Questions and Answers
On Serving Children With Disabilities
Placed by Their Parents in Private Schools

January 2007

The final regulations for the reauthorized Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Since publication of the final regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education has received requests for clarification of some of these regulations. This is one in a series of question and answer documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of IDEA and the regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As are not intended to be a replacement for careful study of IDEA and the regulations. The statute, regulations, and other important documents related to IDEA and the regulations are found at http://idea.ed.gov.

IDEA and its implementing regulations contain a number of significant changes from the preexisting law and regulations for parentally-placed private school children with disabilities. Section 612(a)(10)(A) of IDEA and 34 CFR §§300.130 through 300.144 now require that the local educational agency (LEA), after timely and meaningful consultation with private school representatives, conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private schools *located in the LEA*. These requirements make clear that the obligation to spend a proportionate amount of IDEA Part B funds to provide services to children with disabilities enrolled by their parents in private schools now refers to children enrolled by their parents in private elementary schools and secondary schools "in the school district served by a local education agency." Other key changes relate to the consultation process, calculation of the proportionate share, and standards applicable to personnel providing equitable services.

A. Consultation With Private School Representatives and Representatives of Parents of Parentally-Placed Private School Children With Disabilities

Authority: The requirements for consultation are found in the regulations at 34 CFR §300.134.

Question A-1: What guidance is available on how to carry out the consultation process? Are there any consultation models available?

Answer: In March 2006, OSEP issued a document entitled "Questions and Answers on Serving Children With Disabilities Placed by Their Parents at Private Schools." This document provides guidance on the requirements for the consultation process. In addition, the website http://idea.ed.gov provides a topic brief and a video clip describing specific changes in the requirements in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) for parentally-placed private school children with disabilities. There are a number of ways to carry out the consultation process. OSEP, however, does not endorse any specific consultation model.

B. Equitable Services

Authority: The requirements for equitable services are found in the regulations at 34 CFR §§300.132 and 300.137-300.138.

Question B-1: Define equitable services.

Answer: Equitable services are services provided to parentally-placed private school children with disabilities in accordance with the provisions in IDEA and its implementing regulations at 34 CFR §§300.130 through 300.144.

The regulations at 34 CFR §300.137(a) explicitly provide that children with disabilities enrolled in private schools by their parents do not have an individual right to receive some or all of the special education and related services they would receive if enrolled in the public schools. Under the Act, LEAs only have an obligation to provide parentally-placed private school children with disabilities an opportunity for equitable participation in the services funded with Federal Part B dollars that the LEA has determined, after consultation, to make available to its population of parentally-placed private school children with disabilities.

The consultation process is important to ensure the provision of equitable services. Consultation among the LEA, private school representatives, and parent representatives must address how the consultation will occur throughout the school year so that parentally-placed children with disabilities identified through child find can meaningfully participate in special education and related services. How, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities is determined during the consultation process.

Equitable services for a parentally-placed private school child with disabilities must be provided in accordance with a services plan. A services plan must describe the specific special education and related services that will be provided to a parentally-placed private school child with disabilities designated to receive services.

C. Services Plans

Authority: The requirements for services plans are found in the regulations at 34 CFR §§300.132(b) and 300.138(b).

Question C-1: How often must a services plan be written?

Answer: IDEA and its implementing regulations do not specify how often a services plan must be written. As provided in 34 CFR §300.138(b)(2)(ii), a services plan must, to the extent appropriate, be developed, reviewed and revised in accordance with the IEP requirements in 34 CFR §§300.321 through 300.324. The regulations at 34 CFR §300.324(b)(1) require that a child's IEP be reviewed periodically and not less than annually, to determine whether the annual goals for the child are being achieved; and to be revised as appropriate. The Department, therefore, believes that generally a services plan should be reviewed annually and revised, as appropriate.

Question C-2: Must the parent of a parentally-placed private school child participate in the development of a services plan?

Answer: As provided in 34 CFR §300.138(b)(2)(ii), a services plan must, to the extent appropriate, be developed, reviewed and revised in accordance with the requirements in 34 CFR §§300.321 through 300.324. Therefore, to the extent appropriate, the meeting to develop a services plan should be conducted in accordance with 34 CFR §300.321. Under 34 CFR §300.321(a)(1), the parents of the child are required participants. Given the emphasis on parent involvement in IDEA, the Department believes that parents should participate in the meeting to develop the services plan for their child.

D. Due Process

Authority: The requirements for how due process and State complaints apply to children parentally-placed in private schools are found in the regulations at 34 CFR §300.140.

Question D-1: Under what circumstances may a parent file a complaint under the private school provisions?

