

Children in Private Schools Preamble Comments and Discussion

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Children With Disabilities Enrolled by Their Parents in Private Schools

Section 300.130 (definition of *parentally-placed private school children with disabilities*) has been revised to clarify that the term means children with disabilities enrolled by their parents in private, including religious, schools or facilities, that meet the definition of *elementary school* in § 300.13 or *secondary school* in § 300.36.

A new § 300.131(f), regarding child find for out-of-State parentally-placed private school children with disabilities, has been added to clarify that each LEA

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in which private (including religious) elementary schools and secondary schools are located must include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located.

Section 300.133, regarding expenditures for parentally-placed private school children with disabilities, has been revised, as follows:

(1) A new § 300.133(a)(2)(ii), has been added to clarify that children aged three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of *elementary school* in § 300.13.

(2) A new § 300.133(a)(3) has been added to specify that, if an LEA has not expended for equitable services for parentally-placed private school children with disabilities all of the applicable funds described in § 300.133(a)(1) and (a)(2) 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 (including direct services) to parentally placed private school children with disabilities during a carry-over period of one additional year.

Section 300.136, regarding compliance related to parentally-placed private school children with disabilities, has been revised to remove the requirement that private school officials must submit complaints to the SEA using the procedures in §§ 300.151 through 300.153.

Section 300.138(a), regarding the requirement that services to parentally placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, has been modified to clarify that private elementary school 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 § 300.18.

Section 300.140, regarding due process complaints and State complaints, has been revised to make the following changes:

(1) Section 300.140(b)(1) (proposed § 300.140(a)(2)), regarding child find complaints, has been changed to clarify that the procedures in §§ 300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in § 300.131, including the requirements in §§ 300.301 through 300.311.

(2) A new paragraph (b)(2) has been added to provide that any due process complaint regarding the child find requirements (as described in § 300.140(b)(1)) must be filed with the LEA in which the private school is located and a copy of the complaint must be forwarded to the SEA.

(3) A new § 300.140(c), regarding State complaints by private school officials, has been added to clarify that

(A) any complaint that an SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in §§ 300.151 through 300.153, and (B) a complaint filed by a private school official under § 300.136(a) must be filed with the SEA in accordance with the procedures in § 300.136(b).

Children With Disabilities Enrolled by Their Parents in Private Schools When FAPE Is at Issue

Section 300.148 Placement of Children by Parents if FAPE Is at Issue

A new § 300.148(b), regarding disagreements about FAPE, has been added (from current § 300.403(b)) to clarify that disagreements between a parent and a public agency regarding the availability of a program appropriate for a child with a disability, and the question of financial reimbursement, are subject to the due process procedures in §§ 300.504 through 300.520.

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Children With Disabilities Enrolled by Their Parents in Private Schools General Comments

Comment: Many comments were received regarding the parentally-placed private school children with disabilities requirements in §§ 300.130 through 300.144. Many commenters supported the changes to the regulations and believed the regulations simplify the processes for both private schools and public schools. Numerous commenters, however, expressed concern regarding the implementation of the private school requirements. Many of the commenters expressed concern with the requirement that the LEAs where private elementary schools and secondary schools are located are now responsible for child find, individual evaluations, and the provision of services for children with disabilities enrolled by their parents in private schools located in the LEA. These commenters described the private school provisions in the Act and the NPRM as burdensome and difficult to understand.

Discussion: The revisions to the Act in 2004 significantly changed the obligation of States and LEAs to children with disabilities enrolled by their parents in private elementary

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schools and secondary schools. Section 612(a)(10)(A) of the Act now requires LEAs in which the private schools are located, rather than the LEAs in which the parents of such children reside, to conduct child find and provide equitable services to parentally-placed private school children with

disabilities. The Act provides that, in calculating the proportionate amount of Federal funds under Part B of the Act that must be spent on parentally-placed private school children with disabilities, the LEAs where the private schools are located, after timely and meaningful consultation with representatives of private elementary schools and secondary schools and representatives of parents of parentally-placed private school children with disabilities, must conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private elementary schools and secondary schools located in the LEAs. In addition, the obligation of the LEA to spend a proportionate amount of funds to provide services to children with disabilities enrolled by their parents in private schools is now based on the total number of children with disabilities who are enrolled in private schools located in the LEA whether or not the children and their parents reside in the LEA. We believe these regulations and the additional clarification provided in our responses to comments on §§ 300.130 through 300.144 will help States and LEAs to better understand their obligations in serving children with disabilities placed by their parents in private elementary schools and secondary schools. In addition, the Department has provided additional guidance on implementing the parentally-placed private school requirements on the Department's Web site. We also are including in these regulations *Appendix B to Part 300—Proportionate Share Calculation* to assist LEAs in calculating the proportionate amount of Part B funds that they must expend on parentally placed private school children with disabilities attending private elementary schools and secondary schools located in the LEA.

Changes: We have added a reference to Appendix B in § 300.133(b).

Comment: Several commenters expressed concern that §§ 300.130 through 300.144 include requirements that go beyond the Act and recommended that any requirement beyond what is statutory be removed from these regulations.

