

Mississippi Department of Education – Office of Federal Programs
Every Student Succeeds Act: Equitable Services Dispute Resolution Procedure

The Mississippi Department of Education, Office of Federal Programs, is authorized by the Every Student Succeeds Act: Equitable Services Dispute Resolution Policy (*Miss. Admin. Code 7-3:80.4*, State Board Policy Chapter 80, Rule 80.4) to devise the following Procedure to implement said Policy.

1. INTRODUCTION

The *Elementary and Secondary Education Act of 1965 (ESEA)*, as amended by the *Every Student Succeeds Act of 2015 (ESSA)*, acknowledges that disputes may arise between a private school and the local educational agency (LEA)¹ responsible for administering equitable services to a private school under the provisions of *ESEA*.² Unresolved disputes requiring formal resolution are presumed to be rare.³ Amicable settlement of misunderstandings or misapplied procedures prior to formal dispute resolution and enforcement is therefore expected to be normative, in the spirit and letter of *ESEA*'s "goal of reaching agreement" through LEA-private school consultation on how to provide equitable services.⁴ The Mississippi Department of Education's (MDE's) State Equitable Services Ombudsman and *ESEA* title-program specialists are available to assist LEAs and private schools with all equitable services concerns.

As required of all SEAs by *ESEA*,⁵ the MDE established its State Ombudsman in the MDE's Office of Federal Programs (OFP) as the "primary point of contact for addressing questions and concerns from private school officials and LEAs regarding the provision of equitable services ..."⁶ The Ombudsman is vested by *ESEA* with the power to "monitor and enforce" *ESEA*'s equitable services

¹ "LEA," "public school district," "school district," and "district," are used interchangeably herein.

² *ESEA* § 1117 [20 U.S.C. 6320] (b)(6) and § 8501 [20 U.S.C. 7881] (c)(6), broadly establish the option for private school officials to lodge complaints.

³ U.S. DoE's Nov. 21, 2016, Non-Regulatory Guidance, p.27: "[M]ost instances of non-compliance with equitable services requirements by an LEA can be corrected with minimal intervention by the [State Educational Agency (SEA)]."

⁴ *ESEA* § 1117 [20 U.S.C. 6320] (b)(1): "[The LEA] and private school officials shall both have the goal of reaching agreement [through consultation] on how to provide [equitable services]." See also, *ESEA* § 8501 [20 U.S.C. 7881] (c)(1), [substantially same quotation]. *ESEA* § 1117 [20 U.S.C. 6320] (a)(1)(A) requires that: "[The LEA] shall ... after timely and meaningful consultation [with the private school] ... provide such children ... as requested by the [private school] officials to best meet the needs of such children ... [equitable services] that address their needs." *ESEA*'s Part F – UNIFORM PROVISIONS (§ 8501 [20 U.S.C. 7881] et seq.) specifically incorporate services involving the *ESEA* programs listed in *ESEA* § 8501 [20 U.S.C. 7881] (b)(1) into the consultation requirement.

⁵ *ESEA* § 1117 [20 U.S.C. 6320] (a)(3)(B): "... the [SEA] involved shall designate an ombudsman to monitor and enforce the requirements of this part." See also, *ESEA* § 8501 [20 U.S.C. 7881] (a)(3)(B).

⁶ U.S. DoE's Nov. 21, 2016, Non-Regulatory Guidance, p.23.

provisions.⁷ In exercising the responsibility of partnering with the OFP’s *ESEA* title-program specialists to monitor equitable services and provide technical assistance to LEA staff and private school officials,⁸ the Ombudsman will facilitate LEA-private school collaboration to correct mistakes and misunderstandings prior to initiation of formal disputes, but will act as the enforcement authority under this Equitable Services Dispute Resolution Procedure (ESDRP) in the event of unresolved disputes.⁹ The Ombudsman may appoint a designee to act as the Ombudsman’s agent for a specified task in the dispute resolution process; this designee and his/her role must be approved by the Executive Director of the OFP.¹⁰

At the close of the LEA-private school planning-phase consultation for equitable services, the LEA is required by *ESEA* to submit its *Final Equitable Services Plan* for each participating private school to the State Ombudsman at the MDE,¹¹ including simultaneous submission by the LEA of a *Written Affirmation of Consultation and Agreement (Written Affirmation)* signed by the private school official who reviewed the LEA’s *Final Equitable Services Plan* for the private school.¹² Because *ESEA* provides that this *Written Affirmation* shall contain the option for the private school official to claim that “timely and meaningful consultation did not occur,” and/or that “the program design is not equitable,”¹³ a negative indication in the *Written Affirmation* will be the first formal report to the Ombudsman that an unresolved disagreement exists, thus triggering this ESDRP.

This ESDRP meets the requirements of, and is otherwise consistent with, the broadly-stated equitable services dispute provisions included in *ESEA*,¹⁴ U.S. DoE’s published guidance on these

⁷ *ESEA* § 1117 [20 U.S.C. 6320] (a)(3)(B) and § 8501 [20 U.S.C. 7881] (a)(3)(B); U.S. DoE’s Nov. 21, 2016, Non-Regulatory Guidance, pgs.23-24.

⁸ U.S. DoE’s Nov. 21, 2016, Non-Regulatory Guidance, p.24.

