The Individuals with Disabilities Education Act (IDEA): Parentally Placed Children in Private Schools

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Summary

The Individuals with Disabilities Education Act (IDEA) is a grants and civil rights statute that authorizes federal funding to the states to help provide special education and related services for children with disabilities. One of the most intricate issues of the IDEA statute is the provision of equitable educational services for children with disabilities enrolled in private schools. A child with a disability may be placed in a private school by the local educational agency (LEA) as a means of fulfilling the IDEA requirement of a free appropriate public education (FAPE) for the child. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or a court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents.

In the 2004 reauthorization of IDEA, Congress made changes to the requirements for providing services for parentally placed children with disabilities. Arguably one of the most significant changes was altering which LEA is responsible for providing these services. Under prior law, it was the LEA in which the child lived that provided these services. Now these services are provided by the LEA in which the child's private school is located. This report examines possible issues related to this policy change. Possible issues discussed include

- disproportionate impacts on LEAs with large numbers of private schools;
- concerns about lack of compensation for LEAs experiencing increased numbers of parentally placed children for whom they are responsible;
- possible conflicts with state law and procedures for serving children with disabilities in private schools;
- complications in identifying and evaluating parentally placed children who may be eligible for services under IDEA; and
- difficulties in serving preschool children and toddlers with disabilities under new policies for parentally placed children.

There are no comprehensive data on the impact of this policy change. Some argue that the impact should be minimal and temporary; others maintain that the impact is significant and long-term. As a result, it is difficult to determine what additional policy changes Congress might consider or whether any policy changes are necessary.

This report will be updated as necessary.

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Introduction

The Individuals with Disabilities Education Act (IDEA) is a grants and civil rights statute that authorizes federal funding to the states to help provide special education and related services for children with disabilities. If a state receives funds under IDEA, it must make available a free, appropriate public education (FAPE) for all children with disabilities in the state.[1]

One of the most intricate issues of the IDEA statute is the provision of equitable educational services for children with disabilities enrolled in private schools. A child with a disability may be placed in a private school by the local educational agency (LEA) or state educational agency (SEA) as a means of fulfilling the FAPE requirement for the child. In this situation, the full cost is paid for by the LEA or the SEA. A child with a disability may also be unilaterally placed in a private school by his or her parents. In this situation, the cost of the private school placement is not paid by the LEA unless a hearing officer or court makes certain findings. However, IDEA does require some services for children in private schools, even if they are unilaterally placed there by their parents.

In the 2004 reauthorization of IDEA, Congress made changes to the requirements for providing services for parentally placed children with disabilities.[2] Arguably one of the most significant changes was to alter which LEA is responsible for providing services: from the LEA in which the student lives to the LEA in which the student's private school is located. This report examines possible issues related to this policy change. It will use the term **the LEA of residence** when referring to the LEA previously responsible for providing IDEA services for parentally placed children and **the LEA of enrollment** for the LEA that is responsible for services under current law.

Background

IDEA Provisions Prior to 1997

Congress and the courts have instituted a series of approaches with regard to children with disabilities placed by their parents in private schools. Under the law prior to the enactment of P.L. 105-17 in 1997, states were required to set forth policies and procedures to ensure that a provision was made for the participation of children with disabilities enrolled in private schools by their parents consistent with the number and location of these children. These requirements were further detailed in regulations, which required that LEAs provide private school students an opportunity for equitable participation in program benefits, and that these benefits had to be "comparable in quality, scope, and opportunity for participation to the program benefits" provided to students in the public schools.[3]

[1] 20 U.S.C. §1412(a)(1)(A). In addition to the requirements of IDEA, schools must also comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §§12101 et seq., where applicable. These statutes essentially prohibit discrimination against an otherwise qualified individual with a disability.

[2] For a discussion of the 2004 IDEA reauthorization, see CRS Report RL32716, *Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

[3] Former 34 C.F.R. §§ 76.651-76.662.

The vagueness of the statute and the "equitable participation" standard led to differences among the states and localities and to differences among the courts. Prior to P.L. 105-17, the courts of appeals that had considered these issues had sharply divergent views. Some courts gave local authorities broad discretion to decide whether to provide services for children with disabilities in private schools which generally resulted in fewer services to such children,[4] while others attempted to equalize the costs for public and private school children.[5] The Supreme Court had granted *certiorari* in several of these cases, but when Congress rewrote the law in 1997, the Court vacated and remanded these cases.

The 1997 Amendments

The IDEA Amendments of 1997 rejected the "equitable participation"standard and provided that to the extent consistent with the number and location of children with disabilities in the state who were enrolled in private schools by their parents, provision was made for the participation of these children in programs assisted by Part B by providing them with special education and related services.[6] The amounts expended for these services by an LEA were to be equal to a proportionate amount of federal funds made available to the LEA under Part B of IDEA:

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):
>
> (I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.[7]

These services could be provided to children with disabilities on the premises of private schools, including parochial elementary and secondary schools.[8] There was also a requirement that the statutory provisions relating to identifying children with disabilities (i.e., "child find") are applicable to children enrolled in private schools, including parochial schools.[9]

Regulations clarified that the proportional share of an LEA's IDEA grant was based on the number of private school children **residing in** the LEA:

> For children aged 3 through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(g) of the Act as the number of private school children with

[4] See e.g., Goodall v. Stafford County Public School Board, 930 F.2d 363 (4th Cir. 1991), cert. denied, 502 U.S. 864 (1991); K.R. v. Anderson, 81 F.3d 673 (7th Cir. 1996), vac. 521 U.S. 1114 (1997), 125 F.3d 1017 (7th Cir. 1997), cert. denied, 523 U.S. 1046 (1998).