Discussion: In general, the regulations track the language in section 612(a) (10) (A) of the Act regarding children enrolled in private schools by their parents. However, we determined that including clarification of the statutory language on parentally-placed private school children with disabilities in these regulations would be helpful. The volume of comments received concerning this topic confirm the need to regulate in order to clarify the statutory language and to help ensure compliance with the requirements of the Act.

Changes: None.

Comment: Some commenters requested that the regulations provide flexibility to States to provide services to parentally-placed private school children with disabilities beyond what they would be able to do with the proportionate share required under the Act. A few of these commenters requested that those States already providing an individual entitlement to special education and related services or providing a full range of special education services to parentally-placed private school children be deemed to have met the requirements in §§ 300.130 through 300.144 and be permitted to continue the State's current practices. One commenter specifically recommended allowing States that provide additional rights or services to parentally-placed private school children with disabilities (including FAPE under section 612 of the Act and the procedural safeguards under section 615 of the Act), the option of requesting that the Secretary consider alternate compliance with these requirements that would include evidence and supporting documentation of alternate procedures under State law to meet all the requirements in §§ 300.130 through 300.144. A few commenters requested that the child find and equitable participation requirements should not apply in States with dual enrollment provisions where children with disabilities who are parentally-placed in private elementary schools or secondary schools are also enrolled in public schools for special education and have IEPs and retain their due process rights.

Discussion: The Act in no way prohibits States or LEAs from spending additional State or local funds to provide special education or related services for parentally-placed private school children with disabilities in excess of those required in § 300.133 and section 612(a)(10)(A) of the Act, consistent with State law or administrative procedures. The Act, however, does not provide the Secretary with the authority to waive, in whole or in part, the parentally-placed private school requirements in §§ 300.130 through 300.144 for States or LEAs that spend State or local funds to provide special education or related services beyond those required under Part B of the Act. The Secretary, therefore, cannot consider alternative compliance with the parentally-placed private school provisions in the Act and these regulations or consider States and LEAs that use State and local funds to provide services to parentally-placed private school children with disabilities beyond the required proportionate share of Federal Part B funds, including providing FAPE to such children, to have met the statutory and regulatory requirements governing parentally placed private school children with disabilities. States and LEAs must meet the requirements in the Act and these regulations. With regard to the comment requesting that the child find and equitable participation requirements for parentally-placed private school children with disabilities not apply in States with dual enrollment, there is no exception in the Act to the child find and equitable participation requirements of section 612(a)(10)(A) for States that permit dual enrollment of a child at a parent's discretion. Therefore, there is no basis to regulate to provide such an exception. It would be a matter of State or local discretion to decide whether to have a dual enrollment policy and, if established, how it would be implemented. Whether dual enrollment alters the rights of parentally-placed private school children with disabilities under State law is a State matter. There is nothing, however, in Part B of the Act that would prohibit a State from requiring dual enrollment as a condition for a parentally-placed private school child with a disability to be eligible for services from a public agency. As long as States and LEAs meet the requirements in §§ 300.130 through 300.144, the local policy covering enrollment is a matter of State and local discretion.

Changes: None.

Comment: Several commenters expressed concern regarding the applicability of the child find and equitable participation requirements in §§ 300.130 through 300.144 for children with disabilities who reside in one State and are enrolled by their parents in private elementary schools or secondary schools located in another State. These commenters recommended that the regulations clarify whether the LEA in the State where the private elementary school or secondary school is located or the LEA in the State where the child

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resides is responsible for conducting child find (including individual evaluations and reevaluations), and providing and paying for equitable services for children who are enrolled by their parents in private elementary schools or secondary schools.

Discussion: Section 612(a)(10)(A)(i)(II) of the Act provides that the LEA where the private elementary schools and secondary schools are located, after timely and meaningful consultation with private school representatives, is responsible for conducting the child find process to determine the number of parentally-placed children with disabilities attending private schools located in the LEA. We believe this responsibility includes child find for children who reside in other States but who attend private elementary schools and secondary schools located in the LEA, because section 612(a)(10)(A)(i)(II) of the Act is clear about which LEA is responsible for child find and the Act does not provide an exception for children who reside in one State and attend private elementary schools and secondary schools in other States. Under section 612(a)(10)(A)(i) of the Act, the LEA where the private elementary schools and secondary schools are located, in

consultation with private school officials and representatives of parents of parentally placed private school children with disabilities, also is responsible for determining and paying for the services to be provided to parentally-placed private school children with disabilities. We believe this responsibility extends to children from other States who are enrolled in a private school located in the LEA, because section 612(a)(10)(A)(i) of the Act clarifies that the LEA where the private schools are located is responsible for spending a proportionate amount of its Federal Part B funds on special education and related services for children enrolled by their parents in the private schools located in the LEA. The Act does not provide an exception for out-of-State children with disabilities attending a private school located in the LEA and, 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.

Changes: We have added a new paragraph (f) to § 300.131 clarifying that each LEA where private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally placed private school children who reside in the State other than where the private schools they attend are located.

