

Texas Part C Continuous Improvement Visit Letter
Enclosure - Verification Component

Scope of Review

During the verification component of the Continuous Improvement Visit (CIV), OSEP reviewed critical elements of the State's general supervision and fiscal systems,¹ and the State's systems for improving functional outcomes for infants and toddlers with disabilities and protecting child and family rights. We also reviewed the State's policies and procedures for ensuring the appropriate tracking, reporting and use of IDEA funds made available under The American Recovery and Reinvestment Act of 2009 (ARRA).

Methods

In reviewing the State's systems for general supervision, including the collection of State-reported data,² and fiscal management, and the State's systems for improving child and family outcomes and protecting child and family rights, OSEP:

- Analyzed the components of the State's general supervision and fiscal systems to ensure that the systems are reasonably calculated to demonstrate compliance and improved performance
- Reviewed the State's systems for collecting and reporting data the State submitted for selected indicators in the State's Federal Fiscal Year (FFY) 2009 Annual Performance Report (APR)/State Performance Plan (SPP)
- Reviewed the following—
 - Previous APRs
 - The State's application for funds under Part C of the IDEA
 - Previous OSEP monitoring reports
 - The State's Web site
 - Other pertinent information related to the State's systems³
- Gathered additional information through surveys, focus groups or interviews with—
 - The Part C Coordinators
 - State personnel responsible for implementing the general supervision, data, and fiscal systems
 - Early intervention services (EIS) program staff, where appropriate
 - State Interagency Coordinating Council
 - Parents and Advocates

¹ As explained in the cover letter, OSEP will respond to the fiscal component of the review under separate cover.

² For a description of the State's general supervision system, including the collection of State reported data, see the State Performance Plan (SPP) on the State's Web site; http://www.dars.state.tx.us/ecis/reports/ECI_SPP2005-2012.htm.

³ Documents reviewed as part of the verification process were not reviewed for legal sufficiency, but rather to inform OSEP's understanding of your State's systems.

Description of the Part C System

The Texas Department of Assistive and Rehabilitative Services (DARS) is designated as the lead agency to administer the IDEA Part C early intervention program in Texas. Within DARS, the IDEA Part C program is administered by the Division for Early Childhood Intervention Services (ECI). ECI is one of four programs in DARS and is the second largest financially. The IDEA Part C program is currently administered at the local level through 56 contracted programs, which serve as the early intervention service (EIS) programs for SPP/APR reporting purposes under IDEA sections 616 and 642. According to the 2010 IDEA section 618 data table submitted by the State, the Texas Part C program serves 28,895 infants and toddlers birth through two years of age.

I. General Supervision System

Critical Element 1: Identification of Noncompliance

Does the State have a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components?

To effectively monitor the implementation of Part C of the IDEA by EIS programs/providers, as required by IDEA sections 616, 635(a)(10)(A), and 642 and 34 CFR §§303.500 and 303.501,⁴ the State must have a general supervision system that identifies noncompliance in a timely manner.

Components of the State's general supervision system include: onsite monitoring (focused or comprehensive), the ECI complaint log, the Texas Kids Intervention Data System (TKIDS) and desk audits. All programs receive on-site monitoring at least once every four years. The State does not issue written findings for all noncompliance. Rather, according to OSEP's interviews with State staff and review of monitoring documents, the State only issues written findings for noncompliance with IDEA Part C if the level of noncompliance for a local program is below 90%.

The State also reported during onsite interviews that, prior to 2011, the State was only making findings if the finding or noncompliance was determined to be systemic. For example, if it was found that only one or two files were out of compliance, no finding would be made and no corrective action was required. Programs are notified of all individual noncompliance although findings may not be issued if the level of compliance does not meet the threshold. On November 28, 2011, the State submitted a draft plan to OSEP describing the State's intentions to comply with OSEP Memorandum 09-02, Reporting on Correction of Noncompliance in the Annual Performance Report Required under Sections 616 and 642 of the Individuals with Disabilities Education Act, dated October 17, 2008 (OSEP Memo 09-02), in the identification of noncompliance, including issuing findings for all noncompliance, regardless of the level of noncompliance or whether it is individual or systemic.

