

# **Title VIII, Part F of the Elementary and Secondary Education Act of 1965:**

## **Equitable Services for Eligible Private School Children, Teachers, and Other Educational Personnel**

### **Non-Regulatory Guidance**



U.S. Department of Education  
July 17, 2023

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## PURPOSE OF THE GUIDANCE

Since the initial passage of the Elementary and Secondary Education Act of 1965 (ESEA), private school children and educators have been eligible to participate in certain ESEA programs. The reauthorization of the ESEA by the Every Student Succeeds Act (ESSA) in 2015 continues this requirement under Title VIII, Part F, Subpart 1 (Title VIII) of the ESEA,<sup>1</sup> which requires that a State educational agency (SEA), local educational agency (LEA), educational service agency, consortium of those agencies, or another entity that receives funds under a Title VIII-covered program (hereinafter referred to collectively as “covered ESEA programs”) provide equitable services to eligible private school children and their teachers or other educational personnel (hereinafter referred to as “eligible private school children and educators”). This guidance is intended to be used in conjunction with the applicable statute and regulations by both public and private school officials.<sup>2</sup>

In general, LEAs are responsible for providing equitable services and benefits to eligible private school children and educators under covered ESEA programs. However, SEAs, educational service agencies, consortia of those agencies, or other entities receiving Federal financial assistance may be responsible for providing such services and benefits. For purposes of reading ease, we use the term “LEA” to refer to any entity responsible for providing equitable services and benefits to eligible private school children and educators. Accordingly, readers should note that any requirements of an LEA described in this guidance also apply to other entities that are responsible for providing equitable services to eligible private school children and educators.

This guidance supersedes:

- the U.S. Department of Education’s (Department) guidance titled *Title IX, Part E Uniform Provisions Subpart 1 - Private Schools, Equitable Services for Eligible Private School Students, Teachers, and Other Educational Personnel* (March 2009);
- the equitable services guidance contained in Section G of the *Improving Teacher Quality State Grants, ESEA Title II, Part A, Non-Regulatory Guidance* (October 5, 2006);
- *Title III, Part A English Language Acquisition, Language Enhancement, and Academic Achievement Equitable Services to Private School Students, Teachers, and Other Educational Personnel* (July 2015);
- the equitable services guidance contained in Chapter V, Section H of the *Non-Regulatory Guidance for Title I, Part C, Education of Migratory Children* (Revised March 2017); and
- the equitable services guidance contained in Section V of *Non-Regulatory Guidance: Fiscal Changes and Equitable Services Requirements under the Elementary and Secondary Education Act of 1965 (ESEA), as Amended by the Every Student Succeeds Act (ESSA)* (November 21, 2016).

This guidance document only addresses equitable services to eligible private school children and educators in covered ESEA programs under Title VIII. The ESEA also requires LEAs to provide for the equitable participation of eligible private school children and their teachers and families under Title I, Part A. For guidance related to equitable services under Title I, Part A, please refer to *Title I, Part A of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act*:

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<sup>1</sup> Unless otherwise noted, references and citations in this document are to the ESEA, as amended by the ESSA.

<sup>2</sup> This Title VIII non-regulatory guidance does not affect the requirements for providing equitable services to eligible parentally placed private school children with disabilities in accordance with section 612(a)(10)(A) of the Individuals with Disabilities Education Act (IDEA) and the IDEA Part B regulations at 34 C.F.R. §§ 300.129 through 300.144. The C.F.R is accessible online at <https://www.ecfr.gov/>. See also *Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools*, Revised February 2022, available at [https://sites.ed.gov/idea/files/QA\\_on\\_Private\\_Schools\\_02-28-2022.pdf](https://sites.ed.gov/idea/files/QA_on_Private_Schools_02-28-2022.pdf).

*Providing Equitable Services to Eligible Private School Children, Teachers, and Families Updated Non-Regulatory Guidance* (October 7, 2019/Updated May 17, 2023) available at <https://oese.ed.gov/files/2023/05/Title-I-ES-guidance-revised-5-2023.pdf>.

The Department has determined that this guidance is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). See <https://www.govinfo.gov/content/pkg/FR-2007-01-25/pdf/FR-2007-01-25.pdf>. Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public in any way. This document is intended to provide clarity to the public regarding existing requirements under the law or agency policies.

The Department provided a 30-day opportunity for the public to comment on this document and has made responsive changes. If you are interested in commenting further on this guidance, please email your comments to [EquitableServices@ed.gov](mailto:EquitableServices@ed.gov) or write to us at the following address: Office of Non-Public Education, 400 Maryland Avenue, SW, Washington, DC 20202. For further information about the Department's guidance processes, please visit <https://www2.ed.gov/policy/gen/guid/significant-guidance.html>.

## INTRODUCTION

ESEA section 8501 requires an LEA participating in a covered ESEA program, in consultation with appropriate private school officials, to provide eligible private school children and educators with services or other benefits that are equitable to those provided to eligible public school children and educators. This document provides information on the requirements of ESEA section 8501 and other applicable requirements in Title VIII.

Programs governed by Title VIII include the following formula grants:

- Title I, Part C - Education of Migratory Children;
- Title II, Part A - Supporting Effective Instruction;
- Title III, Part A - English Language Acquisition, Language Enhancement, and Academic Achievement;
- Title IV, Part A - Student Support and Academic Enrichment Grants;
- Title IV, Part B - Nita M. Lowey 21<sup>st</sup> Century Community Learning Centers (21<sup>st</sup> CCLC); and
- Title IV, Part F, section 4631 - Project SERV.

(ESEA section 8501(b)(1); 34 C.F.R. § 299.6(b)).

Formula grants are non-competitive awards based on a statutory formula. Most of the Department's formula grants are awarded to State agencies (e.g., SEAs), which in turn make formula subgrants to LEAs. For some programs, such as the 21<sup>st</sup> CCLC program, the Department awards formula grants to SEAs, which then make subgrants on a competitive basis. Grantees and subgrantees that receive such grants must comply with applicable statutory and regulatory requirements.

In addition, certain discretionary grant programs are governed by Title VIII, including grants awarded under the Title III, Part A, Native American and Alaska Native Children in School Program and National Professional Development Program.<sup>3</sup> (ESEA section 8501(b)(1)(C); 34 C.F.R. § 299.6(b)(3)). Information regarding the application of Title VIII equitable services requirements to a discretionary grant is stated in the Notice Inviting Applications for the program.

Unlike formula grants, the Department generally awards discretionary grants competitively. The Department reviews applications for a discretionary grant through a formal process in accordance with applicable statutory and regulatory requirements, including published selection criteria established for the program. The review process gives the Department discretion to determine which applications most effectively address the program requirements and are, therefore, worthy of funding.

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<sup>3</sup> Although not governed by Title VIII or addressed in this guidance, Title IV, Part F, section 4644 (Jacob K. Javits Gifted and Talented Children Education Program) requires, where appropriate, that the Department make provision for the equitable participation of eligible private school children and educators.

## GENERAL TITLE VIII EQUITABLE SERVICES REQUIREMENTS

### A. CONSULTATION

#### CONSULTATION IN GENERAL

An LEA must consult with appropriate private school officials regarding equitable services under covered ESEA programs. The goal of consultation is reaching agreement between the LEA and appropriate private school officials on how to provide equitable and effective programs for eligible private school children and educators. (ESEA section 8501(c)(1)).

After timely and meaningful consultation, an LEA makes the final decisions with respect to the services to be provided to eligible private school children and educators. (34 C.F.R. § 299.7(b)(3)).

#### A-1. What is consultation?

Timely and meaningful consultation with appropriate private school officials is an essential requirement in the implementation by an LEA of an effective covered ESEA program for eligible private school children and educators. Consultation involves discussions between public and private school officials on key issues that affect the ability of eligible private school children and educators to participate equitably in covered ESEA programs. Successful consultation establishes positive and productive working relationships, makes planning effective, continues throughout implementation of equitable services, and serves to ensure that the services provided meet the needs of eligible private school children and educators. A unilateral offer of services by an LEA with no opportunity for discussion, or the application of a blanket rule, is not adequate consultation. Only after discussing key issues relating to the provision of equitable services may an LEA make its final decisions with respect to those services.

#### A-2. Who is responsible for initiating contact with private school officials regarding participation in covered ESEA programs?

An LEA must annually contact officials of private schools located in the attendance or service area of the LEA to determine whether those officials would like for their eligible children and educators to participate in equitable services under each covered ESEA program in which the LEA participates. (ESEA section 8501(c)(1); see A-7). If this annual contact does not occur, private school officials should contact the LEA and ask to speak with the individual(s) responsible for administering the program. If a private school official contacts an LEA but receives no response, that official may also contact the State ombudsman for assistance. (See Section D).

To facilitate statewide planning and delivery of programs and services that are provided under State-level activities (e.g., Title II, Part A and Title IV, Part A State-level programs) and require the equitable participation of eligible private school children and educators, the SEA is responsible for initiating and engaging in consultation with appropriate private school officials. An SEA may facilitate consultation through a State-level private school working group. (See A-21).

#### A-3. Are charter school LEAs required to provide equitable services for eligible private school children and educators?

Charter school LEAs generally are not required to provide equitable services for eligible private school children and educators in formula grant programs. The traditional LEA in the area generally would receive any formula grant funds attributable to, or for, eligible private school children and educators, and

that LEA would have the responsibility to provide them equitable services.

With respect to discretionary grant programs, such as Project SERV and the 21st CCLC program, however, a charter school LEA that receives a grant is required to provide equitable services for eligible private school children and educators, unless these children and educators are served under the same program by the traditional LEA in the area. A charter school LEA may consult with private school officials representing private schools and may limit consultation and services to eligible children and educators in private schools within a reasonable proximity of the charter school, even if the charter school LEA serves a larger geographic area.

**A-4. What happens if an LEA does not participate in a program requiring equitable services and a private school in that LEA expresses a desire for their students and educators to receive services?**

An LEA is not required to provide equitable services if it does not receive funds under a covered ESEA program (e.g., if it chooses not to participate in such program). (ESEA section 8501(a)(1)). The ESEA does not authorize an SEA to reallocate funds to another LEA for the purpose of providing equitable services in a non-participating LEA.

**A-5. What is an “Intent to Participate” form?**

An “Intent to Participate” form is a document that some LEAs may choose to send annually to private school officials to determine their interest in receiving equitable services for eligible private school children and educators under one or more covered ESEA program. The form might include a brief description of the programs for which equitable services are available as well as a list of allowable activities, services, and benefits. Some LEAs send this form by registered mail in order to document receipt of the form by private school officials. An LEA might also send such form by email with read receipt.

**A-6. May an LEA establish reasonable deadlines for private school officials to submit information necessary to provide equitable services?**

Yes. An LEA may set a reasonable deadline, taking into consideration private school schedules, for private school officials to submit information necessary to provide equitable services. For example, an LEA may set a reasonable deadline for private school officials to indicate their intent to participate or request services and materials. An LEA should provide clear and sufficient notice of the deadline, identify potential consequences for not meeting the deadline, and give adequate time for private school officials to respond.

If a deadline is established in consultation, it would be reasonable for the LEA to inform private school officials that, if the deadline is not met and the private school officials have not notified the LEA of obstacles to meeting the deadline in a timely manner, the LEA may consider the private school officials to have declined services. Generally, however, the ongoing consultation required by the ESEA (see ESEA section 8501(c)(3)) will help prevent this situation from occurring because consultation throughout the year provides an established forum for private school officials to alert the LEA if there are obstacles to meeting a deadline.

**A-7. How does an LEA identify which private school officials to contact?**

Consultation begins with contacting appropriate private school officials based on the nature of the program and the entity responsible for providing equitable services. For example, for Title II, Part A, Title

III, Part A, and Title IV, Part A, an LEA must contact and begin consultation with school officials representing all private schools located within its boundaries, including independent schools and faith-based schools. The LEA might make contact with respect to all covered programs in which it participates or intends to participate (e.g., 21st CCLC) at the same time. For other programs in which eligible entities include more than LEAs, such as the 21st CCLC program, a non-LEA subgrantee must consult with private school officials in the specific geographic area(s) to be served by the program. (See ESEA section 8501(c)).

For assistance identifying appropriate private school officials, an LEA could seek assistance from the ESEA State ombudsman (see Section D) or from State or regional private school associations.

#### **A-8. Who is responsible for initiating consultation?**

An LEA must initiate the consultation process. (ESEA section 8501(c)(1)). One way to accomplish this is for the LEA to extend an invitation to officials of each private school that indicates an intent to participate and to convene a meeting, or meetings, at a time and place determined in consultation with private school officials.

#### **A-9. When and how often does an LEA consult with private school officials?**

Consultation between an LEA and private school officials must include early discussions to prepare for the next school year so that there is a timely start of the covered ESEA programs. (ESEA section 8501(a)(3)(A), (c)(3)). Consultation must also be ongoing throughout the school year to help ensure effective implementation, service delivery, and assessment of equitable services. To be timely and meaningful, consultation must occur during the design and development of such agency's programs and before the LEA makes any decision that affects the opportunity for eligible private school children and educators to participate in covered ESEA programs. (ESEA section 8501(c)(3)). To ensure timely consultation, LEAs, in consultation with private school officials, may develop yearly consultation timelines listing the date and location of each meeting along with specific agenda topics. (See K-6 and K-7 for discussion of consultation in the 21st CCLC program and L-6 for Project SERV).

#### **A-10. May a group of private school officials designate a single private school official to represent its interests?**

Yes. If a group of private schools seeks to be represented by a single official, that representative should inform the LEA in writing as soon as possible that the representative will serve as the designated primary contact for such schools and provide a list of the private schools that the contact represents to ensure the LEA can facilitate the consultation process in a timely manner. (For example, a group of Catholic schools that are under the aegis of a Catholic diocese may be represented by a single diocesan official.)

#### **A-11. What topics must be discussed during the consultation process between public and private school officials?**

The ESEA requires an LEA to consult with private school officials on issues such as:

- How the children's and educators' needs will be identified;
- What services will be offered;
- How, where, and by whom the services will be provided;
- How the services will be assessed and how the results of the assessment will be used to improve those services;

- The size and scope of the equitable services to be provided to eligible private school children and educators and the amount of funds available for those services, and how that amount is determined;
- How and when the agency, consortium, or entity will make decisions about the delivery of services, including a thorough consideration and analysis of the views of the private school officials on the provision of contract services through potential third-party providers;
- Whether the LEA will provide services directly or through a separate government agency, consortium, or entity or through a third-party contractor; and
- Whether to provide equitable services to eligible private school children and educators (1) by creating a pool or pools of funds with all of the funds allocated under a program or (2) on a school-by-school basis based on the equitable share of funds available to provide services in each school (see B-4).

(ESEA section 8501(c)(1)).

Because an LEA must consult with appropriate private school officials during the design and development of the LEA's covered ESEA programs and before the LEA makes any decision that affects the opportunities of eligible private school children and educators to participate (ESEA section 8501(c)(1), (3)), other topics of consultation must include, as appropriate:

- Administrative costs, including indirect costs (see B-8);
- Any funds available for carryover (see B-9 through B-12); and
- Transferring funds from Title II, Part A and Title IV, Part A under the transferability authority in ESEA section 5103<sup>4</sup> (see B-17 and B-18).

