitoring visit in 2011, OSEP found that the State did not, as required by IDEA Section 612(a)(12) and 34 C.F.R. § 300.154, have in effect an interagency agreement between NCDPI and NCDHHS. The agreement was required because NCDPI informed OSEP that NCDHHS is a non-educational public agency that is obligated under State law, in certain circumstances, to provide or pay for special education and related services that are necessary for ensuring FAPE to children with disabilities that NCDHHS places in PRTFs. Following the 2011 monitoring visit, NCDPI provided documentation of an interagency agreement with NCDHHS, and, in OSEP's February 29, 2012, letter reporting on the monitoring visit, OSEP concluded that the agreement met the requirements of 34 C.F.R. § 300.154. NCDPI informed OSEP in April 2012 that NCDHHS had cancelled the agreement, and informed OSEP in July 2013 of its efforts to meet the requirements of 34 C.F.R. § 300.154 through legislation. In a September 3, 2013 letter, OSEP required the State to provide, among other things, contact information of the office with authority to provide an opinion as to whether NCDHHS is a public agency as described in IDEA Section 612(a)(12)(B)(i)²⁵ and an explanation of the steps NCDPI had taken to identify, locate, and evaluate children with disabilities in PRTFs; and any barriers impeding NCDPI from carrying out its child find responsibilities under IDEA.

NCDPI responded on December 13, 2013 and March 3, 2014, and enclosed NCDHHS's January 17, 2014, response stating that NCDHHS is a public agency as described in IDEA Section

²⁵ Section 612(a)(12)(B)(i) of the IDEA states, "If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C)."

612(a)(12)(B)(i). NCDHHS also explained that children are placed in PRTFs by their parent, guardian, or custodian, and that they reside there as a result of parental choice, court order, or the need for mental health or substance abuse treatment unrelated to the provision of special education; and therefore, concluded that it was not required under the IDEA to provide FAPE to children with disabilities who reside in PRTFs. In addition, NCDPI provided a chronological list of preliminary steps it would take to help ensure that the State's responsibilities for child find and the provision of FAPE are implemented in accordance with the IDEA. NCDPI further indicated that it had engaged in discussions with PRTFs regarding how to involve LEAs in the evaluation process to determine whether students with disabilities in PRTFs are eligible for special education and related services under the IDEA.

In August 2014, the State passed a law regarding PRTFs, including a provision that ensured that FAPE was provided to students with disabilities placed in PRTFs licensed by the State. In June 2015, NCDPI provided OSEP with a copy of the enacted legislation and a fully executed Memorandum of Agreement between NCDPI and NCDHHS demonstrating it met the requirements of 34 C.F.R. § 300.154. OSEP did not require any additional corrective actions since NCDPI's submissions in June 2015.

Summary of Current Issues

On October 17, 2018, OSEP was contacted by an out-of-State PRTF concerning NCDPI's obligation to reimburse the PRTF for educational services to North Carolina students with IEPs. OSEP has had additional contacts with the PRTF, including a meeting on March 28, 2019. During that meeting, the representative of the PRTF asserted that North Carolina students with IEPs were referred to their facility not only by parents and Medicaid managed care organizations—Local Management Entities (LMEs) and Managed Care Organizations (MCOs)—but also by North Carolina public agencies such as social services and juvenile justice agencies.²⁶ After the March 28, 2019 visit, the PRTF representative provided documentation that appeared, on its face, to show that North Carolina students with IEPs were referred to their facility by public agencies in North Carolina, such as the State's social services and juvenile justice agencies. The documentation provided by the PRTF also indicated some of the students with IEPs at the facility were wards of the State.

On December 21, 2018, NCDPI wrote OSEP requesting TA in determining the State's obligation to ensure FAPE to eligible students with disabilities in out-of-state PRTFs. Specifically, NCDPI requested that "OSEP provide a response as to whether it agrees with the state's determination that the SEA is not responsible for reimbursing out-of-State PRTFs for special education services when the placement was not made by an LEA or other state agency."²⁷ NCDPI and NCDHHS²⁸ indicated that LMEs/MCOs only authorize Medicaid payments for, and do not place, North

²⁶ Under 34 C.F.R. § 300.2(b)(1), the requirements of IDEA Part B apply to all political subdivisions of a State that are involved in the education of children with disabilities, including the SEA, LEAs, other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or blindness), and State and local juvenile and adult correctional facilities. In addition, the requirements of IDEA Part B apply to these public agencies regardless of whether that agency receives IDEA Part B funds. 34 C.F.R. § 300.2(b)(2).