⁹ Per the authority vested by *ESEA*. See note 7, above.

¹⁰ Throughout this ESDRP, a reference to the Ombudsman shall be assumed to indicate “the Ombudsman or his/her designee.”

¹¹ *ESEA* § 1117 [20 U.S.C. 6320] (b)(1): “... the results of which agreement shall be transmitted to the Ombudsman ...”

¹² *ESEA* § 1117 [20 U.S.C. 6320] (b)(5) and substantially identical § 8501 [20 U.S.C. 7881] (c)(5): “Each [LEA] shall ... provide to the [SEA] involved a written affirmation signed by the officials of each participating private school that the meaningful consultation required ... has occurred. [This affirmation must include] the option for private school officials to indicate ... belief that timely and meaningful consultation has not occurred or that the program design is not equitable ...”

¹³ *Id.*

¹⁴ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(A)-(C) and substantially identical § 8501 [20 U.S.C. 7881] (c)(6)(A)-(C).

broadly-stated procedures,¹⁵ and the procedures found in the Code of Federal Regulations (C.F.R.) sections¹⁶ referenced by the U.S. DoE’s published guidance.

This ESDRP discourages default by the parties, with the Ombudsman acting to guide the parties through the various exchanges, deadlines and requirements, so as to avoid a procedural oversight impacting the proper delivery of services for the benefit of students. Only in the case of an obvious willful capitulation, evidenced by repetitive behavior in the face of warnings, will this ESDRP invite the Ombudsman to declare a default.

A set of forms has been integrated with this ESDRP, which prescribes the required content of the forms. Notices, a Complaint, and a Response are included (the *Final Equitable Services Plan* and *Written Affirmation* are independently authorized by *ESEA*’s equitable services consultation process and not among the integrated ESDRP forms). The most current versions of the ESDRP and integrated forms shall be available for inspection and download directly from the MDE’s OFP website (<http://www.mde.k12.ms.us/ofp>). The forms may be revised, or new forms created, as needed to increase utility or instructive clarity if deemed necessary by the State Ombudsman and OFP Executive Director.

2. ADMINISTRATIVE PROCEDURE

The MDE OFP has adopted this ESDRP for the resolution of any unresolved private school disagreement with any aspect of equitable services provided by the LEA under the requirements of *ESEA*. If a disagreement persists following the LEA’s submission to the MDE OFP of its *Final Equitable Services Plan* for the private school, the following procedures shall be followed:

A. Negative Written Affirmation: This ESDRP is initiated by the Ombudsman’s receipt of the LEA’s *Final Equitable Services Plan*, accompanied by a negative *Written Affirmation* signed by the private school’s official indicating the official’s belief that timely and meaningful consultation with the LEA did not occur, and/or that the LEA’s equitable services program design is not equitable.¹⁷

¹⁵ U.S. DoE’s Nov. 21, 2016, Non-Regulatory Guidance, p.27: “... consistent with the standards the [U.S. DoE] Secretary must use for a bypass ... under equitable services requirements in [*ESEA*] 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 request.” This ESDRP represents MDE’s adherence to the foregoing U.S. DoE guidance.

¹⁶ 34 C.F.R. §§ 76.670-76.677: [Procedures for Bypass].

¹⁷ See notes 12 and 13, above. Prior to the LEA’s submission to the State Ombudsman of the LEA’s *Final Equitable Services Plan* for the given private school and the accompanying private school *Written Affirmation*, the LEA’s equitable services plan will necessarily remain in the consultative process of collaborative development and revision with the goal of reaching

B. Ombudsman Contacts Private School: Upon the Ombudsman’s receipt of a negative *Written Affirmation*, or upon the Ombudsman’s notification by a private school official that a negative *Written Affirmation* has been conveyed to the LEA (whichever occurs first¹⁸), the Ombudsman (or designee) shall, on the day of receipt/notification or as soon as possible within the following five (5) business days, telephone the private school’s official to:

- i. Verify the negative *Written Affirmation* and ascertain the private school official with authority to represent the private school’s interests in the dispute (presumably – though not necessarily – the signatory of the negative *Written Affirmation*), and the representative’s contact information.
- ii. Explain the Ombudsman’s authority under *ESEA* “to monitor and enforce the equitable services requirements” of *ESEA*,¹⁹ including the authority to resolve the subject dispute(s) according to *ESEA*’s requirements and the requirements of this ESDRP.
- iii. Ascertain and summarize the nature of the dispute so that the Ombudsman can involve all relevant OFP staff specialists.
- iv. Notify the private school official that this initial contact is prescribed by the ESDRP, and the next step in the procedure is a required settlement conference²⁰ (at the Ombudsman’s discretion via conference call or in-person conference²¹ hosted at an LEA facility or other designated location) involving the OFP title-program specialists, a representative of the LEA, a private school representative, and up to two additional individuals on behalf of each party, to be held within the next seven (7) business days or as soon as possible thereafter.
- v. Notify the private school official that if the dispute(s) are not satisfactorily resolved during the settlement conference, the private school will have the option to file a *Complaint for Enforcement*,²² triggering an in-person Enforcement Hearing or (if neither party requests

agreement. Only after the LEA has finalized the plan (perhaps overruling lingering private school objections), will any disagreement be considered unresolved.