⁴ Unless otherwise specifically noted, the IDEA Part C regulations cited in this letter are to the regulations with which States must comply during FFY 2011 and which were in effect prior to the publication of the new IDEA Part C regulations published in 76 *Federal Register* 60140 on September 28, 2011, which are referred to in this Enclosure as the "new" regulations.

OSEP Conclusion

To effectively monitor the implementation of Part C of the IDEA by EIS programs/providers, as required by IDEA sections 616, 635(a)(10)(A), and 642 and 34 CFR §§303.500 and 303.501, the State must issue written findings for all noncompliance, regardless of the level of noncompliance. Based on the review of documents, analysis of data and interviews with State and local personnel, as described above, OSEP concludes that the State does not have a general supervision system that is reasonably designed to identify noncompliance in a timely manner using its different components because the State: (1) uses an impermissible percentage threshold to identify noncompliance; and (2) makes findings only if the noncompliance is determined to be systemic.

Required Actions/Next Steps

Although the State has submitted a plan to OSEP for its monitoring process related to the identification and correction of noncompliance, the State must submit within 90 days from the date of this letter an assurance that it is issuing written findings for all instances of noncompliance regardless of the level of noncompliance and whether the noncompliance is systemic or individual.

Also within 90 days from the date of this letter, the State must submit revised policies and procedures related to identification of noncompliance.

Critical Element 2: Correction of Noncompliance

Does the State have a general supervision system that is reasonably designed to ensure correction of identified noncompliance in a timely manner?

To effectively monitor the implementation of Part C of the IDEA by EIS programs/providers, as required by IDEA sections 616, 635(a)(10)(A), and 642, 34 CFR §§303.500 and 303.501, the State must have a general supervision system that corrects noncompliance in a timely manner. In addition, as noted in OSEP Memo 09-02, in order to verify that previously-identified noncompliance has been corrected, the State must verify that the EIS program and/or provider: (1) is correctly implementing the specific regulatory requirements (i.e., achieved 100% compliance) based on a review of updated data such as data subsequently collected through on-site monitoring or a State data system; and (2) has corrected noncompliance for each child, unless the child is no longer within the jurisdiction of the EIS program and/or provider.

During OSEP's visit the State reported that it does not verify correction for all noncompliance consistent with OSEP Memo 09-02. Although State contracts with local EIS programs require 100% correction of noncompliance, the State is using a threshold of 90-95% for an EIS program to demonstrate correction of noncompliance. OSEP was able to verify this information during a focus group with local EIS program administrators.

Additionally, previous to 2011, the State only followed up on systemic findings and the local EI programs addressed any individual noncompliance. The State uses the TKIDS database to verify correction and conducts a follow-up verification visit for subsequent file reviews. The State defended their use of a threshold by pointing out that they look at one year's worth of data both for the finding and for correction rather than reviewing a smaller sample from a shorter time period in order to achieve 100%. OSEP was not able to verify that the State is correcting all noncompliance for each child regardless of the level of noncompliance. On November 28, 2011

the State submitted a draft plan to OSEP describing the State's intentions to comply with OSEP Memo 09-02 in the correction of noncompliance, including clearing of findings when the State has found 100% compliance both for correction of individual cases and systemic noncompliance.

OSEP Conclusion

To ensure the timely correction of noncompliance by EIS programs/providers, as required by IDEA sections 616, 635(a)(10)(A), and 642 and 34 CFR §§303.500 and 303.501, and subsection (e), and OSEP Memo 09-02, the State must require correction of all noncompliance regardless of the level or type of noncompliance. Based on the review of documents, analysis of data, and interviews with State and local personnel, as described above, OSEP concludes that the State does not have a general supervision system that is reasonably designed to correct noncompliance in a timely manner using its different components because the State is not requiring correction of all noncompliance regardless of the level or type of noncompliance. Additionally, even in the absence of the above issue, OSEP could not conclude that the State's systems are fully effective in correcting noncompliance in a timely manner, because the State's FFY 2009 SPP/APR data for Indicator C-9 reflect 88.9% compliance.

