UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

THE ASSISTANT SECRETARY

AUG 15 2019

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Dear Mr. Perla, Dr. Perda, Sr. Ciszewski, Ms. Kriegel, and Ms. Hellman:

This letter responds to the October 27, 2017 correspondence you submitted to Betsy DeVos, Secretary, U.S. Department of Education (Department), pursuant to 20 U.S.C. 1412(a)(10)(A)(v) of the Individuals with Disabilities Education Act (IDEA).[1] In your letter you appealed the final

[1] The applicable regulatory provisions are found in 34 C.F.R. § 300.136 .

decisions of the Massachusetts Department of Elementary and Secondary Education (DESE) on complaints you filed against the State educational agency (SEA) and 25 local educational agencies (LEAs) related to compliance with certain IDEA requirements. Specifically, you stated that you are dissatisfied with the SEA's final decisions on these complaints because the SEA: (1) failed to consider the child find allegations in the complaints; (2) limited the scope of its review to a one-year period; (3) did not require LEAs to produce evidence that the required amount of IDEA Part B funds were spent on equitable services and failed to address "supplement but not supplant" and LEA "maintenance of effort" requirements; and (4) did not require appropriate corrective actions.

The Office of Special Education and Rehabilitative Services (OSERS) has completed its review of the SEA's decisions on your complaint and our decision is the Department's final action in this matter. We regret the delay in providing you with the written results of our review.

The enclosure to this letter includes relevant background information and a description of the procedures OSERS followed in its review. The enclosure also provides findings of fact, analyses, conclusions, and any corrective actions required to address your allegations.

By copy of this letter we are notifying DESE of OSERS' decision in this matter. If you or DESE have questions or would like to request technical assistance related to implementation of the required corrective actions, please contact Dwight Thomas, OSEP's State Lead for Massachusetts at 202-245-6238 or by email at Dwight.Thomas@ed.gov.

Sincerely,

Johnny W. Collett

Enclosure

cc: The Honorable Charlie Baker
Governor of Massachusetts

Russell Johnston
Senior Associate Commissioner

Appeal of Resolution of Complaints by the
Massachusetts Department of Elementary and Secondary Education

BACKGROUND

This matter in general concerns the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*., and its requirement that a "free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). IDEA requires that children with disabilities who are parentally-placed in private schools and are in need of special education and related services, are identified, located, and evaluated, and are provided such services consistent with the requirements. 20 U.S.C. § 1412(a)(3) and 20 U.S.C. § 1412(a)(10). The specific nature of this matter concerns the application of IDEA's equitable services provisions to parentally-placed children with disabilities in private schools in the State of Massachusetts.

By letter dated October 27, 2017, certain private school officials in Massachusetts (hereinafter, the complainants) submitted a complaint to Betsy DeVos, Secretary, U.S. Department of Education (Department), pursuant to section 612(a)(10)(A)(v) of IDEA, 20 U.S.C. § 1412(a)(10)(A)(v). The Secretary has delegated the responsibility to respond to the complaint to the office of the Assistant Secretary for Special Education and Rehabilitative Services (OSERS).

The complainants stated that they were dissatisfied with the Massachusetts Department of Elementary and Secondary Education's (DESE's) resolution of 25 complaints the complainants had previously filed regarding certain school districts, hereinafter referred to as local educational agencies (LEAs).[1] These complaints alleged noncompliance with the requirement that LEAs conduct timely and meaningful consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities, in accordance with 20 U.S.C. § 1412(a)(10)(A)(iii) and 34 C.F.R. § 300.134.

The complainants also stated that they were dissatisfied with DESE's resolution of their complaint in which they alleged that DESE, as the State educational agency (SEA) had failed to ensure its LEAs comply with IDEA as required by 20 U.S.C. § 1412(a)(11) and 34 C.F.R. §§ 300.149 and 300.600.

DESE's Resolution of Complaints Against LEAs: On June 28, 2017, DESE received complaints from the complainants alleging that 27 school districts had failed to comply with

[1] The IDEA requirements at issue in this complaint apply both to the SEA (also referred to as DESE) (20 U.S.C. § 1412 and 34 C.F.R. § 300.100) and to LEAs (20 U.S.C. § 1413(a)(1) and 34 C.F.R. § 300.201). DESE also refers to the school districts as LEAs. See February 8, 2018 letter from DESE to Secretary DeVos, (hereinafter, SEA Response #1).

certain requirements of IDEA. Specifically, the complainants alleged that each of the LEAs failed to conduct timely and meaningful consultation as required by 20 U.S.C. § 1412(a)(10)(A)(iii) and 34 C.F.R. § 300.134. The complainants subsequently withdrew their complaints against two of the LEAs.

DESE reported that its Problem Resolution System Office (PRS) resolved the complaints using the same procedures it has established to resolve IDEA State complaints filed under 34 C.F.R. §§ 300.151-300.153. On September 28, 2017, DESE issued Letters of Finding to the complainants and each of the 25 LEAs. DESE found that all LEAs were out of compliance with one or more IDEA requirements related to parentally-placed private school children with disabilities. DESE's written decision on the complaint for each LEA included findings of fact and conclusions and required corrective actions to address the identified noncompliance.

Upon review of the LEAs' implementation of the actions required by PRS's Letters of Finding, DESE determined that additional corrective action was necessary. See DESE's Response #1, page 12.

DESE's Resolution of the Complaint Against Itself: In their June 28, 2017 complaint to DESE the complainants alleged that "DESE has failed to carry out its obligations to parentally-placed private school students with disabilities by failing throughout that time [2005 to the present] to have in effect policies and procedures to ensure that the LEAs meet their obligations to such students." See Complainants' June 28, 2017 complaint to DESE, Program Quality Assurance Services, page 1. The complainants noted that "DESE's failure to guide LEAs properly can be traced to its own lack of understanding of the provisions relating to equitable participation for private school children."

The complainants alleged DESE had failed to carry out its oversight of the LEAs' compliance with requirements related to: (1) timely and meaningful consultation; (2) providing an accurate count and report of parentally-placed private school children with disabilities; (3) conducting an accurate calculation of the proportionate share of IDEA Part B funds that must be expended for parentally-placed private school children with disabilities; and (4) ensuring LEAs expended the required amount of IDEA Part B funds on children with disabilities placed in private schools by their parents.

To remedy the alleged noncompliance, the complainants requested that DESE conduct a Statewide audit to determine the impact of the alleged violations from 2005 to the present, provide compensatory services for the "wrongful withholding" of equitable services to parentally-placed private school children with disabilities, appoint a Statewide private school ombudsman to help resolve concerns about appropriate implementation of IDEA's equitable services provisions, and facilitate collaboration between LEAs and private school officials. See complainants' October 27, 2017 complaint to the Secretary, pages 11-12.