Answer: As provided in 34 CFR §300.140(b), a parent of a child enrolled by that parent in a private school has the right to file a due process complaint regarding the child find requirements in 34 CFR §300.131, including the requirements in 34 CFR §§300.300 through 300.311. Such a complaint must be filed with the LEA in which the private school is located and a copy forwarded to the SEA. The due process provisions in section 615 of the Act and 34 CFR §§300.504 through 300.519 of the regulations do not apply to issues regarding the provision of services to a particular parentally-placed private school child with disabilities an LEA has agreed to serve, because there is no individual right to services for parentally-placed private school children under IDEA. Disputes that arise about equitable services are, however, properly subject to the State complaint procedures in 34 CFR §§300.151 through 300.153. As provided in 34 CFR §300.140(c), a parent may file a signed written complaint in accordance with the State complaint procedures alleging that an SEA or LEA has failed to meet the private school provisions, such as failure to properly conduct the consultation process.

E. Child Find and Individual Evaluations

Authority: The requirements for child find for parentally-placed private school children with disabilities are found in the regulations at 34 CFR §300.131.

Question E-1: Is it possible for a parent to request evaluations from the district where the private school is located as well as the district where the child resides?

Answer: The Department recognizes that there could be times when parents request that their parentally-placed child be evaluated by different LEAs if the child is attending a private school that is not in the LEA in which they reside. For example, because most States generally assign the responsibility for making FAPE available to the LEA in which the child's parents reside, and because that could be an LEA that is different from the LEA in which the child's private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time. Although there is nothing in IDEA that prohibits parents from requesting that their child be evaluated by the LEA responsible for FAPE for purposes of having a program of FAPE made available to the child at the same time that the parents request that the LEA where the private school is located evaluate their child for purposes of considering the child for equitable services, the Department does not encourage this practice. Note that a new requirement at 34 CFR §300.622(b)(3) requires parental consent for the release of information about parentally-placed private school children between LEAs. Therefore, as a practical matter, one LEA may not know that a parent also requested an evaluation from another LEA. However, the Department does not believe that the child's best interests would be served if parents request evaluations of their child by the resident school district and the LEA where the private school is located, even though these evaluations are conducted for different purposes. Subjecting a child to repeated testing by separate LEAs in close proximity of time may not be the most effective or desirable way to ensure that the evaluations are meaningful measures of whether a child has a disability or of obtaining an appropriate assessment of the child's educational needs.

Question E-2: Does the LEA where the private school is located have an obligation to make an offer of FAPE?

Answer: The LEA where a child attends private school is responsible for ensuring equitable participation. If a parentally-placed private school child also resides in that LEA, then the LEA would generally be responsible for making FAPE available to the child, unless the parent makes clear his or

her intent to keep the child enrolled in the private elementary or secondary school located in the LEA. If a parentally-placed private school child resides in a different LEA, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to that child.

If a determination is made through the child find process by the LEA where the private school is located that a child needs special education and related services and a parent makes clear his or her intent to keep the child enrolled in the private elementary or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child.

F. Highly Qualified Teachers in Private Schools

Authority: The requirements for highly qualified teachers in private schools are found in the regulations at 34 CFR §§300.18(h) and 300.138(a).

Question F-1: Who must meet the "highly qualified teacher" requirements? If an LEA hires a teacher to provide special education services to children with disabilities placed by their parents in private schools, does the teacher have to meet the "highly qualified teacher" requirements?

Answer: The regulations at 34 CFR §300.138(a) clarify that personnel providing equitable services required by IDEA to children enrolled in private schools by their parents must meet the same standards as personnel providing services in the public schools, except that private elementary and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements in 34 CFR §300.18. If the responsible LEA contracts with private school teachers to provide equitable services to children with disabilities enrolled by their parents in private schools, those private school teachers do not have to meet the highly qualified special education teacher requirements. However, if public school personnel provide equitable services to private school children on or off the premises of the private school, those public school personnel must meet the highly qualified teacher requirements.

Question F-2: Can States go beyond IDEA's requirements and require teachers in private schools to hold certain credentials or certifications?

Answer: The regulations at 34 CFR §§300.18(h) and 300.138(a) make clear that private school teachers do not have to meet the same highly qualified teacher requirements as teachers who are employed by public agencies. IDEA is silent regarding additional credentials or certifications that each State may require under State law.

Therefore, States may go beyond IDEA requirements and require teachers in private schools to hold certain credentials or certifications. If a State establishes requirements that exceed those required by Part B of the Act or the Federal regulations, the State is required by 34 CFR §300.199(a)(2) to identify in writing to the LEAs located in the State and to the Secretary that such rule, regulation, or policy is a State imposed requirement, which is not required by Part B of the Act or the Federal regulations.

