



COLORADO DEPARTMENT OF EDUCATION

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Guidance Memorandum

Date: August 20, 2012

To: Superintendents
Special Education Directors
BOCES Executive Directors

From: Peg Brown-Clark
Assistant Commissioner
Exceptional Student Services Unit

Re: Special Education Services for Parentally-Placed Private School
Children with Disabilities

I. Purpose

The purpose of this guidance memorandum is to revise the guidance memorandum dated March 19, 2012, regarding IDEA's requirements related to providing services for parentally-placed nonprofit private school children.¹ The revisions specifically relate to **Section VI (A) (1)**, *below*, and clarify the obligations of AUs with respect to preschool and kindergarten students with disabilities attending private preschools or kindergartens. The remainder of the document remains unchanged.

Overall, this guidance memorandum is intended to provide clarification and to assist Colorado administrative units ("AUs") in complying with the requirements of IDEA's requirements related to providing services for parentally-placed nonprofit private school children.² This document

¹ This guidance document only discusses issues relating to students who have been parentally placed in nonprofit private schools when a free appropriate public education is *not* in issue. It does not discuss issues relating to students with disabilities who have been placed in private schools, either by an IEP team or unilaterally by their parents, when FAPE is in issue, *i.e.*, the parents of an eligible child with a disability seek private placement at public (AU) expense. Nor does this guidance document address those students who are attending for-profit private schools, as the requirement to provide equitable services to parentally-placed private school students does not apply to students attending for-profit private schools.

² This guidance document only discusses issues relating to students who have been parentally placed in nonprofit private schools when a free appropriate public

addresses the areas of consultation, child find, determination of proportionate share of federal funds, equitable services, allowable use of funds and documentation.

II. Background

Under the Rules for the Administration of the Exceptional Children's Educational Act (ECEA Rules)³ and the implementing regulations of Part B of the federal Individuals with Disabilities Education Improvement Act of 2004 (IDEA)⁴, parental placement of students with disabilities in private schools does not relieve AUs of their obligations to identify, locate and evaluate those students and to spend a "proportional share" of IDEA Part B funds to provide services to children with disabilities enrolled by their parents in nonprofit private elementary schools and secondary schools in the AU.⁵

III. Child Find

The law requires AUs to identify, locate and evaluate *all* students with disabilities or suspected disabilities within their jurisdiction, regardless of the severity of the disability.⁶ Under the Colorado ECEA rules, the child find requirement applies to, among others, students attending private schools.⁷ Child identification includes "child find, special education referral, initial evaluation, and determination of disability and eligibility for special education."⁸ Each AU must have one person designated as the child find coordinator who shall be responsible for an ongoing child identification process.⁹

A. Which private school students must the AU identify?

An AU's jurisdiction and responsibility with respect to locating, identifying and evaluating eligible students with disabilities enrolled in private schools extends **to private schools within the AU**, including students who reside in

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³ 1 CCR 301-8

⁴ 34 CFR §§ 300.130–300.144

⁵ 34 C.F.R. §§ 300.130 through 300.144; ECEA Rules 4.02(1)(a), 4.02(1)(a)(ii) and 5.01(7).

⁶ ECEA Rule 4.02(1)(a).

⁷ *Id.*, emphasis added.

⁸ ECEA Rule 4.02(1)(a)(ii).

⁹ ECEA Rule 4.02(2)(b).

another state but attend private elementary or secondary schools in the AU.¹⁰ In other words, it is the **location of the private school** (*i.e.*, whether it is in the AU's boundaries), not the child's AU of residence, that determines whether an AU is responsible for identifying students with disabilities.

B. What sorts of activities satisfy the "child find" requirement for students in private schools?

The federal regulations provide that whatever activities an AU conducts to fulfill its child find obligations for public school students, it must undertake similar activities for its private school students. In Colorado, the child find process must to be designed to utilize available resources within the community and involve and provide information to families. Each AU must have specific child find strategies in place for children aged 3 through 5, children in school (including private school), and children out of school who are "discontinuers" or dropouts.¹¹ The process must be available throughout the year and must include the following components:

- Planning and developing in public awareness, community referral systems, community and building based screening, diagnostic evaluations, service coordination and staff development;
- Coordination and implementation in the areas of interagency collaboration, public awareness, referral, screening and resource coordination;
- Screening procedures for identifying from the total population of children aged 3 to 21 years those who may need more in-depth evaluation in order to determine eligibility for special education and related services.¹²

Further, Colorado rules specifically require that "notice be published or announced in newspapers or other media with adequate circulation to notify parents throughout the administrative unit."¹³

As to students enrolled in a private school located an AU in which they do not reside, and students in private schools whose parents are not as connected or involved in their communities (or reside outside the community altogether) media publications and other general child find efforts may not suffice, such that additional measures are required. What fills this gap is the "**timely and meaningful consultation**" requirement.