¹⁸ See notes 12 and 13, above. *ESEA* requires the LEA to forward the *Written Affirmation* to the SEA after receipt from the private school official, simultaneously with the forwarding of the LEA’s *Final Equitable Services Plan* for the private school. It is foreseeable that a private school official may complain directly to the Ombudsman at the time of returning a negative *Written Affirmation* to the LEA.

¹⁹ See note 7, above.

²⁰ See notes 3 and 4, above, observing that the goal of consultation is agreement, and that most [noncompliance] can be corrected with minimal SEA involvement.

²¹ The nature of the dispute and other factors (including, but not limited to, availability issues and party preference) may inform the Ombudsman’s final decision on a conference call or in-person conference being most constructive toward the goal of achieving settlement.

²² *ESEA* § 1117 [20 U.S.C. 6320] (b)(6) and 8501 [20 U.S.C. 7881] (c)(6) outline the complaint rights of an aggrieved private school.

an in-person hearing) a decision by the Ombudsman resolving the dispute based on documentation and written arguments only.

vi. Advise the private school official to expect an update within the next business day on the progress of scheduling the settlement conference, to be scheduled for a day within the next seven (7) business days or as soon as possible thereafter.

vii. Provide, via email, a copy of this ESDRP to the private school official and confirm receipt thereof.

C. Settlement Conference; Notice; Procedure: A settlement conference shall be immediately scheduled, to occur within the seven (7) business days following the Ombudsman's contact with the private school official outlined in § 2(B), or as soon as possible thereafter. The settlement conference shall be conducted either by conference call or in-person, at the Ombudsman's discretion in consultation with OFP staff who will participate. Due to the impending possibility of the Ombudsman's adjudication of the matter, the Ombudsman shall not participate in the settlement conference.

i. The Ombudsman or designee shall contact the LEA's equitable services representative, email him/her a copy of this ESDRP, inform him/her of the circumstances and nature of the complaint(s) and of the required settlement conference, and schedule the conference within the next seven (7) business days or as soon as possible thereafter. The conference shall be prioritized.

a. The private school official shall be notified by phone of the appointed meeting details for the conference call or in-person conference.

b. Email notice shall also be conveyed to each party confirming the time/location and date, including: *ESDRP Form 1 – Notice of Settlement Conference* (available on the MDE OFP website: <http://www.mde.k12.ms.us/ofp>). This form shall contain the identifying information for the private school and LEA in question, their representatives' contact information, OFP staff intending to attend the conference and contact information, and a summary of the conference purpose and procedures described herein below.

c. The parties shall comply with the instructions contained in *ESDRP Form 1 – Notice of Settlement Conference*.

d. If a conflict of interest would naturally risk impairing the Ombudsman's ability to be an impartial decisionmaker in further proceedings in the case, the Ombudsman shall recuse him/her -self and the Executive Director of the OFP, or his/her designee, shall perform the role of the Ombudsman herein for the remainder of the case. A written decision by the Ombudsman to continue presiding over the case – after a party's written motion for the Ombudsman's recusal due to an alleged conflict of interest – may be appealed by the party after the Ombudsman's decision in the case if the party elects to appeal per § 3, below. The party's written motion for

recusal and the Ombudsman’s written decision overruling the motion for recusal shall be retained and included in the documents associated with the case.

ii. The purpose of the conference shall be for the parties and OFP staff specialists to collaboratively discuss the unresolved dispute(s) and reasons therefore, to confirm that the dispute is not the result of miscommunication, or misinterpretation of *ESEA*’s equitable services requirements or other mistake, and to resolve the dispute(s) by reaching agreement if possible.²³ The conference shall be informal in procedure and conducted collegially and in good faith.

iii. The primary document of reference for the conference shall be (if applicable) the LEA’s written *Final Equitable Services Plan* for the private school, including (if any) the LEA’s attached written explanations of disagreement with certain private school views/requests (as required by *ESEA*’s consultation provisions²⁴). Additional documents may be submitted for reference by the parties – scanned copies of any such documents must be emailed to the Ombudsman prior to the conference. The Ombudsman shall forward copies to the opposing party and distribute to participating OFP staff.

iv. MDE OFP shall determine which of its staff shall attend, excepting the Ombudsman who shall not attend due to the likelihood of impending adjudication. The private school and LEA shall participate with such personnel as deemed necessary by those parties, including, if possible, an individual who has, or has been delegated, final decision-making authority,²⁵ but limited to a maximum of three individuals per party. If delegation of final authority to a conference attendee is not achieved, a decision on any proposed resolutions developed at the conference must be (per § 2(C)(viii), below) promptly considered and accepted/rejected by, the decision-making authority.

v. A designated OFP staff facilitator shall begin the settlement conference with an opening statement reciting relevant language from the “Purpose” and “Procedure” subsections of the “Instructions and Information” section of *ESDRP Form 1 – Notice of Settlement Conference*. The OFP facilitator will verify that all documents and other evidence

²³ See note 20, above.