In its September 28, 2017 Letter of Findings, PRS resolved the allegations made against DESE. PRS concluded DESE did not fully implement the requirements of 34 C.F.R. §§ 300.149 and 300.600 to ensure the LEAs complied with the consultation requirements in 34 C.F.R. § 300.134 and ordered the LEAs to take appropriate corrective action. In addition, although DESE had issued updated guidance to its LEAs to ensure an accurate count and record of parentally-placed private school children, PRS determined that additional corrective action was necessary.

With respect to ensuring LEAs accurately calculate the proportionate share of IDEA Part B funds and expend the required amount of these funds, PRS referenced the Department's Office of Special Education Programs' (OSEP's) May 13, 2016 monitoring report that included a finding on these same matters.[2] PRS's Letter of Findings noted that as a required corrective action to address OSEP's finding, DESE had revised its policies and procedures for calculating the proportionate share, and those policies and procedures were submitted and approved by OSEP in an August 8, 2017 letter. PRS concluded that, based upon DESE's action and OSEP's approval of the revised policies and procedures, along with a revised technical assistance document provided to its LEAs, DESE had "corrected its partial noncompliance with 34 C.F.R. §§ 300.129, 300.149, 300.600, as they relate to 34 C.F.R. 300.133…." See PRS's September 28, 2017 Letter of Findings to DESE, page 8.

The complainants disagree with PRS's resolution of their complaints and have requested that the Secretary review DESE's decisions and require additional corrective action to remedy the identified noncompliance.

REVIEW PROCEDURES

1. By a November 28, 2017 letter to the complainants, OSERS acknowledged receipt of the complaint and indicated that it had initiated a review of the information provided with the October 27, 2017 submission. OSERS provided DESE with a copy of its November 28, 2017 letter to the complainants and indicated that it would be requesting appropriate documentation from DESE in the future.

2. OSERS notified DESE on January 8, 2018, that it must provide a written response to each of the allegations included in the complainants' complaint to the Department. OSERS also identified specific documents it had determined were necessary to resolve the complaint and invited DESE to submit those documents and any other documentation it believed would

[2] In its May 13, 2016 fiscal monitoring letter, OSEP found the State did not have procedures to ensure that LEAs spend the required amount of their section 611 and section 619 subgrants on providing special education and related services to parentally-placed private school children with disabilities in accordance with the requirements in 34 C.F.R. § 300.133 and Appendix B of 34 C.F.R. Part 300. As a result, the State was required to submit revised policies and procedures demonstrating compliance with the regulations in 34 C.F.R. § 300.133 and Appendix B. On August 15, 2016, the State submitted its revised policies and procedures. OSEP reviewed the State's policies and procedures and closed this finding in an August 8, 2017 letter to DESE.

demonstrate that DESE properly resolved the complainants' complaints against the LEAs and DESE. The January 8, 2018 letter set out the procedures and timelines for each party to the complaint to submit information for OSERS' consideration. OSERS also notified DESE that the complainants would be given the opportunity to provide a joint written response to DESE's written response and documentation. OSERS' letter stated that each party was required to provide the other party with a copy of any information submitted to OSERS. By copy of its January 8, 2018 letter to DESE, OSERS notified the complainants of this information.

3. On February 8, 2018, DESE submitted its written response to the allegations and accompanying documentation to OSERS and copied the complainants on its submission for review as required by OSERS' January 8, 2018 letter.

4. On February 9, 2018, DESE submitted documentation related to OSEP's fiscal monitoring of the State that is relevant to the issues in this complaint.

5. On February 9, 2018, the complainants requested an extension of the due date to provide a response to DESE's February 8, 2018 submission. On February 12, 2018, OSEP responded to that request and granted a one-week extension to the due date.

6. On February 13, 2018, the complainants requested documentation of the PowerPoint slides referenced in DESE's February 8, 2018 response. On that same date, DESE provided the requested information to OSEP and the complainants.

7. On February 16, 2018, DESE submitted a copy of a status report on the implementation of corrective actions required by PRS's resolution of the complaints. DESE also notified OSEP that the LEA responses to the complaints provided with the complainants' October 27, 2017 complaint to the Secretary were incomplete. DESE offered to provide OSEP with complete copies of the LEAs' information.

8. In a February 21, 2018 email, OSEP confirmed receipt of DESE's February 16, 2018 communication and accompanying documents and requested that DESE provide a copy of the LEAs' complete responses to the complaints that were filed with DESE. In a February 27, 2018 telephone conversation with State officials, OSEP reiterated its request that DESE provide OSEP with complete copies of the LEAs' responses to the complaints the private school officials had filed against them.

9. On March 6, 2018, OSEP received the complainants' response to DESE's February 8, 2018 submission, including the document, "Private School Status Report on District Compliance." The complainants provided a copy of their submission to DESE as required by OSERS' January 8, 2018 letter.

10. As a follow up to the February 27, 2018 telephone conversation referenced above, in a March 8, 2018 email, OSEP confirmed the procedures that DESE should follow when providing OSEP any LEA materials that contain personally identifiable information.

11. On March 10, 2018, DESE forwarded the LEAs' responses to OSEP.

12. On March 13, 2018, DESE requested a telephone call to discuss the complaint and the complainants' March 6, 2018 submission to OSERS. OSEP responded to that request in a March 20, 2018 email to DESE and the complainants. In that email, OSEP notified the parties that they would have one final opportunity to submit information for consideration and set a timeline for each of the parties to respond.

13. On March 21, 2018, the complainants requested an extension of time for both parties to submit additional information to OSEP due to the religious holidays. OSEP granted the extension of time and notified the parties of the revised due date for their submissions.

14. On April 9, 2018, DESE provided its response to the complainants' March 6, 2018 submission to OSEP and provided a copy to the complainants as required by OSERS' procedures.

15. On April 16, 2018, the complainants requested that OSEP confirm the due date for the complainants' response to DESE's April 9, 2018 submission. On that same date, OSEP provided the requested information to both parties.

16. On April 26, 2018, the complainants provided their response to DESE's April 9, 2018 submission and provided a copy to DESE as required by OSERS' procedures.

17. On May 24, 2018, DESE requested that OSEP consider additional information in response to the complainants' April 26, 2018 submission. In a June 1, 2018 email, OSEP communicated to both parties its decision to deny DESE's request, because the parties had been informed on March 20, 2018 that there would be one final opportunity to submit information for OSEP's consideration.

18. OSEP reviewed documentation relevant to the findings and conclusions referenced below, which includes the parties' submissions, information obtained through OSEP's fiscal monitoring of the State, and other publicly available information.

STANDING TO APPEAL: 20 U.S.C. § 1412(a)(10)(A)(v)(I) authorizes a private school official to file a complaint with the SEA against an LEA asserting that the latter "did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of

the private school official."[3] Moreover, 20 U.S.C. § 1412(a)(10)(A)(v)(II) permits a private school official dissatisfied with the SEA's decision to file a complaint seeking the Secretary's review of that decision.