Required Actions/Next Steps

Although the State has submitted a plan to OSEP for its monitoring process related to the correction of noncompliance, the State must submit within 90 days from the date of this letter an assurance that it is issuing written findings for all instances of noncompliance regardless of the level of noncompliance and whether the noncompliance is systemic or individual. OSEP will respond to the State's FFY 2010 SPP/APR data for timely correction in Indicator C-9 through the SPP/APR review process.

Critical Element 3: Dispute Resolution

Does the State have procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA?

The State must have procedures and practices that are reasonably designed to implement the following IDEA Part C dispute resolution requirements: the State Complaint procedures in 34 CFR §§303.510 through 303.512; and the mediation and due process procedure requirements in 34 CFR §§303.419 through 303.425 (as modified by IDEA sections 615(e) and 639(a)(8)). Texas has adopted the IDEA Part C due process hearing procedures in §§303.421 through 303.425.

State Complaint Procedures

During OSEP's onsite visit, the State presented a case study of a State complaint it had received and investigated in FFY 2011. The State reported that the written decision provided to the complainant did not address the remedies (i.e., corrective actions) to address the noncompliance with Part C requirements identified through the investigation as required by 34 CFR §303.510(b). The State explained that instead, it referred the matter to its "Performance and Oversight" group to determine next steps, including the actions required to correct the matter for the individual child and to prevent the provider's noncompliant practice from recurring with other infants and toddlers and their families. Referring corrective action to a subagency is inconsistent with the agency's general supervision responsibilities in 34 CFR §303.510(b), which requires the lead agency to include in the written decision remedies to address denial of services,

including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family and appropriate future provision of services for all infants and toddlers with disabilities and their families. Referral to a subagency for further review does not remedy the denial of service.

Ensuring Mediators and Hearing Officers are Knowledgeable in Part C Laws and Regulations

During OSEP's visit, the State reported that mediators and hearing officers for Part C mediations and due process hearings participate in training and professional development activities offered by the Texas Education Agency. The State acknowledged that these particular activities were focused on IDEA Part B requirements and did not specifically address Part C laws and regulations.

Subsequent to the visit, the State provided additional information that indicates the hearing officers and mediators the lead agency uses for Part C matters are attorneys licensed to practice law in the State of Texas. The State reported that the lead agency's attorney provided an orientation to the hearing officers and mediators, explained the general differences between Parts B and C, and provided materials, including Federal regulations and State rules, and an opportunity to ask questions. Based on this additional information, no further action is required at this time regarding this issue.

Availability of Mediation

The Texas Administrative Code (TAC) rule §101.7047(a) provides that a parent who has initiated a due process hearing may request mediation to resolve the dispute. The rule further provides that the "Department, with the consent of the ... parent, may also originate the request for mediation." It is unclear whether the State's interpretation of this rule is consistent with the IDEA requirement that mediation is available to parties, including the lead agency, to resolve disputes in any matters involving Part C consistent with IDEA sections 639(a)(8), which cross-references IDEA section 615(e).

TAC rules §§101.7047 and 108.217 provide that mediation is available when a parent files a request for a due process hearing or files a State complaint.⁵ The State's rules do not make clear that mediation must be available at any time to parties to disputes involving any matter under Part C, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process at any time as required by IDEA sections 615(e) and 639(a)(8).

Due Process Hearing Procedures – Filing a Due Process Complaint

According to TAC rule §101.7007(a)(2), a parent may initiate a hearing involving the "identification, evaluation, or placement of or the provision of appropriate early intervention

⁵ The State's rule §108.217 (g) indicates that when a complaint is filed, mediation services are to be offered "as an alternative to proceeding with the State complaint investigation." OSEP notes that the current Part C regulation at 34 CFR §303.433 requires that the State's complaint procedures include an opportunity for a parent who has filed a complaint and the lead agency, public agency, or EIS provider to voluntarily engage in mediation consistent with 34 CFR §§303.430(b) and 303.431. The State may not view the existence of mediation, in and of itself, as an exceptional circumstance that warrants an extension of the 60-day timeline but may extend the timeline if the parent and the lead agency, public agency, or early intervention service provider involved agreed to extend the time to engage in mediation.