#### **A-12. What is entailed in achieving “the goal of reaching agreement” between an LEA and appropriate private school officials as required by section 8501(c)(1)?**

The “goal of reaching agreement” (ESEA section 8501(c)(1)) between an LEA and appropriate private school officials is predicated on the good faith efforts of all parties to reach agreement regarding the provision of equitable services. Meaningful consultation that results in agreement begins well before the decisions are made or services are implemented and provides a genuine opportunity for all parties to express their views, to have their views given serious, due consideration, and to discuss viable options for ensuring equitable participation of eligible private school children and educators. In the event of disagreement during the consultation process, an LEA and/or the appropriate private school officials may wish to contact the State ombudsman to help facilitate agreement.

#### **A-13. What documentation of consultation must an LEA maintain?**

The ESEA requires an LEA to maintain, and provide to the SEA, the following documentation about the consultation process:

**Written Affirmation:** Each LEA must maintain in the agency's records, and provide to the SEA involved, a written affirmation signed by officials of each participating private school or their designated representative that meaningful consultation has occurred. The written affirmation must provide the option for private school officials to indicate such officials' belief that timely and meaningful consultation has not occurred or that the program design is not equitable with respect to eligible private school children and educators. If such officials do not provide such affirmation within a reasonable period of time, the LEA must forward the documentation that such consultation has, or

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<sup>4</sup> ESEA section 5103 also gives States the authority to transfer State-level activity funds from Title II, Part A, Title IV, Part A, and Title IV, Part B.

attempts at such consultation have, taken place to the SEA. (ESEA section 8501(c)(5)).

**Reason for Disagreement on Use of Contractor (if applicable):** If an LEA disagrees with the views of the private school officials on the provision of services through a contract, the LEA must provide in writing to such private school officials the reason why the LEA has chosen not to use a contractor. An adequate explanation would address concerns expressed by private school officials about the LEA's direct services and fully explain the reasons why the LEA chose not to use a third party, such as any financial, administrative, regulatory, or statutory impediments, or the ability of the LEA to provide the services directly. The written explanation should not simply reiterate the LEA's decision but also provide reasons for the decision. (ESEA section 8501(c)(2)).

**A-14. Is other documentation that meaningful consultation has occurred helpful?**

Yes. In addition to the required documentation discussed in A-13, it is also good practice for an LEA and appropriate private school officials to maintain a record of notes about topics addressed and decisions made during consultation meetings. Retaining meeting agendas and sign-in sheets is also good practice. In order to verify that it has met the requirement for timely and meaningful consultation and has provided equitable services, as a best practice, an LEA may want to document that it has:

- Annually informed private school officials of the opportunity to participate in covered ESEA programs and the various services available;
- Engaged in timely consultation, allowing for meaningful discussion between the LEA and the appropriate private school officials regarding services and other benefits;
- Identified the needs of eligible private school children and educators;
- Allocated a per-pupil amount of funds for services to eligible private school children and educators that is calculated in accordance with ESEA section 8501(a)(4)(A);
- Provided services, programs, materials, and resources;
- Evaluated programs and services for effectiveness;
- Adequately addressed problems and formal complaints raised by private school officials; and
- Reached agreement with private school officials on how to provide equitable and effective programs for eligible private school children and educators.

**A-15. Is there a specific time by which an LEA must obtain the signature of appropriate private school officials regarding written affirmation/results of agreement?**

No. The affirmation of timely and meaningful consultation is generally signed when consultation on the planning and design of the next year's program has been completed. The SEA has the flexibility to require LEAs to submit the written affirmations at a specified time, so long as that specified time is reasonable and the result of timely and meaningful consultation.

**A-16. What should an SEA do if an LEA does not provide written affirmation of consultation from private school officials?**

If an LEA has not obtained a written affirmation of timely and meaningful consultation signed by appropriate private school officials, an SEA may request that the LEA provide a reason for the lack of affirmation. In some cases, the reason may be that private school officials did not want ESEA services. However, if the reason is that there is a disagreement between the LEA and private school officials, the SEA may facilitate resolution of their differences.



**A-17. What assistance might an LEA need to request from private school officials to obtain information necessary to provide equitable services to eligible private school children and educators?**

An LEA is responsible for providing equitable services. Because an LEA may not have all necessary information available to do so, an LEA may need to request assistance from private school officials to obtain information or documentation that enables the LEA to meet its responsibilities. For example, if after timely and meaningful consultation with private school officials, an LEA decides to use a primary home language other than English (PHLOTE) survey to identify children who are eligible for equitable services under Title III, Part A (i.e., those who meet the definition of English learner (EL) in ESEA section 8101(20)), the LEA may obtain a higher response rate to the PHLOTE survey with assistance from private school officials.

Although the ESEA does not impose any requirements on private school officials, the only way to ensure that consultation is timely and meaningful is for the private school officials to participate actively in the consultation meetings. By participating, the private school officials will have an opportunity to:

- provide input in the development of a timeline for consultation;
- provide data and information about the needs of their eligible children and educators;
- offer suggestions regarding program design, implementation, and evaluation;
- inquire about participation in any discretionary grant programs;
- address the use of third-party providers, if appropriate; and
- complete any appropriate forms needed by the LEA to ensure the delivery of equitable services.

However, such paperwork should not require undue administrative effort for the private school officials or require them to submit operational budget information.

**A-18. What is an LEA's obligation to consult with appropriate private school officials, and provide services to eligible children and educators in a new private school that opens after the LEA's deadline for indicating an intent to participate?**

An LEA is generally responsible for contacting officials of a new private school, along with officials of all private schools, to determine their intent to participate. An LEA is not required to provide equitable services in the current year to eligible children and educators who attend or work at a new private school if the school opens after the LEA's deadline for indicating an intent to participate in equitable services, but the LEA may do so.

**A-19. What is an LEA's obligation to provide equitable services if a private school official declines services on behalf of private school children and educators or does not respond to the LEA's request to consult?**

An LEA must be able to demonstrate that it made a good faith effort to contact all the private schools in the district or service area. (See A-1, A-2, and A-5 through A-9). If a private school official declines services in covered ESEA programs or does not respond to an LEA's request to consult in the given timeframe regarding the provision of services in a particular year, the LEA has no further responsibility to provide equitable services to children and educators in that school during that school year. The LEA must contact each private school every year, however, to determine the private school official's intent to have their eligible children and educators participate in covered ESEA programs.

**A-20. Is an LEA application available for review by private school officials?**

Yes. Generally, such application is a matter of public record and is available for public review. An application can provide private school representatives with information that enhances consultation and helps them understand the scope of program activities within the LEA.

**A-21. How might an SEA help foster effective consultation and program implementation between the LEA and private school officials?**

There are a number of ways an SEA might do this. An SEA is responsible for ensuring that its LEAs comply with applicable statutory and regulatory requirements under State-administered ESEA programs, including those requirements related to providing equitable services to eligible private school children and educators. (ESEA sections 8304(a)(1) and (3)). One way an SEA can help to ensure that LEAs are in compliance is to develop policies and procedures that assist it in administering and implementing programs for eligible private school children and educators. SEAs can also provide additional guidance and other resources to aid in this effort.

An SEA can help foster positive working relationships between an LEA and private school officials. The SEA's ombudsman, required under ESEA section 8501(a)(3)(B), is a valuable resource for fostering positive working relationships. The ombudsman serves as an SEA's primary point of contact for addressing questions and concerns from private school officials and LEAs regarding the provision of equitable services. (See Section D).

An SEA might also consider establishing a private school working group comprised of SEA, LEA, and private school representatives to provide an organized forum for facilitating technical assistance, promoting promising practices for implementing equitable services, and addressing issues of mutual concern to public and private school communities. Although this is a best practice, the ESEA does not require an SEA to establish such a working group.

Additionally, some SEAs provide workshops on equitable services under the ESEA to which they invite both LEA ESEA program directors and private school officials in order to ensure that all participants involved in the consultation process receive the same information and technical assistance. Some SEAs have also developed nonpublic school pages on their State department of education websites with helpful information and resources for LEAs and private school officials to access. Such assistance fosters uniformity in administration of equitable services throughout the State.

**B. ALLOCATIONS AND EXPENDITURES**

***Allocations***

**ALLOCATING FUNDS FOR EQUITABLE SERVICES – IN GENERAL**

The ESEA requires an LEA to ensure that its expenditures for equitable services for eligible private school children and educators under covered ESEA programs are equal on a per-pupil basis to the expenditures for participating public school children and educators, taking into account the number and educational needs of the eligible private school children and educators. (ESEA section 8501(a)(4)(A); 34 C.F.R. § 299.7(a)).

**B-1. How does an LEA determine the equitable share of funds for covered ESEA programs?**

Many LEAs calculate equal expenditures solely on the basis of the relative enrollments of public and private school children, or, as applicable, eligible public and private school children, on the permissible assumption that these numbers also accurately reflect the relative needs of children and educators in public and private schools. For programs such as Title III, Part A, which limit services to a specific group of children, an LEA would use the number of eligible children in the defined group enrolled in both public and private schools. However, it is permissible for an LEA to use other factors relating to educational need and not base equal expenditures only on relative enrollments.

<b>EXAMPLE OF FORMULA TO DETERMINE AMOUNT FOR EQUAL EXPENDITURES BASED ON TOTAL ENROLLMENT OF CHILDREN</b>	
<b>A. Number of Eligible Children</b>	
A1: LEA Enrollment	900
A2: Participating Private Schools' Enrollment	100
A3: Total Enrollment = A1 + A2	1,000
<b>B. LEA program (e.g., Title II, Part A) Allocation</b>	
B1: Total LEA Allocation	\$1,000,000
B2: Administrative Costs (for public and private school programs)	\$50,000
B3: LEA Allocation Minus Admin Costs = B1 - B2	\$950,000
<b>C. Per Pupil Rate</b>	
C1: B3 divided by A3	\$950
<b>D. Equitable Services</b>	
Amount LEA must reserve for equitable services for private school children and educators = A2 x C1	\$95,000

**B-2. When calculating the amount of funding available for providing equitable services, what year's data (i.e., total enrollment or number of eligible children) does an LEA use?**

Generally, an LEA will calculate the per-pupil funding for equitable services based on public and private school data from the previous school year in order that timely consultation can occur. To ensure that this calculation is accurate, it is necessary that an LEA use data for private schools and public schools from the same school year. For example, during consultation for services for school year 2023-2024, the LEA might use enrollment data from the 2022-2023 school year.

**B-3. In calculating funding for equitable services, is an LEA required to include preschool data if a private school enrolls such children?**

Under ESEA section 8501(a)(1) and (a)(4)(A), an LEA must determine funding for equitable services based on the number and educational needs of eligible children enrolled in private elementary and secondary schools. As a result, unless preschool is considered part of elementary education under State law, an LEA may not include preschool enrollment in determining equitable services funding. (See C-2 for additional information on the provision of equitable services to preschool children.)

**B-4. What are the options available to an LEA for providing equitable services to eligible private school children and educators?**

Consistent with ESEA section 8501(c)(1)(H),<sup>5</sup> following consultation with, and the agreement of, private school officials, an LEA may choose one of the following options for providing equitable services to eligible private school children and educators.

1. School-by-School: Provide equitable services, as applicable, to eligible private school children and educators in each school based on the amount of funds generated by the total number of children or number of eligible children, as applicable, enrolled in the school.
2. Pooling Within an LEA: Provide equitable services, as applicable, to eligible private school children and educators in a private school that is part of a group of private schools (such as a group of schools under the authority of a single organization) by pooling the funds generated by the total number of children or number of eligible children, as applicable, enrolled in private schools in the group.<sup>6</sup> The LEA, in consultation with appropriate private school officials, must establish criteria to determine how services will be allocated for eligible private school children and educators in schools within the pool. The services provided to private school children and educators in a particular school do not depend on the amount of funds generated by children enrolled in that school; rather, the services are based on the criteria developed for allocating services among the eligible private school children and educators. If private school officials representing different groups of private schools request pooling, the LEA may establish a separate pool for each requesting group.
3. Pooling Across LEAs: Provide equitable services, as applicable, to eligible private school children and educators in a private school that is part of a group of private schools (such as a group of schools under the authority of a single organization) located in multiple LEAs by pooling the funds generated by the total number of children or number of eligible children, as applicable, enrolled in private schools in the group. The LEAs, in consultation with appropriate private school officials, must establish criteria to determine how services will be allocated for eligible private school children and educators in schools across all participating LEAs within the pool. The services provided to eligible private school children and educators in a particular school or LEA are not dependent on the amount of funds generated by eligible children enrolled in that school; rather, the services are based on the criteria developed for allocating services among the private school children and educators across LEAs. Based on consultation with private school representatives, the LEAs participating in the pool may arrange to have one LEA, another public entity, or a third-party contractor provide services for eligible private school children and educators in private schools participating in the pool.

The following example shows the differences among the school-by-school approach, pooling within an LEA, and pooling across LEAs. In this example:

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<sup>5</sup> ESEA section 8501(c)(1)(H) references the number of children from low-income families in a participating public school attendance area who attend private schools. This language is the same as a similar provision in ESEA section 1117(b)(1)(J), which applies to equitable services under Title I, Part A, but is not applicable to Title VIII-covered programs. Equitable services under Title VIII-covered programs are not limited to children from low-income families who live in a Title I participating public school attendance area.

<sup>6</sup> An LEA may not combine funds from multiple ESEA programs within a pool.

- LEA A has a responsibility to provide Title IV, Part A equitable services to eligible children and educators in Private Schools 1 and 2, and LEA B has a responsibility to provide equitable services to eligible children and educators in Private School 3.
- In LEA A, private school children who attend Private School 1 generate \$50,000 for Title IV, Part A equitable services. Private school children who attend Private School 2 generate \$5,000 for Title IV, Part A equitable services.
- In LEA B, private school children who attend Private School 3 generate \$25,000 for Title IV, Part A equitable services.

*Scenario 1: No pooling (school-by-school approach)*

Eligible private school children and educators in a particular school receive services based on the amount of funds generated by the total number of children or number of eligible children, as applicable, in that school. For example, eligible children in Private School 1 receive \$50,000 in services, administered by LEA A; eligible children in Private School 2 receive \$5,000 in services, administered by LEA A; and eligible children in Private School 3 receive \$25,000 in services, administered by LEA B.

*Scenario 2: Pooling funds among private schools within a single LEA*

In consultation with LEA A, private school officials representing Private Schools 1 and 2 request that the LEA pool the Title IV, Part A funds generated by their children and LEA A agrees. LEA A combines the total amount of Title IV, Part A funds generated for services for eligible children and educators in Private School 1 (\$50,000) and Private School 2 (\$5,000). The LEA then has \$55,000 to spend on Title IV, Part A services for eligible private school children and educators in these schools regardless of the amount of funds generated by children in a particular school. In consultation with private school officials, the LEA then decides how the funding will be allocated for services to meet the various needs of the children and educators in these schools. Under this option, the services provided to children and educators in a particular private school are not dependent upon the amount of funding generated for services by children in that school (e.g., if the needs are greater in Private School 2, the LEA may spend more than \$5,000 of the \$55,000 in this school). Children in Private School 3 receive \$25,000 in services, administered by LEA B, and are not included in the pool under LEA A.

