Under the Congressional Review Act, Congress has passed, and the President has signed, a resolution of disapproval of the accountability and State plans final regulations that were published on November 29, 2016 (81 FR 86076). This guidance document is unaffected by that resolution and remains applicable.

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

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INTRODUCTION

On December 10, 2015, President Obama signed into law the Every Student Succeeds Act (ESSA), which reauthorized the Elementary and Secondary Education Act of 1965 (ESEA). The ESSA makes a number of changes to certain fiscal requirements that existed in the ESEA, as amended by the No Child Left Behind Act of 2001 (NCLB), including changes to: Title I, Part A (hereafter Title I) within-State allocations; Title I within-district allocations; Title II, Part A allocations; maintenance of effort requirements; and transferability requirements. The ESSA also makes a number of changes to the equitable services requirements for private school students in Title I and Title VIII of the ESEA. This guidance document discusses these specific changes and is designed to support State educational agencies (SEAs), local educational agencies (LEAs), and schools in implementing the ESEA, as amended by the ESSA.[1] New or revised requirements are presented in a shaded box.

The changes made by the ESSA to the State formula-grant programs discussed in this guidance take effect beginning in the 2017−2018 school year. The Department is issuing guidance with respect to these specific changes now to provide SEAs, LEAs, and schools with timely information to support SEAs, LEAs, and schools in meeting their obligations under the ESEA for the 2017−2018 school year.

The U.S. Department of Education (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 www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf. Significant guidance is non-binding and does not create or impose new legal requirements.

If you are interested in commenting on this guidance, please email us your comments at OESE.guidance@ed.gov or write to us at the following address: Office of Elementary and Secondary Education, 400 Maryland Avenue, SW, Washington, DC 20202. For further information about the Department's guidance processes, please visit www2.ed.gov/policy/gen/guid/significant-guidance.html.

[1] Unless otherwise noted, all references to the ESEA in this document refer to the ESEA, as amended by the ESSA.

I. TITLE I WITHIN-STATE ALLOCATIONS

A. OVERVIEW

The ESSA made several changes to the ESEA regarding how an SEA adjusts the Department-determined Title I LEA allocations to account for differences between the Department's list of LEAs and the universe of LEAs within a State and to make State-level reservations. The ESEA now includes specific language requiring an SEA to calculate a hold-harmless amount for each formula that reflects the increased enrollment for a newly opened or significantly expanded charter school LEA, and contains new and revised State-level reservations that affect the final Title I LEA allocations calculated by an SEA. These changes take effect beginning with fiscal year (FY) 2017 Title I funds that the Department expects to award on July 1, 2017, for use primarily in the 2017–2018 school year.

The following describes, in chronological order, the steps for an SEA to follow to adjust the Department-determined Title I LEA allocations in a manner that is consistent with the ESEA. New requirements are presented in a shaded box. In general, for requirements that existed under the ESEA, as amended by NCLB, and continue under the ESEA, as amended by the ESSA, a link to previously-issued guidance or regulations is provided.

B. STEPS TO ADJUST DEPARTMENT-DETERMINED TITLE I LEA ALLOCATIONS

Step 1: Adjust formula counts[2]

If the LEAs in a State differ from the Department's list of LEAs (*e.g.*, due to the existence of charter school LEAs), an SEA must estimate the number of formula children and determine eligibility for each LEA not on the Department's list by following the procedures on pages 4-13 in the Department's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc]. To carry out this process for a newly opened or significantly expanded charter school LEA, including projecting the formula count and enrollment, see Questions 48-52 in the Department's 2000 charter school allocation guidance [available at: http://www2.ed.gov/policy/elsec/guid/cschools/cguidedec2000.pdf].

If a State's list of LEAs matches the Department's list of LEAs, the SEA begins with Step 3 of this guidance because Steps 1 and 2 only apply to States whose universe of LEAs includes one or more LEAs that are not on the Department's list. (In a situation in which the State list of LEAs and the Department's list of LEAs are identical, there are not any LEAs in addition to those on the Department's list for which an SEA would need to derive a formula count or apply the hold-harmless requirements, which are the activities covered in Steps 1 and 2.)

[2] If an SEA is unable to track children counted under the Title I formulas from a sending LEA to a receiving LEA, the SEA follows the special procedures on pages 19-24 in ED's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc] to implement Step 1 and Step 2a.

Step 2a: Adjust initial allocations based on adjusted formula counts

An SEA must calculate Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants for each eligible LEA that is not on the Department's list by using the adjusted formula count from Step 1 and adjusting the Department-determined allocations of LEAs on the Department's list. To do so, the SEA follows the procedures on pages 14-18 in the Department's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc].

Step 2b: Apply the variable hold-harmless requirements of each formula

An SEA must apply the variable hold-harmless requirements to the LEA allocations (including charter school LEAs) calculated in Step 2a for Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants, as required by 34 CFR 200.73.

Description of the variable hold-harmless requirements:

- The hold-harmless percentage that an SEA applies to an LEA varies based on the percentage of formula children who reside within the LEA.
- Under the Basic Grants, Targeted Grants, and Education Finance Incentive Grants formulas, the hold-harmless guarantee only applies to an LEA that meets the eligibility criteria of the respective formula as determined in Steps 1 and 2a.
- Under the Concentration Grants formula, the hold-harmless guarantee applies to an LEA for four years after it last met the formula eligibility criteria.
- The following table summarizes the variable hold-harmless (left column) and how the hold-harmless applies under each formula (right column):

Percentage of LEA formula children ages 5 to 17, inclusive, as a percentage of its total population of children ages 5 to 17, inclusive, and variable hold-harmless percentage	**Hold-harmless applies on a formula-by-formula basis**
(i) 30 percent or more: 95 percent (ii) 15 percent or more but less than 30 percent: 90 percent (iii) Less than 15 percent: 85 percent	• To apply under Basic Grants, Targeted Grants, or Education Finance Incentive Grants, respectively, an LEA must meet the eligibility criteria for the respective formula. • To apply under Concentration Grants, an LEA must meet the eligibility criteria in the current year or have met the criteria at least once in the four years prior to the current year.

An SEA must apply the hold-harmless requirements using ratable reductions on a formula-by-formula basis. If the amount of funds available under one of the formulas is enough to satisfy the guaranteed hold-harmless amount for each LEA, the SEA must ratably reduce LEAs that are above their guaranteed hold-harmless amounts in order to ensure that LEAs that are below their guaranteed hold-harmless amounts are raised to their hold-harmless levels and must repeat this process until no LEA in the State falls below its guaranteed hold-harmless amount. If the

amount of funds available under one of the formulas is not enough to satisfy the guaranteed hold-harmless amount for each LEA, an SEA must ratably reduce all LEAs from their hold-harmless amounts to the amount of funds available under the formula.

New ESEA Requirement

Special Hold-Harmless Provisions for Newly Opened and Significantly Expanded Charter School LEAs

For purposes of implementing the hold-harmless protections in sections 1122(c) and 1125A(f)(3) of the ESEA for a newly opened or significantly expanded charter school LEA, an SEA must calculate a hold-harmless base for the prior year that reflects the new or significantly expanded enrollment of the charter school LEA.

(ESEA section 4306(c).)

To ensure that each charter school LEA receives the applicable hold-harmless protection under Step 2b above, an SEA must generate a hold-harmless base for a newly opened or significantly expanded charter school LEA that reflects the new or significantly expanded enrollment of the charter school LEA. This provision is necessary to give effect to ESEA section 4306(a) that requires an SEA to take such measures as are necessary to ensure that every charter school LEA that newly opens or significantly expands its enrollment receives the Federal funding for which the charter school LEA is eligible, notwithstanding the fact that the identity and characteristics of the students enrolling in the charter school LEA are not fully and completely determined until the charter school LEA actually opens or significantly expands. Section 4306(a) ensures that each newly opened or significantly expanded charter school LEA receives an allocation that reflects its current student count even though allocations may be calculated before the identity and characteristics of the students enrolling in the charter school LEA are fully determined.

Because newly opened and significantly expanded charter school LEAs are treated differently under section 4306(a) from other LEAs, including other charter school LEAs, it is important to ensure that the operation of the hold-harmless protections in ESEA sections 1122(c) and 1125A(f)(3) do not unduly negate increases in Title I allocations based on the increased student population in the charter school LEAs. Accordingly, an SEA must generate a "prior year" base amount for each newly opened and significantly expanded charter school LEA in order to apply the 85, 90, or 95 hold-harmless percentage described above. With respect to newly opened charter school LEAs, this means creating a hold-harmless base where none exists. With respect to a significantly expanded charter school LEA, which is defined consistent with 34 CFR 76.787[3], this means adjusting the prior year's hold-harmless base to create a new base that reflects the increase in the formula count for the current year.