Comment: A few commenters recommended the regulations clarify the LEA's obligation under §§ 300.130 through 300.144 regarding child find and equitable participation for children from other countries enrolled in private elementary schools and secondary schools by their parents.

Discussion: The obligation to consider children with disabilities for equitable services extends to all children with disabilities in the State who are enrolled by their parents in private schools within each LEA's jurisdiction.

Changes: None.

Comment: Several commenters recommended the regulations clarify the applicability of the child find and equitable participation requirements in §§ 300.130 through 300.144 for children with disabilities, aged three through five, enrolled by their parents in private preschools or day care programs. Many commenters recommended the regulations clarify that preschool children with disabilities should be counted in determining the proportionate share of funds available to serve children enrolled in private elementary schools by their parents.

Discussion: If a private preschool or day care program is considered an elementary school, as defined in § 300.13, the child find and equitable services participation requirements in §§ 300.130 through 300.144, consistent with section 612(a)(10) of the Act, apply to children with disabilities aged three through five enrolled by their parents in such programs. Section 300.13, consistent with section 602(6) of the Act, defines an *elementary school* as a nonprofit institutional day or residential school, including a public elementary charter school, which provides elementary education, as determined under State law. We believe it is important to clarify in the regulations that children aged three through five are considered parentally-placed private school children with disabilities enrolled in private elementary schools only if they are enrolled in private schools that meet the definition of *elementary school* in § 300.13.

Changes: We have added a new § 300.133(a)(2)(ii) to clarify that children aged three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, if they are enrolled in a private school that meets the definition of *elementary school* in § 300.13 or *secondary school* in § 300.36.

Child Find for Parentally-Placed Private School Children With Disabilities (§ 300.131)

Comment: A few commenters recommended permitting the LEA where private schools are located to request reimbursement from the LEA where the child resides for the cost of conducting an individual evaluation, as may be required under the child find requirements in § 300.131. One commenter recommended that the LEA where private schools are located be responsible for locating and identifying children with disabilities enrolled by their parents in private schools and the LEA where the children reside be responsible for conducting individual evaluations.

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Discussion: Section 300.131, consistent with section 612(a)(10)(A)(i) of the Act, requires that the LEA where private elementary schools and secondary schools in which the child is enrolled are located, not the LEA where the child resides, is responsible for conducting child find, including an individual evaluation for a child with a disability enrolled by the child's parent in a private elementary school or secondary school located in the LEA. The Act specifies that the LEA where the private schools are located is responsible for conducting both the child find process and the initial evaluation. Therefore, the LEA where private schools are located may not seek reimbursement from the LEA of residence for the cost of conducting the evaluation or to request that the LEA of residence conduct the evaluation. However, the LEA where the private elementary school or secondary school is located has options as to how it meets its responsibilities. For example, the LEA may assume the responsibility itself, contract with another public agency (including the public agency of residence), or make other arrangements.

Changes: None.

Comment: One commenter recommended permitting a parent who enrolled a child in a private elementary school or secondary school the option of not participating in child find required under § 300.131.

Discussion: New § 300.300(e)(4) clarifies that parents who enroll their children in private elementary schools and secondary schools have the option of not participating in an LEA's child find activities required under § 300.131. As noted in the *Analysis of Comments and Changes* section for subpart D, once parents opt out of the public schools, States and school districts do not have the same interest in requiring parents to agree to the evaluation of their children as they do for children enrolled in public schools, in light of the public agencies' obligation to educate public school children with disabilities. We further indicate in the discussion of subpart D that we have added new § 300.300(e)(4) (proposed § 300.300(d)) to clarify that if the parent of a child who is home schooled or placed in a private school by the child's parent at the parent's own expense does not provide consent for an initial evaluation or reevaluation, the public agency may not use the due process procedures in section 615 of the Act and the public agency is not required to consider the child for equitable services.

Changes: None.

Comment: Several commenters recommended permitting amounts expended for child find, including individual evaluations, to be deducted from the required amount of funds to be expended on equitable services for parentally-placed private school children with disabilities.

Discussion: The requested changes would be inconsistent with the Act. There is a distinction under the Act between the obligation to conduct child find activities, including individual evaluations, for parentally-placed private school children with disabilities, and the obligation to use an amount of

funds equal to a proportionate amount of the Federal Part B grant flowing to LEAs to provide special education and related services to parentally-placed private school children with disabilities. The obligation to conduct child find for parentally-placed private school children, including individual evaluations, is independent of the services provision. Further, § 300.131(d), consistent with section 612(a)(10)(A)(ii)(IV) of the Act, clarifies that the costs of child find activities for parentally-placed private school children, including individual evaluations, may not be considered in determining whether the LEA has spent an appropriate amount on providing special education and related services to parentally-placed private school children with disabilities.

Changes: None.

Comment: One commenter requested clarifying whether an LEA may exclude children suspected of having certain disabilities, such as those with specific learning disabilities, in conducting individual evaluations of suspected children with disabilities enrolled in private schools by their parents.