*Scenario 3: Pooling funds among private schools across LEAs*

In consultation with LEAs A and B, private school officials representing Private Schools 1, 2, and 3 request that the LEAs pool the Title IV, Part A funds generated by their children and both LEAs agree. The LEAs combine the total amount of Title IV, Part A funds generated for services for eligible children and educators in Private School 1 (\$50,000), Private School 2 (\$5,000), and Private School 3 (\$25,000). The LEAs have \$80,000 to spend on Title IV, Part A, services for all eligible private school children and educators in these schools regardless of the amount of funds generated by children in a particular school. In consultation with private school officials, the LEAs then decide that LEA A will provide services and how the funding will be allocated for those services to meet the needs of the eligible private school children and educators in the three schools. Under this option, the services provided to children and educators in a particular private school are not dependent upon the amount of funding generated for services by the children in that school (e.g., if the needs are greater in Private School 2, LEA A may spend more than \$5,000 of the \$80,000 in this school).

**B-5. May an LEA make a unilateral decision to pool funds among several private schools to provide equitable services?**

No. As a general rule, ESEA section 8501 requires an LEA to provide equitable services to eligible children and educators in a private school commensurate with funds generated by the total number of children or the number of eligible children, as applicable, enrolled in the school.

Pooling is an alternative to this general rule (compare section 8501(c)(1)(H)(i) with 8501(c)(1)(H)(ii)) and permits an LEA, after timely and meaningful consultation with appropriate private school officials, to provide services to eligible private school children and educators among a group of schools with funds generated by the total number of children or the number of eligible children, as applicable, who attend those schools. Which children and educators to serve is determined, in consultation with appropriate private school officials, among all private schools in the pool. Thus, children and educators in a given private school may not receive services commensurate with the funds generated by children in the school; some may receive more services, and some may receive less. Rather, services are dependent on need among all children or educators in the schools in the pool.

Because pooling is an alternative to the general rule, despite an LEA's authority to make the final decisions with respect to the services it will provide to eligible private school children or educators (see 34 C.F.R. § 299.7(b)(3)), appropriate private school officials must agree through consultation for the LEA to pool funds for services for eligible children and educators among a group of private schools because it impacts the services eligible children and educators in a given private school would otherwise receive. Without such agreement, an LEA must follow the general rule in section 8501(c)(1)(H)(ii) and provide equitable services to eligible private school children and educators in each school commensurate with the funds generated by children in that school.

**B-6. If an LEA, after consultation with appropriate private school officials, decides to establish a pool or pools of funds allocated for services for eligible private school children and educators, and later, one or more private schools in the pool decline services for eligible children and educators in the school(s), what happens to the funds generated by children in the private school(s)?**

The ESEA requires that an LEA consult with private school officials regarding the size and scope of equitable services to be provided to eligible private school children and educators in a single school or pool of schools; the amount of funds available for those services; and how that amount is determined. (ESEA section 8501(c)(1)(E)). Consistent with this requirement, if a private school that initially is part of a pool later declines services for eligible children and educators, an LEA must consult with appropriate private school officials regarding how funds generated by children in that school will be used for services for eligible private school children and educators in other schools in the pool. Generally, the funds generated for equitable services remain within the pool. However, after consultation with private school officials, an LEA might determine that the amount generated by children who attend schools declining services results in a total amount for the pool that substantially exceeds the amount needed to provide equitable services to eligible private school children and educators in the pool's participating schools (e.g., where a significant amount of funds is generated by children in schools declining services, but other schools in the pool include only a small number of eligible private school children and educators). In this situation, the LEA may allocate the excess funds to provide services to eligible children and educators in public and private schools that are not part of the pool in a manner consistent with B-1.

**B-7. What happens if, during consultation, officials of one or more private schools choose not to seek equitable services for their eligible children or educators?**

In general, an LEA needs to include the total number of children or the number of eligible children, as applicable, enrolled in only participating private schools in the calculation for equitable services to ensure that the most accurate per-pupil allocation is determined.

If a private school official decides not to have their eligible children and educators participate after allocations have been determined, the LEA may then treat the funds initially allocated for equitable services as additional funds that would be equitably redistributed for services for both public and participating private school children.

***Administrative and Other Expenditures***

**B-8. How are administrative costs and other costs of providing services to public and private school children determined?**

An LEA reserves funds for administrative costs, including indirect costs, from a program's total allocation (off the top) before the LEA determines the allocation for services and benefits for public and private school children and educators. (34 C.F.R. § 299.7(a)(2)). Funds reserved cover administrative costs of both the public and private school components of the program. In some cases, the statute for a covered ESEA program specifies the maximum percentage of a program's total allocation that an LEA may use for administrative costs. When the statute is not explicit regarding the amount of funds an LEA may use for administrative costs, the amount of funds that an LEA may spend for this category of expenses is subject to the cost principles in 2 C.F.R. Part 200, Subpart E,<sup>7</sup> including the requirement that, among other things, all costs must be necessary, reasonable, and allocable to the program. In addition, a program that has a supplement not supplant requirement, like Title II, must use a restricted indirect cost rate.<sup>8</sup> Generally, an LEA with an approved restricted indirect cost rate may apply that rate to all its modified total direct costs,<sup>9</sup> including those it incurs to provide equitable services.

A contract to provide equitable services may include reasonable and necessary costs associated with providing services. These costs would not be included in an LEA's reservation of funds to administer the covered ESEA program. Rather, such costs would be built into the contract—i.e., as program service costs.

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<sup>7</sup> 2 C.F.R. Part 200 is the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance), available at <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200>.

<sup>8</sup> Information on a restricted indirect cost rate is in the Uniform Guidance in Appendix VII to Part 200 – States and Local Government and Indian Tribe Indirect Cost Proposals, available at: <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/appendix-Appendix%20VII%20to%20Part%20200>.

<sup>9</sup> The definition in the Uniform Guidance of modified total direct costs is in 2 C.F.R. § 200.1, available at: <https://www.ecfr.gov/current/title-2/subtitle-A/chapter-II/part-200/subpart-A/subject-group-ECFR2a6a0087862fd2c/section-200.1>.

## ***Timeframe for Obligations***

### **OBLIGATION OF FUNDS**

Funds allocated to an LEA for educational services and other benefits to eligible private school children and educators must be obligated in the fiscal year for which the funds are received by the LEA. (ESEA section 8501(a)(4)(B); 34 C.F.R. § 299.7(a)(3)).

#### **B-9. What is the purpose of the obligation of funds requirement given that an LEA may carry over funds from a given fiscal year and spend those funds in the succeeding fiscal year?**

The purpose of the obligation of funds requirement is to ensure that an LEA uses the funds available under a covered ESEA program to provide equitable services in the Federal fiscal year for which the funds are appropriated (i.e., through September 30 of the applicable fiscal year) so that eligible private school children and educators receive the services to which they are entitled in a timely manner. This provision reinforces the requirement that an LEA conduct timely consultation with private school officials so that services can begin at the beginning of the school year for which the funds are appropriated.

#### **B-10. May an LEA carry over unobligated funds despite the statutory requirement regarding obligation of funds?**

If an LEA is engaging in ongoing consultation, providing equitable services as required, and meeting the obligation of funds requirement in ESEA section 8501(a)(4)(B), it generally should not have any, and certainly no significant, carryover. The ESEA, however, does not prohibit carryover of funds for equitable services and, in most cases, requires it. The following are examples of circumstances that could result in carryover of funds for equitable services and how an LEA would use such carryover:

<b>Reason for Carryover</b>	<b>Use of Carryover</b>
Services for eligible children in one or more private schools are delayed (e.g., based on a natural disaster, delayed consultation, inability to employ qualified personnel, or unexpected procurement challenges). As a result, the LEA is unable to fully provide required equitable services, and some funds are unobligated at the end of the Federal fiscal year.	The LEA must use the funds to provide equitable services to eligible children and educators in the affected private schools the following year in addition to the equitable share for that year.
An LEA uses a third-party contractor to provide equitable services, and the invoiced amount for services in one of the private schools is \$1,000 less than anticipated. Based on consultation with private school officials, the LEA determines there are additional needs. However, because this occurs late in the summer, the LEA is unable to responsibly obligate the funds prior to the end of the Federal fiscal year.	The LEA, in consultation with private school officials, must use these funds the following year to provide equitable services to children and educators in the affected private school in addition to the equitable share for that year.
An LEA provided equitable services to private school children or educators, but the services cost less than what was budgeted or the private school official decides not to have eligible children and educators participate in planned activities. Based on timely and meaningful consultation, the LEA and private school officials agree there are no additional needs.	Any carryover funds become part of the general pool of funds available for expenditures for programs for public schools and participating private school children and educators for the next year.



### **B-11. When does an “obligation” occur?**

34 C.F.R. § 76.707 governs when an obligation of Federal funds by an SEA or LEA occurs. The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

<b>If the obligation is for—</b>	<b>The obligation is made—</b>
(a) Acquisition of real or personal property	On the date on which the State or subgrantee makes a binding written commitment to acquire the property.
(b) Personal services by an employee of the State or subgrantee	When the services are performed.
(c) Personal services by a contractor who is not an employee of the State or subgrantee	On the date on which the State or subgrantee makes a binding written commitment to obtain the services.
(d) Performance of work other than personal services	On the date on which the State or subgrantee makes a binding written commitment to obtain the work.
(e) Public utility services	When the State or subgrantee receives the services.
(f) Travel	When the travel is taken.
(g) Rental of real or personal property	When the State or subgrantee uses the property.
(h) A pre-agreement cost that was properly approved by the Secretary under the cost principles in 2 C.F.R. part 200, Subpart E—Cost Principles	On the first day of the grant or subgrant performance period.

### **B-12. By what date must an LEA obligate funds under ESEA section 8501(a)(4)(B)?**

ESEA section 8501(a)(4)(B) requires an LEA to obligate funds for equitable services “in the fiscal year for which the funds are received by the agency.” The applicable fiscal year is the Federal fiscal year, which ends on September 30 of each year. Although the State in which an LEA is located may operate on a different fiscal year (e.g., July 1 through June 30), September 30 is the date by which an LEA must obligate funds for equitable services to meet ESEA section 8501(a)(4)(B). For example, with respect to fiscal year 2023 ESEA funds that an LEA receives for the 2023-2024 school year, section 8501(a)(4)(B) requires an LEA to obligate the funds generated for equitable services by September 30, 2024. In other words, the obligation period does not end with the end of the school year or the State’s fiscal year. (See B-10 for examples of when an LEA might carryover ESEA funds to the subsequent fiscal year).

## ***Notice of Allocations***

### **NOTICE OF ALLOCATION**

An SEA must provide notice in a timely manner to appropriate private school officials in the State of the allocation of funds for educational services and other benefits for each covered ESEA program that an LEA has determined are available for eligible private school children and educators (ESEA section 8501(a)(4)(C); 34 C.F.R. § 299.7(a)(4)).

#### **B-13. What information must an SEA include in the notice of allocation that the SEA must provide to private school officials?**

An SEA must annually provide information on the amount of funds allocated for equitable services under each covered ESEA program that each LEA responsible for providing equitable services has determined is available for eligible private school children and educators. (ESEA section 8501(a)(4)(C); 34 C.F.R. § 299.7(a)(4)).

#### **B-14. Is an SEA required to use a particular method to disseminate the notice of allocation?**

No. An SEA has flexibility to determine, in consultation with appropriate private school officials, an effective manner for disseminating the notice of allocation. An SEA may consider methods such as publicly posting this information on the SEA's website, using an email distribution list of private school officials, and other methods.

#### **B-15. Is there a specific timeline for the SEA to disseminate the notice of allocation?**

No. An SEA has flexibility to determine, in consultation with appropriate private school officials, a reasonable timeline for providing the notice of allocation. To ensure that the notice is provided in a timely manner, dissemination would generally occur prior to the beginning of the school year.

#### **B-16. Is an LEA required to inform private school officials of the amount of funds available for equitable services for private school children and educators in a specific private school or pool of schools?**

Yes. As noted in A-11, the ESEA requires an LEA to consult with private school officials regarding the size and scope of the equitable services to be provided, the proportion of funds that is allocated for equitable services, and how that proportion is determined. (ESEA section 8501(c)(1)(E)). Given that consultation must occur well before allocations are finalized, it is likely that the initial discussions of this topic will be based on estimated allocations for the coming school year, which may be based on the prior year's allocations or preliminary allocations for the coming school year.

Once final allocations are available, the ESEA requires an LEA to provide this information to private school officials in a timely manner. In addition to addressing this topic during consultation, some LEAs provide this information through their website or in some other written form. This requirement is distinct from the notice of allocation requirement applicable to an SEA that is described in B-13.

## ***Transferability and Equitable Services***

ESEA section 5103 gives an LEA flexibility to transfer some or all of its funds under two covered ESEA programs to other eligible ESEA programs. Under the transferability authority, an LEA may transfer up to 100 percent of funds received under Title II, Part A and Title IV, Part A into, for example, Title I, Part A. An LEA may not, however, transfer funds out of Title I, Part A. An LEA does not need prior approval from the SEA or the Department to exercise the transferability authority, but before an LEA may transfer funds from a covered ESEA program, it must engage in timely and meaningful consultation with appropriate private school officials. (ESEA section 5103(e)(2)).

For more information, see the “Transferability” section in the *Fiscal Changes and Equitable Services Requirements* under the ESEA non-regulatory guidance, available at <https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf>.

### **CONSULTATION AND TRANSFERABILITY**

Before transferring any funds, an LEA must engage in timely and meaningful consultation with appropriate private school officials and give due consideration to the views of these officials prior to making decisions regarding transfers. (ESEA section 5103(e)(2)).

#### **B-17. If, after timely and meaningful consultation, an LEA chooses to transfer funds to another authorized program under ESEA section 5103, does this have any impact on its equitable service responsibilities under the programs from which and to which funds are transferred?**

Yes. Before an LEA may transfer funds from Title II, Part A or Title IV, Part A, the LEA must engage in timely and meaningful consultation with appropriate private school officials in order to identify and consider the needs of private school children as well as public school children in regard to any transfer. (ESEA section 5103(e)(2)).<sup>10</sup> With respect to the transferred funds, the LEA must provide eligible private school children and educators equitable services under the applicable program(s) to which, and from which (if less than 100 percent of funds are transferred), the funds are transferred, based on the total amount of funds available to each program after the transfer. For example, if an LEA transfers 50 percent of its Title II, Part A allocation to Title IV, Part A, it must provide Title II, Part A equitable services based on the amount of funds left in the Title II, Part A program after the transfer and must provide Title IV, Part A equitable services based on the total amount of funds available under Title IV, Part A, including the transferred funds. For additional information on the transferability authority, see Appendix C of the Informational Document on the Rural Education Achievement Program (REAP), 2021 available at <https://oese.ed.gov/files/2021/01/19-0043-REAP-Informational-Documents-final-OS-Approved-1.pdf>.

#### **B-18. Under ESEA section 5103(b), after timely and meaningful consultation, may an LEA transfer funds into a program or retain funds in a program from which it transfers funds solely to provide equitable services for eligible private school children and educators?**

No. The ESEA does not authorize an LEA to transfer or retain only the portion of funds available for

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<sup>10</sup> Similarly, before an SEA may transfer funds from Title II, Part A, Title IV, Part A, or the Nita M. Lowey 21<sup>st</sup> Century Community Learning Centers program, the SEA must engage in timely and meaningful consultation with appropriate private school officials. (ESEA section 5103(e)(2)).

equitable services for eligible private school children and educators from one or both of the programs whose funds may be transferred. If, after timely and meaningful consultation, an LEA decides to transfer funds, it must provide services to public and private school children and educators in accordance with all the requirements of the program(s) to which and from which the funds are transferred based on the amount of funds in each program after the transfer. (ESEA section 5103(e)(1)).