²⁷ Under IDEA, the FAPE obligation is based on whether the placement is made by a public agency, not a "state agency" as NCDPI indicated in its letter. 34 C.F.R. §§ 300.145–300.147.

²⁸ In its December 21, 2018 letter, NCDPI enclosed a November 28, 2018, letter from NCDHHS to NCDPI restating NCDHHS' position that neither NCDHHS nor LMEs/MCOs place children in PRTFs as a means of providing special education and related services.

Carolina students with disabilities in out-of-State PRTFs.²⁹ NCDPI also indicated that these students are parentally-placed students with disabilities, because no public agency made the placement decision. NCDPI therefore maintains that the SEA has no responsibility to pay for the allowable costs of special education and related services for these students while they are in out-of-State PRTFs.

In addition, after the on-site DMS visit, on April 22, 2020, OSEP held a conference call with staff from NCDPI and NCDHHS to follow up on questions regarding their respective roles in the provision of services to students with disabilities in PRTFs. During the call, NCDPI and NCDHHS provided OSEP with detailed information regarding the public agencies' responsibilities to, and oversight of, PRTFs, the relationship between LEAs and PRTFs, and the role of LMEs/MCOs in the assignment of students with disabilities in PRTFs located within and outside of the State.

Legal Requirements

Under IDEA Section 612(a)(1) and 34 C.F.R. §§ 300.101 and 300.102, States must ensure that FAPE is available to all eligible children with disabilities residing in the State within the State's mandated age range.³⁰ Additionally, IDEA Section 612(a)(3) and 34 C.F.R. § 300.111 require that the State have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State, and children with disabilities attending private schools, regardless of the severity of their disabilities and who are in need of special education and related services, are identified, located, and evaluated. Under its general supervision responsibilities, an SEA must ensure that each educational program for children with disabilities administered within the State, including each program administered by any other State or local agency, is under the general supervision of the persons responsible for educational programs for children with disabilities in the SEA, and meets the educational standards of the SEA including the requirements of IDEA. IDEA Section 612(a)(11)(A) and 34 C.F.R. § 300.149(a). The State must also have in effect policies and procedures to ensure that it complies with the monitoring and enforcement requirements in 24 C.F.R. §§ 300.600 through 300.602 and §§ 300.606 through 300.608. 34 C.F.R. § 300.149(b).

In addition, as required by IDEA Section 612(a)(12) and 34 C.F.R. § 300.154(a), the Chief Executive Officer of a State or designee of that officer must ensure that an interagency agreement or other mechanism for interagency coordination is in effect between the SEA and each non-educational public agency that is otherwise obligated under Federal or State law, or assigned responsibility under State policy, to provide or pay for any special education and related services necessary for ensuring the provision of FAPE to children with disabilities within the State. The purpose of the agreement is to ensure that all services described in IDEA Section 612(a)(12)(B)(i) and 34 C.F.R. § 300.154(b)(1) that are needed to ensure FAPE are provided, including the provision of such services during the pendency of any dispute under IDEA Section 612(a)(12)(A)(iii) and 34 C.F.R. § 300.154(a)(3). The agreement or mechanism must include all

²⁹ In a May 30, 2019, letter to OSEP, the State Attorney General's Office described LMEs and MCOs as "local political subdivisions of the State governed by area boards." The State explained that LMEs/MCOs manage State, county, and Federal funds for the provision of mental health, developmental disability, and substance abuse services for residents of the counties that they serve and provide authorizations for Medicaid behavioral health services in North Carolina. The State also indicated that PRTFs contract with LMEs and MCOs to provide behavioral health services which are funded through Medicaid.

³⁰ Children whose parents have placed them in a private school or facility even though FAPE was available are an exception to this rule. IDEA Section 612(a)(10)(A) and 34 C.F.R. §§ 300.132 and 300.137.

the information required in IDEA Sections 612(a)(12)(A)(i)-(iv) and 34 C.F.R. § 300.154(a)(1)-(4). Prior to the expenditure of IDEA Part B funds reserved for State administration, a State must certify to the Secretary that interagency agreements or other mechanisms to establish responsibility for services for children for whom a noneducational public agency is obligated under Federal or State law to provide or pay for services that are required by Part B are current. IDEA Section 611(e)(1)(C); 34 C.F.R. § 300.704(a)(3).

