



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

DIRECTOR

OSEP Policy Letter 22-06

November 16, 2022

Dr. Jacquelyn Flanigan
Associate Superintendent
Diocese of Orlando – Office of Catholic Schools
Post Office Box 1800
Orlando, Florida 32802-1800

Dear Dr. Flanigan:

Thank you for your July 12, 2022, email inquiry to the U.S. Department of Education (Department), Office of Non-Public Education (ONPE). Your inquiry was referred to the Office of Special Education Programs (OSEP), a component of the Office of Special Education and Rehabilitative Services, and in developing a response, OSEP conferred with ONPE to fully understand the inquiry.

In your initial email, you raised three questions and, based on follow-up conversations, we understand that you would like a written response to two of your three questions. First, you ask whether a child who has been identified as a child with a disability under Part B of the Individuals with Disabilities Education Act (IDEA), but for whom the parent has rejected the offer of a free appropriate public education, must be counted when calculating the proportionate share of IDEA Part B funds that a local educational agency (LEA) is required to spend on the provision of equitable services to parentally-placed private school children with disabilities enrolled in private schools in the LEA. Second, you ask about a Memorandum of Understanding (MOU) that the School Board of Brevard County, Brevard County Public Schools (BCPS), an LEA in Florida, is requiring schools in the Diocese of Orlando to sign in order for BCPS to provide equitable services under Part B of the IDEA to parentally-placed private school children with disabilities. We interpret your second question to be whether it is consistent with IDEA for BCPS to require a private school to enter into an MOU as a condition of the LEA providing equitable services for parentally-placed private school children with disabilities enrolled at that school.

Section 607(d) of the IDEA prohibits the Secretary of the Department from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of Section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA Section 607(e), this response is provided as informal guidance and is not legally binding. It represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances. Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This

400 MARYLAND AVE. S.W., WASHINGTON, DC 20202-2800

www.ed.gov

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

document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies. Further, the Department responds to these matters, generally, and not in the context of any specific due process complaint or State complaint that may be pending or resolved.

Regarding your first question, the Department recently issued *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools* (Feb. 2022). The Q&As provide additional information regarding the consultation process including filing complaints and are located on the Department’s website at:

https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf. As addressed in Q&A N-2 of that document, “[a]ll children who have been evaluated and found eligible for special education and related services—not solely those children who receive services through an IEP or services plan—must be included in the count to calculate the proportionate share...” (emphasis added). Therefore, any student found eligible under IDEA who is enrolled by their parent in a private elementary or secondary school,¹ whether or not they have a current or prior IEP or services plan, must be counted when calculating the proportionate share.

In response to your second question, IDEA’s mechanism for private school involvement in the design and development of equitable services is through timely and meaningful consultation as described in 34 C.F.R. § 300.134. Consultation is an ongoing process that happens throughout the school year between the LEA, private school representatives, and representatives of parents of parentally-placed private school children with disabilities. Further, determinations of equitable services for an individual child, including the anticipated frequency, location, and duration of the equitable services that the LEA will provide, must be included in a child’s services plan. 34 C.F.R. §§ 300.137-300.139.

The responsibility for providing IDEA equitable services lies with the LEA. Services may be provided onsite at a child’s private school, or another location as discussed during consultation. 34 C.F.R. § 300.139. IDEA does not require that the private school administer any portion of an LEA’s equitable services requirements on behalf of the LEA. IDEA also does not require an LEA to use, or prohibit an LEA from using, an MOU in order to provide equitable services at either the private school or another location. However, a private school’s declining to sign an MOU cannot be a basis for an LEA’s denying the provision of equitable services to parentally-placed private school children with disabilities enrolled at that school who are otherwise eligible to receive such services.

As a general matter, the Department believes that the terms of any proposed MOU regarding the provision of equitable services must be consistent with IDEA. For example, an MOU must not prohibit the private school from filing a complaint with the State educational agency (SEA), as appropriate. Under 34 C.F.R. § 300.136, a private school official has the right to raise complaints to the SEA regarding the consultation process, including whether it was meaningful and timely, and whether due consideration was given to the views of the private school official.

¹ See Question and Answer A-1 of the above referenced Q&As: “The IDEA Part B regulations define parentally-placed private school children with disabilities as children with disabilities under 34 C.F.R. § 300.8, enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in 34 C.F.R. § 300.13 or secondary school in 34 C.F.R. § 300.36.” (internal footnotes omitted).

In the Department's view, timely and meaningful consultation could include discussion of any proposed MOU. Any MOU that prohibits or limits a private school official's right to file a State complaint under IDEA, or the rights of parentally placed private school children with disabilities under IDEA,² would be inconsistent with IDEA.

We hope that this addresses the questions that you have raised. If you have additional questions, please feel free to contact Pamela Allen in ONPE at pamela.allen@ed.gov, or, in OSEP, Dwight Thomas at dwight.thomas@ed.gov, or Travis Bryant at travis.bryant@ed.gov.

Sincerely,

/s/

Valerie C. Williams

Cc: Victoria Gaitanis, Florida Department of Education
Maureen Dowling, Director, Office of Non-Public Education

² No parentally placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.
34 C.F.R. § 300.137(a).