### **C. DELIVERY OF EQUITABLE SERVICES**

#### **ELIGIBLE CHILDREN**

An LEA must provide equitable services under a covered ESEA program to the extent consistent with the number of eligible children in areas served by the LEA who are enrolled in private elementary and secondary schools. (ESEA section 8501(a)(1)).

#### **C-1. Who is eligible to participate in equitable services?**

Children and educators in nonprofit private elementary and secondary schools in the LEA's service area are generally eligible to receive equitable services. ESEA sections 8101(19) and (45) define "elementary school" and "secondary school" to mean a "nonprofit institutional day or residential school" that provides elementary or secondary education through grade 12, respectively, as determined under State law. Some covered ESEA programs restrict eligibility or participation to a particular group of children (e.g., ELs under Title III, Part A), in which case the eligibility or participation of private school children is likewise restricted.

#### **C-2. Are preschool children enrolled in a private school eligible to receive equitable services under covered ESEA programs?**

ESEA section 8501 requires an LEA to provide equitable services to eligible elementary school children. As a result, unless State law considers preschool to be part of elementary education, an LEA is not required to provide equitable services to preschool children in a private school and preschool children do not generate funds for such services. At the same time, if preschool children attend a private elementary school that is participating in a covered ESEA program, the preschool children and their educators may receive ESEA services based on timely and meaningful consultation between the LEA and private school officials, taking into consideration the needs of the preschool children and other eligible children in the private school and the amount of funds available to provide services.

#### **C-3. Are parents or families of private school children eligible to receive equitable services?**

ESEA section 8501 does not require an LEA to provide equitable services to parents or families of eligible children. However, to the extent a covered ESEA program allows for the participation of parents or families, the LEA may provide services to parents and families of private school children based on timely and meaningful consultation between the LEA and private school officials, taking into consideration the needs of the parents and families and the eligible children and educators in the private school and the amount of funds available to provide services. To the extent that an LEA serves eligible children who are English learners and/or children whose parents or families have limited English proficiency, the LEA must comply with requirements of Title VI of the Civil Rights Act of 1964 to take reasonable steps to provide meaningful language access to its programs and activities. *See generally Lau v. Nichols*, 414 U.S. 563 (1974); 34 C.F.R. Part 100; *see also* Dear Colleague Letter: English Learner Students and Limited English Proficient Parents, U.S. Department of Education, U.S. Department of Justice (2015) (<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>). To the extent

that an LEA serves eligible children who have disabilities or whose parents or family members have disabilities, the LEA must comply with Section 504 of the Rehabilitation Act of 1973 (Section 504), including by taking appropriate steps to ensure that communications with individuals with disabilities are as effective as communications with others.

**C-4. Is the residency of a private school child a factor that must be considered under Title VIII when determining whether the child is eligible to receive benefits from covered ESEA programs?**

No. Unlike Title I, Part A of the ESEA, in which a private school child must reside in a participating Title I public school attendance area to be eligible for equitable services, there are no residency requirements for ESEA programs covered under Title VIII. Rather, under Title VIII, an LEA must provide equitable services based on the number and educational needs of children who are enrolled in private schools within the geographical area served by the LEA that want their eligible children and educators to participate, even if some of the children enrolled in the private schools reside in other districts or States. (ESEA section 8501(a)(1), (4)(A)). A child's residency within the LEA is not a factor. However, as noted in C-1, some covered ESEA programs restrict eligibility to a particular group of students (e.g., ELs under Title III, Part A), in which case the eligibility of private school children is likewise restricted.

Likewise, the immigration or citizenship status of a private school child is not a factor. For example, foreign or international children enrolled in a private school may be served like any other student, regardless of whether they are citizens.

**C-5. Are children and educators at private for-profit schools eligible to receive equitable services under covered ESEA programs?**

No. ESEA section 8501(a) requires an LEA to provide equitable services to eligible children and educators in "private elementary and secondary schools." As noted in C-1, ESEA sections 8101(19) and (45) define "elementary school" and "secondary school" to mean a "nonprofit institutional day or residential school" that provides elementary or secondary education, respectively. Per 34 C.F.R. § 77.1, "nonprofit" is defined as an agency, organization, or institution that is owned and operated by one or more corporations or associations whose net earnings do not benefit, and cannot lawfully benefit, any private shareholder or entity. Children and educators at for-profit private schools are therefore not eligible to receive equitable services.

**C-6. Are children who are schooled at home eligible to receive equitable services under covered ESEA programs?**

Whether home-schooled children and educators are eligible to receive equitable services under covered ESEA programs depends on whether home schools are considered private schools under State law. If home schools are considered private schools, the home-schooled children and educators (including parents) are eligible to receive benefits and services provided to private school children under a covered ESEA program.

**C-7. Are children with disabilities who are placed in private schools by a public agency as a means of providing them a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) or under Section 504 eligible to receive equitable services under**

## **the ESEA?**

Yes. Children with disabilities who are placed in a private school by a public agency as a means of providing FAPE<sup>11</sup> under the IDEA (“publicly placed children with disabilities”) or Section 504 are eligible to receive ESEA equitable services from the equitable share of funding on the same basis as other children enrolled in a private school. The LEA in which the private school is located is responsible for providing equitable services for covered ESEA programs.

### **C-8. How does an LEA determine if services are equitable?**

Services that an LEA provides to eligible private school children and educators participating in a covered ESEA program must be equitable in comparison to the services and other benefits provided to public school children and educators. (ESEA section 8501(a)(1); 34 C.F.R. § 299.7(b)(1)). Participation of private school children generally is considered to be equitable if the LEA: (1) addresses and assesses the specific needs and educational progress of public and private school children and educators on a comparable basis; (2) determines the number of private school children and educators to be served on an equitable basis; (3) spends an equal amount of funds, on a per-pupil basis, to serve similar public and private school children and educators, taking into account the number and educational needs of those children and educators; and (4) provides private school children and educators with an opportunity to participate that is equitable to public school children and educators. (34 C.F.R. § 299.7(b)(2)). Generally, if the needs of private school children and educators are different from the needs of public school children and educators, an LEA must provide different services and other benefits. (34 C.F.R. § 299.7(c)). See C-27, K-4, and K-9.

### **C-9. How does the principle of supplement not supplant apply to equitable services under Title VIII?**

With respect to equitable services, 34 C.F.R. § 299.8(a) requires that an LEA use funds under a covered ESEA program to provide equitable services that supplement, and in no case supplant, the services that would, in the absence of services provided under that program, be available to participating private school children and educators. An LEA must use funds under a covered ESEA program to meet the identified educational needs of eligible private school children and educators and not to meet the needs of the private school or the general needs of children and educators in the private school. (34 C.F.R. § 299.8(b)). In some instances, however, a program or activity that primarily benefits a private school’s children or educators (because it addresses specific, rather than general, needs of children or educators being served) will also incidentally benefit the school.

### **C-10. How does an LEA determine what services to provide to eligible private school children and educators?**

Through the timely and meaningful consultation process with private school officials, an LEA determines which services to provide that meet the specific educational needs of the participating private school

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<sup>11</sup> Publicly placed children with disabilities remain entitled to FAPE under the IDEA and must receive the special education and related services, supplementary aids and services, and program modifications or supports for school personnel that are determined to be necessary by the child’s individualized education program team based on the child’s individual needs, in accordance with IDEA Part B requirements. (34 C.F.R. §§ 300.145-300.147). Similarly, publicly placed students with disabilities remain entitled to FAPE under Section 504 and must receive the educational services and related aids and services determined to be necessary by the student’s Section 504 team in accordance with Section 504 requirements, based on the student’s individual needs. (34 C.F.R. §§ 104.33-104.36).

children and educators and that show reasonable promise of effectiveness. (ESEA section 8501(c)(1)(B)). The services may be different from those provided to public school children and educators but must be allowable under, and allocable to, the particular covered ESEA program, and reasonable and necessary as required by the Uniform Guidance in 2 C.F.R. Part 200. In addition, all services and benefits provided must be secular, neutral, and nonideological. (ESEA section 8501(a)(2)).

In providing services, LEAs must ensure that equipment and supplies placed in a private school (1) are used only for proper purposes of the covered ESEA program and (2) can be removed from the private school without remodeling the private school facility. (34 C.F.R. § 299.9(c)).

**C-11. When must services for eligible private school children and educators start?**

Services under a covered ESEA program for eligible private school children and educators must be equitable and provided in a timely manner. (ESEA section 8501(a)(3)(A)). Therefore, services for eligible private school children and educators should start at the same time as the services for public school participants, meaning at or near the beginning of each school year, or as otherwise agreed upon in consultation.

**C-12. Where may equitable services take place?**

Equitable services for eligible private school children and educators may be provided at various locations, including the private school, community-based locations, or public schools. The ESEA requires LEA officials to consult with private school officials before any decision is made that affects the opportunities of eligible private school children and educators to participate in equitable services, such as the location of those services. (ESEA section 8501(c)(1)(C)). If appropriate space is available, services should be in the least disruptive and least expensive location, which is most times the private school that the participating children or educators attend.

**C-13. Are private school officials required to make space available for equitable services?**

No. If space is not available, or if the private school official chooses not to make their facilities available, an LEA must provide services in another location.

**C-14. If eligible private school children need transportation from the private school to another site in order to be served by the program, who is responsible for providing this transportation?**

If eligible private school children need to be transported from their private school to another site, the LEA, as the provider of equitable services, is responsible for providing that transportation. (See ESEA section 8501(a)(1)). It is not the responsibility of the private school or the participants' parents to provide the necessary transportation. The cost of such transportation, which must be reasonable and necessary to provide services, is an administrative cost and is therefore among the administrative costs taken off the top of the LEA's total allocation. Thus, it is often beneficial for LEAs and private school officials to work together to facilitate the provision of services at the private school site in order to reduce administrative costs and time away from the children's general course of instruction at the private school.

**C-15. May an LEA use Federal funds to purchase textbooks for eligible private school children's use in their regular classroom?**

In general, Federal funds may not be used to purchase general education textbooks for use by eligible private school children in their regular classroom because materials, programs, and benefits purchased

with Federal funds must be supplemental and may not supplant what the private school would otherwise provide in the absence of Federal funds. (34 C.F.R. § 299.8)

**C-16. Must an LEA maintain control of program funds?**

Yes. An LEA must always maintain control of program funds as well as title to all materials, equipment, and property purchased with Federal funds. (ESEA section 8501(d)(1)). For programs for which an SEA must provide equitable services with State-level program funds (i.e., Title II, Part A and Title IV, Part A), the SEA must maintain control of funds in a similar manner.

**C-17. May private school officials order or purchase materials and supplies needed for a covered ESEA program and be reimbursed by an LEA?**

No. Private school officials have no authority to obligate or receive ESEA program funds. (See C-16). Thus, in general, no ESEA program funds may be paid to a private school, even as reimbursement.

**C-18. May an LEA pay for out-of-State professional development for private school educators?**

There is no Federal prohibition on paying for out-of-State professional development for private school educators. However, an LEA must ensure that costs associated with the professional development, whether within or outside of the State, are reasonable and necessary for the provision of equitable services. (2 C.F.R. §§ 200.403(a) and 200.404).

For example, if comparable professional development is available locally at a lower cost than the requested out-of-State professional development, the LEA may determine that the higher-cost, out-of-State professional development is not a reasonable expenditure. In this case, the LEA could either pay for a reasonable amount of the costs associated with the out-of-State professional development or provide comparable services within the State.

**C-19. May an LEA pay fees, hotel, travel, and meal expenses for private school educators to attend a conference?**

Yes. Direct costs for items such as stipends or subsistence allowances, travel allowances, and registration fees paid to (e.g., through reimbursement to individual private school educators) or on behalf of participants or trainees in connection with conferences or training projects are “participant support costs” (2 C.F.R. § 200.1). An LEA is not required to obtain prior approval of participant support costs of \$5,000 or less per participant event, consistent with the Department’s December 8, 2022, letter to Chief State School Officers, available at <https://oese.ed.gov/files/2022/12/oese-pac-psc-prior-approval-dear-colleague-letter-to-post.pdf>. A State often requires local government agencies, including LEAs, to use the State’s written travel and per diem policies. If an LEA is required to use its State’s written travel and per diem policy, the LEA may require private school educators who receive equitable services with Federal funds to follow the same travel and per diem policies that apply to the LEA’s employees, as long as doing so does not prohibit private school educators from participating in otherwise reasonable and allowable activities that meet the identified needs of private school educators. For example, if a professional development activity is identified that best meets the needs of an educator, is an allowable activity under the statute, and is available at reasonable cost, the request may not be denied simply based on the location of the activity (see C-18 and C-27). If the State does not require use of a particular travel or per diem policy, the LEA should pay travel expenses of private school staff based on its own district policy.



**C-20. May ESEA funds be used to pay stipends to private school staff who participate in services and activities funded by covered ESEA programs?**

Yes. ESEA funds may be used to pay for stipends for private school staff, if reasonable and necessary (e.g., time outside regular employment hours). An LEA must pay such stipends directly to the private school staff and not to the private school. (ESEA section 8501(d)(1)).

**C-21. What entity completes purchase orders and other procurement activities to provide equitable services to eligible private school children and educators?**

Under ESEA section 8501(d)(1), a public agency must control funds used to provide equitable services, and the public agency must retain title to materials, equipment, and property purchased with those funds. Moreover, the public agency must administer the funds and services. Accordingly, an LEA must engage in the procurement of equipment, supplies, and services needed to provide equitable services, including preparation and submission of any purchase orders. Private school officials have no authority to obligate ESEA funds. Therefore, LEAs may not request or require private school officials to submit purchase orders.

**C-22. May an LEA use a third-party contractor to provide equitable services?**

Yes. Following consultation, an LEA may provide services directly or indirectly through contracts with individuals and public and private agencies, organizations, and institutions so long as those entities are independent of the private school in the provision of those services. (ESEA section 8501(d)(2)). If an LEA contracts with a third-party provider to provide services and benefits to eligible private school children and educators, the LEA remains responsible for ensuring that private school children and educators receive equitable services and that the requirements of the statute and regulations are met.

**C-23. May an LEA or a third-party contractor employ a private school teacher to provide services under a covered ESEA program to eligible private school children and educators?**

Yes, provided certain conditions are met. An LEA or third-party contractor may hire a private school teacher to provide services to eligible private school children and educators only if the teacher is independent of the private school in the provision of services. The private school teacher must be employed by the LEA or third-party contractor outside of the time the teacher is employed by the private school, and the private school teacher must be under the direct supervision of the LEA or third-party contractor with respect to all activities provided under a covered ESEA program. (ESEA section 8501(d)(2)).

**C-24. May an LEA contract with a religious organization to provide equitable services?**

Yes. An LEA may enter into a contract with a religious organization to provide equitable services on the same basis as any other private entity. Although ESEA section 8501(d)(2)(B) currently indicates that a third-party contractor must be “independent...of any religious organization,” the Department has determined that the specific requirement is unconstitutional in light of the U.S. Supreme Court’s decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), and has so informed Congress in a letter dated March 11, 2019, available at <https://www2.ed.gov/policy/elsec/guid/secletter/190311.html>. Accordingly, the Department will no longer enforce, apply, or administer the specific requirement in ESEA section 8501(d)(2)(B) that an equitable services provider be “independent...of any religious organization.”