[5] See e.g., Russman v. Sobol, 85 F.3d 1050 (2d Cir. 1996), vac. 521 U.S. 1114 (1997), on remand, 150 F.3d 219 (2d Cir. 1998).

[6] P.L. 105-17, §612(a)(10)(A). Part B contains the state formula grant program, the requirement for a free appropriate public education and due process protections for children with disabilities.

[7] P.L. 105-17, §612(a)(10)(A).

[8] Ibid.

[9] P.L. 105-17, §612(a)(10)(A)(ii).

> disabilities aged 3 through 21 **residing in its jurisdiction** is to the total number of children with disabilities in its jurisdiction aged 3 through 21.[10]

ED Guidance on the 1997 Requirements

The U.S. Department of Education (ED) Office of Non-Public Education published a brochure in 2002 that provided guidance on complying with the 1997 Amendments.[11] (Most of these requirements are still in effect.) The brochure explains that the "child find" requirement of the law obligates SEAs and LEAs "to locate, identify, and evaluate all children residing in the state who are suspected of having a disability under Part B of IDEA, so that FAPE can be made available to all eligible children."[12] Child find activities for parentally placed children "must be comparable to activities undertaken for child find for students in public schools."[13] If a child is found to be eligible for IDEA services, an IEP [individualized education program] must be developed "unless the parents make clear their intention to enroll their child at a private school and that they are not interested in a public program or placement for their child."[14]

Although the full range of IDEA special education and related services need not be provided to parentally placed children, the LEA must still provide services based on a share of its IDEA grant. The brochure provides an example of how this proportional share of the grant would be calculated for a hypothetical LEA.[15] This LEA receives an IDEA grant of $152,500. It serves 300 children with disabilities in its public schools. In addition, 20 children residing within the boundaries of the LEA have been unilaterally placed in private schools by their parents. IDEA requires the LEA to allot 20/320=6.25% of its grant (that is, the number of parentally placed children divided by the total public and private children with disabilities) for services for parentally placed children. Thus, the LEA must use $9,531.25 of its IDEA grant to provide services for these children.

Although LEAs must consult with private schools throughout the process, they have wide discretion on which services they provide and where those services are provided. For example, an LEA might choose to provide speech therapy and physical therapy but not reading and math labs for children with specific learning disabilities. The LEA then develops service plans for those children in need of speech therapy and physical therapy. No service plans need be developed for parentally placed children requiring special education services that the LEA does not offer.

The 2004 IDEA Amendments

The Individuals with Disabilities Education Improvement Act of 2004, P.L. 108-446, makes several changes to the previous law regarding children with disabilities enrolled by their parents in private schools. Perhaps the most significant change is with regard to which LEA is responsible for providing equitable services for these children by adding the language indicated in **bold**:

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[10] 34 C.F.R. §300.453(a)(1) (emphasis added).

[11] "Services to Parentally Placed Private School Students with Disabilities Under the Individuals with Disabilities Education Act of 1997," U.S. Department of Education Office of Non-Public Education, July 2002.

[12] Ibid., p. 2.

[13] Ibid., p. 2.

[14] Ibid., p. 2.

[15] Ibid., p. 3.

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools **in the school district served by a local educational agency**, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services in accordance with the following requirements...[16]

According to the Senate report, the general intent of changes regarding services for parentally placed children with disabilities was "to clarify the responsibilities of LEAs to ensure that services to these children are provided in a fair and equitable manner."[17] More specifically with regard to the responsibility for services, the report noted that the intent was to protect "LEAs from having to work with private schools located in multiple jurisdictions when students attend private schools across district lines."[18]

In its guide to the 2004 amendments, the House Committee on Education and the Workforce provided the following explanation of this provision:

> Local educational agencies (LEAs) are required to provide special education and related services for children with disabilities who are enrolled by their parents in private schools **located in the school district served by the LEA**.... Funds for these services must be equal to a proportionate amount of the federal funds made available to the LEA under part B of IDEA as related to the number of private school students located in the LEA.[19]

In addition to changing which LEAs are responsible for services, P.L. 108-446 made several additional changes to provisions with respect to parentally placed children with disabilities. These include

- state and local funds (if any) as supplementing, but not supplanting, the required amount of federal funds allotted for these students' services;
- LEA and SEA record-keeping and reporting requirements;
- additional consultation requirements between the LEA and private schools; and
- a private school complaint procedure if the school is dissatisfied with the LEA's consultation process.[20]

At the same time, the general procedures for child find and service provision remain the same as described above under the 1997 IDEA amendments.

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[16] §612(a)(10)(A)(i) (emphasis added to indicate words added by P.L. 108-446).

[17] S.Rept. 108-185, 108th Cong. 1st sess., p. 15 (2003).

[18] S.Rept. 108-185, 108th Cong., 1st sess., pp. 15-16 (2003).

[19] House Committee on Education and the Workforce, *The Individuals with Disabilities Education Act (IDEA) Guide To "Frequently Asked Questions,"* February 16, 2005, p. 6 (emphasis added).

