August 25, 2005

The Honorable Troy Justesen, Deputy Asst. Secretary
Office of Special Education and Rehabilitation Services
U.S. Department of Education
400 Maryland Ave. SW, Potomac Center Plaza, rm. 5126
Washington D.C.  20202-2641

Attention:  IDEA - Part B -- NPRM Comment on Private School Special Education Services

Dear Mr. Deputy Assistant Secretary;

The undersigned organizations representing the nation’s school superintendents, school board members, elementary and secondary school principals, local special education administrators, and large urban school districts submit this joint comment on an issue of major concern in the proposed IDEA regulations. The proposed regulations [34CFR§§300.130-133] invalidate the existing IDEA service delivery system in the vast majority of States for parentally placed private school students. Regardless of whether the school district receives any IDEA funding for the private school student, the proposed regulation requires the public school district to provide IDEA services based on the jurisdictional location of the private school, instead of the jurisdictional location of the child’s residence.

In addition to forcing the administrative reconstitution of the special education service delivery system for private school students in an overwhelming number of states and local school districts, the new regulation will impose significant new costs and significant new burdens on the limited supply of special education staff in order to serve this newly mandated group of private school students. This regulation disproportionately affects school districts with large private school facilities that attract students from outside of the immediate state or local jurisdictional boundaries. It is unfathomable to our local school organizations that the Department would impose such a disruptive and costly new policy without a clear Congressional directive. This regulatory policy, for example, would force the D.C. Public Schools to pay for IDEA services for suburban Maryland and Virginia private school students attending large D.C.-based private schools without receiving any IDEA funding for those children or any state or local tax revenue from their families as well. Hundreds of school districts located on state boundary lines and thousands of other school districts face similar unexpected costs and additional strains on their special education staffing as a result of this new IDEA regulatory policy.

Analogous to the IDEA requirements of the 2004-2005 school year, the new IDEA Amendments [sec. 612(a)(10)(A)(i)] do not clearly delineate whether the school district of the child’s “residential location” or the school district of the child’s “private school location” is responsible for providing eligible IDEA services for these private school students. Currently the states determine the school district that is responsible for IDEA services to parentally placed private school students. And, it is our position that the states should continue to do so. Congress is fully capable of overriding this current practice among the states with clear and specific statutory language. But Congress did not do so in this instance – in contrast to the numerous other new requirements regarding private school children in the 2004 IDEA Amendments.
Now, the Department has edited the statutory language in order to impose the “private school location” interpretation through the proposed regulations [NPRM §§132 and 133(a)]. However, this rewritten regulatory interpretation is not supported by the rules of statutory construction for grant-in-aid programs under the Spending Clause of the Constitution as cited in the Administration’s Supreme Court amicus brief in the IDEA case of Weast v. Schaffer filed in late June. In short, the U.S. Solicitor General and the Department of Education’s Acting General Counsel underscored that the federal government may not impose new financial mandates upon state and local governments without a clear, unambiguous Congressional directive.

This proposed regulation imposes major new burdens and costs on overwhelming numbers of states and school districts. The 2004 IDEA statutory provision, cited above, does not delineate the school district responsible for providing and paying for the services. And, IDEA does not provide any funds to the “responsible school district” for private school students crossing interstate lines, or necessarily provide a full IDEA allocation for private school students crossing school district jurisdictional lines.

Due to the projected disruptions and other consequences of this new IDEA regulatory interpretation and its lack of statutory foundation, our local school-based organizations strongly urge revision of these provisions in the final regulations. These regulations can be readily fixed by restating the express language of the statute in the proposed regulations [§§300.132 and 133(a)], and by adding two new paragraphs to §300.137(b) for the SEA to determine which LEAs in the state will be responsible for providing and paying for services for parentally placed private school children with disabilities, and for the LEA of the child’s residence to be responsible for services for private school children enrolling across state boundaries. Please see the Attachment for recommended NPRM revisions.

This joint comment from our six local school-based organizations reflects the high level of concern that this particular proposed regulation has invoked across the country. Thank you for your consideration.

Paul Houston, Executive Director
American Association of School Administrators

Luann Purcell, Executive Director
Council of Administrators of Special Education

Michael Casserly, Executive Director
Council of the Great City Schools

Vincent Ferrandino, Executive Director
National Association of Elementary School Principals

Gerald N. Tirozzi, Executive Director
National Association of Secondary School Principals

Anne Bryant, Executive Director
National School Boards Association
Recommended Revisions to IDEA NPRM §300.132, §300.133, and §300.137 on Private Schools:

1. In §300.132(a) restate the statute by striking “who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA” and inserting “in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by the LEA”.

2. In §300.133(a)(1) and §300.133(a)(2) restate the statute by striking “who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA” and inserting “who are enrolled by their parents in private elementary schools and secondary schools in the school district served by the LEA”.

3. In §300.137(b) add new paragraphs (3) and (4) as follows: “(3) The SEA shall determine which LEA will be responsible for providing and paying for services in accordance with §§300.130-137 to parentally-placed private school children with disabilities.” and “(4) Notwithstanding paragraph (3), for children with disabilities who are placed by their parents in a private school in a state other than the child’s state of residence, the LEA in which the child resides shall arrange for and pay for the IDEA services to be provided to these parentally-placed private school children.”