The Department will, however, continue to enforce all other provisions of ESEA section 8501, including the requirement that the contractor is independent of the private school for which it is providing services and that the educational services and other benefits being provided by the contractor are “secular, neutral, and nonideological.” (ESEA sections 8501(a)(2) and (d)(2)(B)). In addition, as with all procurements using ESEA funds, an LEA must continue to follow the procurement requirements under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance) at 2 C.F.R. §§ 200.317-200.326 and 3474.15. Furthermore, the control of funds and title to materials, equipment, and property purchased with such funds must be with the LEA and the LEA must administer such funds, materials, equipment, and property. (ESEA section 8501(d)(1)).

**C-25. What does it mean for a contractor to be independent of a private school in the provision of equitable services?**

In general, whether a contractor is independent of a private school in the provision of equitable services depends on the extent to which the contractor has administrative or fiscal direction and control over the private school. For example, an administrative body that oversees a group of affiliated private schools and has control over the schools’ curriculum and hiring policies would not be independent of a private school subject to its authority. As result, an LEA would be prohibited from entering into a contract with the administrative body for the provision of equitable services to its affiliated schools. In contrast, a membership organization with no authority over the operations of its member schools likely would be considered independent of such schools.

**C-26. May an LEA provide equitable services for eligible private school children and educators beyond the school day and during the summer?**

Yes. In most cases, an LEA has the authority to provide services both during and beyond the school day or year. To the extent that private school officials have requested some services in the summer or beyond the school day in order to better meet the needs of children and educators, an LEA should consider accommodating such a request.

**C-27. Must eligible private school children and educators participate in the same programs that an LEA provides for public school children and educators?**

Generally, no. Within the parameters of each covered ESEA program, the needs of eligible private school children and educators and the amount of funding available for services determine the services and programs that an LEA will offer. To the extent that the services an LEA is providing to public school children and educators meet the needs of eligible private school children and educators, an LEA could decide to provide the same services after consulting with private school officials. Generally, if the needs of eligible private school children and educators are different from those of their public school peers, the LEA must provide different services and other benefits. (34 C.F.R. § 299.7(c)).

**C-28. May an LEA establish a blanket rule that precludes eligible private school children or educators from receiving certain services authorized by the ESEA?**

No. Establishing a blanket rule prohibiting certain services and programs prior to consultation could preclude meaningful consultation, whereby the LEA and private school officials would discuss how best to meet the needs of eligible private school children and educators. However, in carrying out its responsibility to provide equitable services to eligible private school children and educators, an LEA may establish policies that, for reasons of effectiveness, quality, cost, or other relevant factors, favor certain

kinds of services and programs that the particular program statute authorizes and that meet the needs of eligible private school children and educators.

#### **C-29. May ESEA funds be used for repairs, minor remodeling, or construction at a private school?**

No. 34 C.F.R. § 299.9(e) provides that “[n]o funds may be used for repairs, minor remodeling, or construction of private school facilities.” Equipment and supplies may be placed in a private school provided that these supplies are used only for allowable purposes of the program to which they are charged and can be removed from the private school without remodeling the private school facility. (34 C.F.R. § 299.9(c)).

### **D. STATE OMBUDSMAN**

#### **OMBUDSMAN REQUIREMENT**

To help ensure equitable services and other benefits for eligible private school children and educators, an SEA must designate an ombudsman to monitor and enforce ESEA equitable services requirements under Title VIII. (ESEA section 8501(a)(3)(B)). The ombudsman must also monitor and enforce the equitable services requirements under Title I, Part A. (ESEA section 1117(a)(3)(B)).

#### **D-1. What are the roles and responsibilities of an ombudsman?**

An ombudsman serves as an SEA’s primary point of contact for addressing questions and concerns from private school officials and LEAs regarding the provision of ESEA equitable services. In addition, ESEA section 8501(a)(3)(B) requires the ombudsman to monitor and enforce the equitable services requirements under Title VIII and, thus, the ombudsman should have a significant role in the State’s monitoring process. Furthermore, it is important that the ombudsman become familiar with information that the Department provides concerning equitable services. The following are examples of activities the ombudsman could undertake in fulfilling the roles and responsibilities of the position:

- Serve as a general resource regarding equitable services requirements for both LEAs and private school officials, which may include conducting initial outreach to define the contours of the ombudsman’s responsibilities.
- Develop, in partnership with other relevant SEA staff, monitoring protocols applicable to the provision of equitable services and participate in a sample of any monitoring activity.
- Provide technical assistance regarding equitable services requirements for SEA staff administering a covered ESEA program, LEA staff, and private school officials.
- Establish a process for receiving documentation of affirmation of consultation consistent with the consultation requirement that such documentation be transmitted to the SEA. (ESEA section 8501(c)(5)).
- Participate in the State’s nonpublic schools working group as applicable. (See A-21).

#### **D-2. What specific monitoring and enforcement responsibilities does an ombudsman have?**

The primary responsibilities of an ombudsman are to monitor and enforce the ESEA equitable services requirements in coordination with other SEA staff. (ESEA section 8501(a)(3)(B)). Accordingly, an ombudsman should work with SEA staff administering ESEA equitable services to develop monitoring protocols applicable to the provision of equitable services under each program. The ombudsman should take an active role in the monitoring process, particularly with respect to the resolution of any findings regarding equitable services requirements under Titles I and VIII. The ombudsman should also play a role

in responding to and resolving any complaints regarding equitable services that the SEA receives under its ESEA complaint procedures, which may include serving as the primary point of contact for complaints.

### **D-3. Who may serve as an ombudsman?**

An SEA has discretion in determining who to designate as an ombudsman. In determining the relevant qualifications, an SEA should consult with appropriate private school officials. Within most States there is a statewide private school coalition with representatives of the various private schools within the State. An SEA might consider engaging such private school coalition. An SEA should consider the following factors in determining who will serve as an ombudsman:

- **Knowledge:** Does the individual have sufficient experience and demonstrate thorough knowledge and understanding regarding the equitable services provisions, including the statute, regulations, and guidance, necessary to implement, monitor, and enforce the equitable services requirements under both Titles I and VIII? In addition, does the individual have sufficient knowledge and understanding of each of the covered programs?
- **Capacity:** Will the ombudsman work alone or in collaboration with other Federal program directors in the State? Does the individual have experience with integrating input from other technical experts and program specialists, including those at the Department, and communicating it to the appropriate audiences? How many private schools in the State are participating in ESEA equitable services?
- **Impartiality:** Will the individual be able to carry out the ombudsman duties, including monitoring, enforcement, and resolving complaints, in a fair and impartial manner? Will the individual be able to provide guidance to LEAs and private school officials to facilitate the goal of reaching agreement when agreement cannot be achieved independently through consultation?

### **D-4. What funds are available to support an ombudsman?**

An SEA may support its ombudsman using consolidated State administrative funds under ESEA section 8201. If an SEA does not consolidate State administrative funds, it may support its ombudsman using funds reserved for State administration under Title I and the covered ESEA programs. Under these circumstances, however, the SEA must ensure that the ombudsman's salary is charged to each program based on the relative benefit received.

## **E. COMPLAINTS, STATE PROVISION OF EQUITABLE SERVICES, AND BYPASS**

By engaging in timely and meaningful consultation and developing positive relationships with private school officials, an LEA can facilitate creation of a cooperative environment and minimize problems and complaints. If private school officials believe that timely and meaningful consultation has not occurred, the LEA has not given due consideration to their views, or the LEA has not made a decision that treats the private students equitably, they should first discuss this matter with the LEA official responsible for coordinating the consultation between the two entities. Private school officials may also contact the LEA superintendent or program director of the covered ESEA program to ask for assistance. If the response at the local level is not satisfactory, the private school official may contact the SEA official responsible for ensuring that covered ESEA programs are implemented at the local level. Often, these steps will resolve the matter. In the event the problem is not resolved, private school officials have the right to file a formal written complaint with the SEA per ESEA sections 8501(c)(6)(A) and 8503(a).

## COMPLAINTS

A private school official has the right to file a complaint with the SEA when the official deems that an LEA has not engaged in consultation that was meaningful and timely, has not given due consideration to the views of the private school official, or has not made a decision that treats the private school students equitably. (ESEA section 8501(c)(6)(A)).

### **E-1. What information must a formal written complaint to an SEA include?**

A formal written complaint must include:

- A statement that an LEA has violated a statutory or regulatory requirement applicable to the provision of equitable services under a covered ESEA program;
- The facts on which the statement is based and the specific statutory or regulatory requirement(s) allegedly violated; and
- The signature of the complainant. (34 C.F.R. § 299.13).

### **E-2. What option is available to private school officials if an SEA does not answer their complaint in a timely manner?**

ESEA section 8503(a) requires an SEA to resolve a complaint in writing within 45 days. If an SEA does not resolve the complaint within 45 days, private school officials may appeal to the Department. An appeal to the Department must be filed no later than 30 days following the SEA's 45-day deadline. (ESEA section 8503(b)).

### **E-3. May private school officials or another interested party appeal an SEA's resolution of a complaint?**

Any interested party to a complaint (e.g., private school officials who filed the complaint or the LEA that is the subject of the complaint) may appeal an SEA's resolution to the Secretary. The appeal must be filed no later than 30 days following the SEA's resolution of the complaint. The appeal must be accompanied by a copy of the SEA's resolution and a statement of the reasons supporting the appeal. The Department investigates and resolves the appeal no later than 90 days after receipt of the appeal. (ESEA section 8503(b)).

### **E-4. May an SEA require a private school official to file a formal complaint with the LEA and await the LEA's resolution before filing a complaint with the SEA?**

As part of its general ESEA complaint procedures, an SEA may require an intermediate step (e.g., first filing a complaint with the LEA) prior to the SEA addressing the complaint. With respect to an equitable services complaint, however, the SEA's procedures must result in the SEA's final resolution of the complaint within 45 days of the private school official's initial filing of the complaint. (ESEA section 8503(a)).

### **E-5. Under what circumstances is an SEA required to provide equitable services directly or through a third-party provider?**

An SEA must provide equitable services for covered ESEA programs directly or through contracts with public or private agencies, organizations, and institutions if the appropriate private school officials have: (1) requested that the SEA provide such services directly and (2) demonstrated, in accordance with the

SEA's procedures for filing a complaint, that an LEA has not met the requirements to provide equitable services. (ESEA section 8501(c)(6)(C)). In evaluating such a request, an SEA might include procedures that require private school officials to demonstrate that an LEA has substantially failed or is unwilling to provide equitable services before the SEA intervenes to provide equitable services directly or through a third-party provider, consistent with the standards the Secretary uses for a bypass under the equitable services requirements in Title VIII. (ESEA section 8504; see E-8). An SEA should have transparent procedures for evaluating such requests and may also make available a standard template for requests.

**E-6. If an SEA determines that it must provide equitable services in lieu of an LEA in accordance with ESEA section 8501(c)(6)(C), what funds does it use to provide the services?**

An SEA may retain from the applicable LEA's program allocation the funds allocated for equitable services for eligible children and educators in the involved private school(s) and, as reasonable and necessary, funds to administer these services.

**E-7. What is a "bypass"?**

A "bypass" is a means by which the Department arranges for the provision of equitable services to private school children and educators through a third-party provider.

**E-8. Under what circumstances may the Secretary determine that a bypass is appropriate?**

If an LEA is prohibited by State law from providing equitable services under a covered ESEA program to eligible private school children and educators, or if the Secretary determines that an LEA has substantially failed or is unwilling to provide equitable services, the Secretary will waive the LEA's responsibility to provide equitable services and arrange for the provision of services by another entity. (ESEA section 8502(a)(1)-(2)). In making the determination to bypass an LEA, the Secretary will consider one or more factors, including the quality, size, scope, and location of the program and the opportunity of eligible private school children and educators to participate in the program. (ESEA section 8502(b)).

**E-9. How do private school officials request a bypass?**

With respect to allegations that an LEA has not met the requirements of ESEA section 8501, private school officials must first file a complaint with the SEA and give the SEA the opportunity to resolve the complaint, including determining whether it should provide services directly. (ESEA section 8501(c)(6)(A)-(C)). If those officials disagree with the SEA's resolution, they may request that the Department bypass the LEA through an appeal of the SEA's determination. (ESEA section 8503(b)).

With respect to allegations that an LEA is prohibited by law from providing equitable services, private school officials may request a bypass from the Department without first going through the SEA. (See ESEA section 8502).

**E-10. How is a bypass implemented?**

To implement a bypass, the Department generally enters into a contract with a third party and deducts funds from the SEA's allocation for the covered ESEA program at issue. The SEA commensurately reduces the bypassed LEA's allocation for the covered ESEA program.

## **F. OTHER ESEA REQUIREMENTS RELATED TO PRIVATE SCHOOLS**

**F-1. If eligible private school children or educators receive equitable services under a covered ESEA program, is the private school subject to Federal requirements under the applicable program?**

No. The equitable services requirements apply to the LEA providing the services. In fact, the Department may not permit, allow, encourage, or authorize any Federal control over any aspect of any private, religious, or home school. (ESEA section 8506(c)).

**F-2. Does receiving equitable services under a covered ESEA program make a private school a “recipient of Federal financial assistance”?**

No. A private school is not a recipient of Federal financial assistance by virtue of its children or educators receiving equitable services under a covered ESEA program.

Typically, an LEA or other eligible entity is the recipient of Federal financial assistance under a covered ESEA program and is responsible for implementing the respective program in accordance with applicable laws and regulations. A public agency must control and administer the funds and keep title to materials, equipment, and property purchased with the funds; in other words, no funds may go directly to a private school. (ESEA section 8501(d)(1)). As a result, certain Federal requirements that apply to a recipient of Federal financial assistance are not directly applicable to a private school whose children or educators receive equitable services under the program, unless the school receives Federal financial assistance for other purposes.

**F-3. Are private schools whose eligible children or educators receive equitable services subject to the military recruiter requirements in ESEA section 8528?**

No. ESEA section 8528 requires an LEA that receives financial assistance under the ESEA—i.e., is a grantee or subgrantee—to provide, upon a request made by a military recruiter, access to the name, address, and telephone listing of each secondary school child unless the parent of such child opts the child out of the process. The provision of equitable services by an LEA to eligible private secondary school children or educators does not constitute the private school’s receiving financial assistance under the ESEA. Thus, private secondary schools whose children or educators receive equitable services but that do not receive funds under the ESEA are not subject to the military recruiter requirements.

Private secondary schools that do receive funds under the ESEA are subject to the military recruiter requirements. Private schools that maintain a religious objection to service in the armed forces that is verifiable through the corporate or other organizational documents or materials of that school, however, are not required to comply with this requirement.

**F-4. Are private schools whose eligible children or educators receive equitable services subject to the Family Educational Rights and Privacy Act (FERPA)?**

No. Private schools whose eligible children or educators receive equitable services are not subject to FERPA unless they otherwise receive Federal funds from a program administered by the Department.

The requirements of FERPA apply to educational agencies and institutions that receive Federal funds from programs administered by the Department. A private school is not subject to FERPA just because its eligible children and educators receive equitable services from an LEA or SEA under a covered ESEA

program unless the school otherwise also receives Federal funds from programs administered by the Department. (34 C.F.R. § 99.1(b)). Most private schools at the elementary and secondary school levels do not receive funding from programs administered by the Department and, thus, are not subject to FERPA's requirements.