[20] For further information on the requirements under P.L. 108-446 for children with disabilities in private schools, see CRS Report RS22044, *Individuals with Disabilities Education Act (IDEA): Services in Private Schools under P.L. 108-446*, by Nancy Lee Jones.

ED Non-regulatory Guidance and IDEA Final Regulations

ED has issued two sets of non-regulatory guidance to assist states and LEAs to implement these changes. In addition, ED has issued final regulations for implementing P.L. 108-446 as a whole, which include language related to parentally placed children with disabilities.

In a July 2005 memorandum, ED noted that "[E]ach LEA must conduct child find, determine the proportionate share of Part B funds, and provide equitable services to parentally-placed private school children with disabilities who attend private schools located in the LEA without regard to where the children reside."[21] ED acknowledged that "these are significant changes" from prior law and related regulations. Since, as the memorandum observed, LEAs may not have accurate data to make new proportional funding calculations for school year 2005-2006 (the first year in which the new provisions became effective), the Secretary permitted LEAs to use "the best available data" to calculate proportional funding shares for that school year only.

In March 2006, ED provided further guidance "to states and LEAs in complying with the requirements of Section 612(a)(10) of the Act."[22] The preamble to these "frequently asked questions" noted that states and LEAs are subject to provisions of current law and current regulations "that are not inconsistent with the Act." Once final regulations become effective, they will override prior regulations as well as guidance provided by ED.[23] In addition, the March 2006 document provides guidance on a number of related topics:

- LEAs are obligated to provide more than "a unilateral offer of services ... with no opportunity for discussion."[24] LEAs are obligated to provide "timely and meaningful" consultation with parents and private schools about the child find process, the calculation of the proportional share of IDEA funds, the location of services, and the nature of services.[25]
- Regarding the child find obligation, the LEA of enrollment is responsible for determining "the number of parentally-placed children with disabilities attending private schools *located in the LEA*."[26]
- LEAs are required to report to the SEA data on privately placed children regarding the numbers evaluated, the number with disabilities, and the number served. Accurate counts of parentally placed children are "needed to calculate the proportional share of Part B funds" that the LEA must use for services for these children.[27]

[21] "Obligations of States and local educational agencies to parentally-placed private school children with disabilities." Memorandum from Troy Justesen to Chief State School Officers, July 27, 2005, emphasis in the original. Available from various websites; for example, http://olrs.ohio.gov/asp/OSEPGuidanceMemo.asp, viewed April 18, 2006.

[22] "Questions and Answers On Serving Children With Disabilities Placed by Their Parents at Private Schools," March 2006, (Hereafter cited as "ED Q and A"), obtained from http://www.ed.gov/policy/speced/guid/idea/faq-parent-placed.pdf, viewed April 18, 2006.

[23] Ibid., p. 1.

[24] Ibid., p. 2.

[25] Ibid., pp. 2-3.

[26] Ibid., p. 4 (emphasis in the original).

[27] Ibid., p. 5.

- The LEA of enrollment is also responsible for the periodic re-evaluation of parentally placed children.
- Regarding services provided, the LEA of enrollment makes the final determination of what services will be provided after proper consultation. Other than child find and evaluation services, the LEA is not required to provide services for a complete array of disabilities. There is "no individual entitlement to receive some or all of the special education and related services they would receive if enrolled in a public school."[28]
- The LEA of enrollment is responsible for creating a service plan, which is less comprehensive than an IEP that the child would receive in public school, for each parentally placed child who will receive services.
- Private preschools for children with disabilities ages 3 to 5 fall under these requirements if they provide "elementary education, as determined by the state."[29]
- The LEA of enrollment is responsible for all children suspected of requiring special education who are placed by their parents in private schools within their boundaries. This includes children from out of state.
- The LEA of residence is responsible for making FAPE available.
- Home schools fall under these provisions if they are deemed private schools by the state.

On August 14, 2006, ED published final IDEA regulations.[30] Regarding parentally placed children with disabilities, the final regulations track the statutory requirements and add provisions to address some issues raised by comments on the proposed regulations.[31] The regulations reiterate that it is the LEA of attendance that is responsible for locating, identifying, and evaluating all parentally placed children in private schools within their geographic boundaries (the so-called "child find" requirement). The regulations stipulate that the LEA of attendance is responsible for child find and proportional provision of services, even if the child resides in another state.[32] The regulations clarify that children with disabilities ages 3 to 5 are considered to be "parentally placed" only if they attend private schools that meet the definition of "elementary school" contained in the act.[33] The final regulations also clarify that the highly qualified teacher requirements under the Elementary and Secondary Education Act (ESEA) as amended by No Child Left Behind Act (NCLB) do not apply to private school teachers providing services to parentally placed children with disabilities.[34]

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[28] Ibid., p. 7. This was also true under prior law.

[29] Ibid., p. 11.

[30] 71 *Federal Register*, August 14, 2006. For an overview of the final regulations, see CRS Report RL33649, *The Individuals with Disabilities Education Act (IDEA): Final Regulations for P.L. 108-446*, by Richard N. Apling and Nancy Lee Jones.

[31] 70 *Federal Register*, June 21, 2005.

[32] 34 C.F.R. §300.130(f).

[33] See 20 U.S.C §1402(6).