[3] Consistent with 34 CFR 76.787, "[s]ignificant expansion of enrollment means a substantial increase in the number of students attending a charter school due to a significant event that is unlikely to occur on a regular basis, such as the addition of one or more grades or educational programs in major curriculum areas. The term also includes any other expansion of enrollment that the SEA determines to be significant."

Newly opened charter school LEA

To determine the "prior year" base amount on which to apply the hold-harmless for a newly opened charter school LEA, an SEA would take the following sub-steps (for ease of explanation, the example assumes the SEA is making allocations for the 2017−2018 school year (SY)):

Sub-Step A: Refer to the newly opened charter school LEA's initial allocation for SY 2017−2018 under each formula before application of the hold-harmless protections in ESEA sections 1122(c) and 1125A(f)(3) that the SEA determined in Step 2a of this guidance. (Note that, if an SEA calculates these allocations for a new charter school LEA based on projected data used to derive a formula count in Step 1, the SEA must revise the allocations once actual data are available for the new charter school LEA.) This amount will serve as the "prior year" (i.e., SY 2016−2017) base amount for the purpose of determining the guaranteed hold-harmless amount. In other words, the newly opened charter school LEA's "prior year" hold-harmless base under each formula for calculating the guaranteed hold-harmless amount is the same as the charter school LEA's initial allocation under each formula for SY 2017−2018.

Sub-Step B: Based on the charter school LEA's derived formula count for SY 2017−2018 determined in Step 1 compared to its population of children ages 5 through 17 for SY 2017−2018, determine whether the newly opened charter school LEA's hold-harmless percentage will be 85, 90, or 95 percent of its "prior year" base amount. (See hold-harmless table earlier in Step 2b that shows the variable hold-harmless percentages based on an LEA's percentage of formula children.)

Sub-Step C: Multiply the initial allocation discussed in Sub-Step A for each formula by the appropriate hold-harmless percentage from Step 2b to determine the newly opened charter school LEA's hold-harmless amount.

This process will ensure that a newly opened charter school LEA is not disadvantaged by the fact that it had no Title I allocation in the prior year against which to apply the hold-harmless percentage. The following chart illustrates how this process would work in the case of a newly opened charter school LEA that has a percentage of formula children that is greater than 30 percent:

	(1) **SY 2016−2017 allocation**	**(2)** **Initial SY 2017−2018 allocation determined in Step 2a***	**(3)** **Guaranteed hold-harmless amount (Col. (2) x 95%**
Basic grant allocation	0	$92,534	$87,907
Concentration grant allocation	0	$21,900	$20,805
Targeted grant allocation	0	$48,798	$46,358
EFIG allocation	0	$42,620	$40,489
Total Title I allocation	0	$205,852	$195,559
Current year formula count (Step 1 of this guidance)		168	
SY 2017−2018 ages 5-17 population		432	
Percentage of formula children		39%	
Hold-harmless percentage		95%	

* The amount shown in column 2 is also the proxy "prior year" hold-harmless base to be used for determining the guaranteed hold-harmless amount for ESEA sections 1122(c) and 1125A(f)(3) purposes.

An SEA must ensure that the 2017−2018 Title I allocation under each formula for a newly opened charter school LEA does not fall below the Column 3 amount.

Significantly expanded charter school LEA

To determine the "prior year" hold-harmless base for a significantly expanded charter school LEA[4], an SEA would take the following sub-steps (for ease of explanation, the example assumes the SEA is making allocations for SY 2017−2018):

Sub-Step A: Compare the SY 2017−2018 derived formula count determined in Step 1 with the LEA's SY 2016−2017 derived formula count and calculate the percentage by which the SY 2017−2018 projected formula count has increased over the SY 2016−2017 actual formula count. (Note that if an SEA derived a formula count in Step 1 based on projected data, the SEA must revise the derived formula count once actual data are available for the significantly expanded charter school LEA.)

Sub-Step B: Multiply the SY 2016−2017 allocation the charter school LEA received under each formula by the percentage increase calculated in Sub-Step A to determine the significantly expanded charter school LEA's adjusted "prior year" (SY 2016−2017) hold-harmless base amount.

Sub-Step C: Based on the significantly expanded charter school LEA's derived formula count for SY 2017−2018 from Step 1 compared to its enrollment ages 5 through 17 for SY 2017−2018, determine whether the significantly expanded charter school LEA's hold-harmless percentage will be 85, 90, or 95 percent of its "prior year" base amount. (See hold-harmless table earlier in Step 2b that shows the variable hold-harmless percentages based on an LEA's percentage of formula children.)

Sub-Step D: Multiply the amount determined in Sub-Step B for each formula by the appropriate hold-harmless percentage determined in Sub-Step C to determine the significantly expanded charter school LEA's guaranteed hold-harmless amount.

The following chart illustrates how this process would work in the case of a significantly expanded charter school LEA that has a percentage of formula children that is at least 15 percent and less than 30 percent:

[4] If a charter school LEA has significantly expanded, but its number of formula children has decreased, the charter school's hold-harmless amounts would be its actual allocations from the prior year.

		(1) SY 2016−2017 allocations	(2) Percentage increase due to expanded enrollment in SY 2017−2018 (Line 9)	(3) Adjustment to SY 2016−2017 base amount due to increase in formula count (Col. (1) x (2)	(4) Adjusted SY 2016−2017 base amount to reflect increase in formula count (Col. (1) + (3))	(5) Hold-harmless percentage based on poverty percentage (Line 11)	(6) Guaranteed hold-harmless amount for SY 2017−2018 allocation purposes (Col. (4) x (5))
1	SY 2016−2017 actual formula count	277					
2	SY 2016−2017 Basic grant allocation	$119,541	52%	$62,161	$181,702	90%	$163,532
3	SY 2016−2017 Concentration grant allocation	$23,052	52%	$11,987	$35,039	90%	$31,535
4	SY 2016−2017 Targeted grant allocation	$62,938	52%	$32,728	$95,666	90%	$86,099
5	SY 2016−2017 EFIG allocation	$54,923	52%	$28,560	$83,483	90%	$75,135
6	Total Title I allocation	$260,454			$395,890		$356,301
7	SY 2017−2018 formula count (Step 1 of this guidance)	420					
8	Increase over SY 2016−2017 count (line 7 – Line 1)	143					
9	Percentage increase (Line 8 ÷ Line 1)	52%					
10	SY 2017−2018 ages 5-17 population	1,432					
11	Poverty percentage (Line 7 ÷ Line 10)	29%					

Please see the *Dear Title I Director* guidance on applying the hold-harmless to newly opened or significantly expanded charter school LEAs that ED issued in 2013 for additional details [available at: http://www2.ed.gov/programs/titleiparta/charterschlallocationreq.pdf].

Step 3: Determine LEA allocations prior to State reservations

An SEA must sum each LEA's allocations for Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants calculated in Step 2b to determine the LEA's Title I allocation prior to the State-level reservations described in Step 4.

Step 4: State reservations

Step 4a: Reservation for school improvement

New ESEA Requirement

FY 2017 School Improvement Reservation

An SEA must ratably reduce the allocations of all LEAs calculated in Step 3, including newly opened and significantly expanded charter school LEAs, to reserve the greater of:

- Seven percent of the SEA's FY 2017 Title I award; or
- The sum of the total amount that the SEA reserved for school improvement under section 1003(a) from its FY 2016 Title I award (generally, 4 percent of that award) and the amount of the SEA's FY 2016 School Improvement Grants (SIG) allocation under section 1003(g).

(ESEA section 1003(a).)

Special Rule for FY 2018 and Subsequent Years' School Improvement Reservation

An SEA must ratably reduce the allocations of all LEAs calculated in Step 3 to reserve the greater of the amounts described in the two bullets under FY 2017 and must also follow a special rule.

Special rule for FY 2018 and subsequent years' allocations

In reserving funds under section 1003(a) from FY 2018 and subsequent years' allocations, an SEA may not reduce an LEA's Title I allocation below the prior year's amount. (ESEA section 1003(h).) It is possible that in some years this special rule will prevent an SEA from reserving the "full amount" for school improvement. (The term "full amount" refers to the figure described under the heading, "FY 2018 and Subsequent Years' School Improvement Reservation.")

Questions 3 and 5 in the 2013 *Dear Title I Director* guidance [available at: http://www2.ed.gov/programs/titleiparta/charterschlallocationreq.pdf] provide information on how to implement the special rule for newly opened and significantly expanded charter school LEAs.