OSEP Analysis

The threshold issue is determining the circumstances under which eligible students with disabilities in PRTFs are entitled to FAPE. The question regarding which entity is responsible for payment and reimbursement for services to these students is secondary and follows from this determination. This issue was addressed in OSEP Memorandum 05-08, issued on March 17, 2005.³¹ In this memorandum to the field, OSEP wrote:

If a public agency³ determines in an individual situation that an eligible child cannot receive an appropriate education from the programs that the public agency conducts, and, therefore, placement in a public or private residential program is necessary in order to provide special education and related services to the child, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. §300.302. In addition, each SEA must ensure that a child with a disability who is placed in, or referred to, a private school or facility by a public agency is provided special education and related services in conformance with the child's individualized education program (IEP), and with the standards that apply to education provided by the SEA and LEAs (including the requirements of IDEA-Part B). 20 U.S.C. §§ 1402(8) and 1412(a)(10)(B) and 34 C.F.R. §300.401.

³ The term "public agency" includes the SEA, local educational agencies (LEAs), and any other political subdivisions of the State that are responsible for providing education to children with disabilities. 34 C.F.R. §300.22.

In summary, if an eligible student with a disability is placed by a public agency in a residential facility, whether in-State or out-of-State, the SEA is responsible for ensuring that FAPE is provided, and as a result, for ensuring that the costs of special education and related services in conformity with the student's IEP are covered. Regardless of the role that NCDHHS and LMEs/MCOs may have in connection with the placement of children with disabilities in PRTFs, NCDPI, in its exercise of general supervisory authority as an SEA, must ensure that FAPE is available to all eligible children with disabilities in mandated age ranges residing within the State, including children publicly placed outside the State. Further, the SEA's responsibility to ensure FAPE for all eligible students with disabilities residing in the State and the SEA's general supervisory responsibility require that the SEA be able to identify, locate, evaluate, and make FAPE available to all children with disabilities residing in the State who are publicly placed in out-of-State PRTFs. This means the SEA must also be able to track the locations of students who

³¹ The statutory and regulatory references included in Memorandum 05-08 reflect the 1997 IDEA statute and its 1999 implementing regulations. The Individuals with Disabilities Education Improvement Act of 2004, which took effect on July 1, 2005, contains similar provisions. Specifically, the requirements formerly in 34 C.F.R. §§ 300.22, 300.302, and 300.401 are now found in 34 C.F.R. §§ 300.33, 300.104, and 300.146, respectively. The statutory authority for these provisions is at IDEA Sections 602(9) and 612(a)(10)(B) and (a)(11).

have been identified as a child with a disability under IDEA, in order to determine whether the child is publicly placed and is being provided FAPE, or whether FAPE does not need to be provided because the child is not publicly placed but is in the PRTF due to a unilateral decision by the parents to place their child in a private facility. 34 C.F.R. §§ 300.101, 300.145–300.147, 300.148, and 300.149.

In NCDPI's December 21, 2018 letter to OSEP, NCDPI and NCDHHS asserted that LMEs/MCOs do not place students in PRTFs as a means of providing special education and related services, but simply authorize Medicaid payments. However, special education and related services include psychological and counseling services and other supportive services as are required to assist a child with a disability to benefit from special education. 34 C.F.R. § 300.34(a). In addition, a child's IEP is required to include a statement of the special education and related services and supplementary aids and services to be provided to the child, as well as program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals, be involved in, and make progress in the general education curriculum. 34 C.F.R. § 300.320(a)(4). Therefore, because some Medicaid-covered services could be considered special education and related services, LMEs/MCOs appear to be public agencies, at least for some students with disabilities. While OSEP generally defers to NCDPI on the determination of whether LMEs/MCOs are public agencies, OSEP notes that the SEA's determination must be consistent with IDEA requirements.

In addition, in the *PRTF Handbook: Educational Services in Psychiatric Residential Treatment Facilities* (referred to as the "Handbook" in this correspondence), there are multiple references to requirements related to students with disabilities in in-State PRTFs, which make clear these students are treated as publicly placed students with disabilities, regardless of what agency makes the placement decisions. To the extent that the State considers LMEs/MCOs to be involved in the placement of eligible students with disabilities in in-State PRTFs, it is unclear on what basis the State treats the role of LMEs/MCOs in out-of-State placements differently.