[34] 34 C.F.R. §300.138(a)(1). For a discussion of the highly qualified teacher requirements as they apply to special education teachers, see CRS Report RL32913, *The Individuals with Disabilities Education Act (IDEA): Interactions with Selected Provisions of the No Child Left Behind Act (NCLB)*, by Richard N. Apling and Nancy Lee Jones.

The regulations follow the act in requiring that an LEA use a share of its IDEA grants in proportion to the number of parentally placed children with disabilities in private schools within the LEA to provide equitable services for these children. In addition, the regulations present a hypothetical example of how a proportional share of an LEA's IDEA grant is to be calculated.[35] Again, following the language of the statute, the regulations exclude the cost of child find from this proportional share. While requiring consultation on the child find process and the provision of services as the statute requires, the regulations specify that "[n]o 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."[36] In addition, the LEA makes the final decisions about the nature of services, and the LEA is responsible for devising a service plan for every parentally placed child with a disability receiving special education or related services.

Some commenters proposed that "the LEA where the private school is located to provide [sic] the district of residence the results of an evaluation and eligibility determination of the parentally-placed private school child."[37] The discussion in response to this comment noted ED's concern that the privacy rights of the child be protected and, as a result, the following requirement was added:

> If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.[38]

Proponents and Critics of These Changes

Proponents of private school education, such as the U.S. Council of Catholic Bishops and the Council for American Private Education (CAPE), are supportive of these changes. One reason for this appears to be the argument that children with disabilities in private schools are underserved by IDEA. *Education Week* reported that a study by the U.S. Council of Catholic Bishops found that while 6% of students in Catholic schools were students with disabilities, only 1% received services under IDEA. Sister Dale McDonald, the director of public policy and education research for the National Catholic Educational Association, was quoted as saying that the changed policy "could lead to more provision of special education services on site at private schools." She maintained that under the previous policy, "many private school parents have chosen not to accept services in the past because that has meant that their child had to get on a bus and return to the home district, missing part of the school day."[39]

Advocates for the policy change also maintain that it would have minimal impact on public schools. In the same *Education Week* article, Joe McTighe, the executive director of CAPE, argued that the financial impact on LEAs would be "a wash" because districts would be gaining children for whom they would be responsible (i.e., those attending private schools within their

[35] See Appendix B to Part 300.

[36] 34 C.F.R. §300.137(a).

[37] 71 *Federal Register* 46592, August 14, 2006.

[38] 34 C.F.R. 622(a)(3).

[39] "Private Schools Hail Changes to IDEA," *Education Week*, May 18, 2005, downloaded from http://www.edweek.org.

boundaries) but losing responsibilities for other students (i.e., those living within their boundaries but attending private schools within the boundaries of other LEAs). Mr. McTighe presented a hypothetical example: "Using the District of Columbia as an example, he said that the school system there would now have to provide special education services for students who attend private schools within Washington's city limits. However, it will no longer have to provide services for city students whose parents send them to private schools in surrounding school districts."[40]

Criticisms of the policy change have come most recently in comments regarding the final IDEA regulations. Some public school advocates, who had hoped that ED might relax the statutory requirements, continue to express concerns. Reggie Felton, director of federal relations for the National School Boards Association, noted that "[i]t creates an additional burden for school districts that happen to have a higher number of private schools physically located in their district."[41] Mary Kunstler, assistant director of government relations for the American Association of School Administrators (AASA), argued that "[c]hild find costs can be extravagantly high, and local taxpayers are footing the bill to find students who aren't living in their area."[42] She noted that AASA "has every intention of going back to Congress with this."[43]

Demographics of Private Schools and Private School Children

Demographic data on private schools and their students provide useful background for a discussion of parentally placed children with disabilities. According to the National Center for Education Statistics (NCES), there are approximately 28,000 private schools serving about 5.1 million students.[44] Most of these schools are located in urban (34%) and suburban (42%) areas, and about 25% are located in rural areas. Even higher percentages of students attend urban (43%) and suburban (45%) private schools. Private schools tend to be small: 82% have fewer than 300 students. Only about 3% serve 750 or more students.

ED's Office of Special Education Programs (OSEP) collects data from the states on children with disabilities through the Data Analysis System (DANS). For 2004, the 50 states, the District of Columbia, and Puerto Rico reported approximately 90,000 parentally placed children with disabilities. These children accounted for 1.3% of all children with disabilities ages 3 to 21 receiving IDEA services. State percentages of parentally placed children ranged from a high of 6.6% for New Jersey to a low of 0.1% for California.[45] To some, these numbers may appear low; however, there is no obvious method for validating these data.[46]

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[40] Ibid.

[41] "Child find requirements will be costly for districts," *Education Daily*, August 9, 2006, p. 2.

[42] Ibid., p. 2.

[43] Ibid., p. 1.

[44] Data on private schools and students are taken from S.P. Broughman, and N.L. Swaim, "Characteristics of Private Schools in the United States: Results From the 2003-2004 Private School Universe Survey (NCES 2006-319)," U.S. Department of Education, (Washington, DC: National Center for Education Statistics).

[45] Data available at https://www.ideadata.org/tables28th/ar_2-3.xls.

[46] One alternative source of data comes from a survey of Catholic schools, commissioned by the United States Conference of Catholic Bishops. Based on a national sample of Catholic schools, this study reported that approximately (continued...)