The complainants are a group of Catholic and Jewish private school officials asserting that the LEAs failed to conduct timely and meaningful consultation with the complainants' representatives and with the representatives of parents of parentally-placed private school children with disabilities. See § 1412(a)(10)(A)(v)(I). After receiving an unfavorable decision from PRS, the complainants have appealed to the Secretary seeking her review of the decision below. See § 1412(a)(10)(A)(v)(II). For the reasons given, they have standing to bring this appeal.

ALLEGATION #1: DESE failed to consider the child find allegations set forth in the private school officials' complaints to DESE**.**

Findings of Fact

1. DESE reported that PRS requested information from the LEAs regarding the child find allegations and reviewed the information it received. However, "it did not make a separate finding as to those allegations as a separate heading in the Letters of Findings." See DESE Response #1, page 4.

2. DESE reported that it declined to resolve the allegations as a separate issue because it believed that "PRS does not have jurisdiction to make a separate finding regarding violations of the child find requirement in 34 C.F.R. 300.131." See DESE Response #1, page 7.

[3] Section 612(a)(10)(A)(v) of the IDEA reads:

(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. 20 U.S.C. § 1412(a)(10)(A)(v).

The Department's IDEA Part B regulation at 34 C.F.R. § 300.136 essentially incorporates this statutory provision. The authority to administer the requirements of IDEA and its implementing regulations, including the above-referenced statutory and regulatory provision, has been delegated to the Assistant Secretary for the Office of Special Education and Rehabilitative Services (OSERS), who has administrative oversight of State implementation of IDEA and has conducted the review of this complaint.

3. DESE further reported that it did not make a separate finding regarding the child find allegations because "34 C.F.R. 300.140 explicitly provides that 'child find complaints' are to be addressed through due process procedures" and noted that "due process complaints are to be filed with the Bureau of Special Education Appeals, a State agency under the Commonwealth of Massachusetts Division of Administrative Law Appeals." See DESE Response #1, page 5.

4. DESE stated that "making a separate finding regarding 'child find' would not have changed the outcome or the resolution of any of the complaints." The State further reported that, "[h]aving a separate finding on the 'child find' allegation would not have altered the non-compliance findings or the actions ordered by PRS beyond what PRS already required the district to do." See DESE Response #1, page 7.

5. In 24 of the 25 LEAs, DESE identified noncompliance due to the LEA's failure to conduct timely and meaningful consultation with respect to child find. See DESE Response #1, page 7. However, the PRS decisions included statements that it was "not making any determinations with respect to this requirement." See, e.g., PRS Letter of Findings to Worcester Public Schools, page 4.

OSERS' Analysis and Conclusions

The Department's position is that States may choose to use their State complaint procedures established under 34 C.F.R. §§ 300.151-300.153 as the means to resolve a complaint filed by a private school official pursuant to 34 C.F.R. § 300.136, as DESE has done. See 71 Fed. Reg. 46595. Under 34 C.F.R. § 300.151, each SEA must adopt written procedures for resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of 34 C.F.R. § 300.153.

A complaint filed pursuant to 34 C.F.R. §§ 300.151 through 300.153 must be signed and written and must include "a statement that a public agency has violated a requirement of Part B of the Act" or of the Part B regulations. Regardless of whether the complaint alleges a matter that could be the subject of a due process complaint under IDEA (see 34 C.F.R. § 300.140(b)), if the complaint meets the content requirements in 34 C.F.R. § 300.153, the SEA must resolve that complaint in accordance with the requirements in 34 C.F.R. § 300.152.

If a private school official alleges that an LEA did not comply with the child find requirement in 34 C.F.R. § 300.131, which is one of the applicable private school requirements in 34 C.F.R. Part

300 and also a required subject of consultation in 34 C.F.R. § 300.134, the SEA must resolve the allegation consistent with its State complaint procedures.[4]

In this situation, the private school officials submitted their complaint to the SEA pursuant to both 34 C.F.R. § 300.136 (the provision that provides authority for a private school official to file a complaint against an LEA with the SEA and seek review of the SEA's final decision by the Secretary) and the IDEA State complaint procedures in 34 C.F.R. §§ 300.151-300.153 (which provide for resolution of the complaint at the State level with no further review by the Secretary). The opening paragraph of each complaint includes language that identifies the name of the private school and specifies that the representative is filing a "complaint under 34 C.F.R. § 300.136, 300.140, and 300.151-300.153…" See, e.g., the opening paragraph in the complaint filed with DESE regarding Worcester Public Schools dated, June 28, 2017.

OSERS finds that DESE was required to resolve the child find allegations included in the private school officials' complaint filed pursuant to 34 C.F.R. §§ 300.136 and 300.151-300.153, because child find is a required subject of consultation, and is an appropriate subject of a Part B State complaint even though it also could be the subject of a due process complaint, consistent with 34 C.F.R. § 300.140(b).

Required Actions

Within 90 days of receipt of this letter, DESE must:

1. Review and revise its policies, procedures, and practices as necessary, to ensure that DESE fulfills its responsibility to resolve complaints filed pursuant to the IDEA Part B State complaint procedures in 34 C.F.R. §§ 300.151-300.153 or 34 C.F.R. § 300.136 when such a complaint is filed by a private school official and alleges violations of the child find requirements in 34 C.F.R. § 300.131 with respect to parentally-placed private school children with disabilities.

2. Notify OSEP in writing of the results of DESE's review. OSEP will review the State's submission and determine if any further action is required.

ALLEGATION #2: DESE incorrectly limited the scope of its review of a complaint filed pursuant to 34 C.F.R. § 300.136 to a one-year period.

Findings of Fact

[4] There are important differences between the types of issues, procedures, and appeal processes for complaints filed under 34 C.F.R. §§ 300.151-300.153 and those filed pursuant to 34 C.F.R. § 300.136. Although not specifically required by IDEA, OSERS recommends that as a best practice, DESE should inform its stakeholders of the procedures it uses to resolve both types of complaints, including the jurisdiction of each procedure, the issues that may be raised, filing timelines, appeal processes, and other relevant procedures.

1. DESE reported that it uses the same procedures to resolve a complaint filed by a private school official pursuant to 34 C.F.R. § 300.136 as those it has established for resolving State complaints filed pursuant to 34 C.F.R. §§ 300.151-300.153. These procedures are set out in DESE's *Problem Resolution System (PRS) Information Guide* available at: http://www.doe.mass.edu/pqa/prs/. See SEA Response #1, page 7.

