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# IDEA 2004

## Private School Provisions

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## IDEA 2004: Private School Provisions

### Overview

How will the latest overhaul of the Individuals with Disabilities Education Act (IDEA 2004) affect students in private schools? In some respects the new law's effect will be negligible, but in others, noteworthy.

Overall, IDEA 2004 treats services to children placed by their parents in private schools essentially the same way the old law did. School districts are obliged to provide private school children who have special needs with services equal to a proportionate share of a school district's IDEA funds. Thus, if private schools located in a district enroll 10 percent of all the students in a district with special needs, the district is obliged to spend 10 percent of its IDEA allocation on services for those children. (In the old law the target private school population was students *residing* in the district; in the new law it is students *attending* private schools in the district.) Because no individual child in a private school is entitled to any particular services, the determination of what students are served, what services they receive, and how, when, where, and by whom such services are provided are all matters of consultation between public school officials, private school officials, and parents of the students involved.

But while essentially retaining the existing approach, the new IDEA includes important improvements in provisions relating to children in private schools. A list of the principal improvements begins on the next page. Following the list, we offer the **text** of the private school provisions in IDEA 2004, and following that, a **side-by-side comparison** of the new law and its predecessor.

## Principal Improvements in IDEA 2004 for Students in Private Schools

### Recording and Reporting

- ★ Requires school districts to record and report to the state education agency the number of private school children evaluated, the number determined to be children with disabilities, and the number served. (Sec. 612(a)(10)(A)(i)(V))

### Child Find

- ★ Changes the target child find and service population from children *residing* in the district to children *attending* private schools within the district. ((Sec. 612(a)(10)(A)(i))
- ★ Incorporates within the statute the current regulatory requirement that a school district's child find activities for private school children be comparable to those for public school children. (Sec. 612(a)(10)(A)(ii))
- ★ Incorporates within the statute the current regulatory requirement that expenditures for child find activities not be considered in determining whether a school district has met its "proportionate share" obligation to private school children. (Sec. 612(a)(10)(A)(ii)(IV))
- ★ Upgrades the regulatory requirement for consultation on child find to "timely and meaningful" consultation. (Sec. 612(a)(10)(A)(iii)(I))

### Consultation

- ★ Incorporates within the statute current regulatory requirements that school districts consult with representatives of private school children in carrying out various activities relating to identifying and serving children in private schools, and substantially strengthens those requirements. (Sec. 612(a)(10)(A)(iii))
- ★ Provides an expanded list of items around which there is to be consultation. (Sec. 612(a)(10)(A)(iii))
- ★ Requires school districts that disagree with the views of private school officials, on the provision of services or the types of services, to provide private school officials a written explanation of the reasons why the district chose not to provide services directly or through a contract. (Sec. 612(a)(10)(A)(iii)(V))
- ★ Requires school districts to obtain a written affirmation from private school officials that timely and meaningful consultation has occurred. (Sec. 612(a)(10)(A)(iv))

### Third-Party Contracts

- ★ Clarifies that school districts may provide services to private school children directly or through contracts with public and private agencies, organizations, and institutions. (Sec. 612(a)(10)(A)(vi)(I))

(continued on next page)

### Supplement/Supplant

- ★ Specifies that state and local funds for special education services to children in private schools may supplement but not supplant the federal funds required to be spent under IDEA. (Sec. 612(a)(10)(A)(i)(IV))

### Complaint Procedure

- ★ Incorporates, clarifies, and strengthens regulatory procedures relating to filing complaints. (Sec. 612(a)(10)(A)(v))

### Bypass

- ★ Requires the U.S. Department of Education to arrange for services to private school children if a state or district is unwilling, or substantially fails, to provide for the equitable participation of private school children. (Sec. 612(f)(1))

## IDEA 2004: Legislative Language Conference Report on HR 1350

(Approved by Congress 11/19/04)

### **Section 612(a)(10)(A) Children Enrolled in Private Schools by Their Parents.—**

(i) IN GENERAL.—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, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency 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.