Issues Regarding Parentally Placed Children

Since this is the first year of implementing the new policy on parentally placed children, there are no systematic data on its impact or comprehensive information on possible short-term and long-term issues. One state director of special education noted that her state would not be able to collect and analyze data on parentally placed children before next September. In the absence of comprehensive data, this report uses information from websites, such as the ED website, various SEA websites, the websites of interest groups, and from interviews with several state special education administrators[47] and advocates for children with disabilities in private schools. The state directors interviewed represent a diverse set of states in terms of geographic location and size. Several potential issues arose from consultation with these sources.

Disproportionate Impact on Some Public Schools

One concern expressed by some interest groups and by state directors in interviews is that the policy change disproportionally affects LEAs with large concentrations of private schools. Private schools in these LEAs attract students from other LEAs within the state and even from LEAs in other states. Under prior law, these LEAs were responsible for equitable services for students residing within their boundaries, but not for children from other LEAs attending these private schools. Under the new law, these LEAs are still responsible for parentally placed children who reside in and attend private schools within their boundaries, and in addition, for children who do not reside within their boundaries but attend private schools within these LEAs. Of course, these LEAs would no longer be responsible for privately placed children who reside within their boundaries but attend private schools elsewhere. However, several state directors maintain that the change in policy results in net increases of students for those LEAs with concentrations of private schools.

For example, consider two neighboring LEAs, the first with several private schools within its boundaries, the second with no private schools. All the parentally placed children residing in the first LEA attend private schools in that LEA, and all the parentally placed children residing in the second LEA also attend private schools in the first LEA. Under prior law, each LEA was responsible for providing IDEA services for parentally placed children residing within its boundaries. Under current law, the first LEA is now responsible for IDEA services for all parentally placed children from both LEAs. The second LEA is now no longer responsible for IDEA services for any parentally placed children.

A related issue is that many of the LEAs with high concentrations of private schools are in urban areas. As noted above, about one-third (⅓) of private schools and about 40% of private school children are located in urban areas. Public schools in these areas often, as one state director of

(...continued)

7% of children in these schools "have been diagnosed by a qualified, licensed, trained professional as having a disability." At the same time, "less than one percent of these children receive services funded by IDEA." United States Conference of Catholic Bishops, *Catholic School Children with Disabilities*, November 2003, p. 4.

[47] Telephone interviews were conducted with state administrators in Arkansas, Connecticut, Montana, New York, and Virginia.

special education noted, "are among the most fiscally stressed LEAs, in part because of parents exercising various choice options in the state and leaving larger school districts."[48]

Small LEAs can also experience disproportionate impacts. A state director in a state with many small, rural LEAs noted that some LEAs may have a private school within their boundaries that enrolls more children than the LEA does and has more children with disabilities than the LEA serves. He provided an example of a worst-case scenario in which a small LEA bordering a large city has within its boundaries a large private school that enrolls three times the number of children (presumably most coming from the neighboring city) that the LEA does. In this case, the proportional share of the LEA's IDEA funds is considerable.[49]

There is little dispute that some LEAs are disproportionally affected by the new policy. What some question is the magnitude of the impact. Several state directors said that the impact on some LEAs is quite significant. On the other hand, Joe McTighe of CAPE, while admitting that some LEAs would be gaining students, maintains that the overall impact is small. One reason for his position, he noted, is that "the number of private school students hasn't changed." Thus, he argued, the overall shifts among LEAs will be "a wash." In addition, he maintained that the students in question, that is, those living in one LEA and enrolled in a private school in another LEA, make up "a small subset" of all privately placed students. In the case of children placed in private schools in another state, "we are talking about even a smaller subset."[50]

Funding and Resources

The 2004 amendments brought the calculation of the proportional share for services for parentally placed children with disabilities into line with the substate formula for allocating IDEA funds to LEAs. As a result, although some LEAs will be gaining parentally placed children for whom they are responsible for providing services, and other LEAs will be losing the responsibility for some of these children, the current IDEA substate formula will not redistribute IDEA funds as a result of these shifts. This is because the current substate formula, which has been in effect since FY2000 and was not changed by the 2004 amendments, distributes substantial amounts of funds based on LEAs' proportional shares of "numbers of children **enrolled** in public and private elementary schools and secondary schools **within the local educational agency's jurisdiction**."[51] Presumably, distribution is based on private school enrollment, irrespective of where private school children reside. On the other hand, prior law (and regulations based on prior law) required LEAs to use a proportional share of their IDEA grants based on the number of parentally placed children **residing within the LEA**, irrespective of where they went to school. As a result, even though some LEAs have gained students for whom they are responsible while others have lost students, the substate formula has not increased funding for the former or decreased funding for the latter.[52] Of course, the substate formula will increase funding for those

[48] Telephone interview with state special education administrator, February 21, 2006.

[49] Telephone interview with state special education administrator, March 22, 2006.

[50] Interview, March 22, 2006.

[51] 20 U.S.C §1411(f)(2)(B)(I), emphasis added.

[52] Indeed, one could argue that some LEAs were overcompensated under the previous policy because part of their IDEA allocation was based on private school enrollment, but the proportional share of their IDEA grant used for private school services was based on numbers of parentally placed children with disabilities residing within their boundaries.

LEAs that experience, over time, growing numbers of any private school students enrolled in schools within their boundaries.

