UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

Honorable Chris Cerf
Acting Commissioner
New Jersey Department of Education
P.O. Box 500
Trenton, New Jersey 08625-0500

APR - 7 2011

Dear Mr. Cerf:

This is in response to the enclosed September 29, 2010, letter to Secretary Arne Duncan, in which New Jersey requests a waiver in the amount of $25,671,915 for State financial support for special education and related services for children with disabilities for State Fiscal Year (SFY) 2010 (July 1, 2009 – June 30, 2010) for the Individuals with Disabilities Education Act (IDEA) under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1). The information in New Jersey's letter was supplemented by information provided in a November 9, 2010, e-mail from Barbara Gantwerk of the New Jersey Department of Education's Office of Special Education Programs. We appreciate the time and effort your staff took to provide the initial and supplemental information.

Under 20 U.S.C. §1412(a)(18)(A) and 34 CFR §300.163(a), a State must not reduce the amount of State financial support for special education and related services for children with disabilities, or made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. While we are permitted to waive these requirements for a State, for one fiscal year at a time, if we determine that granting a waiver would be equitable due to exceptional or uncontrollable circumstances (such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State, 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1)), we do so carefully and reluctantly, given the importance we place on maintaining State financial support for our most vulnerable students. However, regardless of whether a State receives a waiver under this authority, the State has a continuing obligation to ensure that a free appropriate public education (FAPE) is made available to all eligible children with disabilities, as required in 20 U.S.C. §1412(a)(1) and 34 CFR §300.101.

New Jersey reduced State financial support for special education and related services by $25,671,915, which represents a 2.1 percent decrease for SFY 2010 when compared to SFY 2009. From the information your agency provided, we are aware that the State experienced a significant decrease in revenues of 1.1 billion dollars, which represented a 3.8 percent decrease from SFY 2009 to SFY 2010. The State cut its appropriations across agencies, with an overall cut in appropriations from SFY 2009 to SFY 2010 of 12.76 percent, including a cut in appropriations for elementary and secondary education, other than special education and related services, of 18.59 percent. While it is regrettable that cuts were made to education, we recognize that the reduction in financial support for special education and related services was relatively small compared with cuts to other areas of education.

In reviewing the September 29, 2010, request, as part of our review of "equitability," we considered all of the information provided by the State in all of its submissions--including that the percent reduction in State financial support for special education and related services was less than the average percent reduction in appropriations across agencies and less than the percent reduction in revenues. We also considered other relevant information, including the current information provided by the State with regard to the targets it has set and its data on the compliance and performance indicators under section 616 of the IDEA (20 U.S.C. §1416). In addition, when evaluating the equity of the requested waiver, we considered the fact that the IDEA American Recovery and Reinvestment Act (ARRA) funds were available to assist the State and local educational agencies (LEAs) in meeting their obligation to make a FAPE available to all children with disabilities in SFY 2010.

Based on all of the information discussed above, I have determined that it is equitable to grant a waiver under 20 U.S.C. §1412(a)(18)(C)(i) and 34 CFR §300.163(c)(1) due to exceptional or uncontrollable circumstances--the precipitous and unforeseen decline in the financial resources of the State--permitting New Jersey to reduce its amount of State financial support provided for special education and related services for SFY 2010 by $25,671,915.

We remind the State that if the Department determines through an audit, or other means, that the State failed to maintain State financial support at the level permitted by this waiver, the Department will be required to reduce the allocation of funds to the State under section 611 of the IDEA for any fiscal year following the fiscal year for which the State fails to maintain effort by the same amount by which the State fails to meet the requirement. 20 U.S.C §1412(a)(18)(B) and 34 CFR §300.163(b). In addition, the Department may take action to recover funds as provided for in section 452(a)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. §1234a(a)(1).

Further, as provided in 20 U.S.C. §1412(a)(18)(D) and 34 CFR §300.163(d), the amount of State financial support required of the State in SFY 2011 is the same amount that would have been required in the absence of this waiver (i.e., $1,204,956,000). We also want to make clear to the State that, when making decisions about its level of State financial support for special education and related services in SFY 2011, the State should not anticipate, or rely on, a waiver of the requirement to maintain State financial support for special education and related services. Indeed, since the advent of the State's economic downturn, the State has had an opportunity to examine its sources and amounts of revenues and to plan accordingly, consistent with its obligations under the IDEA.

As you know, the State must ensure that LEAs do not count ARRA Part B funds as "State" or "local" funds for the purpose of determining whether an LEA has met its supplement/not supplant and maintenance of effort requirements at 34 CFR §§300.202(a)(3) and 300.203. Further, if it is discovered, through means such as monitoring or auditing, that an LEA has not met these requirements, the Department will seek to recover funds from the State educational agency (SEA), in an amount equal to the amount by which the LEA did not meet the requirements. The amount recovered must be paid from non-Federal funds.

The Department may undertake additional monitoring of New Jersey's implementation of Part B of the IDEA should we believe that to be necessary to assess whether a FAPE is still being made available to all eligible children with disabilities, even though the State has been granted the waiver described above. In addition, in light of the New Jersey Special Education Advisory

Panel's duties in 20 U.S.C. §1412(a)(21)(D), particularly its duty in 20 U.S.C. §1412(a)(21)(D)(i) to "advise the State educational agency of unmet needs within the State in the education of children with disabilities," we are providing it with a copy of this letter.

To ensure that the public is fully informed regarding the granting of this waiver, OSEP requires the SEA to prominently post on its Web site the State's September 29, 2010, letter to the Department and this letter. In addition, OSEP is requiring the State to report to your OSEP State Contact on July 1, 2011, and October 1, 2011, responses to the following:

1. What action is the State taking, or did the State take, to ensure that children with disabilities are receiving a FAPE during the current school year (2010-2011), including monitoring and reviewing complaints filed or hearings requested? and
2. How will the State communicate with stakeholders regarding the waiver request and the State's actions to ensure that all eligible children with disabilities are receiving a FAPE?

We appreciate your State's commitment to serving children with disabilities and look forward to our continued collaboration on their behalf.

Sincerely,

Alexa Posny

Alexa Posny, Ph.D.

Enclosure

cc: New Jersey State Special Education Advisory Council