Further, NCDPI's responsibility to ensure FAPE is available to all eligible children with disabilities who are residing in North Carolina and have been publicly placed in PRTFs does not hinge on the reason for their placement. That is, regardless of whether the placement is for education or treatment reasons, the SEA is responsible for ensuring that FAPE is made available to the child. *See* June 9, 1994 Letter from OSEP to John McAllister.³² *See also* Question 16, Appendix A to Part 300 of Final Regulations Implementing IDEA Amendments of 1997, 64 Federal Register. 12406, 12476 (Mar. 12, 1999).³³ Children with disabilities do not lose their right to FAPE if their parents seek mental health or substance abuse treatment for them from a public agency. To suggest otherwise would leave parents with the impossible choice of either

³² In the letter to Mr. McAllister, OSEP explained that, "under Part B, when a child with a disability is placed or referred by a State social service, social welfare, or similar State agency, whether for education or treatment reasons, at a private school or facility, whether within the State or outside of the State, the SEA in the State in which the child resides is responsible for ensuring that FAPE is made available to the child during the course of the child's placement at the out-of-State facility."

³³ In Appendix A to Part 300 of the 1999 IDEA final regulations, Question 16 asks, "For a child placed out of State by an educational or non-educational State or local agency, is the placing or receiving State responsible for the child's IEP?" The response provides: "Regardless of the reason for the placement, the 'placing' State is responsible for ensuring that the child's IEP is developed and that it is implemented. The determination of the specific agency in the placing State that is responsible for the child's IEP would be based on State law, policy, or practice. However, the SEA in the placing State is ultimately responsible for ensuring that the child has FAPE available."

seeking needed publicly subsidized mental health or substance abuse treatment for their child or giving up their child's right to FAPE.

The lack of clarity on NCDHHS's role in matters related to children with disabilities in PRTFs is precisely the situation that Congress sought to address in Section 612(a)(12) of IDEA, which governs interagency disputes and other related matters. That section requires the Chief Executive Officer of a State, or a designee of that officer, to ensure that an interagency agreement or other mechanism for interagency coordination is in effect between the SEA and each noneducational public agency that is obligated under Federal or State law, or assigned responsibility under State policy, to provide or pay for any services that are also considered special education or related services (which includes, but is not limited to, psychological and counseling services as well as supplementary aids and services) that are necessary for ensuring FAPE to children with disabilities in the State. The purpose of this requirement is to ensure that the responsibility for the provision of FAPE for all students with disabilities in the State is clear and that services necessary to ensure FAPE are provided in a timely and appropriate manner. This is particularly important in the context of PRTFs, where it is not uncommon for multiple agencies to share responsibility in the placement of, and provision of services to, children placed in the facilities. The State may meet this requirement through State statute or regulation, a signed interagency agreement between respective agency officials that clearly identifies the responsibilities of each agency relating to the provision of, and payment for, services, or other appropriate written method, consistent with IDEA Section 612(a)(12)(C) and 34 C.F.R. § 300.154(c).

OSEP remains concerned about the State's lack of policies and procedures to determine if a student with a disability attending an out-of-State PRTF whose residency or parents' residency remains in North Carolina is entitled to FAPE and the apparent inability of NCDPI to track students with disabilities who are in such facilities. While OSEP cannot verify the accuracy of the log of students with disabilities submitted by the out-of-State PRTF, the information in the log raises questions about the status of these students. When provided with this information, NCDPI was unable to determine whether these students were publicly placed and therefore entitled to FAPE, consistent with the IDEA requirements cited above. In addition, during the on-site DMS visit, and in the subsequent April 22, 2020 call that OSEP held with NCDPI and NCDHHS, NCDPI was unable to provide any policies and procedures used to determine whether these students are publicly placed or to pay for public placement of students with disabilities in out-of-State PRTFs. It is notable that, as to students with disabilities publicly placed in in-State PRTFs, NCDPI was able to explain, and provide a copy of, the State's policies and procedures for identifying, locating, and evaluating the students and ensuring FAPE is made available to them. Finally, OSEP notes that during the April 22, 2020 teleconference, when provided with information indicating that students with disabilities could be residing in out-of-State facilities as a result of local social services agency determinations, NCDPI was unable to provide any policies and procedures to ensure that these students are receiving FAPE.

Findings

Based on the review of documents and interviews with NCDPI and NCDHHS staff, OSEP finds that the State does not have policies and procedures in place to ensure that eligible students with disabilities located in PRTFs outside of North Carolina are receiving FAPE in accordance with IDEA Section 612(a)(1), (2), (3), (5), (10)(B), (11), and (12) and 34 C.F.R. §§ 300.101–300.110; 300.111, 300.145–300.147; and 300.149. Specifically, OSEP finds that the State does not have

policies and procedures in place to: 1) identify, locate, and evaluate students with disabilities attending PRTFs or other educational facilities outside the State; 2) determine if any of these students are publicly placed; and 3) ensure that FAPE is provided to any students with disabilities publicly placed outside the State.