(ii) Child Find Requirement.—

(I) In General.—The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable Participation.—The child find process shall be designed to ensure the equi-

table participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities.—In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost.—The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion Period.—Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

(iii) Consultation.—To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;

(III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and

(V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

(iv) Written Affirmation.—When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

(v) Compliance.—

(I) In General.—A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

(II) Procedure.—If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

(vi) Provision of Equitable Services.—

(I) Directly or Through Contracts.—The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, Neutral, Nonideological.—Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public Control of Funds.—The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this title, and a public agency shall administer the funds and property.

**Section 612(f) By-Pass for Children in Private Schools.—**

(1) In General.—If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements that shall be subject to the requirements of such subsection.

[THE SECTION GOES ON TO DETAIL THE PROVISIONS OF THE BY-PASS.]

**CAPE's Side-by-Side Comparison:  
How IDEA 2004 Compares to Current Law/Regulation  
Relating to Services for Children Placed by  
Their Parents in Private Schools**

(Current regulations are printed in *green italics*.)

<b>Existing Law and Regulation</b>	<b>IDEA 2004</b>
<p>20 USC 1412(a)(10) Children in private schools (A) Children enrolled in private schools by their parents</p> <p>(i) In general. 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 subchapter 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) of this section:</p>	<p>HR 1350, Sec. 612(a)(10) Children in Private Schools (A) Children Enrolled in Private Schools by Their Parents.--</p> <p>(i) In General.--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, unless the Secretary has arranged for services to those children under subsection (f):</p>
<p>(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 subchapter.</p>	<p>(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this part.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p> <p><b>Regulations (34 CFR Part 300)</b> <i>§300.451 Child find for private school children with disabilities.</i> <i>(a) Each LEA shall locate, identify, and evaluate all private school children with disabilities, including religious-school children residing in the jurisdiction of the LEA, in accordance with §§300.125 and 300.220. The activities undertaken to carry out this responsibility for private school</i></p>	<p>(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.</p>

<p><i>children with disabilities must be comparable to activities undertaken for children with disabilities in public schools.</i></p> <p><i>(b) Each LEA shall consult with appropriate representatives of private school children with disabilities on how to carry out the activities described in paragraph (a) of this section.</i></p> <p><u><i>§300.453 Expenditures.</i></u></p> <p><i>(b) Child count.</i></p> <p><i>(2) The child count must be used to determine the amount that the LEA must spend on providing special education and related services to private school children with disabilities in the next subsequent fiscal year.</i></p>	
<p>(II) Such services may be provided to children with disabilities on the premises of private, including parochial, schools, to the extent consistent with law.</p>	<p>(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p>	<p>(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p>	<p>(V) Each local educational agency 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.</p>
<p>(ii) Child-find requirement. The requirements of paragraph (3) of this subsection (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including parochial, elementary and secondary schools.</p> <p><b>Regulations (34 CFR Part 300)</b></p> <p><u><i>§300.451 Child find for private school children with disabilities.</i></u></p> <p><i>(a) Each LEA shall locate, identify, and evaluate all private school children with disabilities, including religious-school</i></p>	<p>(ii) Child Find Requirement.--</p> <p>(I) In General.--The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.</p> <p>(II) Equitable Participation.--The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.</p> <p>(III) Activities.--In carrying out this clause,</p>