**F-5. Does a private school child's participation in a Federal or State private school choice program affect that private school child's eligibility for ESEA equitable services?**

No. Participation in a Federal or State private school choice program does not affect a private school child's eligibility for ESEA equitable services. Although most children enrolled in private schools pay their tuition with private funds, there are some instances in which public funds may support a child's tuition (e.g., through a Federal or State scholarship or scholarship-type program or a State education savings account (ESA)). Regardless of the source of funds paying a private school child's tuition, the child is eligible for equitable services under the ESEA if the child meets the eligibility requirements of the respective program.



## PROGRAM SPECIFIC REQUIREMENTS

### NOTE

General requirements applicable to all covered ESEA programs are covered in Sections A through F of this guidance, including consideration of administrative costs (see B-8); eligibility (see C-1 through C-7); the requirements that all services be supplemental in nature and used to meet the educational needs of participating children and educators and not for the needs of the private school or the general needs of private school children and educators (see C-9), reasonable and necessary (see C-10), and secular, neutral, and non-ideological (see C-10); and the requirement that a public agency must maintain administrative supervision and control of Federal funds available to provide equitable services (see C-16). Section A addresses general requirements related to consultation, including the requirements that an LEA must engage in timely and meaningful consultation with appropriate private school officials before the LEA makes any decision that impacts the participation of eligible private school children and educators in a covered ESEA program (see A-9) and that, after such consultation, the LEA makes the final decisions with respect to the services it will provide to meet the needs of eligible private school children and educators (see introduction to Section A). These requirements generally are not repeated in the discussion of program-specific requirements that follows.

## G. TITLE I, PART C – EDUCATION OF MIGRATORY CHILDREN

### G-1. What is the purpose of Title I, Part C?

The purpose of Title I, Part C—also known as the Migrant Education Program (MEP)—is, among other things, to assist States in supporting high-quality and comprehensive educational programs and services that address the unique educational needs of migratory children. The MEP helps migratory children overcome educational disruption, cultural and language barriers, social isolation, various health-related problems, and other factors that inhibit the ability of such children to succeed in school. (ESEA section 1301).

ESEA section 1309(3) defines a “migratory child” as a child or youth who made a qualifying move in the preceding 36 months as a migratory agricultural worker or a migratory fisher, or with, or to join, a parent or spouse who is a migratory agricultural worker or a migratory fisher.

For additional information on the MEP program, including additional program guidance and other resources, visit <https://oese.ed.gov/offices/office-of-migrant-education/migrant-education-program/>.

### G-2. Who is responsible for implementing the equitable services requirements, including the requirement for timely and meaningful consultation with private school officials?

The local operating agency (LOA) that operates a local MEP project is responsible for implementing the equitable services requirements. An LOA may be an LEA to which an SEA makes a Title I, Part C subgrant; a public or private agency with which the SEA or the Secretary makes an arrangement to carry out a project under Title I, Part C; or an SEA, if the SEA operates the State's migrant education program or projects directly. (ESEA section 1309(1)).

An LOA must consult with officials of those private schools in the entity's service area that enroll currently eligible migratory children (i.e., children the State has determined meet the definition of “migratory child” and for whom the State has approved a MEP Certificate of Eligibility) (ESEA section

8501(c)(1)). The LOA is expected to maintain current school enrollment information for the eligible migratory children in its service area. The Department recommends that SEAs and LOAs engage with State-level private school working groups or associations to increase awareness among private school officials regarding migratory children and establish processes to ensure the identification and referral of MEP eligible children.

**G-3. If eligible migratory children reside in a geographical area served by one LOA but their private school is located in a geographical area served by another agency, which agency is responsible for serving them?**

The LOA that serves the geographical area where the private school is located is responsible for serving eligible migratory children. (ESEA section 8501(a)(1)).

**G-4. Which children who attend private schools are eligible to receive MEP services?**

Children are eligible to receive MEP services if they: (1) meet the statutory and regulatory definitions of a migratory child and (2) the State has properly recorded its determination that the child is a “migratory child” on the national Certificate of Eligibility (COE).<sup>12</sup>

In determining how to provide MEP services, the agency that operates the local MEP project must consider on an equitable basis (i.e., on the same basis as migratory children enrolled in public schools) children who: (1) meet the priority for services criteria in ESEA section 1304(d) and (2) have unique educational needs identified through the State’s comprehensive needs assessment and service delivery plan.

**G-5. If private school officials do not wish to coordinate with the MEP to provide their enrolled eligible migratory children with MEP-funded services, is the SEA or LOA still required to serve these children?**

No. If private school officials do not wish to coordinate with the MEP in order to provide MEP-funded services to their enrolled eligible migratory children, neither the SEA nor the LOA is required to work with the private school officials to serve these children. Depending on the needs of the eligible migratory children and the capacity of the SEA or LOA, and after consulting with the parents/guardians of the children, the SEA or LOA may provide services in order to address the needs of those children through methods that do not infringe upon, or require the involvement of, the private school (e.g., before or after school programs, summer programs, advocacy).

**G-6. Must an SEA identify the needs of eligible migratory children enrolled in private schools, as part of its statewide comprehensive needs assessment?**

Yes. In its statewide comprehensive needs assessment, an SEA must identify the needs of all migratory children residing in the State, including those eligible migratory children enrolled in private schools. (ESEA section 1306(a)). When private school officials and LOAs engage in consultation, such consultation must address how the needs of eligible migratory children enrolled in private schools will be identified. (ESEA section 8501(c)(1)(A)).

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<sup>12</sup> See ESEA section 1309(3), 34 C.F.R. §§ 200.81(g) and 200.89(c), and Chapter II of the Non-Regulatory Guidance for Title I, Part C, Education of Migratory Children available at <https://oese.ed.gov/files/2021/11/MEP-Non-Regulatory-Guidance-March-2017-1.docx>.

#### **G-7. What activities are allowable under Title I, Part C?**

An LOA may use program funds to identify eligible migratory children and provide them with supplemental services and other forms of support (in accordance with the State's comprehensive needs assessment and service delivery plan), such as: academic instruction; transfer of student records within and across States; counseling and career education services; health, nutrition, and social services; professional development for educators of migratory children; parental involvement activities; and advocacy and outreach to migratory children and their families. (ESEA section 1306(b)).

#### **G-8. What happens if, after offering to provide equitable services to eligible migratory children in private schools, participation is low or the children participate only in some of the services or the amount of funds available for services is small?**

If the private school children's participation is low or they choose to participate only in some of the services the LOA offers, the LOA should examine why this is so and, if appropriate, modify the project in a manner that increases participation.

As necessary, an LOA may adopt alternative methods that are cost-effective to serve small numbers, such as individual tutoring programs, professional development activities with the classroom teachers of eligible migratory children, or other strategies.

Rural LOAs may have special challenges because of small allocations, large distances between private schools, and few locations to provide services. These agencies may consider leasing rather than purchasing equipment, renting a neutral site, or using home tutoring to provide equitable services. They may also consider setting up a joint project with neighboring LOAs and submitting a combined application.

#### **G-9. How might an SEA ensure that LOAs collaborate with private school officials to provide appropriate services to migratory children enrolled in private schools?**

The SEA has the discretion to develop specific procedures to monitor and enforce these requirements. For example, an SEA might require LOAs, as part of the MEP subgrant application, to describe their processes for consulting with private school officials in providing services to eligible migratory children. The SEA might use its monitoring process to ensure that LOAs implement the processes described in their subgrant applications. The SEA may also designate its ESEA State ombudsman to carry out this responsibility (see Section D above).

#### **G-10. How does an SEA meet its responsibility for collecting and submitting electronically to the Migrant Student Information Exchange (MSIX) the minimum data elements (MDEs) applicable to a child's age and grade level for eligible migratory children enrolled in private schools?**

For migratory children who are enrolled in private schools, the SEA meets its responsibility for collecting the applicable MDEs by advising the parent of the migratory child, or the migratory child if the child is emancipated, of the necessity of requesting the child's records from the private school, and by facilitating the parent's or emancipated child's request to the private school.

The parent's or emancipated child's request may indicate that the private school provide all necessary information from the child's school records either (1) directly to the parent or emancipated child (in which case the SEA must follow up directly with the parent or child) or (2) to the SEA or a specific LOA (in

which case the SEA must follow up with the parent, emancipated child, or the private school to facilitate the submission of records to MSIX). (34 C.F.R. § 200.85(b)(1)(ii)).

## **H. TITLE II, PART A – SUPPORTING EFFECTIVE INSTRUCTION**

### **H-1. What is the purpose of Title II, Part A?**

The purpose of Title II, Part A is to assist SEAs and LEAs to:

- Increase student achievement;
- Improve quality and effectiveness of teachers, principals, and other school leaders;
- Increase the number of teachers, principals, and other school leaders who are effective in improving student academic achievement; and
- Provide low-income and minority students greater access to effective teachers, principals, and other school leaders. (ESEA section 2001).

### **H-2. Who is eligible to receive equitable services under Title II, Part A?**

Generally, only private school teachers, principals, and other school leaders (that meet the definition provided in ESEA section 8101(44)) are eligible to receive equitable services under Title II, Part A. However, other educational personnel, including paraprofessionals, may also receive equitable services consistent with specific allowable uses of Title II, Part A funds. For example, under ESEA section 2103(b)(3)(I), Title II, Part A funds may be used for training for all school personnel in addressing issues related to school conditions for student learning such as safety, peer interactions, drug and alcohol abuse and chronic absenteeism.

### **H-3. Which entities must provide equitable services under Title II, Part A?**

SEAs that reserve funds for State activities under ESEA section 2101(c) and LEAs that receive a Title II, Part A subgrant under ESEA section 2102 must provide equitable services under Title II, Part A. (ESEA section 8501(a)(1)).

### **H-4. What options are available to SEAs for using funds to provide State-level equitable services under Title II, Part A?**

Under section 8501(a)(1), an SEA is responsible for implementing equitable services for private school teachers, principals, and other school leaders to the extent that it reserves any funds under section 2101(c)(1) or (3) for State-level activities.

ESEA section 2101(c)(1) allows an SEA to reserve up to five percent of its overall Title II, Part A allocation for State-level activities (specified in ESEA section 2101(c)(4)); and section 2101(c)(3) allows an SEA to reserve an additional amount of not more than three percent of the amount otherwise reserved for LEA subgrants for State-level principal or other school leader activities. For additional information regarding State reservations under Title II, Part A, please see Part 3, p. 27, of the *Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading* available at <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiipartaguidance.pdf>.

The SEA determines the amount of Title II, Part A funds to reserve for equitable services to private school teachers, principals, and other school leaders by calculating, on a per-pupil basis, the amount available for all public and private school children in the area of the State to be served, taking into consideration the number and needs of the eligible private school children and educators to be served.

(ESEA section 8501(a)(4)(A)). State-level activities in which private school educators may participate must be determined in consultation between the SEA and appropriate private school representatives (ESEA section 8501(c)(1)), such as a State-level private school working group.

#### **H-5. How does an LEA determine the amount required for Title II, Part A equitable services to private school educators?**

The amount an LEA must reserve to provide equitable services for private school educators for Title II, Part A services is based on the LEA's *total* Title II, Part A allocation, less administrative costs (see also B-8). Please note that prior to the 2015 passage of the ESSA, the LEA was required to calculate equitable services based only on the amount the LEA spent on professional development activities. Under ESEA section 8501(b)(1)(B), Title II, Part A equitable services are calculated based on the total amount of an LEA's Title II, Part A allocation. (See B-1 for specific information on how to calculate Title VIII equitable services allocations.)

#### **H-6. What types of activities may an LEA provide to private school educators?**

An LEA may use Title II, Part A funds to provide professional development activities for educators to address the specific needs of private school children. In addition to professional development, there may be other permissible uses of Title II, Part A funds for the benefit of private school educators. For example, ESEA sections 2103(b)(3)(H), (I), (J), (K), and (L) allow training for selecting and implementing formative and classroom-based assessments, for identifying gifted and talented children, for mental health support, for supporting instructional services provided by effective school library programs, and for preventing and recognizing child sexual abuse. Additionally, section 2103(b)(3)(I) allows in-service training for school personnel related to techniques and supports necessary to facilitate student access to appropriate mental health services, and training to improve school conditions for student learning. For additional information on allowable activities under Title II, Part A, please also see Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading at <https://www2.ed.gov/policy/elsec/leg/essa/essaguidancel60477.pdf>.

However, an LEA may not use Title II, Part A funds for equitable services to reduce the class size (ESEA section 2103(b)(3)(D)) in a private school because using the funds reserved for equitable services for contracts for private school teachers and staff would be inconsistent with the requirements in ESEA section 8501(d) regarding public control of funds and the supervision and control of employees or contractors and the requirement that equitable services address specific identified needs of students and educators rather than the general needs of a private school (34 C.F.R. § 299.8(b)(1)).

#### **H-7. What considerations must inform decisions regarding the professional development that private school educators receive under Title II, Part A funded equitable services?**

An LEA must consider the following:

- Does the professional development meet the definition of “professional development?” (See H-8 and ESEA section 8101(42)).
- Is the professional development evidence-based, where applicable? (See H-8 and ESEA section 8101(21)).
- Is the professional development reasonable and necessary in order to provide Title II, Part A equitable services? (See C-10 and 2 C.F.R. § 200.403).
- Does the professional development supplement, and not supplant, professional development that would have otherwise been provided to private school teachers, principals, and other school leaders? (See C-9 and ESEA section 2301).

## **H-8. How is professional development defined?**

Under Title II, Part A, an LEA may “provide high quality, personalized professional development that is evidence-based, to the extent that the State (in consultation with LEAs in the State) has determined that evidence is reasonably available, for teachers, instructional leadership teams, principals, or other school leaders, that is focused on improving teaching and student learning and achievement.” (ESEA section 2103(b)(3)(E)). Professional development services and programs must meet the definition of “professional development” in ESEA section 8101(42), which requires that the activity is both (1) part of the strategies for providing educators with the knowledge and skills necessary to enable children to succeed in a well-rounded education and (2) “sustained (not stand-alone, 1-day, or short-term workshops), intensive, collaborative, job-embedded, data driven, and classroom focused.”

## **H-9. Do conferences meet the definition of “professional development” in ESEA section 8101(42)?**

Because many conferences are short-term or are stand-alone, they may not meet this definition as an allowable expenditure under ESEA section 2103(b)(3) without further integration into a comprehensive plan for professional development for a teacher or teachers. However, if a private school official can demonstrate, through consultation with an LEA, that attendance at a short-term conference is part of a sustained and comprehensive professional development plan for a teacher that meets these Title II, Part A requirements, including the statutory definition of professional development, then an LEA may use Title II, Part A funds for costs associated with a private school teacher’s participation in the conference. Furthermore, depending on the content and substance of the conference, participation may be allowable under other specifically defined activities in Title II, Part A, which do not need to meet the ESEA section 8101(42) definition of professional development. For example, ESEA section 2103(b)(3)(H), (I), (J), (K), and (L) allows training for selecting and implementing formative and classroom-based assessments, for identifying gifted and talented children, for mental health support, for supporting instructional services provided by effective school library programs, and for preventing and recognizing child sexual abuse.

