



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

SEP 25 2009

Sinai Halberstam  
1214 - 43 Street  
Brooklyn, NY 11219

Dear Mr. Halberstam:

This is in response to your letter of June 29, 2009 to former Secretary of Education Margaret Spellings. Your letter was forwarded to the Office of Special Education Programs within the Department of Education (Department) for response. You provided a list of seven questions regarding the impact of the recent Supreme Court's decision in *Forest Grove School District v. T.A. (Forest Grove)* on the existing regulations governing children with disabilities placed by their parents in private schools.

Five of your seven questions inquire about the effect of the *Forest Grove* decision on the regulations implementing Part B of the Individuals with Disabilities Education Act (IDEA) at 34 CFR §§300.130-300.144, regarding children with disabilities enrolled by their parents in private schools when the provision of a free appropriate public education (FAPE) is not at issue. The *Forest Grove* decision does not change these requirements because it only addresses the provisions at 34 CFR §300.148 regarding children with disabilities enrolled by their parents in private schools when the provision of FAPE is at issue. Moreover, the decision is consistent with the Department's prior interpretations of that regulation.

In addition, you ask, whether "'Carter-funding' [is] available to a child when the LEA [local educational agency] has exceeded the *allocation formula* limit?" We interpret your question as referencing the Supreme Court's decision in *Florence Co. v. Carter (Carter)*, 510 U.S. 7 (1993) and the provision at 34 CFR §300.133, setting out the formula for expenditures to ensure equitable participation of children with disabilities enrolled by their parents in private schools when the provision of a free appropriate public education (FAPE) is not at issue. Like the *Forest Grove* decision, the *Carter* decision also does not relate to the regulations at 34 CFR §§300.130-300.144. *Carter* upholds the availability of reimbursement to parents of a child with a disability who is denied FAPE, and makes educational progress when parentally-placed in a private school, whether or not that school meets the State standards that apply to education provided by public agencies. Therefore, the *Carter* decision is related to, and one of the bases for, the provisions at 34 CFR §300.148(c).

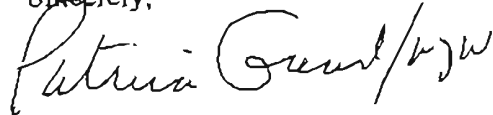
Your final question is whether the regulations at 34 CFR §§300.130-300.144 and §300.148 remain "in full force and effect." Yes. In the Department's view, the *Forest Grove* decision does not change the responsibilities of LEAs to parentally-placed private school children with disabilities under 34 CFR §§300.130-300.144 or 34 CFR §300.148. LEAs remain responsible for providing equitable services, determined through timely and meaningful consultation, up to the proportionate share of Federal funds required by the regulations, to eligible children with

disabilities placed by their parents in private schools where FAPE is not at issue. Enclosed you will find a document with additional information and clarification on 34 CFR §§300.130-300.144, entitled "Questions and Answers On Serving Children With Disabilities Placed by Their Parents at Private Schools." Likewise, the Department's prior interpretations of the regulations at 34 CFR §300.148, that address possible reimbursement of the educational costs of parentally-placed private school children with disabilities when FAPE is at issue, are not affected.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope this information is helpful to you. If you have further questions, please do not hesitate to contact Dr. Deborah Morrow at 202-245-7456 or by email at [Deborah.Morrow@ed.gov](mailto:Deborah.Morrow@ed.gov).

Sincerely,

A handwritten signature in black ink that reads "Patricia Guard/pjw". The signature is written in a cursive style.

Patricia J. Guard  
Acting Director  
Office of Special Education  
Programs

Enclosure

cc: Rebecca Cort

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

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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**

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**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

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**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

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**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.

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**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**

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**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 (and 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

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**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.

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**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**

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**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.

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**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

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**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.

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**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.

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**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.

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**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.

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**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

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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.

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**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.

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**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.