¹⁰ 34 C.F.R. § 300.131(f); ECEA Rule 4.02(1)(a)(ii).

¹¹ ECEA Rule 4.02(c).

¹² *Id.*

¹³ ECEA Rule 4.02(1)(a)(i).

IV. Meaningful consultation

The federal regulations require AUs to engage in timely and meaningful consultation with representatives of parents and private schools in order to fulfill various obligations associated with providing parentally placed private school students with equitable services. Consultation is required to complete a “thorough and complete child find process”¹⁴ and “during the design and development of special education and related services” for the children involved.¹⁵

The federal Office of Special Education Programs explains that “consultation” involves discussions between the AU, private school representatives, and representatives of parents of parentally placed private school children, on key issues that affect the ability of eligible private school children with disabilities to participate equitably in federally funded special education and related services. “Effective consultation provides a genuine opportunity for all parties to express their views and to have those views considered by the AU. Successful consultation establishes positive and productive working relationships that make planning easier and ensure that the services provided meet the needs of eligible parentally placed private school children with disabilities.”¹⁶ “Meaningful consultation” is an ongoing process – AUs must engage in activities to meet the “meaningful consultation” requirement on a regular basis (at least annually).

1. Necessary participants

To ensure that the consultation process includes the necessary participants, the AUs and their child find coordinator(s) should try to maintain a current list or database of nonprofit private schools in their area, including representatives and parents of parentally placed students to be included in the consultation process. Some ways of keeping private school representatives and parents “in the loop” might include sending the private schools periodic notices to remind them of the AU’s child find obligations and to request that the private school notify the AU if it suspects that one of its students may be a student with a disability. AUs should invite private school and parent representatives to open house events, informational meetings or other community activities designed to inform the public about the special education services available in the AU.

¹⁴ 34 C.F.R. §§ 300.133(b) and 300.134(a).

¹⁵ 34 C.F.R. § 300.134.

¹⁶ *Questions and Answers on Serving Children with Disabilities Placed by Their Children at Private Schools*, Question A-1, OSEP Memorandum, March 27, 2006, 106 LRP 57733. In subsequent guidance, OSEP states that “[t]here are a number of ways to carry out the consultation process. OSEP, however, does not endorse any specific consultation model.” See, OSEP Memorandum, January 1, 2007, 107 LRP 11720.

2. The required consultation process

The AU should have a specifically designed consultation process that it adheres to. Consultation could include individual or group meetings, interviews or other effective/efficient strategies, but **must** include specific discussion of the following topics:

- The child find process, including how resident and non-resident parentally-placed private school students suspected of having a disability can participate equitably. A discussion of child find includes how evaluations, eligibility determination and reevaluations will be conducted.
- How, where and by whom parents, teachers and private school officials will be informed of the child find process;
- The determination of the proportionate amount of federal funds to be expended and how the proportionate share was calculated;
- The consultation process and how it will operate through the year to ensure that students identified through the child find process can meaningfully participate in special education and related services;
- How special education and related services will be provided, including a discussion of types of services and service delivery mechanisms;
- How such services will be apportioned if funds are insufficient to serve all students, and how and when these decisions will be made; and
- If the AU disagrees with the views of the private school officials on the provision of services or the types of services, how the AU will provide a written explanation of the reasons why services will not be provided.¹⁷

3. Written affirmation

After consulting with participating private schools, the AU must obtain a written affirmation signed by the representatives of the private schools.¹⁸ A sample Written Affirmation form is attached to this memorandum. If the private school representatives do not provide the affirmation within a reasonable period of time, the AU must forward the documentation of the consultation process to CDE, and specifically to Joyce Thiessen-Barrett.¹⁹

V. Evaluation

A. *What are the procedural requirements for evaluating parentally-placed private school students?*

An essential aspect of the child find process is evaluating students who are suspected of being disabled and requiring special education and related services. If the AU obtains information that should lead it to suspect that a

¹⁷ 34 C.F.R. § 300.134.