Step 4a Example

The following example shows how two hypothetical SEAs determine the section 1003(a) reservation amounts. (The example assumes that the special rule described above does not prevent an SEA from reserving the full amount for school improvement required by section 1003(a).) For SEA 1, seven percent of its current year Title I allocation (Column 7) is greater than the sum of its FY 2016 1003(a) reservation and FY 2016 SIG allocation (Column 5). Therefore, SEA 1 reserves the Column 7 figure, as shown in Column 8. Conversely, SEA 2's

sum of its FY 2016 1003(a) reservation and FY 2016 SIG allocation exceeds seven percent of its current year Title I allocation. Therefore, SEA 2 reserves the Column 5 figure, as shown in Column 8.

Col. 1	*Col. 2*	*Col. 3*	*Col. 4*	*Col. 5*	*Col. 6*	*Col. 7*	*Col. 8*
SEA	**FY16 Title I-A allocation**	**FY16 1003(a) reservation** *(4 percent of Col. 2)*	**FY16 SIG allocation**	**Sum of FY16 1003(a) and FY16 SIG** *(Col. 3 + Col. 4)*	**Current Year Title I-A allocation**	**Seven Percent of Current Year Title I-A allocation**	**Current Year 1003(a) Reservation** *(Greater of Col. 5 or Col. 7)*
SEA 1	200,000,000	8,000,000	5,000,000	13,000,000	210,000,000	14,700,000	14,700,000
SEA 2	175,000,000	7,000,000	4,500,000	11,500,000	164,000,000	11,480,000	11,500,000

Step 4b: Reservation for State administration

An SEA follows the description of this step on pages 32-33 in the Department's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc].

To complete Step 4b, an SEA has two options:

- Proportionately reduce each LEA's total allocation even if an LEA receives less than 85, 90, or 95 percent of the total Title I, Part A amount allocated to it in the prior year (hold-harmless amount).
- Proportionately reduce the allocation of each LEA in the State (including the allocation for Part D, Subpart 2) that is above the LEA's guaranteed hold-harmless amount to bring up the allocation of LEAs below their hold-harmless amount. Repeat this process as necessary until no LEA in the State falls below its guaranteed hold-harmless amount.

Step 4c: Optional reservation for direct student services

New ESEA Optional Reservation for Direct Student Services[5]

After meaningful consultation with geographically diverse LEAs, an SEA may, but is not required to, reserve a maximum of three percent of its Title I allocation for direct student services (DSS).

(ESEA section 1003A(a)(1).)

To reserve funds for DSS, an SEA must ratably reduce the allocations of all LEAs, including charter school LEAs.

[5] The Department expects to provide information in another forum (e.g., other guidance) about DSS. This guidance focuses on how an SEA would make the reservation.

From the DSS reservation, an SEA may use up to one percent to administer DSS. (ESEA section 1003A(a)(2).) For example, if an SEA's DSS reservation is $1,000,000, it may use no more than $10,000 of the $1,000,000 to administer DSS (i.e., one percent of $1,000,000).

C. FREQUENTLY ASKED QUESTIONS

C-1. In implementing the special rule described in Step 4a in FY 2018 and subsequent years, what is an LEA's "prior year amount"?

An SEA has options in what it considers as an LEA's prior year amount, as long as the SEA applies the same option to all LEAs during a given year. The prior year amount may be an LEA's allocation from the previous year at the end of Steps 3, 4a, 4b (if the SEA did not reserve funds for DSS in the prior year), or 4c (if the SEA reserved funds for DSS in the prior year). If, for FY 2018 and subsequent years, the SEA is unable to reserve the full amount under one of the options because of the special rule discussed in Step 4a, the SEA must choose an option that results in reserving the full amount unless none of the options result in reserving the full amount; if it is not possible under any option to reserve the full amount, the SEA must select the option that produces the reservation amount that is closest to the full amount.

C-2. If an SEA received the Department's approval under NCLB to use an alternative method to redistribute allocations to LEAs serving less than 20,000 total residents (small LEAs), may the SEA continue to do so?

Yes, as long as the SEA continues to use the method approved by the Department. See pages 26-32 in the Department's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc].

C-3. Does the ESEA continue the authority in NCLB for covered SEAs to use an alternative method to allocate Concentration Grant funds?

Yes. Under section 1124A(b) of the ESEA, an SEA in a covered State (Alaska, Delaware, New Hampshire, Vermont, and Wyoming) may follow Steps 1-2 above for Concentration Grants or the steps listed in the second bullet under #3 on pages 31-32 in the Department's 2003 within-State allocation guidance [available at: http://www.ed.gov/programs/titleiparta/seaguidanceforadjustingallocations.doc].

C-4. May an SEA reserve funds for the State academic achievement awards program?

No. Under the ESEA, as amended by NCLB, if an SEA's Title I allocation increased over the prior year's amount, the SEA had the option to reserve up to five percent of the increase to support the State academic achievement awards program. The ESEA, as amended by the ESSA, no longer permits this reservation.

II. TITLE I WITHIN-DISTRICT ALLOCATIONS

D. OVERVIEW

An LEA may only use Title I funds in an eligible school attendance area (ESEA section 1113(a)(1)), which is a school attendance area in which the percentage of children from low-income families is —

- At least as high as the percentage of children from low-income families served by the LEA as a whole;
- At least as high as the percentage of children from low-income families in the grade span in which the school is located; or
- At least 35 percent.

(ESEA section 1113(a)(2).)

Except as provided below, if Title I funds are insufficient to serve all eligible school attendance areas, an LEA must —

- Annually rank, without regard to grade spans, eligible school attendance areas in which the percentage of children from low-income families exceeds 75 percent (the "75 percent poverty threshold") from highest to lowest according to poverty percentage; and
- Serve the eligible school attendance areas in rank order.

(ESEA section 1113(a)(3).)

E. CHANGES TO TITLE I WITHIN-DISTRICT ALLOCATION REQUIREMENTS

The ESSA added two requirements to the Title I within-district allocation requirements.

E-1. Ranking high schools

New ESEA Exception to the Ranking Requirement

An LEA may lower the poverty threshold to 50 percent for high schools served by the LEA.

(ESEA section 1113(a)(3)(B).)

An LEA must rank its schools above the 75 percent poverty threshold without regard to grade span and serve those schools in rank order of poverty before it serves any schools at or below the 75 percent poverty threshold. Under the new ESEA exception, an LEA may, but is not required to, continue to serve (in rank order of poverty) high schools with poverty percentages between 50 percent and 75 percent before it either serves other schools with a poverty percentage of 75 percent or below or begins to rank and serve schools by grade span. In other words, an LEA may serve high schools with 50 percent or more poverty before it serves any elementary or middle schools with a poverty percentage at or below 75 percent.

E-2. Eligibility of secondary schools using feeder pattern

New ESEA Provides Explicit Authority to Use Feeder Patterns to Determine the Poverty Percentages of Secondary Schools

- For determining the number of children from low-income families in a secondary school, an LEA may estimate that number by applying the average percentage of students from low-income families in the elementary school attendance areas that feed into the secondary school to the number of students enrolled in the secondary school.
- Before an LEA may use feeder patterns to determine the poverty percentage of secondary schools —
  - The LEA must notify its secondary schools to inform them of the option.
  - A majority of its secondary schools must approve the use of feeder patterns.

(ESEA sections 1113(a)(5)(B) and (C).)

A "secondary school" means a "nonprofit institutional day or residential school (including a public secondary charter school) that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12." Depending on State law, a secondary school might include middle schools as well as high schools. (ESEA section 8101(45).)

For examples of how to use feeder patterns to establish a poverty percentage for secondary schools, see Question 10 on pages 12-15 in the Department's 2003 Title I within-district allocation guidance [available at http://www.ed.gov/programs/titleiparta/wdag.doc].

F. FREQUENTLY ASKED QUESTIONS

F-1. If an LEA participates in the National School Lunch Program's (NSLP) Community Eligibility Provision (CEP), is there information available on how the LEA may use NSLP data, including CEP data, to allocate Title I funds to schools?

Yes. The within-district allocation section of the Department's 2015 Title I CEP guidance [available at http://www2.ed.gov/programs/titleiparta/15-0011.doc] provides options for how an LEA may use CEP data to allocate Title I funds to schools.

F-2. Have the requirements changed for allocating Title I funds to provide equitable services for eligible private school students and their teachers and families?

Yes. See questions O-1 through O-4 in Section V of this guidance: Equitable Services.

III. TITLE II, PART A ALLOCATIONS

G. OVERVIEW

The ESSA modified the formulas by which the Department allocates Title II, Part A funds to SEAs and by which SEAs allocate those funds to LEAs. The following sections provide details on the formula changes.

This guidance, coupled with the Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading available at: http://www2.ed.gov/policy/elsec/leg/essa/essatitleiipartaguidance.pdf, supersedes the Department's previous guidance on Title II, Part A of the ESEA as amended by NCLB, entitled Improving Teacher Quality State Grants, issued on October 5, 2006.