2. The *PRS Information Guide* states, in part:

> The Department has authority to take action to resolve a complaint if it is about State or federal legal requirements for education. The Department will take steps to resolve a complaint if it:
>
> (1) is about a student's current general education program; or
>
> (2) alleges that a special education requirement has been violated, and the violation occurred no more than one year before the Department received the written complaint.

OSERS' Analysis and Conclusions

Under 34 C.F.R. § 300.136, a private school official has the right to submit a complaint to the SEA that the LEA did not engage in consultation that was meaningful and timely or did not give due consideration to the views of the private school official. Neither IDEA nor the IDEA Part B regulations include a timeline by which a private school official must submit a complaint to the SEA or to the Secretary to resolve these allegations.

As noted in our analysis of Allegation 1, the Department's position is that States may choose to use their State complaint procedures established under 34 C.F.R. §§ 300.151-300.153 as the means to resolve a complaint filed by a private school official pursuant to 34 C.F.R. § 300.136. See 71 Fed. Reg. 46595. Under the State complaint procedures in 34 C.F.R. § 300.153(c), a complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received.

As an additional protection, a State may adopt a policy or procedure to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline in 34 C.F.R. § 300.153(c). 71 Fed. Reg. 46606. Therefore, if a State has chosen to apply its State complaint procedures under 34 C.F.R. §§ 300.151 through 300.153 in resolving complaints filed under 34 C.F.R. § 300.136 and if the State has chosen not to accept and resolve State complaints filed outside of the one-year timeline, OSERS does not interpret IDEA as requiring the State to accept and resolve complaints filed pursuant to 34 C.F.R. § 300.136 that include allegations outside of the one-year timeline.

The complainants propose that even if an SEA is permitted to limit the scope of its complaint resolution to one year, it should have included the 2015-2016 school year (from which carry-

over funds could be available for equitable services), as well as the one-year period preceding the date the complaint was received. The complainants assert that DESE should be required to notify the public of its decision to use a one-year timeline for complaints filed pursuant to 34 C.F.R. § 300.136. While the IDEA Part B regulations require the SEA to disseminate the procedures it uses to resolve State complaints filed pursuant to 34 C.F.R. §§ 300.151-300.153 (including the timelines for filing a complaint) to a wide audience,[5] there is no similar provision for widely disseminating procedures for complaints that can be filed by private school officials under 34 C.F.R. § 300.136.[6]

Based on the above, OSERS has concluded that it is not inconsistent with IDEA for DESE to have limited its resolution of the complainants' complaints to the one-year period measured as one year prior to the date the complainants' submitted their complaints to the SEA.

Required Actions

None

Allegation #3: DESE did not require LEAs to produce evidence that funds spent on equitable services were derived from the IDEA Part B grant and failed to address the complainants' concerns regarding LEAs' compliance with the "supplement but not supplant" and maintenance of effort (MOE) requirements in 34 C.F.R. §§ 300.133(d) and 300.203.

Findings of Fact

1. After receiving the complainants' allegations, PRS contacted each of the LEAs in writing and requested that it "produce documents and information regarding 'calculation of the proportionate share' by the District for IDEA Part B funds [and] [f]inancial documents evidencing expenditures of proportionate share funds under IDEA Part B" for the 2016-2017 school year." See, e.g., SEA Response #1, page 8, referencing PRS's July 19, 2017 correspondence to Taunton School District.

2. The extent to which the LEAs submitted the requested documentation varied. Only two of the 25 LEAs (Acushnet and Fall River) submitted documentation that PRS found sufficient to conclude that the LEAs complied with the requirements in 34 C.F.R. § 300.133.

[5] Under 34 C.F.R. § 300.151(a)(2), each SEA must adopt procedures for "widely disseminating to parents and other interested individuals, including parent and training information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under 300.151 through 300.153."

[6] As noted in Footnote 4, OSERS recommends that as a best practice, DESE should inform its stakeholders of the procedures it uses to resolve both types of complaints, including the filing timelines and other relevant procedures.

3. The PRS Letters of Finding do not specify the amount of the LEAs' required proportionate share of IDEA Part B funds to be used for parentally-placed private school children with disabilities or the amount of IDEA Part B funds the LEAs actually expended for this purpose.

4. In multiple cases, the LEAs' written responses to PRS note confusion about compliance with IDEA requirements regarding equitable services due to the SEA's previous guidance regarding the State-imposed requirement for a free appropriate public education (FAPE) to parentally-placed private school children with disabilities and IDEA's equitable services requirements for such children. See, e.g., Holyoke School District's submission to PRS, page 4. Some LEAs reported that prior to DESE's June 27, 2017 guidance, LEAs were not directed to include home-schooled children with disabilities in the count of parentally-placed private school children with disabilities and asserted that the State has no legal basis to require such children to be included in the proportionate share calculation.[7] See, e.g., Chicopee Public Schools' submission to PRS, page 9.

5. While PRS reached a conclusion as to whether each LEA complied with 34 C.F.R. § 300.133 generally, the PRS decisions do not specifically include findings and conclusions that address the complainants' allegations that LEAs used State and local funds to supplant IDEA Part B funds in the provision of services to children with disabilities placed by their parents in private schools in violation of 34 C.F.R. § 300.133(d). Further, the PRS decisions do not resolve the complainants' concerns about whether the LEAs complied with the MOE requirements in 34 C.F.R. § 300.203.

Relevant IDEA Requirements

Use of State and Local Funds to Supplant the Proportionate Share of IDEA Funds Prohibited: Under IDEA, State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally-placed private school children with disabilities. 20 U.S.C. § 1412(a)(10)(A)(i)(IV); 34 C.F.R. § 300.133(d).

LEA MOE Requirements: Generally, 34 C.F.R. § 300.203 provides that an LEA may not reduce the amount of local, or State and local, funds that it spends for the education of children with disabilities below the amount it spent for the preceding fiscal year, except as provided in 34 C.F.R. §§ 300.204 and 300.205. There are two components to the LEA MOE requirement – the eligibility standard (34 C.F.R. § 300.203(a)) and the compliance standard (34 C.F.R. §

[7] Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is determined under State law. If the State recognizes home-schools as private elementary and secondary schools, children with disabilities in those home-schools must be treated in the same way as other parentally-placed private school children with disabilities. See *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools,* (Revised April 2011), hereinafter "*Private Schools Q&A*," Question K-2.

300.203(b)). See *Q&A Regarding Local Educational Agency (LEA) Maintenance of Effort* Q&A (hereinafter, *MOE Q&A*), Question A-1.[8]

The eligibility standard in 34 C.F.R. § 300.203(a) requires that, in order to find an LEA eligible for an IDEA Part B subgrant for the upcoming fiscal year, the SEA must determine that the LEA has budgeted for the education of children with disabilities at least the same amount of local, or State and local, funds, as it actually spent for the education of children with disabilities during the most recent fiscal year for which information is available. See *MOE Q&A,* Question A-2.