<p><i>children residing in the jurisdiction of the LEA, in accordance with §§300.125 and 300.220. The activities undertaken to carry out this responsibility for private school children with disabilities must be comparable to activities undertaken for children with disabilities in public schools.</i></p> <p><u>§300.453 Expenditures.</u></p> <p><i>b) Child count. (1) Each LEA shall--</i></p> <p><i>i) Consult with representatives of private school children in deciding how to conduct the annual count of the number of private school children with disabilities; and</i></p> <p><i>(ii) Ensure that the count is conducted on December 1 or the last Friday of October of each year.</i></p> <p><i>(c) Expenditures for child find may not be considered. Expenditures for child find activities described in §300.451 may not be considered in determining whether the LEA has met the requirements of paragraph (a) of this section.</i></p>	<p>the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.</p> <p>(IV) Cost.--The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).</p> <p>(V) Completion Period.--Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p> <p><b>Regulations (34 CFR Part 300)</b></p> <p><u>§300.451 Child find for private school children with disabilities.</u></p> <p><i>(b) Each LEA shall consult with appropriate representatives of private school children with disabilities on how to carry out the activities described in paragraph (a) of this section.</i></p> <p><u>§300.454 Services determined.</u></p> <p><i>(b) Consultation with representatives of private school children with disabilities.</i></p> <p><i>(1) General. Each LEA shall consult, in a timely and meaningful way, with appropriate representatives of private school children with disabilities in light of the funding under §300.453, the number of private school children with disabilities, the needs of private school children with disabilities, and their location to decide—</i></p> <p><i>(i) Which children will receive services under</i></p>	<p>((iii) Consultation.--To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding--</p> <p>(I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;</p> <p>(II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;</p> <p>(III) the consultation process among the local educational agency, private school officials,</p>

<p>§300.452;  <i>(ii) What services will be provided;</i>  <i>(iii) How and where the services will be provided; and</i>  <i>(iv) How the services provided will be evaluated.</i>  <i>(2) Genuine opportunity. Each LEA shall give appropriate representatives of private school children with disabilities a genuine opportunity to express their views regarding each matter that is subject to the consultation requirements in this section.</i>  <i>(3) Timing. The consultation required by paragraph (b)(1) of this section must occur before the LEA makes any decision that affects the opportunities of private school children with disabilities to participate in services under §§300.452-300.462.</i></p>	<p>and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;                  (IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and                  (V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p>	<p>(iv) Written Affirmation.--When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p> <p><b>Regulations (34 CFR Part 300)</b>  <u>§300.457 Complaints.</u>  <i>(a) Due process inapplicable. The procedures in §§300.504-300.515 do not apply to</i></p>	<p>(v) Compliance.--                  (I) In General.--A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views</p>

<p><i>complaints that an LEA has failed to meet the requirements of §§300.452-300.462, including the provision of services indicated on the child's services plan.</i></p> <p><i>(b) Due process applicable. The procedures in §§300.504-300.515 do apply to complaints that an LEA has failed to meet the requirements of §300.451, including the requirements of §§300.530-300.543.</i></p> <p><i>(c) State complaints. Complaints that an SEA or LEA has failed to meet the requirements of §§300.451-300.462 may be filed under the procedures in §§300.660-300.662.</i></p>	<p>of the private school official.</p> <p>(II) Procedure.--If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p>	<p>(vi) Provision of Equitable Services.--</p> <p>(I) Directly or Through Contracts.--The provision of services pursuant to this subparagraph shall be provided--</p> <p>(aa) by employees of a public agency; or</p> <p>(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.</p> <p>(II) Secular, Neutral, NonideologicalL.--Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.</p>
<p>NO COMPARABLE LANGUAGE IN CURRENT LAW.</p>	<p>(vii) Public Control of Funds.--The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this title, and a public agency shall administer the funds and property.</p>
<p>20 USC 1412(f) By-pass for children in private schools</p> <p>(1) In general</p> <p>If, on December 2, 1983, a State educational agency is prohibited by law from providing for the participation in special programs of children with disabilities enrolled in private</p>	<p>Sec. 612(f) (1) In General.--If, on the date of enactment of the Education of the Handicapped Act Amendments of 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private</p>

<p>elementary and secondary schools as required by subsection (a)(10)(A) of this section, the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements which shall be subject to the requirements of such subsection. [The statute continues with details on implementing the by-pass.]</p>	<p>elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements that shall be subject to the requirements of such subsection. [The statute continues with details on implementing the by-pass.]</p>
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