Discussion: The LEA where the private elementary schools and secondary schools are located must identify and evaluate all children suspected of having disabilities as defined under section 602(3) of the Act. LEAs may not exclude children suspected of having certain disabilities, such as those with specific learning disabilities, from their child find activities. The Department recommends that LEAs and private elementary schools and secondary schools consult on how best to implement the State's evaluation criteria and the requirements under this part for identifying children with specific learning disabilities enrolled in private schools by their parents. This is explained in more detail in the discussion of comments under § 300.307.

Changes: None.

Comment: A few commenters expressed concern that parents who place their children in private elementary schools and secondary schools outside the district of residence, and who are determined by the LEA where the private schools are located, through its child find process, to be children with disabilities eligible for special education and related services, would have no knowledge of the special education and related services available for their children if they choose to attend a public school in their district of residence. A few commenters suggested clarifying the obligation of the LEA where the private school is located to provide the district of residence the results of an evaluation and eligibility determination of the parentally-placed private school child. A few commenters recommended that the parent of a child with a disability identified through the child find process in § 300.131 be provided with information regarding an appropriate educational program for the child.

Discussion: The Act is silent on the obligation of officials of the LEA where private elementary schools and secondary schools are located to share personally identifiable information, such as individual evaluation information, with officials of the LEA of the parent's residence. We believe that the LEA where the private schools are located has an obligation to protect the privacy of children placed in private schools by their parents. We believe that when a parentally-placed private school child is evaluated and identified as a child with a disability by the LEA in which the private school is located, parental consent should be required before such personally identifiable information is released to officials of the LEA of the parent's residence. Therefore, we are adding a new paragraph (b)(3) to § 300.622 to make this clear. We explain this revision in more detail in the discussion of comments under § 300.622. We believe the regulations adequately ensure that parents of children enrolled in private schools by their parents, who are identified as children with disabilities through the child find process, receive information regarding an appropriate educational program for their children. Section 300.138(b) provides that each parentally-placed private school child with a disability who has been designated to receive equitable services must

have a services plan that describes the specific education and related services that the LEA where the private school is located has determined it will make available to the child and the services plan must, to the extent appropriate, meet the IEP content, development, review and revision requirements described in

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section 614(d) of the Act, or, when appropriate, for children aged three through five, the IFSP requirements described in section 636(d) of the Act as to the services that are to be provided. Furthermore, the LEA where the private school is located must, pursuant to § 300.504(a) and section 615(d) of the Act, provide the parent a copy of the procedural safeguards notice upon conducting the initial evaluation.

Changes: We have added a new paragraph (b)(3) to § 300.622 to require parental consent for the disclosure of records of parentally-placed private school children between LEAs.

Comment: A few commenters stated that § 300.131 does not address which LEA has the responsibility for reevaluations.

Discussion: The LEA where the private schools are located is responsible for conducting reevaluations of children with disabilities enrolled by their parents in private elementary schools and secondary schools located within the LEA. Reevaluation is a part of the LEA's child find responsibility for parentally placed private school children under section 612(a)(10)(A) of the Act.

Changes: None.

Comment: One commenter expressed concern that the regulations permit a parent to request an evaluation from the LEA of residence at the same time the child is being evaluated by the LEA where the private elementary school or secondary school is located, resulting in two LEAs simultaneously conducting evaluations of the same child.

Discussion: We recognize 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 allocate the responsibility for making FAPE available to the LEA in which the child's parents reside, and that could be a different LEA 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 this part that would prohibit 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 have requested that the LEA where the private school is located evaluate their child for purposes of considering the child for equitable services, we do not encourage this practice. We note that new § 300.622(b)(4) 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, we do not believe that the child's best interests would be well-served if the parents requested 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. A practice of subjecting a child to repeated testing by separate LEAs in close proximity of time may not be the most effective or desirable way of ensuring that the evaluation is a meaningful measure of whether a child has a disability or of providing an appropriate assessment of the child's educational needs.

Changes: None.

Comment: Some commenters requested the regulations clarify which LEA (the LEA of residence or the LEA where the private elementary schools or secondary schools are located) is responsible for offering FAPE to children identified through child find under § 300.131 so that parents can make an informed decision regarding their children’s education. *Discussion:* If a determination is made by the LEA where the private school is located that a child needs special education and related services, the LEA where the child resides is responsible for making FAPE available to the child. If the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child. We do not believe that a change to the regulations is necessary, as § 300.201 already clarifies that the district of residence is responsible for making FAPE available to the child. Accordingly, the district in which the private elementary or secondary school is located is not responsible for making FAPE available to a child residing in another district.

Changes: None.