services to a child or child’s family.” This provision became effective August 31, 2008. The TAC rule §101.8011(d)(1) provides that a parent, ECI, or the contractor responsible for services to a child may initiate a hearing on matters involving the “identification, evaluation, or placement of or the provision of appropriate early intervention services to the child and the child’s family.” The provision was adopted to be effective August 31, 2008 and amended to be effective September 1, 2010. The State rule §101.8011(d)(1) is inconsistent with the IDEA Part C due process hearing procedures in 34 CFR §303.420(b). If a State adopts the Part C due process hearing procedures under IDEA section 639 and 34 CFR §303.420(b), a due process hearing request may only be filed by the parent.

Due Process Hearing Procedures - Motions for Reconsideration

Under TAC rules §§101.7043 and 101.8013, any party to a hearing may file a motion for reconsideration within 20 days after the party is notified of the issuance of the hearing officer’s decision. The State’s rule is not consistent with IDEA’s finality and 30-day timeline requirements in 34 CFR §303.423(b). A State may permit motions for reconsideration prior to issuing a final decision, but the final decision must be issued within the required timeline.⁶

Due Process Hearing Procedures – Computation of Time

TAC rule §101.7049 provides that if a required deadline falls on a weekend or legal holiday, the timeline will end on the next day that is not a Saturday, Sunday, or legal holiday. The rule also provides that weekends and legal holidays are not counted for any purpose in any time period of five days or less in the State’s rules for appeals and hearing procedures. The State’s rule is not consistent with the definition of “day” as a calendar day as required in 34 CFR §303.9.

OSEP Conclusion

To ensure that the State has procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA, as required by 34 CFR §§303.510 through 303.512; and the mediation and due process procedure requirements in 34 CFR §§303.419 through 303.425 (as modified by IDEA sections 615(e) and 639(a)(8)), the State must have rules and procedures that comply with IDEA. OSEP notes that the new IDEA Part C regulations published on September 28, 2011 will require the State to make further changes but that the following requirements will still apply.

Specifically:

1. The State must ensure that in resolving a complaint in which it finds a failure to provide appropriate services, the State’s written decision addresses the actions required to: (a) remediate the denial of appropriate early intervention services to the child and family; and (b) ensure appropriate future provision of services for all infants and toddlers with disabilities and their families in accordance with 34 CFR §303.510(b).
2. The State must ensure that it allows parties to disputes involving any matter under Part C, including matters arising prior to the filing of a due process complaint, to resolve disputes

⁶ After July 1, 2012 the new IDEA Part C regulations published on September 28, 2011 become effective and the State will be required to be in compliance with 34 CFR §303.437(c). The State should review the requirements of 34 CFR §303.437(c) (which still require a 30-day timeline but permit the hearing officer to grant an extension at the request of either party) to ensure that the State is able to comply with this regulation on or after July 1, 2012.

through a mediation process at any time as required by IDEA sections 615(e) and 639(a)(8) and the new Part C mediation regulation in 34 CFR §303.431(a).

3. If the State chooses to implement the Part C due process hearing procedures under section 639 of the IDEA, the State must eliminate from its procedures and State rule §101.8011(d), the availability of due process hearings filed by the ECI or the contractor responsible for services to a child, consistent with IDEA section 639(a)(1).
4. If the State chooses to allow motions for reconsideration, the State must ensure such motions are filed and decided prior to the issuance of the final decision and within the 30-day timeline or a properly extended timeline in accordance with the IDEA's finality provisions in 34 CFR §303.423(b) and the new Part C regulation in 34 CFR §303.437(b) and (c).
5. The State must compute dispute resolution timelines based on calendar days in accordance with 34 CFR §303.09.

Based on the review of documents, analysis of data and interviews with State and local personnel, as described above, OSEP concludes that the State does not have procedures and practices that are reasonably designed to implement the dispute resolution requirements of IDEA for the foregoing reasons.