When determining the amount of funds that an LEA must budget to meet the eligibility standard, the LEA may take into consideration, to the extent the information is available, the exceptions and adjustment provided in 34 C.F.R. §§ 300.204 and 205 that the LEA: (i) took in the intervening year or years between the most recent fiscal year for which information is available and the fiscal year for which the LEA is budgeting; and (ii) reasonably expects to take in the fiscal year for which the LEA is budgeting. See 34 C.F.R. § 300.203(a)(2) and *MOE Q&A*, Question D-2.

The compliance standard in 34 C.F.R § 300.203(b) prohibits an LEA from reducing the level of expenditures for the education of children with disabilities made by the LEA from local, or State and local, funds below the level of those expenditures from the same source for the preceding fiscal year. In other words, an LEA must maintain (or increase) the amount of local, or State and local, funds it spends for the education of children with disabilities when compared to the preceding fiscal year, except as provided in 34 C.F.R. §§ 300.204 and 300.205. See *MOE Q&A,* Question A-3.

Relevant Massachusetts State Law

Under IDEA, no parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in public school. 34 C.F.R. § 300.137(a). By contrast, Massachusetts has imposed a State requirement that its districts provide services to parentally-placed private school children with disabilities beyond those required by Part B of the IDEA and its implementing regulations.[9]

As a matter of State law, "all school age children with disabilities are entitled to a free appropriate public education (FAPE) from their school district of residence, regardless of whether they are enrolled in a public or private school." See SEA Response #1, page 4.

[8] A copy of this document is available at https://sites.ed.gov/idea/idea-files/qa-regarding-local-educational-agency-lea-maintenance-of-effort-moe/.

[9] Under Massachusetts' State Law, Mass. Gen. L. c. 71B, § 3, all eligible children are provided an individual entitlement to special education and related services from the school district where the child's parent resides.

Additionally, as a matter of State law, children who are home-schooled are considered "privately educated." DESE staff report that although there is no specific statute or regulation for this requirement, the SEA has "consistently interpreted the State statutes in this manner since at least 1994, based in part upon Mass. Gen. Law, c. 71; Mass. Gen. Law c. 76 § 1; and Massachusetts case law." (November 1, 2017 email correspondence from DESE staff to OSEP State Lead). Also see, *Administrative Advisory 2018-1*.

OSERS' Analysis and Conclusions

Use of State and Local Funds to Supplant the Proportionate Share of IDEA Part B Funds: The complainants correctly state that LEAs must expend a proportionate share of IDEA Part B funds for parentally-placed private school children with disabilities under 34 C.F.R. § 300.133, notwithstanding any State and local funds that may be used for such children. Based on the lack of clear and accurate guidance prior to DESE's June 27, 2017 guidance and information in the LEAs' responses to complaints filed by the complainants with PRS, OSERS concludes that, generally LEAs did not understand their obligation to use a proportionate share of IDEA Part B funds to provide equitable services to parentally-placed private school children with disabilities, separate and apart from any State and local funds used for this population of children.

Although PRS did not make specific findings and conclusions on this matter, the documentation, which includes acknowledgements from some LEAs, supports the complainants' allegation that at least in some instances, State and local funds were used to supplant the proportionate share of IDEA Part B funds in violation of the requirements in 20 U.S.C. § 1412(a)(10)(A)(i)(IV) and 34 C.F.R. § 300.133(d).

Further, the complainants are correct in stating that PRS did not gather sufficient information to reach a determination as to the amount of IDEA Part B funds (if any) that were used by each LEA to serve parentally-placed private school children with disabilities. Without further documentation, OSERS is unable to determine the amount of IDEA Part B funds that the LEAs were required to use and actually expended to provide equitable services.

LEA MOE Requirements: The complainants have expressed concern regarding how and whether LEAs have established a baseline for the amount of State and local funds spent on parentally-placed private school children with disabilities. The complainants assert that "an LEA must continue to offer parentally-placed private school students the same level of support provided in previous years with [S]tate and local funds, in addition to spending a proportionate share of [F]ederal dollars on private school students." See October 27, 2017 complaint, page 8.

Prior to the 2004 reauthorization of IDEA, if an LEA spent more than the required proportionate share of IDEA Part B funds using State and local funds, the LEA was not required to spend any IDEA Part B funds on parentally-placed private school children. However, the 2004

reauthorization of IDEA made this practice impermissible. In explaining this change, the Department stated:

> An LEA that previously used only State and local funds to provide equitable services to children with disabilities placed by their parents in a private school and now uses Federal Part B funds to provide equitable services must meet the maintenance of effort requirements in 34 CFR 300.203. The exceptions to maintenance of effort requirements in 34 CFR 300.204 do not apply to funds used for equitable participation of parentally-placed private school children with disabilities. Therefore, the total or per capita amount of local or State and local funds expended for the education of children with disabilities, including the amount of local or State and local funds previously expended for equitable services to children with disabilities placed by their parents in private schools, would have to be maintained, unless an adjustment is permitted under 34 CFR 300.205.
>
> See *Private Schools Q&A*, Question H-8.

OSEP has also advised that if an LEA maintains (or exceeds) its level of local, or State and local, expenditures for the education of children with disabilities from year to year, either in total or per capita, then the Part B funds are, in fact, supplementing those local, or State and local, expenditures and the LEA has met both its MOE requirement in 34 C.F.R. § 300.203 and the supplement/not supplant requirement in 34 C.F.R. § 300.202(a)(3). In other words, if an LEA meets its MOE requirement, then it also meets its supplement/not supplant requirement.[10] See *Guidance on Funds for Part B of the Individuals with Disabilities Education Act Made Available Under The American Recovery and Reinvestment Act of 2009* (April 2009, Revised September 9, 2010), Question C-6. See also September 25, 2009 *Letter to Sarge Kennedy*.[11]

An LEA does not violate IDEA's supplement, not supplant provision in 34 C.F.R. § 300.202(a)(3) if it uses the proportionate share of IDEA Part B funds to provide services to parentally-placed private school children with disabilities that were previously paid with State and local funds. Further, with respect to compliance with the MOE requirements, an LEA is not required to maintain the same amount of State and local funding for a *specific line item or category of expenditures* (such as the amount of funds budgeted and spent to provide services to parentally-placed private school children with disabilities). In summary, an LEA meets the MOE requirement if it maintains either the total aggregate amount or per capita amount of funds when

[10] Under 34 C.F.R. § 300.202(a)(3), IDEA Part B funds provided to an LEA must be used to supplement, not supplant, State, local and other Federal funds. Prior to 1992, the Part B regulations had included a "particular cost test" for determining whether supplanting occurred. The "particular cost test" was removed from the regulations by an amendment published in the Federal Register on August 19, 1992 (37 Fed. Reg. 37652).