Comment: One commenter requested clarification of the term “activities similar” in § 300.131(c). Another commenter recommended clarifying that these activities include, but are not limited to, activities relating to evaluations and reevaluations. One commenter requested that children with disabilities parentally-placed in private schools be identified and evaluated as quickly as possible. *Discussion:* Section 300.131(c), consistent with section 612(a)(10)(A)(ii)(III) of the Act, requires that, in carrying out child find for parentally-placed private school children, SEAs and LEAs must undertake activities similar to those activities undertaken for their publicly enrolled or publicly-placed children. This would generally include, but is not limited to, such activities as widely distributing informational brochures, providing regular public service announcements, staffing exhibits at health fairs and other community activities, and creating direct liaisons with private schools. Activities for child find must be completed in a time period comparable to those activities for public school children. This means that LEAs must conduct child find activities, including individual evaluations, for parentally-placed private school children within a reasonable period of time and without undue delay, and may not wait until after child find for public school children is conducted. In addition, evaluations of all children suspected of having disabilities under Part B of the Act, regardless of whether they are enrolled by their parents in private elementary schools or secondary schools, must be conducted in accordance with the requirements in §§ 300.300 through 300.311, consistent with section 614(a) through (c) of the Act, which describes the procedures for evaluations and reevaluations for all children with disabilities. We believe the phrase “activities similar” is understood by SEAs and LEAs and, therefore, it is not necessary to regulate on the meaning of the phrase.

Changes: None.

Provision of Services for Parentally- Placed Private School Children With Disabilities—Basic Requirement (§ 300.132)

Comment: Several commenters expressed confusion regarding which LEA is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child, the district of the child’s residence or the LEA where the private school is located.

Discussion: We believe § 300.133, consistent with section 612(a)(10)(A) of the Act, is sufficiently clear that the LEA where the private elementary schools and secondary schools are located is responsible for paying for the equitable services provided to a parentally-placed private elementary school or secondary school child. These provisions provide that the LEA where the private

elementary and secondary schools are located must spend a proportionate amount of its Federal funds available under Part B of the Act

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for services for children with disabilities enrolled by their parents in private elementary schools and secondary schools located in the LEA. The Act does not permit an exception to this requirement. No further clarification is needed.

Changes: None.

Comment: One commenter recommended the regulations clarify which LEA in the State is responsible for providing equitable services to parentally-placed private school children with disabilities who attend a private school that straddles two LEAs in the State.

Discussion: The Act does not address situations where a private school straddles more than one LEA. However, the Act does specify that the LEA in which the private school is located is responsible for providing special education to children with disabilities placed in private schools by their parents, consistent with the number of such children and their needs. In situations where more than one LEA potentially could assume the responsibility of providing equitable services, the SEA, consistent with its general supervisory responsibility, determines which LEA in the State is responsible for ensuring the equitable participation of children with disabilities attending that private school. We do not believe that the situation is common enough to warrant a change in the regulations.

Changes: None.

Comment: A few commenters recommended revising the heading for § 300.132(b) to clarify that LEAs, not SEAs, are responsible for developing service plans.

Discussion: We agree with the commenters that the heading for § 300.132(b) should be changed to accurately reflect the requirement and to avoid confusion.

Changes: We have revised the heading for § 300.132(b) by removing the reference to SEA responsibility.

Comment: One commenter requested requiring in § 300.132(c) that data on parentally-placed private school children with disabilities be submitted to the Department. Another commenter agreed, stating that the data should be submitted the same day as the annual child count.

Discussion: The purpose of the child count under § 300.132(c) is to determine the amount of Federal funds that the LEA must spend on providing special education and related services to parentally-placed private school children with disabilities in the next fiscal year. We are not requiring States to submit these data to the Department as the Department does not have a programmatic or regulatory need to collect this information at this time. Section 300.644 permits the SEA to include in its annual report of children served those parentally-placed private school children who are eligible under the Act and receive special education or related services. We believe this is sufficient to meet the Department's need to collect data on this group of children and we do not wish to place an unnecessary data collection and paperwork burden on States.

Changes: None.

Expenditures (§ 300.133)

Comment: One commenter requested the regulations clarify whether an LEA must spend its entire proportionate share for parentally-placed private school children with disabilities by the end of a fiscal year or could carry over any remaining funds into the next fiscal year.

Discussion: We agree with the commenter that a provision should be included in these regulations to clarify that, if an LEA has not expended for equitable services all of the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities 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 (including direct services) to parentally-placed private school children with disabilities during a carryover period of one additional year.

Changes: A new paragraph (a)(3) has been added to § 300.133 to address the carry over of funds not expended by the end of the fiscal year.

Comment: None.

Discussion: It has come to our attention that there is some confusion among States and LEAs between the count of the number of children with disabilities receiving special education and related services as required under section 618 of the Act, and the requirement under section 612(a)(10)(A)(i)(II) of the Act that each LEA conduct an annual count of the number of parentally-placed private school children with disabilities attending private schools in the LEA. We will, therefore, revise the heading (child count) for § 300.133(c) and the regulatory language in § 300.133(c) to avoid any confusion regarding the requirements in paragraph (c).

Changes: Section 300.133(c) has been revised as described above.

Comment: One commenter interpreted § 300.133(d) to require that: (1) LEAs provide services to parentally placed private school children with disabilities with funds provided under the Act and (2) LEAs no longer have the option of using local funds equal to, and in lieu of, the Federal pro-rated share amount. This commenter recommended that LEAs continue to be allowed to use local funds for administrative convenience.