Required Actions/Next Steps

1. Within 90 days of the date of this letter, the State must submit an assurance that it has revised its State complaint procedures to ensure that in resolving a complaint in which it finds a failure to provide appropriate services, the State's written decision addresses the actions required to: (a) remediate the denial of appropriate early intervention services to the child and family; and (b) ensure appropriate future provision of services for all infants and toddlers with disabilities and their families in accordance with 34 CFR §303.510(b).⁷
2. With its FFY 2012 Part C Grant Application, the State must submit a signed, written specific assurance that it will comply with the requirements in IDEA sections 615(e) and 639(a)(8) and 34 CFR §303.431(a) to ensure that the State allows parties to disputes involving any matter under Part C, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process at any time.

In addition, within 90 days of the date of this letter, the State must clarify its interpretation of TAC rule §101.7047 as it relates to the availability of mediation to a party other than a parent to resolve disputes involving any matter under Part C to be consistent with the requirements in IDEA sections 615(e) and 639(a)(8) and 34 CFR §303.431(a).

3. If the State chooses to implement the Part C due process hearing procedures under section 639 of the IDEA, the State must submit a signed, written specific assurance with its FFY 2012 Part C Grant Application, stating that it will comply with the requirements in 34 CFR §303.435 and IDEA section 639(a)(1).⁸

⁷ This requirement may be found in the new Part C regulations at 34 CFR §303.432(b).

⁸ If the State chooses to adopt the Part B due process hearing procedures under section 615 of the IDEA, the State will need to make additional revisions to its policy, procedures, and State rules to comply with the requirements in

4. If the State chooses to allow motions for reconsideration, the State must provide a signed, written specific assurance with its FFY 2012 Part C Grant Application stating it will ensure such motions are filed and decided prior to the issuance of the final decision and within the 30-day timeline or a properly extended timeline in accordance with the IDEA’s finality provisions in 34 CFR §303.437(b) and (c).

If the State decides to eliminate its provision that permits motions for reconsideration of IDEA Part C due process hearing decisions, with its FFY 2012 Part C Grant Application, the State must, with its FFY 2012 Part C Grant Application, provide a timeline for completing the required revisions to TAC rule §101.7043 and any related policy or procedure implementing that rule.

5. With its FFY 2012 Part C Grant Application, the State must submit a signed, written specific assurance that it will comply with the requirements in 34 CFR §303.09 to ensure that for the purpose of calculating dispute resolution timelines, “day” is defined as a calendar day in accordance with 34 CFR §303.09.

Critical Element 4: Data System

Does the State have a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance?

To meet the requirements of IDEA sections 616, 618, 635(a)(14), 642, 34 CFR §303.540, and OSEP Memorandum 10-04: Part C State Performance Plan (Part C – SPP) and Part C Annual Performance Report (Part C – APR) the State must have a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance.

OSEP Conclusion

Based on the review of documents and interviews with State personnel, OSEP concludes that the State has a data system that is reasonably designed to timely collect and report data that are valid and reliable and reflect actual practice and performance.

Required Actions/Next Steps

No action is required.

Critical Element 5: Implementation of Grant Assurances

Does the State have procedures and practices that are reasonably designed to implement selected grant application requirements, i.e., monitoring and enforcement related to local determinations and State-level interagency coordination?

The State must have procedures and practices that are reasonably designed to ensure that the State is implementing the following grant application requirements: (1) monitoring and enforcement related to local determinations pursuant to IDEA sections 616 and 642; and (2) State-level interagency fiscal coordination to ensure that methods are in place under IDEA sections 635(a)(10), 637(a)(2) and 640.

Transition Conference

During a focus group discussion with local EIS program administrators, OSEP was told that it was a practice in Texas to hold group transition conference meetings at the IDEA section 619 preschool locations. These conferences are led by the preschool staff. The State staff confirmed that their policy allows for group transition conferences but this mostly occurs in the urban setting. The TAC rule §108.1217 requires the service coordinator to “document that the method is appropriate and acceptable to the family, if conducted in a group setting. If a group setting is not acceptable or appropriate to the family, the contractor must convene an individual LEA Transition Conference.”