¹⁸ 34 C.F.R. § 300.135(a).

¹⁹ 34 C.F.R. §300.135(b).

parentally-placed private school student might have a disability, it must provide the parents with prior written notice (PWN) and a copy of their IDEA procedural safeguards, and request consent to conduct an initial evaluation.²⁰

1. Applicable timelines

As with a student enrolled in the AU, once the AU receives written consent to conduct an initial evaluation, it has 60 calendar days to conduct the evaluation.²¹ Where the evaluation is of a student suspected of having a specific learning disability, the evaluation timeframes may be extended by mutual written agreement of the child's parents and the eligibility team.²²

If the parents do not provide consent to evaluate or fail to respond to a request for consent, the AU may, but is not required to, pursue the evaluation through mediation or due process. The AU will **not** be deemed to violate its child find obligations if it declines to pursue the evaluation. Further, the AU will not be required to pursue the evaluation or comply with the applicable timelines if the child enrolls in another AU or in a state-operated program after the 60-day timeline begins to run and before the AU's determination of whether the child is an eligible child with a disability. This exception *only* applies if the subsequent AU or state-operated program is making sufficient progress to ensure a prompt completion of the evaluation and the parent and subsequent AU agree to a specific time when the evaluation will be completed.²³

If the AU determines, via the evaluation process, that a parentally-placed private school student is a resident, school-aged student with a disability who is entitled to a FAPE, then the AU must offer a free appropriate public education to the student in the AU. For non-resident students, the AU should notify parents of their right to enroll their child and seek a FAPE from the student's resident AU.

In addition to initial evaluations, where a parentally-placed private school student is already identified as an eligible student with a disability, the AU of attendance (i.e., the AU in which the student's private school is located) is responsible for any reevaluations that might be due.

2. Special considerations for students attending schools outside their AU of residence

For non-resident students, the ECEA Rules require the AU of attendance to conduct "child find" and to invite the AU of residence to participate "in the

²⁰ The PWN requirements are found at 34 C.F.R. §§ 300.503 and 300.504.

²¹ 34 C.F.R. § 300.301(c)(1)(i); ECEA Rule 4.02(3)(c).

²² 34 C.F.R. § 300.309(c). The AU may not, however, delay commencing the evaluation of a student suspected of having a specific learning disability in order to attempt RtI.

²³ ECEA Rule 4.02(3)(c)(iii)(B).

process of the initial assessment or reevaluation.”²⁴ The AU of attendance is also required to convene initial eligibility meetings, and to invite the AU of residence to participate in the assessment and eligibility determination process.²⁵ The federal regulations, however, require parental consent for the release of information between AUs about parentally placed private school students.²⁶

In order to reconcile these requirements, the CDE recommends that in requesting parental consent to evaluate a non-resident student, the AU of attendance should, 1) contemporaneously notify the parents of the requirement to invite the AU of residence to participate in the evaluation process and that such participation will likely require the sharing of information with the AU of residence; and b) request parental consent to share such information with the AU of residence.

B. How can AUs evaluate of students suspected to have specific learning disabilities (SLD) who have not received services through the RtI process?

Under Colorado’s eligibility rules for identifying students with specific learning disabilities (SLD), an essential part of the evaluation is a determination that the student is not making “sufficient progress to meet age or state-approved grade-level standards in one or more of the areas ... when using a process based on the child’s response to scientific, research-based intervention.”²⁷ However, private schools might not utilize a response-to-intervention (RtI) process and cannot be compelled to do so, such that when a parentally-placed private school student is suspected of having an SLD, an essential component of the evaluation and identification process might be missing.

When systemic data are not available for a child who is suspected of having an SLD, an AU should still try to determine what instruction/intervention has been provided and what evidence of the child’s learning is available. The AU should attempt to obtain information from parents and teachers about the curricula used and the child’s progress with various teaching strategies, as well as current classroom-based assessments or observations. The AU should identify and attempt to obtain any other information needed to determine whether the child’s low achievement is due to a disability or is primarily the result of a lack of appropriate instruction.

Another option would be for the AU to offer to provide limited interventions (probably at a neighboring school) during the evaluation period and track the child’s response as part of the evaluation process. The CDE recommends that, during the consultation process (see above), the AU consult with the

²⁴ ECEA Rule 8.04(1).

²⁵ ECEA Rule 8.05(1).

