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SECRETARY OF EDUCATION

BILL RICHARDSON
Governor

November 14, 2005

MEMORANDUM

TO: Superintendents
Special Education Directors
Charter School Administrators
REC Directors

FROM: Dr. Veronica C. García (Signature on file)
Secretary of Education

RE: IDEA 2004: 20 U.S.C. Sec. 1412(a)(10)(A)(B)(C)—Children in Private Schools

This memorandum provides information regarding one portion of the newly reauthorized Individuals with Disabilities Education Improvement Act (IDEA) of 2004. On August 1, 2005, some of this information was disseminated by the NMPED to Special Education Directors, Charter School Directors, Regional Educational Cooperatives, and school principals as part of the non-regulatory guidance on the IDEA 2004.

Children Enrolled in Private Schools by Their Parents

IDEA 2004 has made significant changes regarding requirements pertaining to parentally-placed private school students, and has also moved some existing regulatory requirements into the statute. In addition, the Office of Special Education Programs (OSEP) issued a guidance memorandum on June 27, 2005 pertaining to those changes. That memorandum primarily discusses LEA responsibility for providing equitable special education and related services, determining the proportionate amount of federal funds to be expended by an LEA for children placed in private schools by their parents, and requirements of the consultation process. A copy of the memorandum is attached to this memorandum for your reference. Specific changes in the IDEA are discussed further below.

Child Find

LEAs remain obligated to identify, locate, and evaluate all students with disabilities or suspected disabilities within their jurisdiction, regardless of the severity of the disability. Per state rules, the child find requirement applies to students enrolled in private schools by their parents, whether or not accredited, and to **home-schooled students** within the LEA's jurisdiction, whether or not registered with the NMPED.

However, an LEA's jurisdiction with respect to these students now refers to students in private and home schools located in the LEA. Obligations regarding child find (and provision of services, discussed below) are no longer determined by where these students *reside*. Please refer to the attached **OSEP memorandum** for further explanation of this change.

The IDEA 2004 also includes the following self-explanatory child find provisions, some of which maintain or expand existing requirements in current federal regulations:

- The child find obligation extends to students attending religious elementary and secondary schools.
- The money spent on child find must not come out of proportionate share funds (discussed further below).
- Child find activities must be completed for parentally-placed private school (and home-schooled students) in a comparable time period to that conducted for public school students.

LEAs must therefore continue to ensure that those responsible for conducting child find activities know and understand all of their responsibilities under the law with respect to parentally-placed private school students and home-schooled students. These responsibilities include the continued obligation to locate and offer to evaluate such students who are suspected of having a disability. If the parent of such a student consents to an initial evaluation and the student is deemed eligible for special education or related services, **the LEA must offer a program that provides a free appropriate public education (FAPE) to the student.**

The NMPED suggests that LEAs monitor and document all child find activities that include home-schooled and private school students within their respective jurisdictions, including the specific activities conducted, the dates of each activity, and the results of each activity. All screenings and evaluations resulting from child find activities are free to parents, including parents of home-schooled students and parents of students who attend private school by parent choice.

Special Note: In some cases, a parent will accept a program of services offered by an LEA to a student on a part-time basis, while providing home schooling for the student for the remainder of each day. Students who are deemed eligible for special education and related services under the IDEA are entitled to receive services under this type of arrangement, according to the terms of an IEP developed by a properly composed IEP team that includes the parent(s). In such situations, the LEA is obligated to provide the services according to the student's IEP, and to fulfill all its other obligations under the IDEA 2004 with respect to those services.

Funding and Consultation

IDEA 2004 maintains the requirement that each LEA spend a proportionate amount of IDEA funds for services delivered to parentally-placed students in private schools. However, the federal law has expanded and clarified the requirement that the proportionate amount—and other key issues—be determined via **timely and meaningful consultation** with representatives from the private school.