²⁴ *ESEA* § 1117 [20 U.S.C. 6320] (b)(2) and § 8501 [20 U.S.C. 7881] (c)(2): Any unresolved disagreement with the private school’s views/requests on the designated Title I-A topics of consultation (see, *ESEA* § 1117 [20 U.S.C. 6320] (b)(1)) must be documented by the LEA in a written explanation of the reasons for disagreement provided to the private school by attachment to the *Final Equitable Services Plan*. Regarding non-Title I-A designated topics of consultation (see, *ESEA* § 8501 [20 U.S.C. 7881] (c)(1)), the LEA must include a written explanation of reasons for disagreement only when the disagreement is with a private school’s request for the provision of equitable services through a contractor.

²⁵ To expedite resolution and avoid excessive delay, it is recommended that an individual in attendance for each party has the authority to agree to a final settlement, without the need to carry back proposals for the consideration of higher authorities. If further consideration is unavoidable due to organizational structure, approval or rejection of proposals must be promptly decided by the final authority (per § 2(C)(viii), below).

intended to be referenced are in possession of all parties and remedy the absence of any document by immediately conveying it by email to the party lacking the document or providing a copy if the conference is in-person.

vi. The OFP facilitator shall introduce all present individuals and the conference will proceed, informally, as follows:

a. The private school official will begin by stating the dispute(s) and reasons therefore.

b. The LEA's representative will respond to the private school's arguments.

c. OFP staff may: clarify the apparent components of the dispute(s), comment on the apparent application of the requirements of *ESEA* to the dispute as presented by the parties, question the parties, and offer observations of apparently required resolutions (if any) or suggestions of compromise.

d. The private school official and LEA representative, and the individuals associated with those parties, may respond as desired, as moderated by the OFP facilitator.

e. Though presented in step-by-step format above, the conference procedure is informal, and should proceed as an orderly and respectful conversation with the goal of possible resolution in compliance with the requirements of *ESEA*.

f. The discussion of the dispute or disputes shall proceed until each dispute is resolved and settled, a proposal for resolution is delineated for conveyance to the final decision-making authority, or until it becomes clear that no further resolution is possible.

vii. Settled disputes shall be documented in writing prior to ending the conference, including all details of the settlement, signed and dated, and a copy retained by the parties. This text shall be incorporated into the LEA's *Final Equitable Services Plan* (along with any other consequent edits). The amended *Final Equitable Services Plan* shall then be transmitted by email to the private school and the State Ombudsman. The Ombudsman shall document the resolution by attaching a notation to the prior negative *Written Affirmation* on file at OFP that the private school's complaints were resolved at the settlement conference, noting the date and agreed resolution.

viii. If a period of consideration is required by either party to decide whether or not to agree to a proposed resolution, the detailed text of that proposed resolution shall be agreed upon (each party retaining a copy, signed and dated by a party already agreeing to the terms) prior to the close of the conference, and a decision by the considering party (if agreeing, in the form of the resolution with the party's signature and date added) shall be conveyed to the Ombudsman within the following three (3) business days (the Ombudsman shall document any agreement, and the LEA shall incorporate the agreement into its *Final Equitable Services*

Plan and convey it to the Ombudsman, as described in § 2(C)(vii), above). If this period lapses without a decision announced, the Ombudsman will contact the considering party and request the decision. If no resolution is agreed, the process will proceed to the private school's choice (see § 2(D), below) to accept the LEA's position or to file a *Complaint for Enforcement*,²⁶ as stated in § 2(C)(ix), below (fully described in § 2(E)).

ix. If any disputes remain unresolved, the OFP facilitator shall, prior to closing the conference, state that the private school may choose, within the next five (5) business days, to accept the LEA's position on the disputed matter and move forward or choose to file: *ESDRP Form 2 – Complaint for Enforcement* (available on the MDE OFP website: <http://www.mde.k12.ms.us/ofp>). If consideration of a proposed resolution is pending (per § 2(C)(viii), above), the OFP facilitator will note this in his/her statement and note that the private school's five (5) business-day decision period shall run from its notification of a rejection of agreement.

D. Private School Decision: If unresolved dispute(s) remain at the close of the settlement conference (and after any post-conference consideration by decision-makers), the private school shall choose how to proceed within the next five (5) business days: either informing the Ombudsman of the private school's choice to relinquish its dispute and accept the LEA's position (the Ombudsman will subsequently inform the LEA, and document the result (as in § 2(C)(vii), above), or by choosing to file *ESDRP Form 2 – Complaint for Enforcement* by email to the Ombudsman (proceed to section § 2(E), below).

i. If no choice has been announced by the private school within the above-stated five (5) business days, the Ombudsman shall telephone the private school official to request its choice, and, if no choice is then announced, the Ombudsman shall establish an extended deadline for the decision, in consultation with the private school official, but not to exceed an additional three (3) business days, except that a longer deadline is allowable in the case of good cause offered by the private school official and accepted as good cause by the Ombudsman (generally: unavoidable emergencies constitute good cause, while discretionary matters or prioritization choices do not constitute good cause). The established deadline shall be immediately confirmed by email from the Ombudsman to the private school official.

ii. If the above-referenced extended deadline passes without an announced decision by the private school, such circumstances shall conclusively represent the private school's final acceptance of the LEA's position on the dispute, and relinquishment by the private school of the dispute for the remainder of the school year. The Ombudsman shall notify the private school and the LEA of this result, by phone call or voice mail, and by email. The Ombudsman shall document the result with appropriate notations to documents on file at OFP as outlined in § 2(C)(vii).

