



Office of the General Counsel

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March 25, 2019

Via Email (EquitableServices@ed.gov)

U.S. Department of Education
Office of Elementary and Secondary Education
400 Maryland Avenue, SW
Washington, DC 20202

Subject: Title I Equitable Services

Dear Sir or Madam:

Thank you for the opportunity to submit comments on the U.S. Department of Education's ("Department") Title I, Part A Equitable Services Updated Non-Regulatory Guidance, available at <https://www2.ed.gov/policy/elsec/leg/essa/drafteseatitleiequitableervices.pdf>.

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. Catholic schools comprise the nation's largest private educator, with 6,300 schools educating 1.8 million children in the United States today, many of whom come from low-income families, keeping with Catholic schools' long-standing tradition of providing disadvantaged children with a top-quality education. The USCCB is the voice of those schools and our Catholic community before the federal government.

USCCB's comments below are organized by each section of the draft guidance and begin with a brief narrative, which references stakeholders in the field to provide context for our comments. Any requested new language is in red font.

A) CONSULTATION

Stakeholder concerns: The Elementary and Secondary Education Act ("ESEA"), as amended by the Every Student Succeeds Act ("ESSA"), requires consultation with private school officials to be "timely, meaningful and ongoing." And yet, in many local educational agencies ("LEAs"), consultation happens late, haphazardly, or not at all. When consultation occurs, often plans and decisions are *explained* in consultation rather than being discussed. This is most common when it comes to allocations, as they are simply given with no explanation of "how the proportion of funds is determined."

Added language needs to be included giving instruction to LEAs for using an estimated amount of the allocation when actual dollars are not yet available. The guidance does

not give any explanation about providing updated allocation and expenditure amounts during ongoing consultation.

A-3 and A-4 Intent to Participate:

A-4 discusses consultation setting a deadline, identifying consequences of not meeting the deadline, and providing adequate time for private school officials to gather the data and respond. The purpose of an Intent to Participate form is simply a “yes, my students will” or “no, my students won’t.” It should be clear that no data should be required from a private school leader at this time in the process in order to agree to participate.

A-8 Topics to address during consultation:

Proposed addition: *“If estimated dollar amounts are used for calculating the portion of funds to serve eligible private school students, an updated notice of the actual funding and its impact on the proportionate share must be made known to the private school officials in a timely manner so to allow for effective use of available funding before the close of the year in which it is to be obligated.”* This would support B-31.

A-14 Documentation needed from Private Schools:

Private school leaders do submit the addresses of students, but it should be clear that they should not need to identify the student’s assigned public school or eligible students who reside in an LEA different from the one in which the private school is located. For clarification, we suggest two additions and one deletion below:

*“An LEA may request documentation, as needed, from private school officials that enables the LEA to provide equitable services. That documentation includes information **for LEAs** to identify private school students who generate funds for equitable services (i.e., they are from low-income families and reside in a participating public school attendance area) and **for LEAs** to identify students who are eligible for equitable services (i.e., they reside in a participating public school attendance area and are low achieving). As part of identifying eligible private school students, private school officials would need to provide information on the achievement of eligible private school students to determine their need for Title I services and, in consultation with public school officials, what services would be provided. ~~Private school officials may also need to identify eligible students who reside in an LEA different from the one in which the private school is located and alert the relevant LEA of the students’ eligibility.~~ (See A-5.)”*

A-17 Must an LEA provide a copy of the Title I application:

Proposed addition: *Such applications are a matter of public record “**and should be provided without charge.**”*

B) ALLOCATIONS

Stakeholder concerns: Transparency is mandated by the law. Private school leaders desire transparent and timely consultation on their proportionate share, particularly how it was calculated. Additionally, they want to ensure that equitable services start on time. LEAs are not consulting with private schools before transferring funds from another title program. There are two primary battles in many LEAs across the country. First, exorbitant funds are set aside for administrative fees. Second, impossible deadlines are set by LEAs for programs and services when allocations are given to the state or the LEA late. The LEA does not give the private school enough time to spend their allocation, e.g., by offering to carry over the allocation to the next fiscal year or allowing services through the end of the fiscal year (September 30), as required by the law. Finally, private schools have a difficult time collecting poverty data and do not have access to national program databases, such as the National School Lunch Program.

B-9 and B-37 Indirect costs:

Including indirect costs for services that are generally provided on-site at the private school is not an LEA expense and should not be allowable. This language needs to be clearer in order to ensure that LEAs do not take advantage of paying for costs that have nothing to do with equitable services provided at the private school.

B-9: Cross reference B-33 and B-37.