The LEA's obligation regarding proportionate spending and consultation extends to parentally-placed private school students who attend private schools located in the LEA. The OSEP memo attached to this memorandum clearly describes what the consultation process is required to address. The memo also explains that, for 2005-06, LEAs may use the best available data to calculate the proportionate amount of IDEA funds that must be expended on behalf of parentally-placed private school students, rather than conducting new child counts. The NMPED refers you to its non-regulatory guidance for

sample a “Consultation Form,” the use of which will help ensure that all required components of the consultation process are addressed.

Although state rules extend the child find requirement to home-schooled students, the state statutory definition of a *private school* (at Sec. 22-1-2(K) NMSA 1978) specifically excludes a home school. Therefore, the proportionate spending and “meaningful and timely consultation” requirements that apply to parentally-placed private school students do not apply to home-schooled students. In addition, parents who home school their children do not have the right to file a state-level complaint against an LEA alleging a violation of these consultation requirements (as discussed further below).

IDEA 2004 also requires that, following the consultation process, the LEA must obtain written affirmation of this process, which is to be signed by private school representatives. The NMPED refers you to the sample “Written Affirmation” form in its non-regulatory guidance as an example of the type of form that may be used for this purpose. If the private school representatives do not sign the written affirmation within a “reasonable” period of time, the LEA must forward documentation of the consultation process to the NMPED.

State-level complaints

Under IDEA 2004, a private school official (not the parent of a private school student) has the right to file a state-level complaint alleging that the LEA did not engage in consultation that was timely and meaningful, or that the LEA did not give due consideration to the views of the private school official during the consultation. Additional information on this topic is provided in the NMPED’s non-regulatory guidance section titled “Procedural Safeguards: State-Level Complaints and Due Process Hearings.”

Special Note about FAPE: IDEA 2004 does not change the fact that an LEA is **not required to provide a FAPE** to a parentally-placed private school student with a disability. However, each LEA has a continued obligation to develop and implement a **services plan** for each such student, in accordance with existing federal regulations.

Reminder: The NMPED required that LEAs provide information regarding the following as part of the 2005-06 IDEA Application:

- The number of students in private schools who were evaluated for eligibility under the IDEA
- The number of students evaluated who were determined to be eligible for services
- The number of students who were served under the IDEA

Children Placed in, or Referred to, Private Schools by Public Agencies

IDEA 2004 made no substantive changes to this section of the law.

Payment for Education of Children Enrolled in Private Schools without Consent of or Referral by the Public Agency

IDEA 2004 has not altered the legal requirements regarding reimbursement to parents for the costs of providing special education and related services to a child enrolled in a private school without consent of or referral by the public agency. IDEA 2004 also has not changed the circumstances under which limitations on such reimbursement may be imposed. Those circumstances include failure by the parents to inform an IEP team at the most recent IEP meeting prior to removal of a child from the public school that they were rejecting the public agency’s offer of FAPE and instead enrolling the child in a private school, as well as failure by parents to give written notice of this information to the public agency 10 business days prior to removing the child from the public school. However, there are **new exceptions to the rules on reimbursement limitations** under the revised federal law.

Notwithstanding the requirements regarding parental notification to the public agency described above, the cost of reimbursement to the parents **shall not** be reduced or denied for failure by the parents to provide such notice if

- the school prevented the parent from providing such notice;
- the parents had not received Procedural Safeguards notice informing them of the laws regarding limitations on reimbursement; or,
- compliance with the limitation on reimbursement provisions would likely result in physical harm to the child.

In addition, the cost of such reimbursement, may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if

- the parent is illiterate or cannot write in English; or
- compliance with the limitation on reimbursement provisions would likely result in serious emotional harm to the child.

One Final Note: OSEP has indicated that it will disseminate guidance on this issue in the form of Frequently Asked Questions. The NMPED will provide access to this information to LEAs as soon as it is available.

VCG/js

Enclosure (1)

cc: Dr. Catherine Cross-Maple, Deputy Secretary Learning and Accountability
Dr. Patricia Parkinson, Assistant Secretary
New Mexico IDEA State Advisory Panel