G. Expenditures

Authority: The expenditure requirements are found in the regulations at 34 CFR §300.133.

Question G-1: Is the proportionate share that the LEA must expend to provide equitable services to children with disabilities placed by their parents in private schools different from the calculation required in previous years?

Answer: Yes, the revisions to IDEA in 2004 made a significant change in the manner in which the proportionate share is calculated. The major change is that the calculation is based on the total number of children with disabilities who are enrolled in private schools located in the LEA whether or not the children or their parents reside in the LEA.

The proportionate share is now calculated as follows: (1) For children aged three through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of private school children with disabilities aged three through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through 21.

(2) For children aged three through five, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of parentally-placed private school children with disabilities aged three through five who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through five.

Appendix B of the regulations provides a helpful example of how to make this calculation.

Question G-2: Which children does an LEA use to make its proportionate share calculation?

Answer: Children who have been evaluated and found eligible for special education and related services, not just those children who receive services through an IEP or services plan, should be included in the calculation. As discussed at 34 CFR §300.133(a), an LEA needs to know the total number of private school children with disabilities who are enrolled by their

parents in private elementary schools and secondary schools located in the LEA and the total number of children with disabilities enrolled in public and private elementary schools and secondary schools located in the LEA.

Question G-3: May an LEA expend more than the proportionate share of Part B funds on children with disabilities placed by their parents in private schools?

Answer: As discussed above, each LEA is required to spend a minimum amount of its subgrant under Part B for children with disabilities placed by their parents in private schools. As long as the LEA meets all the other requirements of the Act, including providing FAPE to children with disabilities, it is permissible for an LEA to spend more than the minimum amount of Part B funds. In addition, as provided in 34 CFR §300.133(d), State and local funds may be used to supplement, but not supplant, the proportionate share of Federal funds required to be expended on children with disabilities placed by their parents in private schools.

Question G-4: If an LEA does not expend the entire proportionate share of Part B funds on children with disabilities placed by their parents in a private school that closes, what must the LEA do with those unexpended funds?

Answer: Under 34 CFR §300.133(a), each LEA is required to spend a minimum amount of its subgrant under Part B on children with disabilities placed by their parents in private elementary and secondary schools. As provided in 34 CFR §300.133(a)(3), if an LEA has not expended all of the proportionate share of its Part B subgrant by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services to children with disabilities placed by their parents in private schools during a carry-over period of one additional year. A reduction in the number of children, for example, when a school closes after the start of the school year, does not excuse the LEA from spending its proportionate share to provide equitable services to children with disabilities placed by their parents in private schools.

Question G-5: Can an LEA require another LEA to pay for the services of a parentally-placed private school child with a disability from another State?

Answer: Section 300.133(a) clarifies that the LEA where a private school is located is responsible for spending a proportionate amount of its subgrant under Part B on special education and related services for children enrolled by their parents in private elementary and secondary schools located in the

LEA. There is no exception for out-of-State children with disabilities attending a private school located in the LEA. Therefore, out-of-State children with disabilities must be included in the group of parentally-placed children with disabilities whose needs are considered in determining which parentally-placed private school children with disabilities will be served and the types and amounts of services to be provided. Another LEA may not be charged for child find and equitable services even if the child with a disability resides in another State.

Nothing in IDEA precludes an LEA from contracting with a third party to fulfill its obligations to ensure equitable participation. This includes contracting with a student's LEA of residence as a third party provider.

Question G-6: How can the public find out the amount an LEA must expend to meet its proportionate share of Part B funds?

Answer: This information should be readily available from the LEA or SEA. As required by 34 CFR §300.134(b), the consultation process must include a determination of the proportionate share of Federal funds available to serve parentally-placed private school children with disabilities, including how the proportionate share of funds will be calculated.

Question G-7: Will the Federal/State allocation of Part B funds have to be adjusted to include parentally-placed private school children with disabilities receiving equitable services?

Answer: Federal Part B funds are allocated under the Grants to States and Preschool Grants for Children with Disabilities programs to States, and from States to LEAs, based on a statutory formula that considers the amount of program funds received in a prior year (the base year) and population and poverty allocations (see 34 CFR §§300.703, 300.705, 300.807 and 300.816). Each LEA calculates the proportionate share it must spend on parentally-placed private school children with disabilities based on the LEA's subgrant. Because Part B funds are allocated to States and LEAs using a statutory formula that is not based on a child count, the amount of Part B funds allocated to States and LEAs cannot be adjusted to include the number of private school students with disabilities receiving equitable services. Adjustments in State funding could be made depending on each State's laws and funding mechanisms.