²⁶ 34 C.F.R. § 300.622(b)(3).

²⁷ ECEA Rule 2.08(6)b(ii).

private school officials on how best to implement Colorado's SLD eligibility criteria.

As noted above, the AU would have to obtain parental consent to conduct the evaluation, including providing interventions in a neighboring school, and would have to include in the PWN specific information regarding the evaluations and interventions proposed.

C. *What if a parentally-placed private school student is evaluated and identified as an eligible child with a disability?*

If a private school student is identified as an eligible child with a disability through the AU's child find efforts, the AU has two options:

1. If the child is a resident of the AU, offer to provide the child a free appropriate public education by developing an IEP to be implemented in the public school system (or if the child is not a resident of the AU, refer the child to the AU in which the child resides); OR
2. Count the child as a parentally-placed private school student who may be eligible to receive equitable services.²⁸

VI. Equitable services

A. *Which private school students are eligible to receive equitable services from an AU?*

1. Students attending private elementary or secondary schools

Under federal law, children aged 3 through 5 are considered to be parentally-placed private school children who may be entitled to equitable services under the IDEA if they are enrolled in a private school, including a religious school, which meets the definition of "elementary school," as that term is defined under state law.²⁹ In Colorado, however, "elementary school" or "elementary education" refers to the compulsory education provided in grades 1 through 6, and excludes kindergarten and preschool programs. **Thus, if a child aged 3 through 5 attends private preschool or kindergarten, he or she will not be entitled to a special education services plan, and an AU may not provide such a child with a special**

²⁸ As noted below, child find (location, evaluation, and identification) applies to all parentally-placed private school students, but only students attending non-profit private elementary schools are eligible to receive equitable services.

²⁹ 20 U.S.C. § 1412(a)(10)(A)(i); 34 C.F.R. §§ 300.133(a)(2)(ii) and 300.13.

education services plan using federal IDEA funds.³⁰ While an AU may provide such services using state or local funds, that use of funds would impact the AU's MOE (maintenance of effort) determination.

As for what constitutes a "private school," Colorado's compulsory attendance law provides that a student will be deemed to be in compliance if they are enrolled for a minimum of 172 days in an independent or parochial school which provides "basic academic education," which is defined as a "sequential program of instruction including, but not limited to, "communication skills of reading, writing, and speaking, mathematics, history, civics, literature, and science." C.R.S. § 22-33-104(2)(b). Thus, the obligation to locate and serve parentally placed private school students with disabilities will only be triggered if the student is enrolled in a program that provides "basic academic education" as defined in the law.

2. Students attending non-profit private schools

Further, only students attending non-profit private schools are entitled to their equitable share of services. To determine if a particular private school is nonprofit or for-profit, the AU could look up the school's incorporation papers with the Colorado Secretary of State's office, or could simply ask personnel at the private school in question about the private school's status.

B. How do AUs calculate the proportionate share of IDEA funds that must be expended on providing services to parentally placed private school students?

Each AU must spend a proportionate share of its Part B funds on services for parentally placed private school children.³¹ The proportionate share is calculated by dividing the amount of federal Part B funds received by the AU by the total number of eligible children with disabilities (both public and private school students), and then multiplying the per-pupil figure by the number of private school students with disabilities in the AU (regardless of whether the student or their parents reside within the AU). The count must be of private school students with disabilities must be conducted between October 1 and December 1, inclusive, of each year.

³⁰ It is important to remember that though children aged 3 through 5 may not be entitled to equitable services as a parentally-placed private school student if they attend private preschool or kindergarten, AUs are nonetheless obligated under federal and state law to fulfill their child find obligations as to all students. The child find obligation applies to all students in the state, regardless of whether the child is attending a private school. 34 C.F.R. §§ 300.111.

³¹ 34 C.F.R. § 300.133.

For example:

Number of eligible children with disabilities in AU X:

$$\begin{array}{r} \text{In public school:} \quad 100 \\ \text{In private school:} \quad \underline{+ 5} \\ \hline 105 \end{array}$$

Federal Part B Flow-Through \$\$ received by AU X: \$52,500

$$\begin{array}{r} \$52,500 \div 105 = \$500 \\ \quad \quad \quad \times \underline{5} \text{ private school students} \\ \hline = \quad \quad \quad \mathbf{\$2,500 \text{ for proportional share}} \end{array}$$

Important: The obligation to conduct child find, including individual evaluations, exists independently from the services provision. The costs of child find activities such as evaluations may not be considered in determining whether the AU has spent an appropriate amount on providing special education and related services to parentally-placed private school students.