H. FEDERAL AWARDS TO AN SEA

All SEAs, the Bureau of Indian Education (BIE), and the Outlying Areas are eligible to receive funds provided under Title II, Part A. (ESEA section 2101(a).)

New ESEA Changes to the Department's Allocations to SEAs

- The hold-harmless is phased out over a series of years starting with the FY 2017 allocations.
- The share of funds allocated based on ages 5 to 17 in poverty relative to the share of funds allocated based on ages 5 to 17 population increases, starting in FY 2018.
- State agencies for higher education (SAHEs) are no longer eligible to receive an allocation from the Department.
- SEAs are allowed to reserve additional funds for certain State activities for principals or other school leaders.

(ESEA section 2101(b)-(c).)

H-1. How the Department determines the amount of each State's Title II, Part A allocation

Step 1: Determine Allocations to the Outlying Areas and the BIE

Prior to calculating State allocations, the Secretary reserves one-half of one percent of the annual Title II, Part A appropriation for allocations to the Outlying Areas, and one-half of one percent for an allocation to the BIE. (ESEA section 2101(a)(1) and (2).)

The Secretary also may reserve up to one-half of one percent of the annual appropriation for evaluation activities. (ESEA section 8601.)

Step 2: Determine allocations to States

Under the ESEA, as amended by NCLB, the Department first allotted to each SEA the amount the SEA received for FY 2001 under the former Eisenhower Professional Development and Class-Size Reduction programs. This was the "hold-harmless" amount. This provision was in effect through FY 2016. For the purposes of allocating funds to States under the ESEA, as amended by the ESSA, the Department will refer to this amount as the "base hold-harmless amount."

Title II, Part A, Base Hold-Harmless Amount

State	Base Hold-Harmless Amount	State	Base Hold-Harmless Amount
Alabama	33,589,576	Nevada	10,014,069
Alaska	10,014,069	New Hampshire	10,014,069
Arizona	31,644,323	New Jersey	48,824,660
Arkansas	20,304,205	New Mexico	16,779,448
California	234,202,657	New York	179,135,506
Colorado	23,239,119	North Carolina	44,562,470
Connecticut	20,267,446	North Dakota	10,014,069
Delaware	10,014,069	Ohio	80,186,546
District of Columbia	10,014,069	Oklahoma	24,217,943
Florida	93,726,505	Oregon	20,368,786
Georgia	53,915,360	Pennsylvania	88,362,883
Hawaii	10,014,069	Puerto Rico	66,751,522
Idaho	10,014,069	Rhode Island	10,014,069
Illinois	87,593,173	South Carolina	25,971,288
Indiana	35,603,460	South Dakota	10,014,069
Iowa	16,625,275	Tennessee	35,360,499
Kansas	16,940,650	Texas	170,820,831
Kentucky	33,528,904	Utah	13,477,195
Louisiana	49,335,846	Vermont	10,014,069
Maine	10,014,069	Virginia	37,642,753
Maryland	31,112,729	Washington	34,547,334
Massachusetts	39,506,167	West Virginia	18,809,357
Michigan	86,285,253	Wisconsin	35,323,167
Minnesota	29,197,574	Wyoming	10,014,069
Mississippi	31,957,903	American Samoa	850,878
Missouri	36,567,509	Guam	1,985,135
Montana	10,014,069	Northern Marianas	484,843
Nebraska	10,291,012	Virgin Islands	1,635,517

Starting in FY 2017: the Department Must Apply the New Hold-Harmless Requirement

Starting in FY 2017, the base hold-harmless amount will be reduced each year by 14.29 percent. For the next few years, the amount of the State hold-harmless as a percentage of its base hold-harmless (the amount received for FY 2001 under the former Eisenhower Professional Development and Class-Size Reduction programs) is as follows:

Fiscal Year	Percentage of FY 2001 base hold-harmless allocated to State[6]
FY 2017	85.71%
FY 2018	71.42%
FY 2019	57.13%
FY 2020	42.84%

(ESEA section 2101(b)(1)(C).)

For FY 2017, the amount of Title II, Part A funds that the Department allocates to each State after calculating the adjusted base hold-harmless amount for the State (excess funds) is determined by the following percentages, which are the same percentages in the ESEA, as amended by NCLB:

- 35 percent according to each State's population of children ages 5 through 17 relative to the number of these children in all States; and
- 65 percent according to each State's relative numbers of individuals ages 5 through 17 from families with incomes below the poverty line relative to the number of these children in all States.

The Department uses the most current data from the U.S. Census Bureau to make this calculation.

[6] Note that in any fiscal year for which the Title II, Part A appropriation is too small to permit allocations that equal at least each SEA's hold-harmless amounts, the Department will ratably reduce each SEA's allocation to the amount available for that fiscal year.

Starting in FY 2018: the Department Must Apply New Percentages

Beginning in FY 2018, new percentages are phased in. The share of excess funds allocated on the basis of a State's relative number of children ages 5 through 17 from families with incomes below the poverty line increases and the share allocated on the basis of a State's relative number of children ages 5 through 17 decreases, as follows:

Fiscal Year	Percentage based on population ages 5 through 17	Percentage based on population ages 5 through 17 in poverty
FY 2017	35	65
FY 2018	30	70
FY 2019	25	75
FY 2020 and subsequent years	20	80

(ESEA section 2102(b)(2)(B).)

Each SEA must receive at least one-half of one percent of the excess amount. (ESEA section 2101(b)(2)(B).)

H-2. SEA reservations from the State's Title II, Part A allocation

An SEA must first reserve at least 95 percent of the State's Title II, Part A award for subgrants to LEAs. It may reserve the remainder of the State's Title II, Part A allocation for allowable State activities. From the remainder, no more than 1 percent of the total State allocation may be used for State administrative costs of carrying out the Title II, Part A program. (ESEA section 2101(c)(2).)

In addition to the funds it reserves for State activities as calculated in the paragraph above, an SEA may also reserve up to 3 percent of the amount it initially reserved for LEA subgrants, and use these additional funds for allowable State activities for principals or other school leaders (for more information on the different activities states can support with this reservation, please refer to our previous guidance on Title II). Thus, for an SEA that elects to reserve the *maximum* amount of Title II, Part A funds for State activities, the split of the total State allocation between LEA-level and SEA-level funds would be as follows:

- 92.15 percent for LEA subgrants; and
- 7.85 percent for State activities, which includes at least 2.85 percent (3 percent of 95 percent) for State activities for principals or other school leaders. (ESEA section 2101(c)(1) through (c)(3).)

Example: A State receiving $10,000,000 that reserved the maximum allowable for State activities

State allocation: $10,000,000			
	State activities funds		**LEA subgrant funds**
Initial amount reserved for State activities (5 percent of $10,000,000)	$500,000	Initial amount reserved for LEA subgrants (95 percent of $10,000,000)	$9,500,000
Maximum additional amount for State activities for principals or other school leaders (3 percent of $9,500,000)	+ $285,000		- $285,000
Maximum total amount for State activities	$785,000	Minimum amount for LEA subgrants	$9,215,000

I. SEA AWARDS TO LEAS

An SEA continues to be responsible for determining LEA allocations and for ensuring the LEAs' provision of equitable services to private school students. (See Section V of this guidance: Equitable Services.

New ESEA Change to LEA Awards: No Hold Harmless

- The hold-harmless provision, based on the amount of funds an LEA received for FY 2001 under the former Eisenhower Professional Development and Class-Size Reduction programs, was eliminated.

  (ESEA section 2102(a).)

I-1. How an SEA determines the amount of each LEA's subgrant

Beginning in fiscal year 2017, under the ESEA, there is no longer a "hold-harmless" provision governing the calculation of LEA subgrants. An SEA, therefore, distributes funds to LEAs based solely on the following formula:

- 20 percent of the funds must be distributed to LEAs based on the relative numbers of individuals ages 5 through 17 who reside in the area the LEA serves (based on the most recent Census data, as determined by the Secretary); and

- 80 percent of the funds must be distributed to LEAs based on the relative numbers of individuals ages 5 through 17 who reside in the area the LEA serves and who are from families with incomes below the poverty line (based on the most recent Census data, as determined by the Secretary). (ESEA section 2102(a).)

I-2. How an SEA may distribute any unclaimed LEA funds

Title II, Part A funds available for LEA use are considered unclaimed if or when one or more LEAs decide not to participate in the program, or agree that they cannot use all or a portion of the funds they receive. An SEA may reserve these funds for State activities unless, in doing so, the SEA would end up reserving an amount of Title II, Part A funds for State activities that is in excess of the limits contained in ESEA section 2101(c)(1) – (3) (See Questions H-2 and H-3 in the above section on Federal Awards to an SEA); in such cases the SEA must redistribute any unclaimed funds to other LEAs. However, it may exercise some flexibility in determining how this redistribution will occur. For example, it may proportionally increase the subgrant amount provided to all participating LEAs. Alternately, an SEA could establish special procedural and distribution criteria (subject to any State rulemaking requirements), and make these funds available to those LEAs that meet these criteria.