Table 1 illustrates how the policy change might affect two hypothetical LEAs. Under prior law, both LEAs had responsibility for serving 30 children with disabilities placed by their parents in private schools. LEA A had 15 parentally placed children residing and enrolled in schools within its boundaries and 15 residing within its boundaries but enrolled in schools within LEA B; LEA B had 25 children residing and enrolled in schools within its boundaries and 5 residential children enrolled in schools within LEA A. Under prior law, LEA A would have been required to use 9.1% of its IDEA grant to provide services for parentally placed children with disabilities; LEA B would have been required to use 5.7% of its IDEA grant (30 divided by 330 and 30 divided by 530, respectively). Under current law, LEA A is now responsible for 20 parentally placed children (i.e., those enrolled in private schools within its boundaries), and LEA B is responsible for 40 such children. As a result, LEA A's proportional share is reduced to 6.2% of its IDEA grant, and LEA B's proportional share is increased to 7.4% (20 divided by 320 and 40 divided by 540, respectively). Notice that no children have changed where they live or where they go to school. Also notice that the child counts used to determine LEA A's and LEA B's IDEA grants have not changed: under prior law and under current law, these counts are based on public and private school enrollments (320 for LEA A and 540 for LEA B). Thus, all things equal, neither LEA's IDEA grant would change, even though the number of parentally placed children with disabilities for whom they are responsible has changed.

Table 1. Example of the Calculation of Proportional Shares of IDEA Grants for Two Hypothetical LEAs

Location and type of children	LEA A	LEA B
Privately placed children with disabilities		
Residing in LEA A and enrolled in private schools in LEA A	15	—
Residing in LEA B and enrolled in private schools in LEA B	—	25
Residing in LEA A but enrolled in private schools in LEA B	**15**	—
Residing in LEA B but enrolled in private schools in LEA A	—	**5**
Public school children with disabilities		
Enrolled in public schools in the LEA	300	500
Totals and proportions		
Total public and private students (**residing in LEA**) for the purposes of privately placed share (prior law)	330	530
Proportional share (prior law)	9.1%	5.7%
Total public and private students (**enrolled in schools in LEA**) for the purposes of privately placed share (current law)	320	540
Proportional share (current law)	6.3%	7.4%
Total public and private students (**enrolled in schools in LEA**) for the purposes of substate formula (prior law and current law)	320	540

Source: Prepared by CRS.

A related issue is the feasibility of shifting resources, especially personnel, from the LEA of residence to the LEA of enrollment. Even though IDEA funds may be distributed to reflect numbers of privately placed children in LEAs of enrollment, shifting teachers and other service providers from one LEA to another is not seamless. One state director noted that some LEAs were laying off staff because of the change in policies. However, collective bargaining agreements and other personnel policies make it difficult for other LEAs to hire these staff.[53]

Similar to the substate formula, the IDEA formula for state allocations distributes funds based on population and poverty. This raises an issue regarding students who cross state lines to attend private schools. Under prior law, these students would be the responsibility of LEAs in the states where they lived, and they would have generated funding for that state. Under current law (as noted above in the discussion of ED guidance), LEAs of enrollment are responsible for parentally placed children from out of state who attend private schools within the boundaries of these LEAs. However, there is no provision for redistributing funds among states that lose or gain parentally placed children as a result of the policy change.

At least one state apparently will not require LEAs to use a proportional share of their IDEA grants to provide services for parentally placed children from out of state. According to Massachusetts State Director of Special Education Marcia Mittnacht:

> The federal grant for Massachusetts is calculated on the basis of identified students who are Massachusetts residents, and students who reside outside the Commonwealth are not included.... Consequently, no proportional share calculations can be made for these students.
>
> For that reason, Massachusetts has determined the state's public school districts aren't required to serve out-of-state residents who attend private school in Massachusetts ...[54]

This same issue was raised by Senator Judd Gregg in a letter to ED's Office of Special Education and Rehabilitation Services (OSERS):

> Districts are frustrated with the new provisions in the IDEA and the requirement has created challenges for families who reside near state boarders [sic] and have placed their children in private schools outside their state of residence.[55]

ED sees no way to make exceptions for these families. A letter in response to Senator Gregg from OSERS noted that "the requirements don't provide an exception for children with disabilities who reside in one state and are enrolled by their parents in a private elementary school or secondary school in another state."[56]

Conflict with State Laws and Procedures

Information from SEA websites and interviews with state directors of special education point to possible issues and conflicts between the new IDEA requirements and state laws and procedures

[53] Telephone interview with state special education administrator, February 27, 2006.

[54] "Massachusetts: LEAs Can't Provide for Out-of-State Student," *The Special Educator*, vol. 20, no. 13, January 20, 2006, p. 10.

[55] "LEAs Look for Ways Around Private School Requirement," *The Special Educator*, vol. 21, no. 17, March 17, 2006, p. 8.