B-10 Determining the number of children from low-income families:

Add language: *“After consultation with private school officials occurs, ESEA section 1117(c)(1) provides an LEA the final authority to decide which option it will use to calculate the number of children who are from low-income families and attend private schools. The method chosen to calculate poverty counts should be the method that provides the most accurate counts, not the most expedient or convenient.”*

B-25 and B-26 Obligation of funds and Carryover:

This language needs additional examples. Carryover is often needed due to the timing of allocations from Congress to the state educational agency (“SEA”). While an estimated allocation might be provided in such cases, consultation is needed again once the actual allocation is determined. Private schools have issues with LEAs saying that they can only carry over allocations if there is a natural disaster.

Add language: *“If the funds generated by private school students are not fully expended for the private school program during the course of the year in which they were allocated because of SEA or LEA fiscal year differences with the federal budget cycle, those funds should be carried over and made available for use at the start of the LEA’s next fiscal year to provide benefits to private school students and their teachers.”*

Rationale:

a. Extenuating circumstances: Experience is showing that districts wait to inform the private school officials of the total amount of funds intended for equitable services very late in school year, when they cannot use the allocation responsibly, as required by statute. This effectively means that they lose the use of the funds.

b. Fiscal Year Disparities: Experience has shown that when state and/or school district fiscal year calendars differ from that of the federal government, private school officials are informed they must use all of the funds, particularly for professional development, by the time the LEA office decides to close its books, usually by the end of June. Since the statute and guidance clearly state that federal funds cannot be used to pay for substitute teachers in private schools, as they may be used for public schools, most professional development activities teachers pursue are held in the summer months, and districts will not approve use of funds during those times if they have “closed their books.” Likewise, requests to use available Title I funds to serve disadvantaged students in summer school programs are denied.

B-27 When an Obligation Occurs:

It would be helpful if the language spells out “when an obligation occurs” thoroughly rather than simply citing the Code of Federal Regulations. The table from 34 C.F.R. § 76.707 could be included in full:

§ 76.707 When obligations are made.

The following table shows when a State or a subgrantee makes obligations for various kinds of property and services.

| If the obligation is for - | The obligation is made - |
|---|--|
| (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 CFR part 200, Subpart E - Cost Principles | On the first day of the grant or subgrant performance period. |

B-28 How long does an LEA have to meet the obligation of funds requirement in ESEA section 1117(a)(4)(B)?

This is a major source of confusion in practice. Often LEAs “close their books” on June 30, mandating that all services be obligated or even completed by that date. An added chart could provide clarification:

| | |
|---------------------------|----------------------------|
| Fiscal Year (FY18) | School Year (SY17-18) |
| Oct 1, 2017-Sept 30, 2018 | July 1, 2017-June 30, 2018 |

B-33 LEA reservation of Title I funds for administrative costs:

“Reasonable and necessary” is too vague and open to exploitation by LEAs, which already occurs across the country. If an LEA could administer the complete Title I program for public and private schools (in former iterations of ESEA) using under 10% of funds for administration, then charging administrative costs to the proportional share at that level or higher seems to be unreasonable. Below is some additional language on reasonableness from the Code of Federal Regulations that could be referenced:

§200.404 REASONABLE COSTS.

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. The question of reasonableness is particularly important when the non-Federal entity is predominantly federally-funded. In determining reasonableness of a given cost, consideration must be given to:

(a) Whether the cost is of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award.

(b) The restraints or requirements imposed by such factors as: sound business practices; arm’s-length bargaining; Federal, state, local, tribal, and other laws and regulations; and terms and conditions of the Federal award.

(c) Market prices for comparable goods or services for the geographic area.

(d) Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government.

(e) Whether the non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award’s cost.

C) DELIVERY OF SERVICES

Stakeholder concerns: “Supplement vs. Supplant” is an ongoing battle between LEAs and private schools. LEAs cite “supplanting” too often in when disapproving services and are questioned by private schools in consultation, especially when it comes to professional development for teachers. In lieu of recent federal guidance, we believe the question is now void since the determination that supplant vs. supplement does not apply to private funds. (Please see additional information below.) There continues to be confusion and lack of communication between LEAs when a student in a private school lives in a different LEA.

C-2 How are the criteria determined?

“To the extent appropriate, the LEA must select private school children who are low achieving.”

Replace the word “select” with “**determine**”, as the LEA does not “select” students, but eligible students are determined based on academic need through the consultation process.

C-9: Cross reference to A-5.

C-12 Consolidate and use Title I funds in coordination with other ESEA Title VIII funds:

This entire answer is confusing. Many private school students are served by an LEA different from the one in which they attend school. If the LEA of residence is different from that of the school location, then the funds cannot be combined.