IV. MAINTENANCE OF EFFORT REQUIREMENTS

J. OVERVIEW

An LEA may receive funds under a covered program for any fiscal year only if the SEA finds that either —

- the combined fiscal effort per student; or
- the aggregate expenditures

of State and local funds with respect to the provision of free public education by the LEA for the preceding fiscal year was not less than 90 percent of the combined fiscal effort per student or aggregate expenditures for the second preceding fiscal year. (ESEA section 1118(a) and 8521(a).) If an LEA fails to maintain effort by falling below 90 percent of both the combined fiscal effort per student and aggregate expenditures (using the measure most favorable to the LEA), the SEA must reduce the LEA's allocation under a covered program in the exact proportion by which the LEA failed to maintain effort. (ESEA section 8521(b).)

ED may waive the maintenance of effort requirement for an LEA if it determines that a waiver would be equitable due to —

- exceptional or uncontrollable circumstances; or
- a precipitous decline in the financial resources of the LEA.

(ESEA section 8521(c).)

K. CHANGES TO MAINTENANCE OF EFFORT REQUIREMENTS

The ESEA, as amended by the ESSA, made several updates to the maintenance of effort provision. Please note that provisions that did not change, including the information on expenditures to be included, expenditures to be excluded, and the definition of preceding fiscal year, are still available on page 11 of the 2008 Title I fiscal guidance [available at: http://www.ed.gov/programs/titleiparta/fiscalguid.doc] and remain applicable.

K-1. Updates to covered programs

Updated Programs to which the Maintenance of Effort Requirement Applies

- Title I, Part A – improving basic programs operated by LEAs
- Title I, Part D – prevention and intervention programs for children and youth who are neglected, delinquent, or at-risk
- Title II, Part A – supporting effective instruction
- Title III, Part A –English language acquisition, language enhancement, and academic achievement
- Title IV, Part B – 21st Century Community Learning Centers
- Title V, Part B, Subpart 2 − Rural and low-income school program
- Title VI, Part A, Subpart 1 − Indian education

(ESEA sections 8101(11), 6118(c), 8521(a).)

K-2. Reduction for failing to maintain effort

An SEA must reduce an LEA's allocation under a covered program if the LEA fails to maintain effort. Prior to the ESSA, the reduction was made based on failing to maintain effort compared to the preceding fiscal year only. Under the ESSA, the SEA has added flexibility and the reduction will be made based on the new requirement below.

New Flexibility regarding Reduction of an LEA's Allocation for Failing to Maintain Effort

- An SEA must reduce an LEA's allocation under a covered program if the LEA fails to maintain effort in a given fiscal year and also failed to maintain effort in one or more of the five immediately preceding fiscal years.

(ESEA section 8521(b)(1).)

K-3. Waiver for exceptional or uncontrollable circumstances

The statute provides two bases (an exceptional or uncontrollable circumstances or a precipitous decline in the financial resources of an LEA) to warrant the Secretary's granting a waiver of maintenance of effort. With respect to exceptional or uncontrollable circumstances, prior to the ESSA, the statute included the example of a natural disaster. Under the ESSA, a new example was inserted so that exceptional or uncontrollable circumstances also include a change in the organizational structure of the LEA. In addition to these two examples listed in the statute, there can be other instances of exceptional or uncontrollable circumstances that might warrant when a waiver request will be considered.

New Example for What Would Qualify an LEA to Receive a Waiver

- Exceptional or uncontrollable circumstances, such as a change in the organizational structure of the LEA.

  (ESEA section 8521(c)(1).)

L. FREQUENTLY ASKED QUESTIONS

L-1. What are examples of a "change in the organizational structure of an LEA" that could potentially qualify an LEA for a waiver of the maintenance of effort requirement?

Below is a list of examples for what a change in the organizational structure of an LEA might mean.

- An LEA changes its configuration. For example:
  - The LEA merges with another LEA.
  - The LEA divides into two or more LEAs.
  - The LEA eliminates grade levels (e.g., previously served grades K-12 and now serves grades K-8)
- An LEA changes its management or operations structure to create economies of scale to be more efficient. For example, each school in the LEA employs budget and fiscal management staff. The LEA makes the decision to consolidate budget and fiscal management staff into a single team located in the central office.

L-2. How does a waiver of maintenance of effort affect an SEA's determination of whether an LEA failed to maintain effort for one or more of the five immediately preceding fiscal years?

If an LEA receives a waiver of the maintenance of effort requirement from the Department for a given fiscal year, the LEA has effectively maintained effort for that fiscal year. Accordingly, in determining whether the LEA had failed to maintain effort for one or more of the five immediately preceding fiscal years, the SEA would count the year in which the LEA received a waiver as a year of maintaining effort.

L-3. If an LEA wishes to request a waiver of maintenance of effort based on a change in its organizational structure, what evidence should an LEA provide to the Department to demonstrate that the change in organizational structure caused the LEA to fail to maintain effort?

In requesting a waiver based on a change in its organizational structure, an LEA would need to provide evidence of that change and the reasons why the change caused the LEA to fail to maintain effort. To explain the change in its organizational structure, the LEA might provide a narrative description of the change or a visual, organizational chart or map, if relevant. The LEA would also need to explain why the change caused the LEA to fail to maintain effort. In doing

so, the LEA might show its expenditures related to its organizational structure before and after the change to demonstrate that the change resulted in lower expenditures.

V. EQUITABLE SERVICES

M. OVERVIEW

The ESEA includes separate provisions governing equitable services for eligible private school students, teachers and other educational personnel, and families under Title I and programs covered under Title VIII, Part F, Subpart 1, Uniform Provisions Subpart 1—Private Schools: Equitable Services for Private School Students, Teachers, and Other Educational Personnel (Title VIII).[7] Many of those requirements remain unchanged from requirements under the ESEA as amended by NCLB. The ESSA, however, made a number of significant changes. Some of those changes are common to the equitable services requirements under both Title I and Title VIII; others are different. Accordingly, Part N of this section addresses significant new requirements common to the equitable services provisions in Titles I and VIII; Part O focuses on significant changes to requirements under Title I; and Part P focuses on significant changes to requirements under Title VIII and the covered programs subject to those requirements.

Please note that, except as otherwise provided in this guidance, the existing non-regulatory guidance documents, *Title I Services to Eligible Private School Children* [available at: http://www2.ed.gov/programs/titleiparta/psguidance.doc] and issued on Oct. 17, 2003 and *Title IX, Part E Uniform Provisions, Subpart 1—Private Schools* [available at: http://www2.ed.gov/policy/elsec/guid/equitableserguidance.doc] and revised on Mar. 2009, remain applicable.

N. COMMON EQUITABLE SERVICES REQUIREMENTS UNDER TITLES I AND VIII

New Requirement: Ombudsman

To help ensure equitable services and other benefits for eligible private school children, teachers and other educational personnel, and families, an SEA must designate an ombudsman to monitor and enforce ESEA equitable services requirements under both Title I and Title VIII.

(ESEA sections 1117(a)(3)(B) and 8501(a)(3)(B).)

N-1. What are the roles and responsibilities of an ombudsman?

An ombudsman should serve 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 under Titles I and VIII. In addition, the ombudsman is required to monitor and enforce the

[7] Under the ESSA, the Title I equitable services requirements previously in section 1120 of the ESEA, as amended by NCLB, are now in section 1117 of the ESEA, as amended by the ESSA. Similarly, the equitable services requirements previously in section 9501 of the ESEA, as amended by NCLB, are now in section 8501 of the ESEA, as amended by the ESSA.

equitable services requirements under Titles I and VIII and, thus, should have a significant role in the State's monitoring process. Furthermore, the ombudsman should ensure that private school officials know how to contact the ombudsman. 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 applicable programs, LEA staff, and private school officials.
- Establish a process for receiving documentation of agreement from LEAs consistent with the consultation requirement that the results of such agreement shall be transmitted to the ombudsman. (ESEA section 1117(b)(1).)
- Participate in the State's Title I Committee of Practitioners (ESEA section 1603(b)) and, as applicable, nonpublic schools working group.

N-2. What specific responsibilities does an ombudsman have with respect to monitoring and enforcement?

The primary responsibilities of an ombudsman are to monitor and enforce the equitable services requirements in Titles I and VIII. Accordingly, an ombudsman should work with SEA staff administering Title I and programs covered under Title VIII to develop monitoring protocols applicable to the provision of equitable services under each program. To ensure that monitoring protocols are being followed, 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 also should serve as the primary point of contact for responding to and resolving any complaints regarding equitable services that the SEA receives under its ESEA complaint procedures.