## **H-10. How can an LEA ensure Title II, Part A funds are only used for “secular, neutral, and nonideological” conference sessions?**

A conference conducted by a religious organization often includes both secular and religious content. If an otherwise allowable professional conference is conducted by a religious organization, an LEA may pay only for a teacher’s participation in that portion of the conference program that is secular, neutral, and nonideological. In determining the costs associated with a private school teacher’s participation in the conference, an LEA would need to (1) determine the sessions of the conference that provide secular, neutral, and nonideological professional development; (2) have the teacher document participation in such program sessions in such a way that the LEA is able to determine the percentage of the teacher’s overall time spent attending those sessions; and (3) apply that percentage against the overall cost of attending the conference as a whole. All costs must be allocable to the Federal program (2 C.F.R. § 200.405). For professional development activities, whether in-person or via a virtual/online format, an LEA might require that a private school teacher provide both titles and descriptions of the sessions the teacher expects to attend, as well as some form of verification that the teacher participated in the sessions. For example, a conference runs from 8:00 a.m. to 5:00 p.m. (with an hour for lunch). If for the 8 hours of work time, the teacher spends 6 hours attending/participating in secular sessions that meet the Title II, Part A requirements above, an LEA could use Title II, Part A funds to pay 75 percent of the registration and travel costs, since the teacher has spent 75 percent of the full-day conference time attending/participating in secular activities.

**H-11. If a private school requires and annually provides, as part of its teacher contract, four days of professional development, may the LEA provide, on these same days, professional development supported by Title II, Part A funds?**

It depends. Because the supplement not supplant requirement (34 C.F.R. § 299.8(a)) applies to all Title VIII equitable services, professional development equitable services provided to private school teachers must supplement the professional development those teachers would otherwise receive from their private school. In determining whether proposed professional development under Title II, Part A is supplemental, a starting point might be whether a private school provides some level of professional development pursuant to a teacher's contract. If it does, Title II, Part A funds may not be used to meet the contractual requirements. Title II, Part A funds may supplement those requirements, however, even during required professional development days. For example, if a private school teacher's contract requires the private school to provide eight hours of professional development that may be fulfilled by teachers working collaboratively with a master teacher or subject-matter coach, Title II, Part A funds could supplement the required professional development by funding a separate activity, such as contracting an outside expert to train teachers on effective collaboration.

**H-12. May Title II, Part A funds be used to pay for an online subscription to a professional development video database?**

Title II, Part A funds may be used to purchase a subscription to an online video database to provide professional development to private school educators so long as the content is secular, neutral, and nonideological.

Title II, Part A funds may not pay for an online subscription to a professional development video database that contains content that is not fully secular, neutral, and non-ideological because, generally, there is no way to guarantee that the user is only accessing the secular content and, thus, that Title II, Part A funds are not spent on religious content. For the same reason, Title II, Part A funds may not be used to pay a pro rata portion of an online subscription to reflect the amount of material that is secular, neutral, and non-ideological because there is no way to determine in advance of payment of the subscription the extent to which users are accessing the religious versus non-religious content.

However, if an online subscription to a professional development video database has a separate subscription that only permits access to content that is secular, neutral, and non-ideological, that separate subscription would be an allowable use of Title II, Part A funds because it ensures that Federal funds are not spent on religious content.

**H-13. Must Title II, Part A professional development programs for private school educators be aligned with the State or LEA student performance goals or other State or LEA strategic plans?**

No. The ESEA does not require Title II, Part A-funded professional development for private school teachers to be aligned with State or LEA goals or strategic plans, which may be detailed in ESEA State and local plans. As noted in C-8, if the needs of eligible private school children and educators are different from the needs of public school children and educators, an LEA must provide different services and other benefits. (34 C.F.R. § 299.7(c)).

**H-14. May Title II, Part A funds be used to pay any portion of a private school educator's salary or benefits?**

No. An LEA may not use Title II, Part A funds to pay or subsidize any portion of a private school teacher's salary or benefits because subsidizing any portion of a private school teacher's or staff's salary would be inconsistent with the requirements in ESEA section 8501(d) regarding the public control of funds and the supervision and control of employees or contractors.

**H-15. May an LEA use Title II, Part A funds to reimburse a private school for the costs of professional development?**

No. An LEA must administer and retain control over the Title II, Part A funds, and services must be provided by the LEA or through a contract between the LEA and a third-party provider. (ESEA section 8501(d)). Therefore, an LEA may not reimburse or provide Title II, Part A funds directly to private schools. An LEA may pay the provider directly or reimburse an individual private school teacher or other staff for professional development that the LEA has pre-approved after timely and meaningful consultation.

**I. TITLE III, PART A – ENGLISH LANGUAGE ACQUISITION, LANGUAGE ENHANCEMENT, AND ACADEMIC ACHIEVEMENT ACT**

**I-1. What are the purposes of Title III, Part A?**

The purposes of Title III, Part A, as described in ESEA section 3102, are:

- To help ensure that ELs, including immigrant children and youth, attain English proficiency and develop high levels of academic achievement in English;
- To assist ELs, including immigrant children and youth, to achieve at high levels in academic subjects;
- To assist teachers, principals, and other school leaders in establishing, implementing, and sustaining effective language instruction educational programs;
- To assist teachers, principals, and other school leaders to develop and enhance their capacity to provide effective language instruction educational programs; and
- To promote parental, family, and community participation in language instruction educational programs for the parents, families, and communities of ELs.

**I-2. Do the parental notification requirements in ESEA section 1112(e)(3) apply to parents of ELs in private schools?**

No. The parental notification requirements in ESEA section 1112(e)(3) do not apply to parents of ELs in private schools. However, in the consultation process, an LEA is encouraged to discuss with the private school officials how parents of the private school ELs will be made aware of the Title III, Part A services and how those services will meet their children's needs.

**I-3. Who is eligible to receive Title III, Part A services?**

To be eligible for Title III, Part A services for ELs, a private school student must be enrolled in a private elementary or secondary school in the geographic area served by an LEA that receives a Title III, Part A subgrant for ELs and must meet the definition of an EL under ESEA section 8101(20).



To be eligible for Title III, Part A services for immigrant children and youth, a private school student must be enrolled in a private elementary or secondary school in the geographic area served by an LEA that receives a Title III, Part A subgrant for immigrant children and youth and must meet the definition of immigrant children and youth under ESEA section 3201(5).

Private school teachers and other educational personnel who instruct private school ELs (or, in the case of a private school in the geographic area served by an LEA that receives a Title III subgrant for immigrant children and youth, private school teachers and other educational personnel who instruct private school immigrant children and youth) may receive professional development under Title III, Part A. The extent to which private school teachers and other educational personnel would receive professional development under Title III, Part A would be determined during the consultation process.

**I-4. Must an LEA use the standardized, statewide entrance and exit procedures that it uses in public schools to identify and exit ELs in private schools?**

No. Under ESEA section 3113(b)(2), each SEA is required to establish standardized, statewide entrance and exit procedures that must be implemented in each LEA in the State. Unlike with public school students, unless required by State law, there is no requirement that private school students be identified as ELs or exited using those entrance and exit procedures. However, the LEA may use the standardized statewide entrance and exit procedures if, after timely and meaningful consultation with private school officials, it is determined to be an appropriate method for identifying and exiting eligible students in a private school.

**I-5. What are some examples of how an LEA might identify children who are eligible for Title III, Part A services in private schools that choose to participate in Title III, Part A equitable services?**

In consultation with private school officials, an LEA should establish objective criteria to determine which private school children are eligible for Title III, Part A services. For example, an LEA and private school officials may decide to identify ELs based on: (1) responses to a primary or home language other than English (PHLOTE) survey and (2) scores on an English language proficiency (ELP) screener assessment or using the same process utilized in the statewide entrance procedures (see I-4).

To facilitate the identification of ELs using the PHLOTE survey and ELP screener assessments, the private school officials may provide to the LEA the names and grade levels of the private school children who, based on parent responses to the PHLOTE survey, are potentially ELs. LEA representatives may then work with the private school officials to identify a time when LEA staff can administer the ELP screener assessment to those private school children. Alternately, the LEA may provide training to private school officials and/or teachers so that they may administer the ELP screener assessment themselves. As with all decisions regarding the provision of Title III equitable services, the LEA, after timely and meaningful consultation with private school officials, makes the final decision regarding the process for identifying ELs.

An LEA is responsible for ensuring that private school children are appropriately identified as ELs and may not require a private school to administer an ELP assessment as a condition for a private school's ELs to receive equitable services under Title III, Part A.

**I-6. May an LEA use Title III, Part A funds to pay for the ELP screener assessment for private school children?**

An LEA may use Title III, Part A funds to pay for the ELP screener assessment for private school children in cases where the use of such funds would not supplant State, local, or other Federal funds that would otherwise be used for such purposes in accordance with ESEA section 3115(g). Under ESEA section 3115(g), an LEA may not use Title III, Part A funds to pay for costs that would be covered by State, local, or other Federal funds in the absence of the Title III, Part A grant. In addition, an LEA may only use Title III, Part A funds to pay for the ELP screener assessment where the assessment is supplemental to, and does not supplant, the level of services that would, in the absence of the Title III, Part A services, be available to participating children in accordance with 34 C.F.R. § 299.8. For example, if State law requires an LEA to assess all potential ELs attending public and private schools in its jurisdiction for purposes of confirming that those children are, in fact, ELs, the use of Title III, Part A funds for an ELP screener assessment for ELs attending private schools would be prohibited by the non-supplanting requirement. An SEA or LEA that receives Title III, Part A funds must ensure that any use of these funds does not violate Title III, Part A's non-supplanting requirement or the supplement not supplant requirement in 34 C.F.R. § 299.8.

Assuming the use of Title III, Part A funds for the ELP screener assessment for private school children does not violate the supplanting prohibitions, an LEA may pay the costs of administering the ELP assessment, LEA training to private school officials on assessment administration, and analysis of private school student results from the equitable share of Title III, Part A funds for educational services and other benefits.

**I-7. May an LEA use the results of an assessment developed by a private school to identify ELs enrolled in the private school?**

Yes. An LEA may use the results of an ELP screener assessment developed by a private school to identify ELs enrolled in the private school. This assessment should be valid and reliable and should utilize objective criteria that would be comparable to an ELP screener assessment used by the State to identify public school ELs. All ELs identified must meet the definition of EL in ESEA section 8101(20). Thus, to the extent a private school has a process for identifying ELs, this process should be discussed during the timely and meaningful consultation process between the LEA and private school officials.

**I-8. Does Title III, Part A require an LEA to administer the State's annual ELP assessment for ELs in private schools?**

No. Title III, Part A does not require an LEA to administer the State's annual ELP assessment for ELs in private schools. If the LEA and private school officials, after the timely and meaningful consultation, decide to administer the State's annual ELP assessment to the private school's ELs, the cost for that assessment may be paid for from the equitable share of Title III, Part A funds in cases where the use of such funds would not supplant other Federal, State, or local funds that may be used for such purposes, and where the assessment would be supplemental to the level of services that the private school children would receive in the absence of the Title III, Part A services, as noted in I-6.

**I-9. What are some examples of the Title III, Part A services that an LEA may provide to private school ELs, their teachers, and other educational personnel?**

Some examples of the Title III, Part A services that an LEA may provide to private school ELs, their teachers, and other educational personnel include:

- Tutoring for ELs before, during, or after school hours;
- Professional development for private school teachers of ELs;
- Summer school programs to provide English language instruction for ELs;
- Administration of an ELP assessment for identification of ELs and/or for the purpose of evaluating the effectiveness of services, including the provision of test booklets, teacher training, and stipends to teachers to administer assessments (see C-20);
- Family literacy services and parent and family outreach and training activities to support the education of ELs in private schools; and
- Supplemental instructional materials and supplies.

Examples of equitable services that an LEA that receives a Title III, Part A subgrant for immigrant children and youth may provide to private school immigrant children and youth, their teachers, and other educational personnel based on timely and meaningful consultation with private school officials include:

- Tutorials, mentoring, and academic or career counseling for immigrant children and youth;
- Curricular materials, educational software, and technologies to support immigrant children and youth; and
- Instructional services designed to assist immigrant children and youth to achieve in schools in the United States, such as programs of introduction to the educational system and civics education.

For other examples of allowable activities, see ESEA section 3115.

**I-10. Must a teacher employed by an LEA to provide Title III, Part A services to ELs enrolled in a private school meet language fluency requirements?**

Yes. Like teachers serving public school ELs, a teacher who is an LEA employee providing Title III, Part A services to private school ELs must be fluent in English and any other language used for instruction, including having written and oral communication skills. (ESEA section 3116(c)).

**I-11. If an LEA contracts with a third party to provide Title III, Part A services to ELs enrolled in a private school, must a teacher who is employed by the third party meet the language fluency requirements under ESEA section 3116(c)?**

No. The Title III, Part A teacher language fluency requirement only applies to a teacher who is directly employed by an LEA. If an LEA uses a third-party contract employee to serve private school ELs, the LEA must follow State law in determining the applicable State licensure and certification requirements for contractors.

**J. TITLE IV, PART A – STUDENT SUPPORT AND ACADEMIC ENRICHMENT GRANTS**

**J-1. What is the purpose of Title IV, Part A?**

The purpose of Title IV, Part A is to improve students' academic achievement by increasing the capacity of SEAs, LEAs, and local communities to:

- Provide all students with access to a well-rounded education;
- Improve school conditions for student learning; and
- Improve the use of technology in order to improve the academic achievement and digital literacy of all students. (ESEA section 4101).

**J-2. Are Title IV, Part A State-level funds subject to the Title VIII equitable services requirements?**

Yes. Both SEAs and LEAs that receive Title IV, Part A funds have the responsibility to provide equitable services to eligible private school children and educators, consistent with the number of eligible children in areas served by such agency. (ESEA section 8501(b)(1)). Therefore, any funds reserved for State-level activities under ESEA section 4104(a)(3) are subject to the equitable services requirements. Section 4104(b) provides examples of allowable activities for State-level funds that involve supporting LEAs in their implementation of Title IV, Part A activities.

**J-3. How does an LEA that receives a subgrant of \$30,000 or greater address both the distribution requirements in Title IV, Part A (i.e., 20 percent for well-rounded education, 20 percent for safe and healthy students, and some portion for effective use of technology) and the equitable services requirement?**

Title IV, Part A requires that LEAs that receive \$30,000 or more in Title IV, Part A funds “use not less than 20 percent of funds received under this subpart” for each of section 4107 (well-rounded education) and 4108 (safe and healthy students) and “use a portion of funds received under this subpart” for section 4109 (effective use of technology). The language “funds received under this subpart” means that these distribution requirements apply to an LEA’s total allocation, including any amount spent for equitable services to private school children and teachers. There is no requirement that the portion an LEA spends for equitable services separately meet these distribution requirements.

**J-4. Must a private school have children that generate Title I, Part A funds in order to participate in Title IV, Part A?**

No. A private school is not required to have children who generate Title I, Part A funds to participate in Title IV, Part A. See B-1 for information on calculating the equitable share of funds for programs covered by Title VIII.