[56] Ibid., p. 8.

for serving children with disabilities in private schools. For example, the state director of special education in Massachusetts noted specific difficulties with this new policy in that state. Massachusetts law requires that each LEA offer special education and related services to **all** private school children with disabilities **residing within its boundaries**, regardless of where they go to school. This parallels the "who pays" requirement under the prior federal law, but is a broader requirement than federal law. A memorandum from the SEA notes that "The school district must provide or arrange for evaluation, determine eligibility, propose an Individualized Education Program (IEP), and make services available to all eligible students who reside in the district, regardless of where they attend school."[57]

If a child with a disability resides in an LEA and attends a private school in that LEA, the new policy would make no difference. The LEA would more than provide its "proportional share" of its IDEA funding. However, if the child enrolls in a private school in an LEA besides the one in which he or she resides, the new federal policy and Massachusetts law are in conflict. This may result in an additional financial burden for some LEAs because they would have to provide a proportional share of their IDEA grant for parentally placed children **from outside their boundaries** in addition to providing FAPE for all parentally placed children **residing within their boundaries**.

Rhode Island faces similar problems, and is waiting for the Rhode Island Board of Regents to review and perhaps modify state regulations, which will not occur until the 2006-2007 school year. In the meantime, the SEA has established the following procedure for parentally placed children residing in one LEA but enrolled in a private school elsewhere in the state: the LEA of enrollment must use a proportional share of its IDEA grant to provide services for these children based on service plans. The LEA of residence must continue to provide an IEP and FAPE if additional services are required beyond those provided by the service plan.[58]

Burden and Confusion Over Child-Find and Evaluation Requirements

The process by which parents decide to place their children with disabilities in private schools can be complex. Under prior law, the parents dealt with the LEA where they lived. That LEA was responsible for identifying and evaluating all children who potentially qualified for special education and related services under IDEA. The LEA would then offer FAPE to those children through the IEP process. If some parents decided to place their children in private schools, the LEA of residence would be responsible for providing service plans for these children. The LEA of residence would also be responsible for re-evaluating these children to determine if they should remain eligible for special education. For example, a parentally placed child who is determined to have a speech or language impairment might be offered speech therapy. After some time, a re-evaluation might determine that the impairment had been remediated and that the child no longer required special education.

[57] Memorandum from Marcia Mittnacht to Special Education Administrators, Educational Collaborative Directors, and Other Interested Parties, September 13, 2005, available at http://www.doe.mass.edu/sped/advisories/06_3.html, view April 18, 2006.

[58] For further details, see Memorandum from Peter McWalters to Superintendents, Directors of Special Education and other School Officials, December 6, 2005, obtained from http://www.ridoe.net/news/advisories/2005/110605_PPPSS%20ADVISORY.pdf, viewed April 18, 2006.

Under current law, this procedure remains the same if a parentally placed child attends a private school in the LEA of residence. However, if the child attends a private school located in another LEA, that LEA (the LEA of enrollment) becomes part of the process. That LEA now is responsible for locating and evaluating parentally placed children potentially eligible for special education who attend private schools within its boundaries. The LEA of enrollment is also responsible for periodic re-evaluations. However, as noted above in the discussion of ED guidance, it is the LEA of residence that is responsible for offering FAPE. As a result of this change, complications could ensue, especially because, as one state director noted, "families often drift back and forth between public and private schools."[59] For example, parents might decide to remove their child from private school and enroll in the LEA of residence. However, there could be significant differences in services offered by that LEA and the LEA of enrollment, which had been providing services. In an extreme case, the child, who was evaluated and deemed eligible for special education by the LEA of enrollment, might be deemed not to need special education by the LEA of residence.[60]

Services for Children Enrolled in Preschool and Daycare

Issues also may arise regarding IDEA preschool services to children with disabilities ages 3 to 5. As noted above in the discussion of ED guidance, these children fall under the parentally placed requirements if the preschool provides "elementary education, as determined by the state."[61] Thus, SEAs and LEAs have to determine whether preschools offer educational services or are daycare facilities. In the latter case, children with disabilities would not fall under the parentally placed requirements. As more than one state director pointed out, deciding whether a preschool offers educational services (e.g., provides kindergarten) or provides only daycare services is not always clear-cut. As one state director noted, suppose a center provides kindergarten readiness. Is it a private school or a private daycare provider?[62] These determinations might become more burdensome for large LEAs with high concentrations of preschools and daycare providers, but less burdensome for smaller LEAs with few providers.

In addition, IDEA Part C—which provides services to infants and toddlers with disabilities and their families—requires service providers to consult with LEAs as toddlers are preparing to transition to preschool services. One state director raised the issue of which LEA the Part C provider should consult. In the past, it was the LEA of residence, regardless of where the child was enrolled.[63] Now this state is requiring that Part C providers meet with both the LEA of residence and the LEA of enrollment. Also, the parent of a toddler might be considering various preschool options that might be in multiple communities. Under current law, several LEAs might need to be consulted.

[59] Telephone interview with state special education administrator, March 22, 2006.

[60] Example based on telephone interview with state special education administrator, February 27, 2006.

[61] "ED Q and A," p. 11.

[62] Telephone interview with state special education administrator, February 27, 2006.

[63] Telephone interview with state special education administrator, February 27, 2006. Current law still requires the provider of Part C services to "notify the **local educational agency for the area in which such a child resides** that the child will shortly reach the age of eligibility for preschool services under part B, as determined in accordance with State law," 20 U.S.C §1437(a)(9)(A)(ii)(I) (emphasis added).