C. *What equitable services must the AU provide?*

As noted above, AUs must timely and meaningfully consult with private school representatives and parents (or their representatives) regarding the design and development of special education and related services for parentally-placed private school students. However, the final decision about all aspects of the services to be provided is left to the AU. If the AU disagrees with the views of the private school officials on the provision of services or the types of services, the AU must provide the private school officials with a written explanation of the reasons why the AU chose not to accept the recommendation of the private school officials.

AUs have the obligation to provide the group of parentally-placed private school students with equitable participation in the services funded with federal IDEA funds. There are, however, no particular kinds of IDEA services or specified amounts of services that must be provided to parentally-placed private school students. Parentally-placed private school students have no individual entitlement to receive some or all of the special education and related services they would receive if enrolled in a public school.

Whatever equitable services are provided by an AU, they must meet the following requirements:

1. The services must be provided by the AU, either by its employees or through contract with other individuals or entities.

2. The personnel providing equitable services to parentally-placed private school students must meet the same standards as personnel providing services in the public schools, except that privately elementary school and secondary school teachers do not have to meet the “highly qualified special education teacher” requirement.
3. The services may be provided on-site at a child’s private school or at another location. The location of services is one of the subjects that should be discussed during the consultation process with representatives of private school officials and parent (but ultimately decided by the AU). Whatever services are provided (direct or indirect) must be secular, neutral and non-ideological.³²

It is also important to remember that equitable services need not be direct services, *i.e.*, direct instruction to a child. The AU may determine, after meaningful consultation with representatives of parents and private schools, that it will provide its population of parentally placed private school students with disabilities with indirect services such as consultative services, equipment, materials or training for private school teachers and other private school personnel.³³

D. What is the process for developing a services plan for a parentally-placed private school student with a disability?

Each parentally-placed private school student with a disability who has been designated by the local AU to receive special education or related services must have a services plan. The services plan must describe the specific special education and related services that the AU will provide to the child. The AU must ensure that a representative of the private school attends each meeting to develop the services plan (or provide other methods to ensure participation, such as individual or conference telephone calls).

VII. Budgeting and Data Reporting

A. How does an AU have to budget for equitable services for parentally-placed private school students?

If an AU has private schools within its boundaries and provides equitable services to students in those private schools, it must include a Project F as part of its application for Part B IDEA funds. Project F reports and tracks expenditures related to providing equitable services to parentally-placed private school students.

All expenses related to providing equitable services to parentally-placed private school students must be tracked and reported, including:

³² 34 C.F.R. § 300.138(c)(2).

³³ 34 C.F.R. § 300.134(d)(1); *see also*, *Questions and Answers on Serving Children with Disabilities Placed by their Parents in Private Schools*, Question D-4, OSERS 2011, <http://idea.ed.gov/explore/view/p/,root,dynamic,QaCorner,1>.

1. Equipment and curriculum materials for providing equitable services (above and beyond general education expenditures); and
2. Time and effort/salaries for personnel providing equitable services.

If an AU does not expend the entire proportionate share of its Part B subgrant by the end of the fiscal year, it must carry those funds over and obligate them for special education and related services for eligible parentally-placed private school students for one additional year. If there are still funds remaining at the end of the carry-over period, and the AU is in compliance with its child find and consultation obligations relating to parentally-placed private school students, then the unexpended funds may be used to pay for other allowable Part B expenses.

B. What are the data reporting requirements?

AUs are required to report child count data, including information regarding the educational environment of children in the count. Counts for both children aged 3-5 and aged 5-21 must be reported according to educational environment.

As noted above, children aged 3-5 attending private preschools or private kindergartens are unlikely to be included in the count, because in Colorado, preschool and kindergarten are not considered part of elementary school.³⁴

For children 6-21 (*i.e.*, grade 1 and up), the AU must include count data reflecting the educational environment, including children with disabilities attending private, non-profit private schools and receiving special education and related services at public expense under a services plan.³⁵

If you have any questions regarding this guidance memorandum, please contact Wendy Armstrong in the Exceptional Student Services Unit.

³⁴ See Section IV.A. of this memorandum, *above*.

³⁵ 34 C.F.R. §§ 300.640-644.