²⁶ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6) and 8501 [20 U.S.C. 7881] (c)(6) authorize the private school's right to complain to the SEA.

E. Complaint for Enforcement; Assignment of Case Number: *ESDRP Form 2 – Complaint for Enforcement* (available on the MDE OFP website: <http://www.mde.k12.ms.us/ofp>) shall be completed by the private school and emailed to the Ombudsman.

- i. *ESDRP Form 2 – Complaint for Enforcement* shall include the following:
 - a. The name of the private school and its representative official, that official's email address and telephone number, and the name of the subject LEA.
 - b. Identification of the private school's general complaint(s) that the LEA: did not engage in consultation that was meaningful and timely, did not give due consideration to the views or requests of the private school, and/or did not make a decision that treats the private school equitably as required by law.²⁷
 - c. Identification of "the basis for the noncompliance"²⁸ including a description of the dispute(s), an identification, to the extent possible, of the requirements of *ESEA* applicable to the dispute(s), and a detailed narrative specifically demonstrating²⁹ how the LEA has failed to comply with the equitable services requirements of *ESEA*.
 - d. A statement requesting that if any noncompliance finally adjudged to have been committed by the LEA remains uncorrected following an Order to Remediate and monitoring thereof, that the MDE provide equitable services directly, by-passing the LEA.³⁰
 - e. An indication of whether the private school requests an in-person Enforcement Hearing.³¹
 - f. Any new documentation the private school believes relevant to its dispute(s). The LEA's *Final Equitable Services Plan* for the private school should be on file with MDE and is part of the primary documentation relevant to the dispute(s). It need not be duplicated and resubmitted with the *Complaint for Enforcement*.
- ii. Upon the Ombudsman's receipt of the *Complaint for Enforcement*, the Ombudsman shall immediately: assign a case number using the format of a sequential number (reflecting the order of the incoming *Complaint*) and identify the subject school year in parenthesis, for

²⁷ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(A) and/or 8501 [20 U.S.C. 7881] (c)(6)(A)

²⁸ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(B) and/or 8501 [20 U.S.C. 7881] (c)(6)(B)

²⁹ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(C)(ii) and/or 8501 [20 U.S.C. 7881] (c)(6)(C)(ii)

³⁰ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(C)(i) and/or 8501 [20 U.S.C. 7881] (c)(6)(C)(i). A goal of this ESDRP is, if necessary, to correct LEA noncompliance rather than implement an immediate MDE bypass of the LEA's required equitable services role. MDE bypass will only occur as a last resort if post-decision monitoring reveals continued failure by the LEA to comply with an Order to Remediate.

³¹ 34 C.F.R. § 76.671(b)(3)(ii) et seq., provides for a hearing, if requested. See notes 15 and 16, above.

example: 1 - (2017-18) for the first-received *Complaint for Enforcement* pertaining to the 2017-18 school year; acknowledge receipt to the indicated private school representative official and notify him/her of the case number; forward the *Complaint* form (with the case number added) to, and confirm its receipt by, the LEA representative, who shall be informed of the LEA's option to file *ESDRP Form 3 – LEA Response to Complaint for Enforcement*³² (*Response*) (described in § 2(F) and available on the MDE OFP website) within the next five (5) business days.

- a. If an in-person Enforcement Hearing is requested by either party, the hearing shall be scheduled during the ten (10) business days following the expiration of the LEA's five (5) business day period to file the *Response*, or the filing of the *Response*, whichever occurs first.
- b. The LEA must provide a conference room for the hearing. At the Ombudsman's discretion, the hearing may be held at an alternative location.

F. Optional LEA Response: The LEA may, within the next five (5) business days after the LEA's receipt of the *Complaint for Enforcement* is confirmed by the Ombudsman, file a written response to the allegations stated in the *Complaint* using *ESDRP Form 3 – LEA Response to Complaint for Enforcement* (available on the MDE OFP website) by completing and emailing the *Response* to the Ombudsman, who shall confirm receipt and forward the *Response* to, and confirm receipt by, the private school official.

- i. *ESDRP Form 3 – LEA Response to Complaint for Enforcement* shall be designed to provide the LEA with the opportunity to offer a detailed response to the private school's *Complaint for Enforcement*, and to indicate whether the LEA requests an in-person Enforcement Hearing.

G. Resolution by Ombudsman without In-Person Hearing: Either party may request an in-person Enforcement Hearing by indicating such on the *Complaint* or *Response* forms. If neither party affirmatively requests an in-person Enforcement Hearing, the Ombudsman shall resolve the dispute within the next ten (10) business days following the filing of the LEA's optional *Response*, or after expiration of the five (5) business-day deadline for the filing of the LEA's optional *Response* if none is filed. The Ombudsman shall resolve the dispute in a written decision, considering as evidence only the LEA's *Final Equitable Services Plan* (including the LEA's attached written disagreements required by *ESEA*³³), the private school's *Complaint for Enforcement*, the *Response* (if any) filed by the LEA, and any properly submitted additional evidence.