[11] A copy of this letter is available online at: https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/letters/2009-3/kennedy092509useoffedfunds3q2009.doc.

budgeting and expending local, or State and local funds for the education of children with disabilities.

DESE notes in its responses dated, February 8, 2018 (page 9) and April 9, 2018 (page 6), that it did not have to specifically address the complainants' allegations related to LEAs' compliance with supplement, not supplant and LEA MOE requirements because the complainants failed to provide "facts on which the statement [that a public agency has violated a requirement] is based" as required by 34 C.F.R. § 300.153(b)(2). In its written decision, PRS communicated it had limited its resolution to "those allegations for which the [complainants] attempted to provide support."[12] See, e.g., PRS Letter of Findings to Fitchburg Public Schools, page 2.

Based on the above, OSERS concludes that, PRS did not sufficiently address the complainants' specific allegation that LEAs violated the supplement, not supplant requirement in 20 U.S.C. § 1412(a)(10)(A)(i)(IV) and 34 C.F.R. § 300.133(d). Additionally, PRS did not address the complainants' allegation as to whether the LEAs met the MOE requirements in 34 C.F.R. § 300.203, notwithstanding any change in the amount of Federal, State, and local funds used to provide services to parentally-placed private school children with disabilities.

Required Actions

The actions required to address the noncompliance related to the supplement, not supplant requirements in 20 U.S.C. § 1412(a)(10)(A)(i)(IV) and 34 C.F.R. § 300.133(d) have been consolidated and described under Allegation #4 below. Under 20 U.S.C. § 1412(a)(10)(A)(v) and 34 C.F.R. § 300.136(b)(1), if the private school official wishes to submit a complaint to the SEA, the official must provide the basis of the noncompliance by the LEA with the applicable private school requirements in 34 C.F.R. Part 300.

If the private school official is dissatisfied with the SEA's decision, under 34 C.F.R. § 300.136(b)(3), such official may submit a complaint to the Secretary by providing the basis of the noncompliance with these requirements. Because the LEAs' alleged noncompliance with MOE requirements is outside the scope of a complaint that can be filed by a private school official under 34 C.F.R. § 300.136, (which is limited to the applicable private school provisions in 34 C.F.R. Part 300), OSERS reaches no conclusion regarding this issue.

[12] The IDEA Part B regulations do not address an SEA's dismissal of, or refusal to resolve, an allegation in a complaint based on lack of supporting facts. In such circumstances we believe an SEA should notify the complainant and provide an opportunity for the complainant to provide the missing content. The SEA could notify the complainant that the allegation will not be resolved and that the time limit not commence until the missing content is provided. See *Questions and Answers on IDEA Part B Dispute Resolution Procedures,* Revised July 2013, Question B-15 available at: https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf

Allegation #4: DESE did not require appropriate corrective actions.

Findings of Fact

1. As a result of the PRS investigations, LEAs with identified noncompliance were required to complete specified corrective actions. In the majority of reports, the LEA was required to:

   a. Conduct training for all appropriate staff on the requirements included in *Administrative Advisory 2018-1* and provide PRS with the date(s) of the training(s), name and title of the presenter, and the staff members that attended.

   b. Provide a written assurance by the LEA's Superintendent that the LEA will follow the requirements in *Administrative Advisory 2018-1* and other actions ordered in DESE's June 22, 2017 memorandum.

   c. Provide evidence to PRS that the LEA arranged or conducted its timely and meaningful consultation meetings for fiscal year 2018 (school year 2017-2018) as required by 34 C.F.R. § 300.134, including date(s) of the consultation meeting(s), any written notice provided to private schools, meeting agenda, and if attendance is kept, the attendance sheet. Further, the LEA was to provide written affirmation after the meeting(s) were held.

   See, e.g., PRS Letter of Findings for the Dennis-Yarmouth Regional School District, page 4.

2. PRS noted that DESE had "corrected its partial noncompliance" by: (a) completing the corrective actions ordered in OSEP's May 13, 2016 fiscal monitoring letter; and (b) issuing the June 22, 2017 memorandum requiring LEAs to recalculate the proportionate share for fiscal years 2017 (school year 2016-2017) and 2018 (school year 2017-2018). See PRS September 28, 2017 decision to DESE, page 6.

3. As a result of the its investigation, PRS required DESE to take the following actions:

   a. Submit updated criteria for monitoring LEA compliance with each component of timely and meaningful consultation to PRS for its review and approval.

   b. Submit "sample submissions from five randomly-selected LEAs that show that information required by 34 C.F.R. § 300.132(c) is being provided to the SEA." See PRS September 28, 2017 decision to DESE, pages 8-9.

OSERS' Analysis and Conclusions

IDEA and its implementing regulations are silent on the precise remedies available when an SEA finds an LEA did not comply with the requirements referenced in 20 U.S.C. § 1412(a)(10)(A)(v) and 34 C.F.R. § 300.136(a). For complaints filed pursuant to the IDEA's

State complaint procedures, an SEA has broad discretion in determining remedies and corrective actions when it finds a public agency has failed to meet IDEA's equitable services requirements. In light of the SEA's general supervisory authority and responsibility under sections 612(a)(11) and 616 of IDEA and 34 C.F.R. §§ 300.149 and 300.600, we believe the SEA should have broad flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint in which the SEA has found that a public agency has failed to meet a requirement of IDEA and the IDEA Part B regulations.

While a State may determine the specific nature of the required corrective action, it must ensure that any noncompliance is corrected as soon as possible, but in no case more than one year after the State's identification of the noncompliance. 34 C.F.R. § 300.600(e); see also OSEP Memorandum 09-02, October 17, 2008.

In each Letter of Findings for the 25 districts, as well as the decision pertaining to DESE, when PRS identified noncompliance, it ordered specific corrective actions and required the submission of documentation to PRS for verification. However, OSERS agrees with the complainants that in this circumstance, the actions PRS ordered are insufficient to address the scope of the identified noncompliance.

As an initial matter, the IDEA violation here was the failure to have policies and procedures in place that were consistent with the requirements of IDEA. Thus, the violation was continuous rather than made up of distinct, discrete acts. The latter might have reset the clock and run some of the violations out of the one-year time limit placed on the filing of State complaints. Because the pattern and effect of the violations made them ongoing, they were not "'temporally distinct,'" *Ledbetter v. Goodyear Tire & Rubber Co., Inc*., 550 U.S. 618, 638 (2007) (quoting *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002)), because the respondents' failure to have policies and procedures in place consistent with IDEA did not take a break. No chronological gap broke the patterns of, intentions behind and/or manifestations of the violation. This is at least in part because, unlike in *Ledbetter*, here no ratifying act denoting finality of decision or conclusion of time period carved up the violation into discrete acts. 550 U.S. at 621.