**J-5. What are some allowable activities for private school children and educators under Title IV, Part A?**

There are three categories of allowable activities under Title IV, Part A. Some examples of activities under each category are:

- Activities to Support Well-rounded Educational Opportunities (ESEA section 4107), such as:
  - College and career guidance and counseling programs;
  - Programs and activities that use music and the arts as tools to support student success through the promotion of constructive student engagement, problem solving, and conflict resolution; and
  - Programming and activities to improve instruction and student engagement in science, technology, engineering, and mathematics, including computer science.
- Activities to Support Safe and Healthy Students (ESEA section 4108), such as:
  - Drug and violence prevention activities and programs;
  - School-based mental health services;
  - High-quality training for school personnel, including specialized instructional support personnel, related to suicide prevention, effective and trauma-informed practices in classroom management, and crisis management and conflict resolution; and
  - Creating, maintaining, and enhancing high-quality school emergency operations plans.
- Activities to Support the Effective Use of Technology (ESEA section 4109), such as:

- Providing educators with the professional learning tools, devices, content, and resources to personalize learning to improve student academic achievement;
- Building technological capacity, which may include procuring content and ensuring content quality and purchasing devices, equipment, and software applications in order to address readiness shortfalls; and
- Developing or using effective or innovative strategies for the delivery of specialized or rigorous academic courses and curricula through the use of technology, including digital learning technologies and assistive technology.

Note that this is not an inclusive list of all allowable activities. Please see ESEA sections 4107-4109 for additional examples of activities that may be supported with Title IV, Part A funds.

## **K. TITLE IV, PART B – NITA M. LOWEY 21st CENTURY COMMUNITY LEARNING CENTERS (21st CCLC)**

### **K-1. What is the purpose of the 21st CCLC program?**

The purpose of the 21st CCLC program is to provide opportunities for communities to establish or expand activities in community learning centers that:

- Provide opportunities for academic enrichment to help children, particularly children who attend low-performing schools, meet challenging State academic standards;
- Offer children a broad array of additional services, programs, and activities that are designed to reinforce and complement the regular academic program of participating children; and
- Offer families of children served by community learning centers opportunities for active and meaningful engagement in their children’s education. (ESEA section 4201).

### **K-2. Who is eligible to apply for a 21st CCLC subgrant?**

ESEA section 4201(b)(3) defines an “eligible entity” for purposes of a 21st CCLC subgrant as an LEA, community-based organization (CBO), Indian tribe or tribal organization, another public or private entity, or a consortium of two or more such agencies, organizations, or entities. Thus, a private school is eligible to apply for and receive a 21st CCLC subgrant through the SEA’s competitive process if it is able to meet the requirements of the program.

### **K-3. Must an eligible entity target services to certain children?**

To receive a 21st CCLC subgrant, an eligible entity must assure that the program will target children who primarily attend public schools eligible to operate a schoolwide program under ESEA section 1114—i.e., a school with a poverty percentage of 40 percent or more. (ESEA section 4204(b)(2)(F)). Also, an SEA must give priority in its competitive process to applications proposing to target children who primarily attend public schools that are implementing comprehensive or targeted support and improvement activities under ESEA section 1111, other public schools determined by an LEA to be in need of intervention and support, and public schools that enroll children who may be at risk for academic failure, dropping out of school, involved in criminal or delinquent activities, or who lack strong positive role models. (ESEA sections 4203(a)(3)(A), 4204(i)(1)(A)). There is no requirement that a 21st CCLC program exclusively serve these children, however. A 21st CCLC program may serve children who are not from low-income families and who do not attend public schools that are low performing.

**K-4. Must a 21st CCLC subgrantee provide for the equitable participation of eligible private school children and educators in programs and activities?**

Yes. A subgrantee under the 21st CCLC program must, after timely and meaningful consultation with appropriate officials of private schools located in the areas served by the subgrant, provide to eligible private school children and educators educational services and other benefits that are equitable in comparison to such services and other benefits provided with program funds to public school children and educators. (ESEA section 8501(a)(1), (3)(A)). The requirement to provide for the equitable participation of eligible private school children and educators applies regardless of whether a subgrantee is an LEA, CBO, or other eligible entity.

How equitable services are provided to eligible private school children and educators may differ, depending on the type of entity receiving a subgrant and the focus of the program. For example, if a 21st CCLC program serves only public school children in schools identified for comprehensive support and improvement, it must offer comparable educational services and other benefits to private school children who are enrolled in private schools within the geographical area of the public schools being served. On the other hand, if a 21st CCLC program serves a broader swath of public school children, it must offer comparable educational services and other benefits to private school children who attend schools within the service area of the subgrantee. If the 21st CCLC program is open to all children within a subgrantee's service area, the program would likely meet the requirement to provide equitable services by ensuring that eligible private school children have an equitable opportunity to participate in the program.

**K-5. How does a 21st CCLC subgrantee determine the equitable share of funds to make available for equitable services?**

A 21st CCLC subgrantee must ensure that its expenditures for equitable services for eligible private school children and educators are equal on a per-pupil basis to the expenditures for participating public school children and educators, taking into account the number and educational needs of the eligible private school children and educators. (ESEA section 8501(a)(4); 34 C.F.R. § 299.7(a)). After timely and meaningful consultation with appropriate private school officials, a subgrantee could choose to calculate equal expenditures strictly on the basis of the relative enrollment of students in public schools and private schools, assuming the needs are similar, that have indicated their willingness to participate in the 21st CCLC program on the assumption that these numbers accurately reflect the relative needs of children and educators in public and private schools. Alternatively, a subgrantee could choose to use other factors relating to the needs of public and private school children and not base its equal expenditures only on relative enrollments. For example, if a subgrantee targets its program on a specific subgroup of students (e.g., ELs, low-achieving students from low-income families), the LEA would use the number of eligible children in the defined subgroup enrolled in both public and private schools. (See B-1).

In the case of a 21st CCLC program that is open to all children within the CBO's service area and has sufficient funding to serve all children interested in participating, the equal expenditures requirement would be met because the program is open to all eligible students and each participating student would receive the same amount of services.

**K-6. When and with whom does an entity applying for a 21st CCLC subgrant consult in providing equitable services to eligible private school children and educators?**

An entity applying for a 21st CCLC subgrant must consult with appropriate private school officials regarding equitable services at the program development stage prior to submitting its application—i.e., before the entity makes any decision that affects the opportunities of eligible private school children and

educators to participate. (ESEA section 8501(c)(3)). The goal is to develop a program that will serve public and private school children and educators in the service area of the applicant (see ESEA section 8501(c)(1)). Such consultation might include a brief survey of non-public schools or other information gathering to indicate the schools' interest in participating and the population to be served. This consultation will allow the entity to consider the needs of all students and educators—both public and private—in developing its application, and to include the projected costs for equitable services in the application. If an applicant is successful in receiving a 21st CCLC subgrant, it must continue to consult with interested private school officials on the specific services the entity will provide students and educators, consistent with the approved application.

It is possible that a service area might not be contiguous with an LEA; rather, it might be a designated school attendance area within an LEA or an area unrelated to LEA boundaries. In this case, the 21st CCLC subgrant applicant should define the geographical area the 21st CCLC will serve and then contact officials of all private schools within that area to carry out consultation and inform private school officials of the type of program the applicant is proposing as part of its application. Non-LEAs applying for a subgrant may reach out to LEAs or the State ombudsman for assistance in identifying the appropriate private school officials with whom to consult.

**K-7. Because 21st CCLC subgrants are for multi-year programs, how often must a subgrantee consult?**

A 21st CCLC subgrant must be awarded for no less than 3 and no more than 5 years. (ESEA section 4203(a)(8)(A)). Accordingly, a subgrantee may not need to consult with private school officials regarding the design and development of the program after its initial timely and meaningful consultation. However, because it is unlikely that participation in the program will remain static for the duration of the subgrant, the subgrantee must annually, and on an ongoing basis, consult with officials of private schools within the geographic area the program serves to determine, consistent with the equitable share available for equitable services, (1) if private school officials wish for their eligible children and educators to participate, or continue to participate; (2) if students participating in the program will change; and (3) to resolve any implementation concerns.

**K-8. How might a 21st CCLC subgrant applicant consider the needs of eligible private school children and educators in developing its 21st CCLC application?**

Each 21st CCLC subgrant applicant must engage in timely and meaningful consultation with private school officials within the geographical area the applicant proposes to serve (ESEA section 8501(c)), which will provide the applicant with information on eligible private school children's needs. Moreover, as part of its 21st CCLC application, ESEA section 4204(b)(2)(I) requires that each applicant evaluate the community's needs and resources available to the community learning center and describe how the proposed program will meet those needs. The evaluation of the community's needs would include the needs of all children in the community, i.e., those attending public and private schools. Finally, each 21st CCLC applicant is required, under ESEA section 4204(b)(2)(D), to develop and carry out the 21st CCLC program in active collaboration with the schools that participating children attend, which includes private as well as public schools.

**K-9. How does a 21st CCLC subgrant applicant such as a CBO with a particular mission (e.g., health, STEM, arts) consult with private school officials?**

A 21st CCLC applicant that has a particular mission, like any other 21st CCLC applicant, must evaluate the needs of the community—both public and private—it intends to serve and describe how its proposed

program will meet those needs. (ESEA section 4204(b)(2)(I)). To the extent the applicant’s mission aligns with the needs of the community, it would engage in consultation with private school officials within the scope of its mission.

**K-10. Where may 21st CCLC activities be provided?**

Services of a 21st CCLC program may be provided in a public school, private school, or other facility that is safe and easily accessible. (ESEA section 4204(b)(2)(A)(i)).

**K-11. What types of services may be provided to eligible private school children in a 21st CCLC program?**

Examples of allowable activities in 21st CCLC programs include:

- Academic enrichment learning programs, mentoring programs, remedial education activities, and tutoring services that are aligned with challenging State academic standards;
- Literacy education programs;
- Programs that support a healthy and active lifestyle;
- Drug and violence prevention programs;
- Programs that build skills in science, technology, engineering, and mathematics (STEM), including computer science, and that foster innovation in learning by supporting nontraditional STEM education teaching methods; and
- Programs that partner with in-demand fields of the local workforce or build career competencies and career readiness. (ESEA section 4205).

**L. TITLE IV, PART F, SUBPART 3 – NATIONAL ACTIVITIES FOR SCHOOL SAFETY  
PROJECT SCHOOL EMERGENCY RESPONSE TO VIOLENCE (PROJECT SERV)  
(ESEA section 4631)**

**L-1. What is the purpose of Project SERV?**

Project SERV funds education-related services for LEAs and institutions of higher education (IHEs) to help them recover from a violent or traumatic crisis in which the learning environment has been disrupted. (ESEA section 4631(a)(1)(A)).

**L-2. Who is eligible to apply for a Project SERV grant?**

LEAs (as defined in ESEA section 8101(30)(A), (B) or (C)) and IHEs are eligible to apply for Project SERV if their learning environment has been disrupted due to a violent or traumatic crisis (see answer to question L-3 below for a discussion of “eligible event”). The Bureau of Indian Education (BIE) is eligible to apply for Project SERV where the learning environment of a school operated or funded by the BIE, including a school meeting the definition of an LEA, has been disrupted due to a violent or traumatic crisis. (ESEA section 4631(c)).

**L-3. What is an eligible event?**

For purposes of Project SERV, an eligible event is a violent or traumatic crisis that has disrupted the learning environment. Many types of events have the potential to seriously disrupt the learning environment. Further, events that appear similar do not always affect the learning environment in the same way. These facts make it difficult to determine in advance all the types of events that would be eligible events. To receive a Project SERV award, an LEA, IHE, or BIE must: (1) demonstrate the



traumatic effect on the learning environment including how the event has disrupted teaching and learning; and (2) demonstrate that the needed services cannot be adequately provided with existing resources in a comprehensive and timely manner. Examples of potentially eligible events include shootings or other serious violent incidents in schools, such as stabbings; suicides of children, faculty members, or staff; and natural disasters, such as hurricanes, flooding, and wildfires. Other violent or traumatic events not listed here may also be eligible. (ESEA section 4631(a)(1)(A), (b), and (c)).

#### **L-4. What are allowable activities under Project SERV?**

Allowable activities must be reasonable and necessary to restoring the learning environment (ESEA section 4631(b)(1) and 2 C.F.R. Part 200), including, for example, mental health and social emotional support services; costs related to ensuring the safety of students and educators; and additional operating costs, such as alternate transportation for children when regular transportation has been disrupted due to a natural disaster.

Construction and provision of medical services are specifically prohibited under Project SERV. (ESEA sections 4001(b) and 8526; see also ESEA section 4631(b)(4)).

#### **L-5. Are children and educators in private schools eligible to receive equitable services under Project SERV?**

Yes. Under 34 C.F.R. § 299.6(b)(6), an LEA that receives a Project SERV grant must provide equitable services to eligible children and educators (i.e., those enrolled or working in private schools within the LEA that have experienced the eligible event, such as devastation from flooding, for which the grant is awarded).

#### **L-6. When and with whom must an LEA consult regarding equitable services in developing its Project SERV application?**

An eligible LEA applying for a Project SERV grant must consult with appropriate private school officials before the LEA makes any decision that affects the opportunities of eligible private school children and educators to participate (ESEA section 8501(c)(3)). Given the expectation that an application for discretionary funds must be submitted in a timely fashion and the urgent need for Project SERV funds in response to an eligible event, full consultation may not be possible before an LEA submits its application. Prior to submitting its Project SERV application, an LEA could, at a minimum, initiate consultation through a survey of private schools to ascertain (1) whether the learning environment in the school was disrupted by the eligible event; (2) if such school intends to have its students and educators participate in Project SERV equitable services; (3) the number of students enrolled at the school whose learning environment was affected by the eligible event; and (4) any other initial information that is readily available, such as an initial needs assessment, to the greatest extent practicable. Such consultation will allow the LEA to consider the needs of impacted children and educators in affected schools—both public and private—in developing its application, and to include the projected costs for equitable services in the application. If the LEA receives a Project SERV grant, it must continue to consult with interested private school officials on the specific services the LEA will provide students and educators to restore the learning environment disrupted by the eligible event.

**L-7. How does an LEA determine the amount of funds to request for equitable services to private school children and educators in its Project SERV application?**

Unlike a formula grant program, there is no fixed allocation for determining in advance the specific amount of overall funding granted to an LEA under a Project SERV grant, including with respect to the provision of equitable services. Rather, the overall amount granted to the LEA is dependent on what an LEA requests in its Project SERV application (i.e., the limited amount needed for the specific purpose of restoring the learning environment from the impacts of the eligible event). The award will also be constrained by the overall amount of Project SERV funds available for award.

ESEA section 8501(a)(4) requires an LEA to ensure that its expenditures for equitable services for eligible private school children and educators are equal on a per-pupil basis to the expenditures for participating public school children and educators, taking into account the number and needs of the eligible private school children and educators. After initial timely and meaningful consultation with officials of affected private schools (see L-6), if one or more affected private schools wish to participate and have needs that can be appropriately served by the Project SERV grant, an LEA must include in its Project SERV application an amount of funding for equitable services. In determining that amount, an LEA might calculate equal expenditures on the basis of the relative enrollments of affected children when the impact and needs are relatively the same. Following submission of its application, the LEA may amend the amount needed to serve eligible children and educators in impacted private schools based on more robust consultation and assessment of needs.

Alternatively, after initial timely and meaningful consultation, an LEA might choose to use other factors relating to the needs of public and private school children and not determine “equal expenditures” solely on the basis of relative enrollments. For example, the needs of all children affected by an eligible event might not be the same. Children in a school that directly experienced a violent event might have significantly greater needs than children in neighboring schools. The LEA, therefore, might weight the needs of children differently, depending on the degree to which their learning environment was disrupted by the eligible event. “Equal expenditures” for services for private school children would be similarly weighted depending on the degree to which their learning environment was disrupted by the eligible event.