N-3. Who may serve as an ombudsman?

An SEA has discretion in determining who to designate as an ombudsman. In determining the relevant qualifications of the ombudsman position, 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. SEAs might consider engaging such private school coalitions. 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?
- **Capacity:** Will the ombudsman work alone or in collaboration with other State Federal program directors? Does the individual have experience with integrating input from other technical experts and program specialists, including those at the U.S. Department of Education, and communicating it to the appropriate audiences?

- **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? (ESEA sections 1117(b)(1) and 8501(b)(1).)

N-4. What funds are available to support an ombudsman?

If an SEA consolidates State administrative funds under ESEA section 8201, it may support its ombudsman using those funds. If an SEA does not consolidate State administrative funds, it nonetheless may support its ombudsman using funds reserved for State administration under Title I and the covered programs under ESEA section 8501(b). Under these circumstances, however, the SEA must ensure that the ombudsman's salary is charged to each program based on the relative benefit received. (2 CFR 200.405(a).)

N-5. What is the timeline for an SEA to designate an ombudsman?

Under the Consolidated Appropriations Act, 2016, the equitable services requirements under the ESEA, as amended by NCLB, continue to apply through the 2016−2017 school year. However, an LEA must consult with private school officials to plan for the 2017−2018 school year before it makes any decision that affects the opportunity of eligible private school children, their teachers, and their families to participate in Title I or covered programs under Title VIII. Thus, an SEA should designate an ombudsman in sufficient time to be of assistance as LEAs and private school officials begin the consultation process for the 2017−2018 school year, which would generally occur in the late winter/early spring of 2017.

New Requirement: Obligation of Funds

Funds allocated to an LEA for educational services and other benefits to eligible private school children, teachers and other educational personnel, and families must be obligated in the fiscal year for which the funds are received by the LEA.

(ESEA sections 1117(a)(4)(B) and 8501(a)(4)(B).)

N-6. What is the purpose of this 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 this requirement is to ensure that an LEA uses the funds available under Title I or a covered program under Title VIII to provide equitable services in the fiscal year for which the funds were appropriated to ensure that eligible students, teachers and other educational personnel, and families 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 to design appropriate equitable services so that those services can begin at the beginning of the school year for which the funds are appropriated.

N-7. May an LEA carry over unobligated funds despite this new statutory requirement regarding obligation of funds?

In general, to ensure that equitable services are provided in a timely manner, an LEA must obligate the funds allocated for equitable services under all applicable programs in the year for which they are appropriated. (ESEA sections 1117(a)(4)(B) and 8501(a)(4)(B).) There may be extenuating circumstances, however, in which an LEA is unable to obligate all funds within this timeframe in a responsible manner. Under these circumstances, the funds may remain available for the provision of equitable services under the respective program during the subsequent school year. In determining how such carryover funds will be used, the LEA must consult with appropriate private school officials. (ESEA sections 1117(b) and 8501(c).)

New Requirement: 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 under each ESEA program that an LEA has determined are available for eligible private school children, teachers and other educational personnel, and families.

(ESEA sections 1117(a)(4)(C) and 8501(a)(4)(C).)

N-8. 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, by program, allocated for equitable services under Title I and each covered program under section ESEA section 8501(b) that each LEA responsible for providing equitable services has determined are available for eligible private school students, teachers and other educational personnel, and families. Such documentation should indicate how the allocation was determined.

N-9. How should an SEA disseminate the notice of allocation?

An SEA should consult with appropriate private school officials to determine an effective manner for disseminating the notice of allocation to appropriate private school officials, which may include notification through the ombudsman. 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, or other method that will ensure that this information is available to appropriate private school officials.

N-10. When should an SEA disseminate the notice of allocation?

An SEA should consult with LEAs and appropriate private school officials to determine a reasonable timeline for providing the notice of allocation. In general, an SEA should ensure that the notice is provided prior to the beginning of the school year.

New Requirement: Compliance – State Services

An SEA must provide equitable services directly or through contracts with public or private agencies, organizations, or institutions, if appropriate private school officials have —

- Requested that the SEA provide such services directly; and
- Demonstrated that an LEA has not met applicable equitable services requirements in accordance with the procedures for making such a request, as prescribed by the SEA.

(ESEA sections 1117(b)(6)(C) and 8501(c)(6)(C).)

N-11. Under what circumstances is an SEA required to provide equitable services in lieu of an LEA?

An SEA must provide equitable services in lieu of an LEA if appropriate private school officials (1) have requested that the SEA do so; and (2) have demonstrated in accordance with the SEA's procedures for making such requests that the LEA has not met the equitable services requirements, as applicable, under ESEA section 1117 or 8501.

N-12. What should an SEA include in its procedures governing a request by private school officials for the SEA to provide equitable services directly or through a third-party provider?

An SEA should consult with appropriate private school officials in developing procedures under which private school officials may request the SEA to provide equitable services in lieu of an LEA. For example, it is likely that most instances of non-compliance with equitable services requirements by an LEA can be corrected with minimal intervention by the SEA. Accordingly, consistent with the standards the Secretary must use for a bypass[8] (see ESEA section 8504) under the equitable services requirements in Titles I and VIII, an SEA might develop 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. An SEA should make available a standard template for requests and have transparent procedures for evaluating such requests.

[8] A bypass is a means by which the Secretary directly provides equitable services to private school students and teachers through a third-party provider.

Change to Existing Requirement: Consultation

The goal of consultation is agreement between the LEA and appropriate private school officials on how to provide equitable and effective programs for eligible private school children.

(ESEA sections 1117(b)(1) and 8501(c)(1), (5).)

N-13. What does "the goal of reaching agreement" between an LEA and appropriate private school officials entail?

The "goal of reaching agreement" between an LEA and appropriate private school officials is grounded in timely, meaningful, and open communication between the LEA and the private school officials on key issues that are relevant to the equitable participation of eligible private school students, teachers and other education personnel, and families in ESEA programs.

Meaningful consultation provides ample time and a genuine opportunity for all parties to express their views, to have their views seriously considered, and to discuss viable options for ensuring equitable participation of eligible private school students, teachers and other education personnel, and families. This assumes that the LEA has not made any decisions that will impact the participation of private school students and teachers in applicable programs prior to consultation, or established a blanket rule that precludes private school students and teachers from receiving certain services authorized under applicable programs. An LEA should consult with private school officials about the timeline for consultation and provide adequate notice of such consultation to ensure meaningful consultation and the likelihood that those involved will be well prepared with the necessary information and data for decision-making.

Successful consultation begins well before the implementation of services, 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 students and teachers.

O. EQUITABLE SERVICES UNDER TITLE I

Change to Existing Requirement: Allocating Funds for Equitable Services

Expenditures for equitable services to eligible private school children, teachers and other educational personnel, and families must be equal to the proportion of funds allocated to participating public school attendance areas based on the number of children from low-income families who reside in those attendance areas and attend private schools. An LEA must determine the proportionate share of Title I funds available for equitable services based on the total amount of Title I funds received by the LEA prior to any allowable expenditures or transfers of funds.

(See ESEA section 1117(a)(4)(A).)

O-1. May an LEA reserve funds off the top of its Title I allocation before it allocates funds for equitable services?

No. An LEA must determine the amount of funds available for providing equitable services prior to any expenditures or transfers of funds. This includes all reservations previously taken "off the top" of an LEA's Title I allocation, including reservations for administration, parental involvement, and district-wide initiatives.

O-2. How does an LEA determine the proportionate share of Title I funds available for all equitable services activities (i.e., administration, instruction, activities for parents and families of participating private school students, and professional development for teachers of participating private school students) now that this amount must be determined before any allowable expenditures or transfers of funds, including off-the-top reservations?

Once an LEA has established the participating public school attendance areas (see B-1 and B-2 of the *Title I Services to Eligible Private School Children* (Oct. 17, 2003)), it would first determine the number of children from low-income families residing in each participating public school attendance area who attend public schools and private schools. The LEA would then determine the overall proportion of children from low-income families who reside in participating public school attendance areas and who attend public schools and private schools. Using the proportion of children from low-income families who attend private schools, the LEA would determine the amount of funds available for equitable services based on that proportionate share of the LEA's total Title I allocation. For example, an LEA with four Title I public school attendance areas and a total Title I allocation of $1,000,000 would determine the total amount available for all equitable services activities (proportionate share) as follows:

EXAMPLE OF DETERMING THE AMOUNT OF TITLE I FUNDS FOR EQUITABLE SERVICES			
Public School Attendance Area	**Number of Public School Low-Income Children**	**Number of Private School Low-Income Children**	**Total Number of Low-Income Children**
A	500	120	620
B	300	9	309
C	200	6	206
D	350	15	365
TOTAL	**1,350**	**150**	**1,500**
PROPORTIONATE SHARE	90%	10%	
	$900,000	$100,000	

O-3. How does an LEA reserve Title I funds for administering equitable services for private school students?