A group transition conference cannot meet the individualization, confidentiality and early childhood transition conference requirements in 34 CFR §§303.148, 303.344(h), 303.402 and 303.460 (new). Although group meetings can occur as part of the parent information process, they cannot take the place of an individual transition conference, which may include developing a transition plan as part of the IFSP.

System of Payments Related to Family Cost Share

Regarding the State’s System of payments related to family cost share, OSEP learned during the verification visit from conversations with ECI staff and supporting documentation from an ECI program brochure and the TAC rule that the Texas ECI program is charging families that do not sign up for Medicaid a monthly fee when their income is below the poverty level. Specifically, as found in the TAC rule §108.1419(e), the State indicated that the contractor must assist the parent with enrolling a potentially eligible child in Medicaid or CHIP. The State further described the following State practices, which are inconsistent with Part C of the IDEA. If the parent refuses to apply for Medicaid or CHIP, the contractor must bill the parent the family cost share amount based on the sliding fee scale or \$10, whichever is greater. If the contractor receives full or partial payment for the month the IFSP service was delivered, the contractor must not bill the parent for refusing to apply for Medicaid or CHIP. Under the current Part C regulations, TAC rule §108.1419(e) and the State’s practices as described above are prohibited, and would be inconsistent with the new IDEA Part C Federal Regulations in 34 CFR §§303.520 and 303.521.

State-level Fiscal Interagency Coordination or Methods

With regard to State-level interagency fiscal coordination, in any State or entity that receives IDEA Part C funds where a State-level agency, other than the State lead agency, provides or pays for IDEA Part C services, the lead agency must have a method for ensuring the financial responsibility for those services as required by IDEA sections 635(a)(10), 637(a)(2) and 640. Beginning with the FFY 2012 IDEA Part C grant application, any State that is required to have a method must certify that its method meets the requirements of subpart F of the new IDEA Part C Final Regulations (new 34 CFR §§303.500 through 303.521), which were published on September 28, 2011.

In addition, if the State's method is an interagency agreement or other written method (i.e., anything other than a State statute or regulation), the State must also submit that method with its FFY 2012 IDEA Part C grant application. If Texas has any questions about updating its methods or this fiscal certification, OSEP remains available to provide technical assistance. Texas should

review carefully OSEP's IDEA Part C Grant Application Technical Assistance Checklist for Fiscal Certification required under new 34 CFR §303.202.

OSEP Conclusions

Based on the review of documents and interviews with State personnel, OSEP concludes that the State has procedures and practices that are reasonably designed to implement selected grant application requirements, regarding enforcement related to local determinations and State-level interagency coordination. In reference to the early childhood transition application requirements, OSEP concludes that the State does not have procedures and practices reasonably designed to implement the confidentiality and timely transition conference requirements as stated by 34 CFR §§303.148(b)(2), 303.402 and 303.460.

In addition, the State will need to review their system of payments related to family cost share and must make changes that comply with the new Part C Federal regulations. OSEP looks forward to receiving the State's revised system of payments policy with the FFY 2012 grant application.

Required Actions/Next Steps

Within 90 days from the date of this letter, the State must either submit revised TAC rule §108.1217 or provide an explanation of how its group transition meetings will not replace the specific transition conference and transition plan requirements in 34 CFR §§303.148 and 303.344(h) (new 34 CFR §§303.209 and 303.344(h)) to ensure that the early childhood transition conference and meeting to develop the transition plan are confidential and individualized.

With the State's FFY 2012 Part C Grant Application, the State must submit revised policies and procedures related to the transition and confidentiality requirements in 34 CFR §§303.209, 303.344(h) and 303.414.

With the State's FFY 2012 IDEA Part C grant application, the State must submit revised TAC rule §108.1419(e) and its revised system of payments policies and a specific assurance that its system of payments practices regarding use of insurance complies with new IDEA Part C Federal Regulations in 34 CFR §§303.520 and 303.521 effective July 1, 2012.

OSEP will review, and respond as part of the IDEA Part C grant application process to any methods submitted by the State with its FFY 2012 application to ensure financial responsibility for the provision of Part C services.