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# Individuals with Disabilities Education Act: Services in Private Schools under P.L. 105-17

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## Summary

The 1997 amendments to the Individuals with Disabilities Education Act (IDEA), P.L. 105-17, changed previous statutory language regarding private school services for children with disabilities who are unilaterally placed in a private school by their parents. Three major additions were made to the statutory language on this issue: (1) requiring the states to spend a proportionate amount of IDEA funds on private school children with disabilities who are enrolled in the private school by their parents, (2) allowing school districts to provide special education related services on the premises of private schools, including parochial schools, and (3) applying the identification, child find, and evaluation provisions to children placed by their parents in private schools. Since enactment, several courts have interpreted these provisions and found public schools are not required to pay the costs of special education services for a particular child in a private school; rather, states are required to expend proportionate amounts of federal funds on special education services for such children. In addition, the Department of Education promulgated regulations implementing the statutory language. This report will be updated. For a general discussion of IDEA see Apling and Jones, "Individuals with Disabilities Education Act (IDEA): Overview of Major Provisions," CRS Report RS20366.

## Background

IDEA is a grants and civil rights statute which provides federal funding to the states to help provide education for children with disabilities. If a state receives funds under IDEA, it must make available a free, appropriate public education (FAPE) for all children with disabilities in the state.[1] Under the law prior to the enactment of P.L. 105-17, states were required to set forth policies and procedures to ensure that provision was made for

[1] 20 U.S.C. §1412(a)(1)(A).

the participation of children with disabilities who are enrolled in private schools by their parents consistent with the number and location of these children.[2] These requirements were further detailed in regulations which required that local education agencies (LEAs) provide private school students an opportunity for equitable participation in program benefits and that these benefits must be "comparable in quality, scope, and opportunity for participation to the program benefits" provided to students in the public schools.[3] The vagueness of the statute and the "equitable participation" standard led to differences among the states and localities and to differences among the courts. Prior to P.L. 105-17, the courts of appeals that had considered these issues had sharply divergent views. Some courts gave local authorities broad discretion to decide whether to provide services for children with disabilities in private schools which generally resulted in fewer services to such children[4] while others attempted to equalize the costs for public and private school children.[5] The Supreme Court had granted *certiorari* in several of these cases but when Congress rewrote the law, the Court vacated and remanded these cases for further consideration.[6]

## Private School Placement under P.L. 105-17[7]

The IDEA Amendments of 1997 provide that to the extent consistent with the number and location of children with disabilities in the state who are enrolled in private schools by their parents, provision is made for the participation of these children in provisions assisted by Part B by providing them with special education and related services.[8] The amounts expended for these services by an LEA shall be equal to a proportionate amount of federal funds made available to the local educational agency under Part B of IDEA. These services may be provided to children with disabilities on the

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[2] Former 20 U.S.C. §1413(a)(4)(A).

[3] 34 C.F.R. §§ 76.651-76.662.

[4] *See e.g., Goodall v. Stafford County Public School Board,* 930 F.2d 363 (4th Cir. 1991), *cert. denied,* 502 U.S. 864 (1991); *K.R. v. Anderson,* 81 F.3d 673 (7th Cir. 1996), vac. 138 L.Ed.2d 1007(1997), 125 F.3d 1017 (7th Cir. 1997), *cert. denied,* 140 L.Ed. 510 (1998).

[5] *See e.g., Russman v. Sobol,* 85 F.3d 1050 (2d Cir. 1996), vac. 138 L.Ed 2d 1008 (1997), 150 F.3d 219 (2d Cir. 1998).

[6] It should be noted that in addition to the requirements of IDEA, schools must also comply with section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and the Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*, where applicable. These statutes essentially prohibit discrimination against an otherwise qualified individual with a disability.

[7] It should be emphasized that the type of private school placement discussed here is where children with disabilities are *unilaterally* enrolled in a private school by their parents. If a child with a disability is placed in a private school by the local education agency in accordance with the child's individualized education program (IEP), this placement is at no cost to the parents. 20 U.S.C. §1412(a)(10)(B). The issues raised in this context are beyond the scope of this report.

[8] 20 U.S.C. §1412(a)(10)(A). Part B of IDEA contains the state formula grant program, the requirement for a free appropriate public education for all children with disabilities and due process protections for such children.

premises of private schools, including parochial, elementary and secondary schools.[9] There is also a requirement that the statutory provisions relating to "child find", identifying children with disabilities, are applicable to children enrolled in private schools, including parochial schools.[10]

The House and Senate reports emphasized that the changes made by P.L. 105-17 should resolve issues raised by the courts by specifying that the total amount of money that must be spent to provide special education and related services to children with disabilities in the state who have been placed by their parents in private schools be limited to a proportional amount of the federal funds under Part B.[11] The legislative history also addressed the issue of parochial schools and noted that their inclusion was "designed to implement the principle underlying the ruling of the Supreme Court in *Zobrest v. Catalina Foothills School District* that it was not an 'entanglement' violation of the First Amendment to provide a sign language interpreter paid for with IDEA funds to a deaf student at this parochial school."[12]

## Department of Education Regulations

The Department of Education issued final regulations implementing the IDEA Amendments of 1997 on March 12, 1999.[13] These regulations were the result of a long process which began on October 22, 1997 with the publication of proposed rules.[14] Over 6000 comments were received by the Department of Education regarding the proposed regulations and Congress had included a statement in the conference report to P.L. 105-277 indicating concern that the final regulations had not been promulgated and directing that the regulations be promulgated by December 1, 1998. When finally released the regulations were long and complex.