The language discusses consolidation of funds and indicates that services should not stay in “silos.” There is no mention of funding. Funding has always stayed in silos.

Finally, if the programs are consolidated, then there should be a mention of consolidated consultation, as many federal program directors do not coordinate consultation together.

C-13 Supplement Not Supplant:

This question is now void due to *new* guidance from the Department stating that supplement not supplant does not apply to private money.

SUPPLEMENT NOT SUPPLANT IN GENERAL

A State educational agency or local educational agency shall use Federal funds received under [Title I, Part A] only to supplement the funds that would, in the absence of such Federal funds, be made available from State and local sources for the education of students participating in programs assisted under [Title I, Part A], and not to supplant such funds.

(ESEA section 1118(b)(1))

ESEA section 1118(b)(1), as amended by ESSA, is largely unchanged from the supplement not supplant requirement in ESEA section 1120A(b), as amended by No Child Left Behind (“NCLB”). The only change in this requirement from NCLB is the clarification that “non-Federal funds,” as used in NCLB, means only public “State and local funds.” Accordingly, other non-Federal funds, such as private

contributions, fundraising, and parent fees, need not be part of determining compliance with the Title I, Part A supplement not supplant requirement.

Although the general requirement in ESEA section 1118(b)(1) remains largely unchanged, ESEA section 1118(b)(3) contains a new provision that represents a significant change from the NCLB Title I, Part A supplement not supplant requirement, particularly with respect to a targeted assistance school.

C-14 Types of Services:

Additionally, services should mention “*Professional Development for teachers of eligible Title I Students.*”

C-15 Use of funds for services other than instructional services:

Omit this answer. The language in C-16 seems to indicate that the list given as examples would occur only if there were insufficient funds – that would contradict C-14, which makes all services available without qualification.

C-26 Third-Party Contractors:

Add Language: “*Under these circumstances, the LEA remains responsible for the oversight of the Title I program. However, the LEA should consult on the drafting of a request for proposal (“RFP”) for a third-party contractor with all the private schools to evaluate the third-party RFP responses.*”

C-26 and C-29:

Delete C-29, which is repetitive and does not include the new language regarding religious institutions as service providers.

C-27:

We applaud the Department for explicitly stating that an LEA may contract with a religious organization to provide equitable services. The Department’s guidance comports with U.S. Supreme Court jurisprudence, especially *Trinity Lutheran Church v. Comer*, 582 U.S. ___ (2017). The guidance will implement this important decision and ensure that religious providers of equitable services are not unconstitutionally discriminated against by governmental agencies.

C-32 and C-33 Parents and Families:

The lists of activities for family engagement do not match. The Department should create a third question following C-33 and address activities there.

C-34 and C-35 Professional development for teachers of eligible students in private schools:

Teacher professional development refers to “participating” private school students instead of “eligible”.

If teachers of private school students are in a district other than the one providing services to eligible those students, there needs to be some clarification about how those private school teachers can participate and how a determination of costs from the proportionate share can be apportioned so that sufficient funds are available for students’ services. The private school share should not be allowed to finance professional development for LEA employees – it should be reserved for the private school instructional staff who teach Title I students.

C-37:

This language allows staff employed by the Title I program to receive professional development with funds from the equitable share. This could lead to LEAs using significant proportional share funds for professional development for their own employees. The proportional share of equitable services for private school children should not be spent on employees of the LEA.

D) ASSESSMENTS

E) OMBUDSMAN

Stakeholder concerns: Since the passage of ESSA, many states are improving, but there is much work to do. The average new ESSA ombudsman is in most cases a current SEA employee with many years of serving public school students in the federal programs office. They often already have multiple jobs, and the “ombudsman” title is layered on as a new role with new responsibilities. The guidance states that the ombudsman should monitor, enforce, and resolve complaints, but too many ombudsmen simply want to serve as neutral parties leaving questions unanswered.

F) COMPLAINTS

Stakeholder concerns: In almost all cases, the complaint process drags on way too long. ESEA section 8503(a) requires an SEA to resolve the complaint in writing within 45 days. This continues to be a struggle in practice.

Conclusion

We appreciate the opportunity to present our comments and ask that the Department carry out a careful and balanced approach to this new guidance.

Sincerely,

Handwritten signature of Anthony R. Picarello, Jr. in blue ink.

Anthony R. Picarello, Jr.
Associate General Secretary & General Counsel

Handwritten signature of Hillary E. Byrnes in black ink.

Hillary E. Byrnes
Director of Religious Liberty & Associate General Counsel