³² 34 C.F.R. § 76.671(b)(3)(i) allows a written response by the LEA, as would be expected in such a matter (see notes 15 and 16, above). The 45 days allowed for a written response in the context of 34 C.F.R. § 76.671(b)(3)(i) is compressed for the purpose of this state Procedure which, per *ESEA* § 8503 [20 U.S.C. 7883] (a), allows 45 total days, start-to-finish, for written resolution by the SEA.

³³ *ESEA* § 1117 [20 U.S.C. 6320] (b)(2) and 8501 [20 U.S.C. 7881] (c)(2).

- i. The Ombudsman’s decision shall address and resolve all disputes, explaining whether the private school has succeeded in demonstrating³⁴ that the LEA has failed to comply with the equitable services provisions of *ESEA*.
- ii. The burden of proof shall be upon the private school to establish the LEA’s noncompliance by a preponderance of all relevant evidence under consideration.³⁵ If adjudged to have met this burden of proof, the private school shall have “demonstrated” the LEA’s noncompliance.
- iii. Each dispute (if more than one) shall be judged separately by the Ombudsman as to whether the private school has met its burden of proof.
- iv. The Ombudsman’s written decision shall be generally comprised of the following sections: a procedural history, a finding of facts, a discussion of controlling authorities, an analysis of the facts subjected to the controlling authorities, a conclusion, and, if necessary, an Order to Remediate (ordering measures the LEA must take to remedy its noncompliance). Appeal rights shall be included with the decision on a separate, final page.
- v. The Ombudsman’s written decision shall be conveyed to the parties by email, and receipt confirmed by the Ombudsman. The Ombudsman shall maintain an electronic copy of the decision on OFP’s departmental drive; a paper copy shall be maintained in a designated file at OFP.
- vi. The Ombudsman shall monitor the LEA’s compliance with any Order to Remediate. If noncompliance continues without correction, further action up to and including MDE bypass of the LEA may be initiated.³⁶

H. In-person Enforcement Hearing Requested; Notice of Enforcement Hearing: If either party requests an Enforcement Hearing:

- i. The Enforcement Hearing shall be an in-person hearing held at an LEA facility in the school district in question, or other appropriate facility at the Ombudsman’s discretion. The time, date, and place of the hearing shall be established by the Ombudsman in consultation with the parties. In the absence of exceptional circumstances, the Enforcement Hearing shall be held within the ten (10) business days following: the LEA’s filing of its *Response* (see

³⁴ *ESEA* § 1117 [20 U.S.C. 6320] (b)(6)(C)(ii) and/or 8501 [20 U.S.C. 7881] (c)(6)(C)(ii): private school’s burden to “demonstrate” noncompliance.

³⁵ No burden of proof is specified in *ESEA*. A “preponderance of the evidence” standard is an ordinary burden of proof, implicit in *ESEA*’s term “demonstrate.” An elevated burden of proof, such as “clear and convincing evidence,” is typically specified if intended. A superiority of weight of one party’s competing evidence over the other party’s, considered by the trier of fact to establish “more likely than not” that a contested fact occurred as that party contends, is “a preponderance of the evidence” related to the contested fact. See, *Black’s Law Dictionary*, “Preponderance of evidence.”

³⁶ See note 30, above.

§ 2(F), above), or the expiration of the period for the filing of the *Response*, whichever occurs first.

ii. Upon scheduling the hearing, *ESDRP Form 4 – Notice of Enforcement Hearing* (available on the MDE OFP website: <http://www.mde.k12.ms.us/ofp>) shall be emailed to each party by the Ombudsman, who shall confirm its receipt. The *Notice of Enforcement Hearing* shall contain scheduling information and a summary of the following procedures for the conduct of the hearing:

a. The LEA and private school must each be represented at the hearing by a designated representative and may also be represented by legal counsel.³⁷ These two positions may be held by different persons, or by the same person, at the discretion of the party. The party's designated representative, or his/her designee (for example, legal counsel) shall be given the opportunity to question each of that party's witnesses or defer to the Ombudsman's questioning of the witness. The designated representative may testify as a witness.

b. Oral, written and other (video, audio, etc.) evidence may be presented at the hearing. Witnesses provided by the parties may give testimony, including discussion of documents and other evidence. Testimony shall be given under oath administered by the Ombudsman, and subject to cross-examination by the opposing party's representative or designee. The Ombudsman may, at any time, intervene to question any person testifying. The parties may give closing arguments after the completion of all witness testimony.³⁸

c. Witnesses are required to answer all questions allowed by the Ombudsman, who may disallow irrelevant or repetitive questions on his/her own initiative or upon the successful objection of a party. A refusal to answer shall be deemed to imply an answer against the interest of the witness's party. The Ombudsman shall warn a refusing witness and give a final opportunity to answer prior to taking a negative inference from the refusal. If a negative inference is taken, it is not automatically fatal to the party's case, but is another piece of evidence to be weighed in the final consideration of whether the private school has met its burden of proof (per § 2(G)(ii)).

d. The Ombudsman shall assess the credibility of each item of testimonial (and other) evidence offered, and the weight afforded such evidence shall be influenced accordingly.