Because the consequences of counting a violation so thinly in the special education line of cases where violations often span long periods of time can be drastic and even fatal to otherwise-meritorious claims, as it could be here, presumably the regulatory scheme would have been unambiguous about it. No such clear statement is evident here. Consequently, the complainants alleged one running violation spanning more than a decade; and the Secretary may consider this entire time period or any of its salient parts when determining culpability and fashioning "appropriate" relief. "Appropriate" relief refers to a remedy that is "suitable or acceptable for a

particular situation." COLLINS ENGLISH DICTIONARY COMPLETE AND UNABRIDGED (10th ed.) (2010).[13]

Second, given the lack of clear and accurate guidance from DESE, LEAs other than those that were the subject of the 25 complaints may also have failed to fully comply with IDEA requirements related to children with disabilities enrolled in private schools by their parents. Third, as explained further under Allegation #5, the LEAs' calculation methods were flawed in multiple ways and it is possible that none of the calculations were accurate, notwithstanding PRS's conclusion that a few LEAs were in compliance.

In order to accurately calculate the proportionate share, the SEA must go back five Federal fiscal years (FFYs) in conducting the required actions below, bearing in mind the records retention requirements in the Uniform Guidance: "Financial records, supporting documents, statistical records, and all other non-Federal entity records pertinent to a Federal award must be retained for a period of three years from the date of submission of the final expenditure report." 2 C.F.R. § 200.333. In guidance previously provided by OSERS, since the three-year records retention timeframe begins upon the date the final expenditure report is to be submitted, the minimum records retention period extends five and a half years from the date the record is created.[14] Thus, as part of the corrective action detailed below, DESE will be required to review LEA records from FFY 2014 to 2018.

OSERS recognizes the complexity of these required actions and will make technical assistance available to support the State and its LEAs to fulfill their obligations.

Required Actions

Within 15 days of receipt of this report, OSERS representatives will meet with DESE to discuss the specific required actions and essential components of the work plan DESE must develop (e.g., timelines and resources DESE will dedicate) to carry out each of the following required actions.

DESE must require the State's LEAs to:

1. Establish a count of parentally-placed private school children with disabilities: Using the best data available and in consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities, each LEA in the State must determine the number of children with disabilities enrolled by their parents in private elementary and secondary schools that are physically located in

[13] "Appropriate," similarly, is elsewhere defined as "especially suitable or compatible." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip Babcock Gove, ed.) (2008). In other words, the correctness of the remedy inextricably depends on the circumstances of the violation.

[14] See *Letter to Anonymous*: https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep-letter-to-anonymous-2-27-17-recordretention.pdf

the LEA. Consistent with State law, children with disabilities who are home-schooled in the LEA for FFYs 2014, 2015, 2016, 2017, and 2018 must be included in this count. The State must also ensure that nonresident children with disabilities who attend private schools located in the LEA for FFYs 2014, 2015, 2016, 2017, and 2018 are included in this count.

2. Recalculate the proportionate share: Using the revised child count established above, each LEA in the State must properly calculate the proportionate share of IDEA Part B funds (including funds from both its section 611 and 619 grants) required for the provision of equitable services under 20 U.S.C. § 1412(a)(10)(A)(i) and 34 C.F.R. § 300.133 for FFYs 2014, 2015, 2016, 2017, and 2018.

3. Determine the amount of State, local, and IDEA Part B funds actually expended: Each LEA in the State must determine the amount of State, local, and IDEA Part B funds that the LEA expended in FFYs 2014, 2015, 2016, 2017, and 2018 to provide special education and related services to parentally-placed private school children with disabilities (including home-schooled children as consistent with State law). The amount of State and local funds and the amount of IDEA Part B funds must be determined and calculated separately for each fiscal year.[15] The expenditures must be verifiable by the SEA or State and/or local auditors.

4. Determine the amount of the shortfall in funds (if any) spent to provide services to parentally-placed private school children with disabilities: By subtracting the result calculated in #2 from the result determined in #3 above, each LEA must identify the amount of the shortfall (if any), in funds spent to provide services to parentally-placed private school children with disabilities. The LEA must perform this calculation separately for FFYs 2014, 2015, 2016, 2017, and 2018.

5. Remedy any shortfall by using available State and local funds, and IDEA Part B funds (where available) to make up the difference: When remedying any shortfall, an LEA may use State and local funds and/or IDEA Part B funds to the extent the LEA has not already used an amount of such funds equal to its required proportionate share for the FFY. In addition, DESE has the discretion to use a portion of its IDEA Part B funds reserved for State level activities to support LEAs in remedying any shortfall.

6. Engage in timely and meaningful consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities in

[15] An LEA may include only the amount of local, or State and local funds in this calculation to the extent those funds are not needed for the LEA to comply with 34 C.F.R. § 300.203.

accordance with 34 C.F.R. § 300.134(d), to provide an opportunity for all parties to express their views about how the amount of funds equal to the shortfall should be used. The LEAs, private school officials, and representatives of parents of parentally-placed private school children may choose to combine the amount of shortfall funds from multiple years, as appropriate. Considering a larger, combined amount of funds could provide the group with increased options when determining how best to meet the needs of parentally-placed private school children with disabilities with these funds. Should the LEA, private school officials, and representatives of parents of parentally-placed private school children with disabilities agree to combine the amount of shortfall funds, other components of the consultation process required under IDEA must be followed. As the authority to make the final decision, upon consultation, resides solely with the LEA, if the LEA representatives disagree 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 LEA must provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract in accordance with 34 C.F.R. § 300.134(e).

7. Provide documentation to DESE, that DESE reports to OSERS, demonstrating that the required actions have been taken. This documentation must include:

    a. The results of the LEA's recalculation of the proportionate share (i.e., revised child count data, amount of IDEA Part B funds used in the calculation with evidence that both section 611 and 619 funds were included, as appropriate, and the amount of proportionate share).

    b. The total amount of expenditures the LEA previously made with State, local, and IDEA Part B funds for FFYs 2014, 2015, 2016, 2017, and 2018 to provide services to parentally-placed private school children with disabilities.

    c. Evidence that the LEAs have conducted meaningful and timely consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities and have given due consideration to the views of the private school officials, on matters including, but not limited to, discussions of the child find process and the decisions reached concerning the use of any shortfall amount for equitable services.

Allegation #5: DESE failed to properly guide and monitor LEAs to ensure equitable participation of parentally-placed private school children with disabilities in the LEAs' special education programs.

