UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

DEC - 1 2006

Honorable Christopher Smith
2372 Rayburn House Office Building
Washington, DC 20515-3004

Dear Congressman Smith:

This letter is in response to your correspondence of August 10, 2006, to Secretary Spellings seeking clarification of the provisions in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) at 20 U.S.C. 1412(a)(10)(A) regarding the applicability of equitable participation requirements to children with disabilities ages three through five who are enrolled by their parents in private schools or facilities. Since that time, I met with your staff to discuss your concerns about the meaning of the final regulations at 34 CFR §§300.130-300.144 – Children with Disabilities Enrolled by Their Parents in Private Schools. Specifically, you are concerned that the New Jersey State Department of Education's (NJSDE's) interpretation of the new regulations is more restrictive than previous requirements regarding the provision of equitable services to children with disabilities ages three through five who are enrolled by their parents in private schools or facilities.

I would like to take this opportunity to respond more fully to the concerns raised in your letter that hundreds of preschool children with disabilities in private schools will be "cut off from their programs" and unable to receive "early educational intervention" because of the changes made by IDEA 2004 and its implementing regulations to the equitable participation requirements. There are several ways that preschool children with disabilities receive special education and related services. While many preschool children with disabilities are not eligible for equitable participation services because, as explained below, they attend a private school or facility, such as a day-care center, that may not meet the State's definition of "elementary school," this does not mean, as your letter suggests, that these children are not eligible for services under IDEA. Under section 612(a)(1) of IDEA, States must make a free appropriate public education (FAPE) available to eligible children with disabilities aged three through twenty-one in the State's mandated age range. (34 CFR §300.101) Because many local educational agencies (LEAs) do not offer public preschool programs, particularly for three- and four-year-olds, LEAs often make FAPE available to a preschool child with a disability in a private school or facility. In these circumstances, there is no requirement that the private school or facility be an elementary school under State law.

As noted above, because many LEAs do not offer public preschool programs, particularly for three- and four-year-olds, LEAs often make FAPE available to an eligible preschool child with a disability in a private school or facility in accordance with 34 CFR §§300.145-300.147. In some instances, the LEA may make FAPE available in the

private school that the parent has selected. If there is a public preschool program available, the LEA of residence may choose to make FAPE available to a preschool child in the public preschool program. If the group of persons specified in 34 CFR §300.116(a)(1), making the placement decision, places the child in a public or private preschool program and the parents reject the public agency's offer of FAPE because they want their child to remain in the private preschool program they have selected, the public agency is not required to provide FAPE to that child. The parent may challenge the public agency's determination of what constitutes FAPE for their child using the State complaint and due process procedures available under IDEA.

In addition, as you know, IDEA 2004 retains the requirement that each LEA must spend a proportionate amount of the subgrant it receives from the State educational agency (SEA) under the Grants to States and Preschool Grants for Children with Disabilities program for the provision of special education and related services to children with disabilities enrolled by their parents in private elementary schools and secondary schools. Under IDEA 2004, significant changes were made in that the LEA where a private elementary school or secondary school or facility is located is responsible for child find, individual evaluations, and the provision of equitable services to parentally-placed private school children with disabilities, rather than the LEA in which the parents of such children reside. Under the previous regulations implementing Part B of the IDEA, "private school children with disabilities" were defined as children with disabilities enrolled by their parents in private schools or facilities. 34 CFR §300.450 (1999). Although the previous regulation did not specify that the private school or facility was required to meet the definition of elementary school or secondary school in IDEA, that has been the Department's consistent interpretation of the statute.

The final regulations implementing section 612(a)(10)(A)(i) of IDEA 2004 at 34 CFR §300.130 now clarify that "parentally-placed private school children with disabilities" 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." Thus, children with disabilities ages three through five are considered to be parentally-placed private school children with disabilities enrolled by their parents in private, including religious, elementary schools, only if they are enrolled in private schools or facilities that meet the definition of "elementary school" in 34 CFR §300.13. "Elementary school" is defined at 34 CFR §300.13, as a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law. Accordingly, if a private preschool or day-care program or other private early childhood program or facility is considered an elementary school under the State's definition of "elementary school," the child find and equitable participation requirements in 34 CFR §§300.130–300.144 apply to those children with disabilities enrolled by their parents in such programs. (34 CFR §300.133(a)(2)(ii)). Therefore, the LEA where the private school or facility is located is not required to include children with disabilities ages three through five enrolled by their parents in private schools that do not meet the State's definition of "elementary school" in the population of children considered for equitable services if the private school or

facility where the parents have enrolled their child is not covered under the State's definition of "elementary school."

The formulas used to calculate the amount of Part B funds that LEAs must spend on providing special education and related services to parentally-placed private school children with disabilities are found at 34 CFR §300.133(a)(1) and (2). The LEA where the private school or facility is located cannot include children with disabilities ages three through five in the calculations if those private preschools or facilities where parents enrolled their child do not meet the State's definition of "elementary school." In those instances where part B funds may not be spent on parentally-placed private school children with disabilities ages three through five, States and LEAs are not prohibited from using other sources of State, local, and private funds to provide equitable services to those children.

Pursuant to 34 CFR §300.131, if a parentally placed child with a disability is suspected of having a disability, the LEA where the private school is located must conduct the child's initial evaluation, subject to informed parental consent. In addition, the LEA where the private school is located must, in accordance with 34 CFR §300.504(a), provide the parents a copy of the procedural safeguards notice, upon the initial referral or parent request for evaluation. If the LEA where the private school is located determines that a child is a child with a disability under State standards, the child's parents, if they wish to have FAPE made available to their child, need to make the LEA of residence aware of their interest in their child receiving FAPE, since generally, depending on State law, the LEA where the child resides is responsible for making FAPE available to an eligible parentally placed child with a disability. Parents, however, may opt not to enroll their child in the LEA of residence and, once the parents have made clear their 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 provide FAPE to that child. Accordingly, the school district in which the private elementary school or secondary school is located is not responsible for making FAPE available to a child whose parents reside in another school district, but must consider the child in the population of children considered for equitable services.

The NJSDE must determine which private preschools and facilities are covered under New Jersey's definition of "elementary school." This will clarify for LEAs which children with disabilities ages three through five attending private preschools and facilities, the LEA must consider for equitable services. The NJSDE may opt to amend its definition of "elementary school" to cover private preschools, programs and facilities where parents enroll their three through five-year-old children with disabilities in order to preserve the eligibility of those children for equitable services consideration.

We do not want to understate the importance of equitable services for preschool children with disabilities. However, it is our belief that many parentally-placed preschool children with disabilities, unlike school aged-children, because they attend a private school or facility that does not meet the State's definition of "elementary school," will not be eligible under IDEA to be considered for equitable participation services. These children

generally will continue to remain the responsibility of the LEA of residence for the purpose of conducting child find and making a program of FAPE available to an eligible child.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

If you have any other questions, please feel free to contact my office. I hope the information in this letter adequately addresses your concerns. Please also feel free to contact the Office of Special Education Programs (OSEP) State Contact for New Jersey, Ms. Susan Falkenhan at (202) 245-7242 or the OSEP Preschool Grants Coordinator, Ms. Nancy Treusch at (202) 245-7553 for further assistance.

Sincerely,

Alexa Posny

Alexa Posny, Ph.D.
Director
Office of Special Education
Programs

cc: Ms. Roberta Wohle
New Jersey State Director