Required Actions/Next Steps

Within 90 days of the date of this letter, NCDPI must submit the following documentation to OSEP:

1. Revised policies and procedures that demonstrate that NCDPI will:
 - a. Identify, locate, and evaluate students with disabilities residing in the State who are attending PRTFs or other educational facilities outside the State;
 - b. Determine if these students are publicly placed; and
 - c. Make FAPE available to any students with disabilities publicly placed outside the State; and
2. A detailed description of:
 - a. The steps NCDPI has taken to identify, locate, and evaluate all eligible children with disabilities residing in the State who are placed by a public agency in a PRTF or other educational facility located outside the State;
 - b. The impact of those steps on ensuring that all such children are identified, located, evaluated, and FAPE is made available to them; and
 - c. The additional steps (with timelines) that NCDPI will take to ensure that all such children are identified, located, evaluated, and FAPE is made available to them.

DMS NOTICE

Differentiated Monitoring and Support Engagement Decisions: *North Carolina* 2019-2020

This year we have selected four States for on-site visits as part of OSEP's Differentiated Monitoring and Support (DMS) system. These selections were based on the relative number of intensive and targeted Levels of Engagement (LOEs) across all states. **Your State has been selected for an on-site visit.**

OSEP's Differentiated Monitoring and Support (DMS) system is a component of Results Driven Accountability. DMS is designed to identify potential grantee risk to the Department and to assist OSEP in effectively using its resources to monitor grantees. DMS addresses State-specific needs in the areas of results, compliance, State Systemic Improvement Plan (SSIP), and fiscal by differentiating levels and types of monitoring and support based on each State's unique strengths, progress, and challenges in each area.

DMS is a multi-tiered model for monitoring and providing support based on the principle that supports are first provided at a core or universal level to effectively address the needs of all States. Targeted monitoring and support is generally based on OSEP's identification of common needs among multiple States. Intensive monitoring and support is reserved for those States with the most intense or complex challenges to implementation.

OSEP has assessed States' and Entities' progress in meeting performance standards and compliance with the legal requirements of the Individuals with Disabilities Education Act, the Education Department General Administrative Regulations and the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards. This information was used to help OSEP make decisions about a State's or Entities' levels of engagement for monitoring and support.

The charts below specify your State's level of engagement in each area – results, compliance, fiscal and SSIP.

Results | Level of Engagement: *Universal*

Factors	Existing/Current Engagement
<ul style="list-style-type: none"> Factors are only listed when the level of engagement is targeted or intensive. 	OSEP continues to make information and technical assistance (TA) resources available and provide universal support to all States.

New Engagement

OSEP will provide universal support to improve data quality and child performance outcomes related to positive social relationships, skills and knowledge.

Fiscal | Level of Engagement: *Intensive*

Factors	Existing/Current Engagement
<ul style="list-style-type: none"> State has had a change in the Part B Director position within the past two years. The State's IDEA 611 award exceeds \$200,000,000. State has lapsed 1% or more of funds from Part B grants FFY 2016. 32% or more of State's LEAs are charter school LEAs. 	OSEP continues to make information and TA resources available and provide universal support to all States.

New Engagement

OSEP will contact the State and discuss the level of engagement. OSEP may also request additional documentation from the State and collect additional publicly available information. Based upon discussions with the State, technical assistance or additional data collection may be conducted on-site or virtually.

Compliance | Level of Engagement: *Intensive*

Factors	Existing/Current Engagement
<ul style="list-style-type: none"> Indicator 11: Timely initial evaluation 90.22 Indicator 12: IEP developed and implemented by third birthday 86.03 Indicator 13: Secondary transition 85.45 Timely State Complaint Decisions 92.59 	OSEP continues to make information and TA resources available and provide universal support to all States.

New Engagement

OSEP will gather additional information to determine the scope of engagement necessary to assist the State in improving IDEA compliance. This may include working collaboratively with the State and OSEP-funded technical assistance centers, working with the State to conduct a root cause analysis of the factors that contributed to low compliance, and /or additional OSEP monitoring.

SSIP | Level of Engagement: *Universal*

Factors	Existing/Current Engagement
<ul style="list-style-type: none"> Factors are only listed when the level of engagement is targeted or intensive. 	OSEP continues to make information and TA resources available and provide universal support to all States.

New Engagement

OSEP will provide universal support related to the State's SSIP.