Other Potential Issues

Interviews and other sources of data raised additional issues or potential issues. One issue involves the complaint procedures under the 2004 IDEA amendments. Private schools, under the new law, have the right to complain to the state if they believe that the LEA has not followed IDEA requirements. One state director noted that this is a burden for state staff to investigate these complaints. This state director noted that she has a limited staff to monitor IDEA compliance, and these new compliant procedures, she worries, will stretch her staff even more than they already are.[64]

Another potential problem involves the complications with reforms in the evaluation process. One state director said that his state is moving away from the "discrepancy model" for identifying specific learning disabilities (LD). The new approach (response to intervention) would track some children who might potentially be identified as LD before eligibility is determined and the IEP process begun. Those children who make normal academic progress would not be identified. Those who did not would be identified. Since the discrepancy model can be implemented at one point in time or within a short period of time by comparing an IQ score with academic performance, eligibility could easily be determined before or while the child was enrolled in private school. The longitudinal process of the response-to-intervention approach, which would begin earlier than the typical discrepancy evaluation, would be more difficult to carry out with a child enrolled or preparing to enroll in a private school. For one thing, this state director worries that private schools might not have the assessment resources to assess the child over time. In addition, would the determination of "normal" progress under the response-to-intervention approach be made with respect to public school norms or the private school norms?[65]

As discussed above, some advocates for the policy change believe that private school children with disabilities are underserved by IDEA, and that the new policy could increase the number served. Increased numbers served could raise issues with public schools and public school advocates, who believe that federal IDEA funds are inadequate. Although federal funding for the IDEA grants-to-states program has increased significantly in recent years, future substantial increases may be less likely given current federal budget constraints. As a result, any redirection of IDEA funds from public schools is likely to result in concern and protests among public school advocates.

Possible Policy Alternatives

There appears to be little agreement on how (or whether) additional policy changes are warranted with respect to parentally placed children. Although state directors and other advocates for public school special education expressed concerns about the policy change, states and LEAs appear to be making good-faith efforts to implement the new policy. As one state director commented, "People in special education are usually willing to do 'the right thing' when it comes to complying with processes and procedures."[66] Another state implemented a "gentlemen's agreement" to transfer funds from LEAs losing responsibility for parentally placed children to

[64] Telephone interview with state special education administrator, March 17, 2006.

[65] Telephone interview with state special education administrator, March 22, 2006.

[66] Telephone interview with state special education administrator, February 21, 2006.

those gaining responsibility.[67] In addition, state directors have offered training and have tried to address LEAs' concerns.[68] Fairfax County in Virginia is waiting for clarification of the new policy when IDEA regulations are finalized. In the meantime, the county's director of special education notes that because the policy is new, "we are proceeding slowly so we don't disrupt services to students and cause undue stress to parents."[69] For now, the county is continuing to serve children who reside within its boundaries but are enrolled in private schools elsewhere "until natural transition times occur, such as when school officials update a student's service plan."[70]

Additional policy changes may be more or less warranted, depending upon the breadth and depth of the impact of the 2004 amendments and on whether burdens resulting from these impacts are temporary or more long-lasting. Given the dearth of data on the impact of the 2004 policy changes regarding parentally placed children with disabilities, it is difficult to answer these questions definitively. One interviewee stated that he could not comment on possible additional policy changes or adjustments because there are no data on impact.

If impacts turn out to be minimal or temporary, few if any policy changes would be called for. Guidance from ED (as summarized above), specific problems addressed in final regulations, and good-faith efforts to implement policy at the state and local levels would likely ease transition to the new policy.

If impacts prove to be widespread and long-lasting, some believe that there is no way to modify the policy to ease its implementation. One state director noted that he sees no obvious fix without basically returning to the old system. In the past, ED regulations have helped to "soften" some prescriptive aspects of congressional directives. However, he sees little room for such softening of this policy because it is clear what Congress intended.[71]

Others who believe that the impact is significant and longer-term suggested changes specific to their particular states' concerns. None of these suggestions would be acceptable to all stakeholders, however. For example, a state director of a state that provides more extensive services than IDEA requires for parentally placed children suggested that such states be exempt from the new policy.[72] Of course, others might wonder why exceptions are made just for one group of states. Another state director advocated for state flexibility to decide which LEAs should be responsible for services for these children because the new policy cannot anticipate all the circumstances that states and LEAs face.[73] However, private school advocates probably would object to this approach over concern that many states would revert to the prior policy, which some of these advocates believe results in limiting services. Still another state administrator, who sees child find and evaluation under the new system as particularly burdensome, advises that these activities be carried out by LEAs of residence, while LEAs of enrollment provide the service plan and the services.[74] Some might object to this approach because of possible disjunctures between

[67] Telephone interview with state special education administrator, January 30, 2006.

[68] For example, see training material posted by one state, available at http://arksped.k12.ar.us/sections/grantsanddata.html, viewed April 18, 2006.

[69] "Schools Tread Carefully," p. 2.

[70] Ibid., p. 2.

[71] Telephone interview with state special education administrator, February 21, 2006.

[72] Telephone interview with state special education administrator, February 27, 2006.

[73] Telephone interview with state special education administrator, March 22, 2006.

[74] Telephone interview with state special education administrator, January 30, 2006.

the evaluation of the child's needs (as determined by one LEA) and the services provided (as determined by another LEA).

Given the lack of consensus on the severity and nature of the impact of the new policy and the lack of data on the impact, further policy considerations would benefit from comprehensive impact data, which LEAs are required to collect and report. IDEA requires that each LEA "shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph."[75]

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[75] 20 U.S.C. §1412(a)(10)(A)(i)(V).