Discussion: The commenter's interpretation is correct. The Act added the supplement, not supplant requirement in section 612(a)(10)(A)(i)(IV), which is included in § 300.133(d). This requirement provides that State and local funds may supplement, but in no case supplant the proportionate amount of the Federal Part B funds that must be expended under this provision. Prior to the change in the Act, if a State was spending more than the Federal proportional share of funds from State or local funds, then the State would not have to spend any Federal Part B funds. That is no longer permissible under the Act.

Changes: None.

Comment: A few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.

Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools.

Changes: None.

Consultation (§ 300.134)

Comment: Some commenters recommended requiring, in § 300.134(e), that the LEA include, in its written explanation to the private school, its reason whenever: (1) The LEA does not provide services by a professional directly employed by that LEA to parentally-placed private school children with a disability when requested to do so by private school officials; and (2) the LEA does not provide services through a third party provider when requested to do so by the private school officials.

Discussion: Section 300.134(e) incorporates the language from section 612(a)(10)(A)(iii)(V) of the Act and requires the LEA to provide private school officials with a written explanation of the reasons why the LEA chose not to provide services directly or through contract. We do not believe that the additional language suggested by the commenter is necessary because we view the statutory language as sufficient to ensure that the LEA meets its obligation to provide private school officials a written explanation of any reason why the LEA chose not to provide services directly or through a contract.

Changes: None.

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Written Affirmation (§ 300.135)

Comment: Several commenters recommended requiring LEAs to forward the written affirmation to the SEA, because this information is important for the SEA to exercise adequate oversight over LEAs with respect to the participation of private school officials in the consultation process.

Discussion: Section 300.135, regarding written affirmation, tracks the language in section 612(a)(10)(A)(iv) of the Act. Including a requirement in the regulations that the LEA must submit a copy of signed written affirmations to the SEA would place reporting burdens on the LEA that are not required by the Act and that we do not believe are warranted in this circumstance. We expect that in most circumstances private school officials and LEAs will have cooperative relationships that will not need State involvement. If private school officials believe that there was not meaningful consultation, they may raise that issue with the SEA through the procedures in § 300.136. However, there is nothing in the Act or these regulations that would preclude a State from requiring LEAs to submit a copy of the written affirmation obtained pursuant to § 300.135, in meeting its general supervision responsibilities under § 300.149 or as a part of its monitoring of LEAs' implementation of Part B of the Act as required in § 300.600. Consistent with § 300.199(a)(2) and section 608(a)(2) of the Act, a State that chooses to require its LEAs to submit copies of written affirmations to the SEA beyond what is required in § 300.135 would have 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 that is not required by Part B of the Act or these regulations.

Changes: None.

Compliance (§ 300.136)

Comment: One commenter recommended revising § 300.136 to permit an LEA to submit a complaint to the State if private school officials do not engage in meaningful consultation with the LEA.

Discussion: Section 300.136, consistent with section 612(a)(10)(A)(v) of the Act, provides that a private school official has the right to complain to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. The provisions in the Act and the regulations apply to the responsibilities of the SEA and its LEAs and not to private schools or entities. Because the requirements of the Act do

not apply to private schools, we do not believe requiring SEAs to permit an LEA to submit a complaint to the SEA alleging that representatives of the private schools did not consult in a meaningful way with the LEA would serve a meaningful purpose. The equitable services made available under Part B of the Act are a benefit to the parentally-placed private school children and not services provided to the private schools.

Changes: None.

Comment: Several commenters recommended revising § 300.136 to allow States to determine the most appropriate procedures for a private school official to submit a complaint to the SEA that an LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school officials. Many of these commenters stated that requiring such complaints be filed pursuant to the State complaint procedures in §§ 300.151 through 300.153 is not required by the Act and recommended we remove this requirement.

Discussion: We agree with the commenters that section 612(a)(10)(A)(v) of the Act does not stipulate how a private school official must submit a complaint to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. We also agree with the commenters that the SEA should have flexibility to determine how such complaints will be filed with the State. We will, therefore, revise § 300.136(a) to remove the requirement that private school officials must file a complaint with the SEA under the State complaint procedures in §§ 300.151 through 300.153. States may, if they so choose, use their State complaint procedures under §§ 300.151 through 300.153 as the means for a private school to file a complaint under § 300.136.

Changes: Section 300.136 has been revised to remove the requirement that a private school official submit a complaint to the SEA using the procedures in §§ 300.151 through 300.153.

Equitable Services Determined (§ 300.137)

Comment: One commenter recommended removing § 300.137(a), stating it is discriminatory and that parentally-placed private school children must receive the same amount of services as children with disabilities in public schools.

Discussion: Section 300.137(a) reflects the Department's longstanding policy, consistent with section 612(a)(10) of the Act, and explicitly provides that children with disabilities enrolled in private schools by their parents have no individual entitlement 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 funds that the LEA has determined, after consultation, to make available to its population of parentally-placed private school children with disabilities. LEAs are not required to spend more than the proportionate Federal share on those services.

Changes: None.