Question G-8: How are the "Maintenance of Effort" requirements affected when equitable services are no longer provided with State and local funds to children with disabilities placed by their parents in private schools? How are the "Maintenance of Effort" requirements affected for an LEA that only used State and local funds in previous years to provide equitable participation to children with disabilities placed by their parents in a private school?

Answer: In accordance with the regulations at 34 CFR §300.133(d), State and local funds may supplement, and in no case supplant, the proportionate share of Federal funds required to be expended for children with disabilities placed by their parents in private schools. This is a new requirement in IDEA. Prior to the reauthorization of IDEA, if an LEA spent more than the Federal proportionate share of funds using State and local funds, the LEA was not required to spend any Federal Part B funds on parentally-placed private school children. This is no longer permissible.

An LEA that previously used only State and local funds to provide equitable services to children with disabilities placed by their parents in a private school and now uses Federal Part B funds to provide equitable services must meet the maintenance of effort requirements in 34 CFR §300.203. The exceptions to the maintenance of effort requirements in 34 CFR §300.204 do not apply to funds used for equitable participation of parentally-placed private school children with disabilities. Therefore, the total or per capita amount of State and local funds expended for the education of children with disabilities, including the amount previously expended for equitable services to children with disabilities placed by their parents in private schools, would have to be maintained, unless adjustments are permitted as discussed in 34 CFR §300.205.

H. General

Question H-1: When making a determination regarding the services that an LEA will provide a child with disabilities placed by their parents in a private school, could an LEA decide to only provide services to students from their LEA or their State?

Answer: LEAs have discretion to determine how the proportionate share of Federal Part B funds will be expended so long as the consultation requirements in 34 CFR §300.134 are followed for all parentally-placed private school children. LEAs cannot determine, outside of the consultation process, that the proportionate share of Federal Part B funds for equitable services can only be expended to meet the needs of children who are residents of that LEA or State.

Question H-2: Section 300.139(a) states that services to parentally-placed private school children with disabilities may be provided on the premises of the private school, including religious schools, to the extent consistent with law. How is "the extent consistent with law" determined?

Answer: Services offered to parentally-placed private school children with disabilities may be provided on-site at a child's private school, including a religious school, to the extent consistent with law, or at another location. The Department believes that, in the interests of the child, LEAs should provide services on-site at the child's private school so as not to unduly disrupt the child's educational experience, unless there is a compelling rationale for these services to be provided off-site. The phrase "to the extent consistent with law" is in section 612(a)(10)(A)(i)(III) of the Act. The Department interprets this to mean that the provision of services on the premises of a private school must take place in a manner that would not violate the Establishment Clause of the First Amendment of the U.S. Constitution and would not be inconsistent with applicable State constitutions or laws.

Question H-3: What obligation, if any, do districts have to serve 3 through 5-year-old children who are parentally-placed in private preschools?

Answer: An LEA's obligation to provide equitable services to three through five-year-old parentally-placed private school children with disabilities depends on whether a child is enrolled in a private school or facility that meets the definition of "elementary school" in IDEA and the final regulations. "Elementary school" is defined at 34 CFR §300.13 as a

nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law. Accordingly, three through five-year-old children with disabilities that are enrolled by their parents in a private school or facility that meets the State's definition of "elementary school" would be considered parentally-placed and the equitable participation provisions would apply. A child aged three through five enrolled by his or her parents in a private school or facility that does not meet the State's definition of "elementary school" would not be eligible to be considered for equitable services. However, the State's obligation to make FAPE available to such children remains. Section 612(a)(1) of IDEA requires that States make FAPE available to eligible children with disabilities aged three through twenty-one in the State's mandated age range (34 CFR §300.101). Because many LEAs do not offer public preschool programs, particularly for three- and four-year-olds, LEAs often make FAPE available to eligible preschool children with disabilities in private schools or facilities in accordance with 34 CFR §§300.145-300.147. In these circumstances, there is no requirement that the private school or facility be an "elementary school" under State law.

In some instances, an LEA may make FAPE available in the private preschool program that the parent has selected. If there is a public preschool program available, the LEA of residence may choose to make FAPE available to a preschool child in that program. If the group of persons making the placement decision, as specified in 34 CFR §300.116(a)(1), places the child in a public or private preschool program and the parents reject the public agency's offer of FAPE because they want their child to remain in the private preschool program they have selected, the public agency is not required to provide FAPE to that child. The parent may challenge the public agency's determination of what constitutes FAPE for their child using the State complaint and due process procedures available under IDEA.