³⁷ 34 C.F.R. § 76.674(a)(2)(i): [The parties may be represented by legal counsel]

³⁸ 34 C.F.R. § 76.674(a)(2)(ii): [The parties may “[s]ubmit oral or written evidence and arguments at the hearing.”]

1. As common in Mississippi administrative hearing procedures,³⁹ the technical rules of evidence shall be relaxed. As such, hearsay testimony may be permitted at the Ombudsman’s discretion, but weighed accordingly. Hearsay carries no evidentiary weight, unless meeting a hearsay exception per the Mississippi Rules of Evidence (MRE), Article VIII. The Ombudsman will give a relaxed latitude for testimony during the hearing (in the Ombudsman’s discretion) and make decisions about the weight of any hearsay evidence after the hearing, explaining said treatment in the written decision.

2. Any attempt by a party to offer testimony about the contents of a document or other media not in evidence at the hearing shall be governed by MRE Article X: the document or media itself is almost always required to be in evidence at the hearing in order to prove the contents thereof. There is no evidentiary value to one party’s testimony alleging the contents of such absent document or media, and such testimony may be precluded by the Ombudsman at the hearing or dealt with afterwards in the written decision.

e. Subpoenas of persons or physical evidence shall not be issued in advance of the hearing.⁴⁰

f. Witnesses shall be sequestered, waiting in a designated area or areas outside of the audible hearing of the proceedings until summoned in to testify.

1. Before departing the hearing room to be sequestered, the Ombudsman shall order the witnesses not to discuss their testimony or any matter related to the case with any other person until the completion of the Enforcement Hearing.

2. Because of the possibility of a private school witness returning to give rebuttal testimony,⁴¹ private school witnesses should return to the sequestration area(s) after testifying. A private school witness who is not immediately available to be recalled for rebuttal testimony may be disqualified from giving rebuttal testimony.

³⁹ See: Mississippi Department of Employment Security (appellate hearing procedure); Mississippi Employee Appeals Board (hearing procedure).

⁴⁰ 34 C.F.R. § 76.673(b) excludes pre-hearing discovery and contains no provision for the subpoena of unwilling persons. This ESDRP reflects those limitations, being designed to be substantially consistent with the C.F.R.’s “Procedures for Bypass.” See notes 15 and 16, above.

⁴¹ Rebuttal testimony is the summoning or recalling of a witness by the first-presenting party (the private school), the sole intended purpose of which is to contradict specific evidence offered by the second-presenting party (the LEA). The LEA, presenting its case second, will have had adequate opportunity to contradict all matters presented by the private school. The private school however, having presented first, will not necessarily have had this opportunity. The opportunity for rebuttal is typical of adversarial hearings. See, *Black’s Law Dictionary*: “Rebuttal evidence.”

g. Each party's designated representative, and if present, legal counsel, are entitled to remain in the hearing room throughout the hearing (never sequestered). Either of these persons may give sworn witness testimony in due course.

h. Designated observers associated with the parties (limited to party administrative officers) may be permitted in, or excluded from, the hearing at the Ombudsman's discretion, including consideration of seating capacity. Observers must remain silent.

1. Credentialed reporters seeking to observe the hearing shall be admitted by the Ombudsman but limited by the reasonable capacity of the room. The Ombudsman may limit, by lottery, the number of media observers to one or more individuals. Those admitted must each agree to issue a written pool report to any excluded media. Any recording and/or broadcasting is prohibited.

2. Members of the public seeking to observe the hearing may be excluded by the Ombudsman, with the instruction that the hearing transcript and Ombudsman's written decision will be made publicly accessible by MDE in due course.

i. Any new documents or other evidence (video, audio, etc.) not previously exchanged for the Settlement Conference but intended to be introduced at the Enforcement Hearing shall be provided to the Ombudsman (who shall immediately forward to the opposing party) a minimum of three (3) business days prior to the day of the hearing, or, if scheduling requires, as much in advance as possible. At the Enforcement Hearing, on the Ombudsman's own initiative, or on the successful objection of a party, the Ombudsman may exclude from evidence any document or other physical evidence not provided by the offering party sufficiently in advance, if the ability of the opposing party to effectively respond is judged to be substantially impaired. Arguments of the parties shall be heard on this issue prior to the Ombudsman's decision to exclude or admit the evidence.

j. Following the full presentations (including brief opening statements, if desired) of both the private school (which presents its case first) and the LEA (which presents its case second), the Ombudsman shall ask if the private school representative requests any rebuttal testimony (the summoning or recalling of a witness by the private school, the sole intended purpose of which is to contradict specific evidence offered by the LEA).

1. If rebuttal testimony is requested, the Ombudsman shall ask the requesting representative (or legal counsel) for a summary of the expected testimony.

2. The Ombudsman shall only allow the testimony if concluding it will neither be repetitive of prior testimony nor irrelevant, and that the rebuttal testimony will not introduce matters unrelated to the specific contradiction of prior evidence.

3. The Ombudsman may dismiss the rebuttal witness at any point if, after a warning, the witness's testimony is repetitive, irrelevant or introduces new matters not specifically contradicting prior evidence.