Equitable Services Provided (§ 300.138)

Comment: Several commenters requested clarifying whether the requirement in § 300.138(a) that services provided to parentally-placed private school children with disabilities be provided by personnel meeting the same standards (*i.e.*, highly qualified teacher requirements) as personnel

providing services in the public schools applies to private school teachers who are contracted by the LEA to provide equitable services.

Discussion: As discussed in the *Analysis of Comments and Changes* section, in the response to comments on § 300.18, it is the Department's position that the highly qualified special education teacher requirements do not apply to teachers hired by private elementary schools and secondary schools. This includes teachers hired by private elementary schools and secondary schools who teach children with disabilities. Further, it is the Department's position that the highly qualified special education teacher requirements also do not apply to private school teachers who provide equitable services to parentally-placed private school children with disabilities.

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In addition to the revision we are making to new § 300.18(h) (proposed § 300.18(g)) to make this position clear, we also will revise § 300.138(a)(1) to clarify that private elementary school 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.

Changes: We have revised § 300.138(a)(1) as indicated.

Comment: A few commenters requested clarifying the process for developing a services plan and explaining how a services plan differs from an IEP.

Discussion: We do not believe that additional explanation in the regulation is needed. Under § 300.138(b), each parentally-placed private school child with a disability who has been designated by the LEA in which the private school is located to receive special education or related services must have a services plan. The services plan must describe the specific special education and related services offered to a parentally-placed private school child with a disability designated to receive services. The services plan also must, to the extent appropriate, meet the IEP content, development, review, and revision requirements described in section 614(d) of the Act, or, when appropriate, for children aged three through five, the IFSP requirements described in section 636(d) of the Act as to the services that are to be provided. The LEA must ensure that a representative of the private school attends each meeting to develop the services plan and if the representative cannot attend, use other methods to ensure participation by the private school, including individual or conference telephone calls. Children with disabilities enrolled in public schools or who are publicly placed in private schools are entitled to FAPE and must receive the full range of services under Part B of the Act that are determined by the child's IEP Team to be necessary to meet the child's individual needs and provide FAPE. The IEPs for these children generally will be more comprehensive than the more limited services plans developed for parentally-placed private school children with disabilities designated to receive services.

Changes: None.

Comment: A few commenters recommended revising the definition of *services plan* to clarify that an IEP could serve as the services plan; otherwise, States that provide IEP services to parentally-placed private school children with disabilities would be required to develop a services plan and an IEP.

Discussion: We do not believe it is appropriate to clarify in the regulations that the IEP can serve as the services plan because, as stated elsewhere in this preamble, a services plan should only describe the specific special education and related services offered to a parentally-placed private school child with a disability designated to receive services. We believe that using an IEP in lieu of a services plan for these children may not be appropriate in light of the fact that an IEP developed pursuant to section 614(d) of the Act will generally include much more than just those services that

a parentally-placed private school child with a disability may receive, if designated to receive services. There is nothing, however, in these regulations that would prevent a State that provides more services to parentally-placed private school children with disabilities than they are required to do under the Act to use an IEP in place of a services plan, consistent with State law.

Changes: None.

Location of Services and Transportation (§ 300.139)

Comment: A few commenters asked for clarification as to how the location where services will be provided to parentally-placed private school children with disabilities is determined.

Discussion: Under § 300.134(d), how, where, and by whom special education and related services are provided to parentally-placed private school children with disabilities are subjects of the process of consultation among LEA officials, private school representatives, and representatives of parents of parentally-placed private school children with disabilities. Further, § 300.137(b)(2) clarifies that, after this consultation process, the final decision with respect to the services provided to eligible parentally-placed private school children with disabilities is made by the LEA.

Changes: None.

Comment: Some commenters recommended specifying that providing services on the premises of private elementary schools and secondary schools is the preferred means of serving parentally-placed private school children with disabilities. A few commenters recommended revising § 300.139(a) to stipulate that services “should” or “must” be provided on the premises of private schools, unless there is a compelling rationale for these services to be provided off-site. In contrast, several commenters objected to the statement in the preamble to the NPRM that services should be provided on-site unless there is a compelling rationale to provide services off-site. A few of these commenters stated that the Act does not indicate a preference for one location of services over another and the Department has no authority to provide such a strong comment on this issue.

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

Changes: None.

Comment: A few commenters expressed concern that § 300.139(b), regarding transportation services, goes beyond the requirements in the Act and should be removed. A few commenters stated that transportation is a related service and should be treated as such with respect to parentally-placed children with disabilities in private schools.

Discussion: We do not agree that transportation services should be removed from § 300.139(b). If services are offered at a site separate from the child’s private school, transportation may be necessary to get the child to and from that other site. Failure to provide transportation could effectively deny the child an opportunity to benefit from the services that the LEA has determined through consultation to offer its parentally-placed private school children with disabilities. In this

situation, although transportation is not a *related service*, as defined in § 300.34, transportation is necessary to enable the child to participate and to make the offered services accessible to the child. LEAs should work in consultation with representatives of private school children to ensure that services are

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provided at sites, including on the premises of the child's private school, so that LEAs do not incur significant transportation costs. However, for some children with disabilities, special modifications in transportation may be necessary to address the child's unique needs. If the group developing the child's services plan determines that a parentally-placed private school child with a disability chosen to receive services requires transportation as a related service in order to receive special education services, this transportation service should be included as a related service in the services plan for the child. In either case, the LEA may include the cost of the transportation in calculating whether it has met the requirement of § 300.133.