With regard to private school placement, the regulations reiterated the statutory provisions and stated that no individual private school child with a disability has a right to receive some or all of the special education and related services the child would receive if enrolled in a public school.[15] The Department also stated that schools are not prohibited from providing services to private school children with disabilities that are in excess of those required.[16]

The most controversial provision in the regulations relating to private schools is the Department's interpretation that the statutory provision regarding services to private school children with disabilities means that the due process procedures of the law do not

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[9] *Id.*

[10] 20 U.S.C. §1412(a)(10)(A)(ii).

[11] S.Rep.No. 105-17, 105th Cong., 1st Sess. 13 (1997); H. R. Rep.No. 105-95, at 92.

[12] S.Rep.No. 105-17, 105th Cong., 1st Sess. 13 (1997); H.R. Rep.No. 105-95, at 93.

[13] 34 C.F.R. Part 300.

[14] 62 F.R. 55094 (Oct. 22, 1997).

[15] 34 C.F.R. §300.454(a).

[16] 34 C.F.R. §300.453(d).

apply to complaints that a school has failed to meet the regulatory requirements regarding private school placement by parents.[17] This prohibition would apparently include the provision of services on a child's IEP. The rationale for this interpretation of the statute is that the statute does not include any individual right to services for private school children placed by their parents and that therefore the need for due process protections is precluded.[18] However, the Department of Education did determine that child find activities were part of the basic FAPE obligation and that a failure to properly evaluate a private school student would be subject to due process.[19]

The regulations do not contain any specific provision relating to whether home schooling is considered to be a private school. However, since several commentators on the regulations asked the Department about the issue, in its comments on the regulations, the Department of Education stated that state law determines whether home schools are considered to be private schools. "If the State recognizes home schools as private schools, children with disabilities in those home schools must be treated in the same way as other private school children with disabilities. If the State does not recognize home schools as private schools, children with disabilities who are home-schooled are still covered by the child find obligations...(and) agencies must ensure that home-schooled children are located, identified, and evaluated, and that FAPE is available if their parents choose to enroll them in public schools."[20]

## Judicial Decisions After P.L. 105-17

Prior to the 1997 amendments, the courts had varied opinions about what school districts were required to provide for children with disabilities who had been unilaterally placed in private school by their parents. A number of judicial decisions were pending before the Supreme Court when the IDEA Amendments of 1997 were enacted. These cases were remanded for consideration in light of congressional action. In addition, in one case which had not yet reached the Supreme Court, the fifth circuit court of appeals withdrew an earlier opinion.[21] In general, these decisions and others decided since P.L. 105-17 have been more uniform in their interpretation of the law than was the case under the preceding statute. The recent cases have found that a state which receives IDEA funds is to allocate a proportionate share of federal funds to children with disabilities unilaterally enrolled in private schools by their parents but is not required to provide services on the premises of the private school.[22]

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[17] 34 C.F.R. §300.457.

[18] 64 F.R. 12605 (1999).

[19] 34 C.F.R. §300.457(b).

[20] 48 Fed. Reg. 12602 (March 12, 1999).

[21] *Cefalu v. East Baton Rouge Parish School Board,* 117 F.3d 231(5th Cir. 1997).

[22] One early case *Goodall v. Stafford County Public School Board,* 930 F.2d 363 (4th Cir. 1991), also held that, even prior to the 1997 amendments, IDEA did not require that the school provide a deaf child with a cued speech interpreter at a private religious school.

The first of these decisions after enactment of P.L. 105-17, *Cefalu v. East Baton Rouge Parish School Board*,[23] involved a hearing impaired student whose parents requested the services of a sign language interpreter in his private school. The fifth circuit withdrew its earlier opinion which had established a three prong test to determine when a school district had to pay for special education services in private schools and found that IDEA imposed no requirement for an on-site interpreter as long as a free appropriate public education had been offered to the student. Similarly, in *K.R. v. Anderson Community School Corporation*,[24] the court rejected a claim for an on-site instructional aide for a parochial school student with multiple disabilities. The seventh circuit specifically stated that "the Amendments unambiguously show that participating states and localities have no obligation to spend their money to ensure that disabled children who have chosen to enroll in private schools will receive publicly funded special-education services generally 'comparable' to those provided to public-school children."[25] In *Peter v. Minnesota*,[26] the eighth circuit found no right to services for a child with a disability placed in a private religious school by his parents. In *KDM v. Reedsport School District*,[27] the plaintiff, a child who was legally blind and had cerebral palsy, argued that he should be provided services in a parochial school. The ninth circuit disagreed stating that every circuit that had considered the issue since the 1997 amendments had found that IDEA does not require services to be provided on site at a private school.

There has been limited judicial discussion of the proportionality of funds issue although in *Russman*,[28] the second circuit discussed the proportionality issue briefly. The court in *Russman* was presented with the issue of whether IDEA required the school district to provide a mentally retarded student with a consultant teacher and a teacher's aide on the premises of a private school and found that the IDEA as amended "does not require a school district to provide on-site special education services to a disabled child voluntarily enrolled in private school."[29] More specifically, the court found that although a state receiving IDEA funds must allocate a proportionate share of federal money to disabled students voluntarily enrolled in private schools, whatever services a school district is obligated to provide did not have to be provided on the premises of the private school.[30]

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[23] 117 F.3d 231 (5th Cir. 1997).

[24] 125 F.3d 1017 (7th Cir. 1997).

[25] *Id.* at 1019.

[26] 155 F.3d 992 (8th Cir. 1998).

[27] 196 F.3d 1046 (9th Cir. 1999).

[28] 150 F.3d 219 (2d Cir. 1998).

[29] *Id.* at 220.

[30] But see *Fowler v. Unified School District No. 259*, 128 F.3d 1431 (10th Cir. 1997), where the court said that it was unclear whether the proportionate amount to be allocated should be allocated for each individual student or whether it should be allocated collectively and remanded.