From the proportionate share of Title I funds available to provide equitable services, an LEA may reserve an amount that is reasonable and necessary to administer equitable services. An LEA determines this amount separately from the funds needed to administer the Title I program for students in public schools. The LEA should discuss administrative costs for implementing equitable services during consultation with appropriate private school officials.

O-4. How does an LEA determine the amount of Title I funds to be used for parent and family engagement activities for participating private school students?

ESEA section 1116(a)(3)(A) requires an LEA to reserve and spend at least 1 percent of its Title I allocation to carry out required Title I parent and family engagement activities if the LEA's Title I allocation exceeds $500,000. To determine the minimum amount it must spend on parent and family engagement activities, an LEA must calculate 1 percent of its total Title I allocation. The LEA then applies the proportionate share percentage for services to private school students in question O-2 to determine how much it must spend for parent and family engagement activities for the families and parents of eligible private school students. The LEA must then spend that amount from the proportion of its Title I allocation available for equitable services for private school students. In other words, the LEA does not reserve a portion of its 1 percent reservation for parent and family engagement activities for participating private school students; rather, this amount comes from the proportionate share that the LEA already determined under question O-2.

EXAMPLE OF EQUITABLE SERVICES FOR PARENTS AND FAMILIES

An LEA's total Title I allocation is $1,000,000. From that amount, $100,000 (10 percent) is allocated for all Title I equitable services activities and $900,000 (90 percent) for all Title I activities in public schools. One percent of the LEA's total Title I allocation is $10,000 ($1,000,000 x .01). Therefore, it must spend $1,000 (10% of $10,000) from the $100,000 allocated for all equitable services activities to provide equitable services for the parents and

families of participating private school students and reserve $9,000 (90% of $10,000) from the $900,000 available for Title I activities in public schools for the parents and families of participating public school students.

EXAMPLE OF EQUITABLE SERVICES FOR PARENTS AND FAMILIES OF ELIGIBLE PRIVATE SCHOOL CHILDREN			
LEA's Title I allocation	**1% for parent and family engagement**	**Proportionate share for equitable services for parents and families (based on example under question O-4**	**Source of funds for equitable services for parents and families (proportionate share under question O-4 = $100,000)**
$1,000,000	$10,000	$1,000 ($10,000 x 10%)	$100,000 − $1,000=$99,000 remaining for instruction and professional development

New Requirement: Transmitting Agreement on Consultation to the Ombudsman

The results of agreement following consultation must be transmitted to the SEA's equitable services ombudsman.

(ESEA section 1117)(b)(1).)

O-5. How should an LEA transmit the result of agreement on consultation?

The ombudsman should establish a process for receiving documentation of agreement from each LEA consistent with the consultation requirement that the results of such agreement shall be transmitted to the ombudsman. (ESEA section 1117(b)(1).) For example, the ombudsman may direct an LEA to document agreement on the same form the LEA uses to document affirmation of consultation and submit that form to the ombudsman.

Changes to Existing Requirement: Consultation

The topics subject to consultation have been expanded to include the following:

- How the proportion of funds allocated for equitable services is determined.
- Whether the LEA will provide services directly or through a separate government agency, consortium, entity or third-party contractor.
- Whether to provide equitable services to eligible private school children by pooling funds or on a school-by-school basis.
- When, including the approximate time of day, services will be provided.
- Whether to consolidate and use funds available for Title I equitable services in coordination with eligible funds available for equitable services under programs covered under section 8501(b) to provide services to eligible private school children in participating programs.
- The written affirmation that consultation has occurred 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.

  (ESEA section 1117(b)(1).)

O-6. Have the options available for using funds to provide equitable services under Title I changed under the ESSA?

No. The only change is that the statute now specifies that an LEA must consult with private school officials regarding whether to provide services by pooling or on a school-by-school basis. For an explanation of pooling under Title I, see *Title I Services to Eligible Private School Children* (Oct. 17, 2003, Questions B-16-18 [available at http://www2.ed.gov/programs/titleiparta/psguidance.doc].

O-7. What does it mean to consolidate and use Title I funds in coordination with eligible funds available for equitable services under programs covered under ESEA section 8501(b) to provide services to eligible private school children in participating programs?

In consultation with appropriate private school officials, an LEA must consider whether to consolidate and use Title I funds to provide equitable services to eligible private school children participating under Title I in coordination with funds for equitable services from programs covered under ESEA section 8501(b). Coordinating the use of Title I funds with the use of funds available from programs covered under Title VIII could greatly improve the equitable services available to Title I participating private school students. Too often, the amount of funds available under Title I or Title VIII programs is not sufficient to provide robust equitable services. If an LEA coordinates the use of funds from a variety of programs, however, the LEA can maximize the services it can provide and use all the funds more efficiently and effectively.

For example, through coordination, an LEA with limited available funds might use Title I funds to provide instructional services to Title I-eligible participating private school students; use Title II funds to provide professional development to those students' teachers (as opposed to all teachers in a given school); use Title III funds to improve the English proficiency of English learners among the participating students; and use Title IV funds to provide necessary counseling services to the most-at risk eligible students. Funds under each program would be used for allowable activities under each program; yet, through a coordinated effort, they could better serve in a comprehensive manner the needs of the most at-risk private school students. Such coordination would eliminate the silo approach through which an LEA consults with private school officials on each program individually and separately, without regard to whether the services could be more effective were they coordinated, resulting in a non-cohesive delivery of equitable services by the LEA.

P. EQUITABLE SERVICES UNDER TITLE VIII

In addition to the equitable services provisions under Title I, Part A contained in ESEA section 1117, a number of other programs include equitable services requirements. Those programs are listed below. The equitable services requirements that apply to those programs are contained in ESEA section 8501.

Change to Existing Requirement: Updates to Programs Covered Under Title VIII

ESSA updated the covered programs to include the following:

- Title I, Part C − Education of migratory children
- Title II, Part A − Supporting effective instruction state grants
- 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 − 21st Century Community Learning Centers

(ESEA section 8501(b).)

Change to Existing Requirement: Complaint Process for Participation of Private School Children – Time Limit

The timeframe that an SEA has for responding to a complaint from parents, teachers, or other individuals concerning violations of ESEA section 8501 regarding the participation by private school children and teachers is 45 days. In addition, the Secretary must investigate and resolve an appeal of an SEA's resolution of a complaint within 90 days.

(ESEA section 8503.)

Changes to Existing Requirement: Consultation

The topics subject to consultation have been expanded to include the following:

- How the amount of funds available for equitable services is determined.
- Whether the agency, consortium, or entity responsible for providing equitable services will provide those services directly or through a separate government agency, consortium, or entity, or through a third-party contractor.
- Whether to provide equitable services to eligible private school participants (1) by creating a pool or pools of funds with all of the funds allocated under programs covered under section 8501(b) or (2) on a school-by-school basis based on each the proportionate share of funds available to provide services in each school.
- Documentation: Each LEA shall maintain in the agency's records, and provide to the SEA involved, a written affirmation signed by officials of each participating private school that the meaningful consultation required by this section has occurred. The written affirmation shall 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. If such officials do not provide such affirmation within a reasonable period of time, the LEA shall forward the documentation that such consultation has, or attempts at such consultation have, taken place to the SEA.

(ESEA section 8501(c).)

P-1. Have the options available for using funds to provide equitable services changed under the ESSA?

No. An LEA continues to have the option of expending funds for equitable services on a school-by-school basis or by pooling. The only change is that the statute now specifies that an LEA must consult with private school officials regarding these options. For an explanation of pooling under Title VIII applicable programs, see *Title IX, Part E Uniform Provisions, Subpart 1—Private Schools* (Revised Mar. 2009), Question F.10 [available at http://www2.ed.gov/policy/elsec/guid/equitableserguidance.doc.question.].

Change to Existing Requirement: Applicability of Equitable Services under Title II, Part A

The requirements in section 9501(b)(3) of the ESEA, as amended by NCLB, limiting the applicability of the equitable services requirements for Title II, Part A to funds used by the LEA to provide professional development to teachers and others has been removed.

(ESEA section 8501(b).)

P-2. How does an LEA determine the amount required for Title II, Part A equitable services to private school teachers and other educational personnel now that this amount must be determined based on the LEA's total Title II, Part A allocation?

The amount an LEA must reserve to provide equitable services for private school teachers and other educational personnel for Title II, Part A services is based on the LEA's total Title II, Part A allocation, less administrative costs. The LEA determines the amount of funds available for Title II, Part A equitable services for private school teachers and other educational personnel by calculating, on a per-pupil basis, the amount available for all public and private school students enrolled in participating private elementary and secondary schools in areas served by the LEA (regardless of a student's residency), taking into consideration the number and needs of the children, their teachers and other educational personnel to be served.