Changes: None.

Due Process Complaints and State Complaints (§ 300.140)

Comment: Several commenters expressed concern that the right of parents of children with disabilities enrolled by their parents in private elementary schools and secondary schools to file a due process complaint against an LEA is limited to filing a due process complaint that an LEA has failed to comply with the child find and evaluation requirements, and not an LEA's failure to provide special education and related services as required in the services plan. A few commenters recommended that the regulations clarify whether the parent should file a due process complaint with the LEA of residence or with the LEA where the private school is located.

Discussion: Section 615(a) of the Act specifies that the procedural safeguards of the Act apply with respect to the identification, evaluation, educational placement, or provision of FAPE to children with disabilities. The special education and related services provided to parentally-placed private school children with disabilities are independent of the obligation to make FAPE available to these children. While there may be legitimate issues regarding the provision of services to a particular parentally-placed private school child with a disability an LEA has agreed to serve, the due process provisions in section 615 of the Act and §§ 300.504 through 300.519 do not apply to these disputes, because there is no individual right to these services under the Act. Disputes that arise about these services are properly subject to the State complaint procedures under §§ 300.151 through 300.153. Child find, however, is a part of the basic obligation that public agencies have to all children with disabilities, and failure to locate, identify, and evaluate a parentally-placed private school child would be subject to due process. Therefore, the due process provisions in §§ 300.504 through 300.519 do apply to complaints that the LEA where the private school is located failed to meet the consent and evaluation requirements in §§ 300.300 through 311. In light of the comments received, we will clarify in § 300.140 that parents of parentally-placed private school children with disabilities may file a due process complaint with the LEA in which the private school is located (and forward a copy to the SEA) regarding an LEA's failure to meet the consent and evaluation requirements in §§ 300.300 through 300.311. We also will clarify that a complaint can be filed with the SEA under the State complaint procedures in §§ 300.151 through 300.153 that the SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and §§ 300.137 through 300.144. There would be an exception, however, for complaints filed pursuant to § 300.136.

Complaints under § 300.136 must be filed in accordance with the procedures established by each State under § 300.136.

Changes: Proposed § 300.140(a)(2) has been redesignated as new paragraph (b). A new paragraph (b)(2) has been added to this section to clarify that any due process complaint regarding the evaluation requirements in § 300.131 must be filed with the LEA in which the private school is located, and a copy must be forwarded to the SEA. Proposed § 300.140(b) has been redesignated as new paragraph (c), and has been revised to clarify that a complaint that the SEA or LEA has failed to meet the requirements in §§ 300.132 through 300.135 and §§ 300.137 through 300.144 can be filed with the SEA under the State complaint procedures in §§ 300.151 through 300.153. Complaints filed pursuant to § 300.136 must be filed with the SEA under the procedures established under § 300.136(b).

Comment: A few commenters requested clarification as to whether a parent of a parentally-placed private school child should request an independent educational evaluation at public expense under § 300.502(b) with the LEA of residence or the LEA where the private school is located.

Discussion: We do not believe that this level of detail needs to be included in the regulation. If a parent of a parentally-placed child disagrees with an evaluation obtained by the LEA in which the private school is located, the parent may request an independent educational evaluation at public expense with that LEA.

Changes: None.

Use of Personnel (§ 300.142)

Comment: Several commenters requested clarifying language regarding who must provide equitable services to parentally-placed private school children with disabilities.

Discussion: Under section 612(a)(10)(A)(vi)(I) of the Act, equitable services must be provided by employees of a public agency or through contract by the public agency with an individual, association, agency, organization, or other entity. Section 300.142(a) provides that an LEA may use Part B funds to make public school personnel available in other than public facilities to the extent necessary to provide equitable services for parentally-placed children with disabilities attending private schools and if those services are not otherwise provided by the private school to children as a benefit provided to all children attending that school. Under § 300.142(b), an LEA may use Part B funds to pay for the services of an employee of a private school to provide equitable services if the employee performs the services outside of his or her regular hours of duty and the employee performs the services under public supervision and control. We believe that the regulation is sufficiently clear on this point.

Changes: None.

Property, Equipment, and Supplies (§ 300.144)

Comment: A few commenters requested clarification as to whether private school officials may purchase equipment and supplies with Part B funds to provide services to parentally placed private school children with disabilities designated to receive services.

Discussion: We do not believe the additional clarification suggested by the commenters is necessary. Section 300.144, consistent with section 612(a)(10)(A)(vii) of the Act, already requires that the LEA must control and administer the funds used to provide special education and related services to parentally-placed private school children with disabilities, and maintain title to materials, equipment, and property purchased with those funds. Thus, the regulations and the Act prevent private school officials from purchasing equipment and supplies with Part B funds.

Changes: None.