Findings of Fact

1. In its May 13, 2016 fiscal monitoring letter, OSEP issued a finding that DESE did not have procedures in place to ensure that LEAs spend the required amount of their section 611 and section 619 subgrants on providing special education and related services to parentally-placed private school children with disabilities in accordance with the requirements in 34 C.F.R. § 300.133 and Appendix B of 34 C.F.R. Part 300. OSEP required the State to submit revised policies and procedures demonstrating compliance with the regulations in 34 C.F.R. § 300.133 and Appendix B.[16]

2. In response to OSEP's findings, DESE revised *Administrative Advisory 2018-1*. In that document, the State explains how it will carry out its general supervisory responsibilities with respect to IDEA requirements for parentally-placed private school children with disabilities. The document states that the SEA's reporting and oversight will consist of annual reviews of LEA data, Coordinated Program Review processes, and financial audits. The document further states DESE will review data from its LEAs' Proportionate Share Forms that include consultation, child count, and how the LEA projects to use IDEA section 611 and 619 funds for equitable services.

3. According to *Administrative Advisory 2018-1,* DESE's special education monitoring process includes a measure to examine an LEA's procedures related to parentally-placed private school children, i.e., Criterion SE 39-A, *"Procedures used to provide services to eligible students enrolled in private schools at private expense whose parents reside in the district,"* and Criterion SE 39-B, *"Procedures used to provide services to eligible students who are enrolled at private expense in private schools in the district and whose parents reside out of State."* DESE's monitoring process does not appear to review an LEA's procedures used to provide services to an eligible child with disabilities enrolled in a private school located within an LEA and the child's parent resides outside of the LEA but within the State.

4. According to *Administrative Advisory 2018-1,* DESE's Office of Audit and Compliance is responsible for reviewing LEA compliance with the IDEA proportionate share calculations and supporting documentation including the list of parentally-placed private school children with disabilities, signed written affirmations from participating representatives of private schools, and expenditures.

[16] OSEP's document that describes the identified noncompliance and required corrective actions is available at: https://www2.ed.gov/fund/data/report/idea/partbfmltrs/fmi-ma-2016b.pdf.

5. Prior to the July 2018 revision to *Administrative Advisory 2018-1*, LEAs were advised to use the amount of their IDEA section 611 funds as the denominator when calculating the proportionate share of IDEA Part B funds that must be used for parentally-placed private school children with disabilities.

6. A review of LEA responses to the complainants' allegations that the LEAs failed to comply with the IDEA provisions reflect a belief by several LEAs that: (i) DESE did not provide clear direction to its LEAs about the equitable services requirements; and (ii) the State changed its position with respect to the requirement to use a proportionate share of IDEA Part B funds to provide services to nonresident children with disabilities placed in private schools by their parents. See, e.g., New Bedford submission to PRS, pages 11-13.

OSERS' Analysis and Conclusions

OSERS concurs with PRS's determination that the SEA did not exercise its general supervisory responsibilities as required by 20 U.S.C. §§ 1412(a)(11) and 1416(a) and 34 C.F.R. §§ 300.149 and 300.600 to ensure LEAs complied with IDEA requirements related to children with disabilities enrolled by their parents in private schools (20 U.S.C. § 1412(a)(10)(A) and 34 C.F.R. §§ 300.129 through 300.144). Further, until July 2018, the SEA's guidance did not instruct LEAs how to properly calculate the proportionate share of IDEA Part B funds. OSERS recognizes that even though DESE has taken steps to revise its oversight and monitoring processes, additional actions are necessary to demonstrate implementation of the IDEA requirements at both the SEA and LEA levels.

Required Actions

Within 90 days of the date of this letter, DESE must provide a written plan to OSERS that describes how the SEA will ensure that all of its LEAs meet the requirements in 20 U.S.C. § 1412(a)(10)(A) and 34 C.F.R. §§ 300.129 through 300.144. DESE's plan must include a description of the steps it will take to ensure that:

1. In accordance with 34 C.F.R. § 300.131, LEAs carry out their child find responsibilities with respect to parentally-placed private school children with disabilities. This includes resident and nonresident children who attend private schools located within the LEA and other children the State considers to be "parentally-placed private school children."

2. In accordance with 34 C.F.R. § 300.132(c), LEAs maintain an accurate record of children with disabilities enrolled by their parents in private elementary and secondary schools that will facilitate an accurate child count of such children.

3. In accordance with 34 C.F.R. § 300.133, LEAs accurately calculate the proportionate share of IDEA Part B funds (both section 611 and 619 funds) that must be expended for

equitable services for parentally-placed private school children with disabilities. This includes reviewing and revising, as appropriate, the State's written guidance to its LEAs and how the State will verify that LEA calculations are accurate.

4. In accordance with 34 C.F.R. § 300.134, LEAs conduct timely and meaningful consultation with private school representatives and representatives of parents of parentally-placed private school children with disabilities. In accordance with 34 C.F.R. § 300.134, the discussions between public school officials and representatives of private schools and representatives of parents of parentally-placed private school children with disabilities must address:

    a. 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;

    b. The determination of the proportionate share of IDEA Part B funds available to serve parentally-placed private school children with disabilities, including the determination of how the proportionate share of those funds was calculated;

    c. How the consultation process among representatives of the LEA, the private schools, and the parents of parentally-placed private school children with disabilities will take place, including how the 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;

    d. How, where, and by whom special education and related services will be provided, including a discussion of the types of services – including direct services and alternate service-delivery mechanisms, as well as how the services will be apportioned if funds are insufficient to serve all children – and how and when decisions regarding services will be made; and

    e. How, if the LEA representatives disagree 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 LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to adopt the recommendations of the private school officials.

5. In accordance with 34 C.F.R. § 300.133, LEAs expend the required amount of IDEA Part B funds to provide special education and related services (including direct services) to parentally-placed private school children with disabilities. This includes ensuring that,

consistent with 34 C.F.R. § 300.133(d), any State and local funds supplement and in no case supplant the proportionate amount of IDEA Part B funds required to be expended for parentally-placed private school children with disabilities.

6. In accordance with 34 C.F.R. §§ 300.149 and 300.600, DESE monitors implementation of IDEA's provisions related to children with disabilities enrolled by their parents in private schools, and that when DESE identifies noncompliance with those requirements, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance as specified in 34 C.F.R. § 300.600(e).

The State's plan must include a timeline for carrying out each action and a description of the evidence that will be used to demonstrate the action has been completed. To the extent the SEA has already taken steps, or has completed actions to address the noncompliance, it may include that information in its plan.

Additional Concern

During PRS's resolution of the complaints against at least one LEA, the names and other personally identifiable information of certain children with disabilities were disclosed to the complainants. It is unclear whether the release of this information was made consistent with IDEA's confidentiality provisions (20 U.S.C. §§ 1412(a)(8) and 1417(c) and 34 C.F.R. §§ 300.611 through 300.626)) and the Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g and its implementing regulations in 34 C.F.R. Part 99). OSERS requests that DESE review this matter and take any actions determined appropriate, to ensure that disclosures of personally identifiable information occur in a manner consistent with IDEA and FERPA.