EXAMPLE OF FORMULA TO DETERMINE AMOUNT FOR TITLE II, PART A EQUITABLE EXPENDITURES	
A. Number of Students	
A1: LEA Enrollment	900
A2: Participating Private Schools Enrollment	100
A3: Total Enrollment = A1 + A2	1,000
B. Title II, Part A Allocation	
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
C. Per Pupil Rate	
C1: B3 divided by A3	$950
D. Equitable Services	
Amount LEA must reserve for equitable services for private school teachers and other educational personnel = A2 x C1	$95,000

P-3. What types of activities may an LEA now provide to private school participants?

An LEA may continue to use Title II, Part A funds to provide professional development activities for teachers, principals, and other school leaders to address the specific needs of their students. Additionally, there may be other permissible uses of Title II, Part A funds for the benefit of private school participants. Any use of Title II, Part A funds for the benefit of private school participants must:

- Be an allowable local use of Title II, Part A funds under the authorizing statute. (ESEA section 2103(b)(3).)
- Meet the specific needs of students enrolled in a private school, and not the school itself. Title II, Part A funds may not be used to meet the needs of a private school or the general needs of the students enrolled in the private school. In some instances, however, a program or activity that primarily benefits a private school's students (because it addresses specific, rather than general, needs of the students) will also incidentally benefit the school. (34 CFR 76.658.)
- Ensure that the public agency (*e.g.*, an LEA) responsible for providing equitable services retains control of the funds used to provide such services. In addition, equitable services must be provided by either an employee of the public agency or through a contract by the public agency with an individual, association, agency, or organization. These employees, individuals, associations, agencies, or organizations providing the services must be independent of the private school and any religious organization and the employment or contract must be under the control and supervision of the public agency. (ESEA section 8501(d).)

Equitable services under Title II, Part A may not be used for class-size reduction (ESEA section 2103(b)(3)(D)) in a private school because 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.

P-4. Have the options available for using funds to provide State-level equitable services under Title II, Part A changed?

Section 2101(c)(1) of the ESEA allows the SEA to reserve up to five percent of its overall Title II, Part A allocation for State-level activities (defined in ESEA section 2101(c)(4)); and section 2101(c)(3) allows the 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. Under section 8501(a)(1), the SEA has responsibilities to implement equitable services for private school teachers and other educational personnel to the extent that it reserves any funds under these provisions for State-level activities. The SEA determines the amount of Title II, Part A funds that it must reserve for equitable services to private school teachers and other educational staff 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 children, their teachers and other educational personnel to be served. (ESEA section 8501(a)(4)(A).)

State-level activities in which private school teachers may participate should be determined in consultation between the SEA and appropriate private school representatives. But as with the permissible uses of Title II, Part A funds an LEA makes available for equitable services (see

question P-3e), any activity an SEA provides to private school participants under Title II, Part A must primarily benefit the children enrolled in the private school, not the school itself. Similarly, as with LEAs, the SEA may not use Title II, Part A funds to meet the general needs of the private school unless providing activities that primarily benefit the private school's students (because it addresses specific, rather than general, needs of the students) also incidentally benefit the school. (See 34 CFR 76.658.)

Q. FREQUENTLY ASKED QUESTIONS UNRELATED TO ESSA CHANGES

Q-1. Does a private school student's participation in a Federal or State private school choice program affect that private school student's eligibility for ESEA equitable services?

No. Participation in a Federal or State private school choice program does not affect a private school student's eligibility for ESEA equitable services. Although most students enrolled in private schools pay their tuition with private funds, there are some instances in which public funds may support a student'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 student's tuition, a student is eligible for equitable services under the ESEA if the student meets the eligibility requirements of the respective program.

Q-2. Are equitable services for children with disabilities under the Individuals with Disabilities Education Act (IDEA) affected by the ESSA?

No. The ESSA did not change the IDEA's requirements on equitable services for children with disabilities. Therefore, the changes to the equitable service requirements under the ESEA, including new or changed provisions regarding the notice of allocation, consultation, the timeline for obligation of funds, the direct provision of equitable services by the SEA in cases of non-compliance, and the SEA's use of an ombudsman do not apply to equitable services under the IDEA. The Department's Office of Non-Public Education maintains a website containing resources on the IDEA's equitable service requirements, which are located at http://www2.ed.gov/about/offices/list/oii/nonpublic/programs2.html.

VI. TRANSFERABILITY

R. OVERVIEW

Under the ESEA, SEAs and LEAs may transfer funds they receive by formula under certain programs to other programs to better address State and local needs. The ESSA amended the transferability authority by changing the programs from and to which an SEA or LEA may transfer funds and removing limits on the amount of funds that may be transferred. This guidance addresses those changes.

Except as provided in this guidance, the *Guidance on the Transferability Authority* [available at www2.ed.gov/programs/transferability/finalsummary04.doc] remains applicable.

S. TRANSFERS BY SEAS

S-1. Updates to programs from which funds may be transferred

Updated Programs from which an SEA May Transfer Funds Allocated for State-level Activities

- Title II, Part A – Supporting effective instruction state grants
- Title IV, Part A – Student support and academic enrichment grants
- Title IV, Part B – 21st Century Community Learning Centers

(ESEA section 5103(a)(1).)

An SEA may not transfer funds it receives under any other ESEA program.

S-2. Updates to programs to which funds may be transferred

Updated Programs to which an SEA May Transfer Funds Allocated for State-level Activities

- Title I, Part A – Improving basic programs operated by LEAs
- Title I, Part C – Education of migratory children
- Title I, Part D – Prevention and intervention programs for children and youth who are neglected, delinquent, or at-risk
- Title II, Part A − Supporting effective instruction state grants
- Title III, Part A – State grants for English language acquisition and language enhancement
- Title IV, Part A − Student support and academic enrichment grants
- Title IV, Part B − 21st Century Community Learning Centers
- Title V, Part B − Rural education

(ESEA section 5103(a).)

T. TRANSFERS BY LEAS

T-1. Updates to programs from which an LEA may transfer funds

Updated Programs from which an LEA May Transfer Funds

- Title II, Part A – Supporting effective instruction state grants
- Title IV, Part A – Student support and academic enrichment grants

(ESEA section 5103(b)(2).)

An LEA may not transfer funds it receives under any other ESEA program.

T-2. Updates to programs to which an LEA may transfer funds

Updated Programs to which an LEA May Transfer Funds

- Title I, Part A – Improving basic programs operated by LEAs
- Title I, Part C – Education of migratory children
- Title I, Part D − Prevention and intervention programs for children and youth who are neglected, delinquent, or at-risk
- Title II, Part A − Supporting effective instruction state grants
- Title III, Part A – State grants for English language acquisition and language enhancement
- Title IV, Part A − Student support and academic enrichment grants
- Title V, Part B – Rural education

(ESEA section 5103(b).)

U. FREQUENTLY ASKED QUESTIONS

U-1. Is there a limit on the amount of funds for State-level activities an SEA may transfer?

No. An SEA may transfer all or a portion of the funds allocated for State-level activities under each of the programs listed under S-1 above.

U-2. May an SEA transfer administrative funds?

No. Under each of the programs listed under S-1 above, an SEA allocates funds separately for authorized State-level activities and for program administration. An SEA may transfer only the funds it allocates for authorized State-level activities; it may not transfer funds that it separately allocates for administration.

U-3. Is there a limit on the amount of funds an LEA may transfer?

No. An LEA may transfer all or a portion of funds it receives under each of the programs listed under T-1 above.

U-4. What are the responsibilities of an SEA or LEA for the provision of equitable services to private school children and teachers with respect to funds being transferred?

Excluding Title I, Part D and Title V, Part B, each program covered by the transferability authority is subject to the equitable services requirements under Title I or VIII, which may not be waived. (ESEA section 8401(c)(5).) Before an SEA or LEA may transfer funds from a program subject to equitable services requirements, it must engage in timely and meaningful consultation

with appropriate private school officials. (ESEA section 5103(e)(2).) With respect to the transferred funds, the SEA or LEA must provide private school students and teachers equitable services under the program(s) to which, and from which, the funds are transferred, based on the total amount of funds available to each program after the transfer.

U-5. May an SEA or LEA transfer only those funds that are to be used for equitable services to private school students or teachers?

No. An SEA or LEA may *not* transfer funds to a particular program solely to provide equitable services for private school students or teachers. Rather, an SEA or LEA, after consulting with appropriate private school officials, must provide equitable services to private school students and teachers based on the rules of each program and the total amount of funds available to each program after a transfer. (See ESEA section 5103(e).)