Following all testimony, the LEA, followed by the private school, may make closing arguments addressing whether the private school has met its burden of proof. A maximum of 15 minutes will be allowed to each party. In the Ombudsman's discretion, the time may be further limited, or extended.

k. The Ombudsman shall arrange for a transcript of the Enforcement Hearing to be taken by a court reporter, or via sufficient digital audio and/or digital video.⁴² The transcript recording shall not be broadcast. No other recording or broadcasting of the hearing shall be permitted.

l. The highest level of civil decorum is required of all participants at the hearing. The Ombudsman may warn, and subsequently expel, any individual exhibiting unabated disruptive or uncivil behavior. The Ombudsman may preemptively close the hearing should any individual disrupt the hearing to the extent proceeding becomes impractical in the Ombudsman's judgement, in which case a negative inference will be taken against the party associated with the disruptive individual.

I. Enforcement Hearing; Procedure: The Enforcement Hearing shall be conducted as follows:

i. The hearing shall commence at the appointed time, at the discretion of the Ombudsman. The Ombudsman shall have the discretion to allow or deny the late entry of individuals. Late-admitted individuals are not entitled to any redress for consequent disadvantage; any procedural reordering or review is in the Ombudsman's discretion.

ii. If a party's designated representative fails to appear for the hearing:

a. If emergency circumstances are demonstrated to the Ombudsman's satisfaction, the hearing shall be delayed or rescheduled.

b. If emergency circumstances are not demonstrated to the Ombudsman's satisfaction, the hearing shall proceed per § 2(I)(iii) below, including the making of a transcript. The party who has appeared shall present its evidence and arguments, and the representative, and individual witnesses offering testimony, shall answer any

⁴² 34 C.F.R. § 76.674(a)(1): "The hearing officer arranges for a transcript to be taken." Necessary for potential appeal.

questions asked by the Ombudsman. The only evidence the Ombudsman shall consider on behalf of the party not appearing shall be any documents previously made part of the case (from the initial submission of the *Final Equitable Services Plan*), and any documentary or other evidence timely submitted for the Enforcement Hearing.

iii. When both parties are present for the hearing, and upon verifying the commencement of the transcript, the Ombudsman shall open the hearing with a statement substantially similar to the following:

“This hearing is open in the matter of [private school] versus [LEA], case number [# __ - (20xx-xx)] and is commencing at [time] on [date] in [location]. My name is [Ombudsman’s name], I am the Mississippi Department of Education’s equitable services Ombudsman, empowered by the Elementary and Secondary Education Act of 1965 as amended by the Every Student Succeeds Act of 2015 to monitor and enforce the equitable services provisions thereof. I will preside over today’s hearing, and will subsequently issue a written decision and order to the parties. Today’s hearing is authorized by sections 1117 [20 U.S.C. 6320] (b)(6) and/or 8501 [20 U.S.C. 7881] (c)(6) of the aforementioned Act, by the Mississippi Administrative Code, Title 7, Part 3, Chapter 80, Rule 80.4, and by the Mississippi Department of Education’s Equitable Services Dispute Resolution Procedure. Today’s hearing shall be governed by this Dispute Resolution Procedure, and otherwise by my discretion.”

iv. The Ombudsman shall continue with an instructional preamble for the hearing by reciting the relevant subsections of § 2(H)(ii), above (omitting footnotes). Likely not relevant (per Ombudsman’s discretion) are subsections: e. (subpoena restriction); h. (1) (if no media); h. (2) (if no public observers); i. (handled in vi., below); and k. (transcript).

v. The Ombudsman shall identify each individual present by name and capacity on behalf of the party (designated representative, legal counsel, witness, or observer). The Ombudsman shall name the court reporter or other transcript manager and identify as credentialed media any media present.

vi. The Ombudsman shall verify that each party is in possession of a copy of all documents and other evidence intended to be offered by either party, and shall exclude or admit any untimely submitted evidence per § 2(H)(ii)(i), after hearing any argument of the parties on whether the ability of the opposing party to effectively respond to the untimely submitted evidence is substantially impaired. All admitted documentary/other evidence shall be identified sequentially (as Exhibit 1, Exhibit 2, etc.) and shall be referenced as such by the parties during testimony. Any excluded documentary/other evidence shall be identified as excluded but included in the record of the hearing. The Ombudsman may limit or prohibit testimony about the contents of excluded evidence.

vii. If multiple disputes are at issue, the Ombudsman shall explain that each witness will be expected to testify regarding all knowledge about all disputes and will not be recalled on separate occasions to discuss each individual dispute.

viii. Witnesses shall be sequestered per § 2(H)(ii)(f).

a. Prior to sending the witnesses to the sequestration area(s), the Ombudsman shall order the witnesses not to discuss their testimony or any matter related to the case with any other person until the conclusion of the Enforcement Hearing.

b. The sequestration area(s) must be outside the audible hearing of the proceedings.

ix. The Ombudsman shall direct the private school to begin its case presentation, with a brief opening statement if desired, then by summoning its first witness. This witness and all subsequent witnesses for both parties shall be placed under oath by the Ombudsman, who is authorized by the State of Mississippi to administer oaths for this purpose by this ESDRP. The witness must respond affirmatively to the Ombudsman's question:

“Do you solemnly swear or affirm, that the testimony you are about to give, will be the truth, the whole truth, and nothing but the truth?”

If the witness refuses to so swear or affirm, the witness shall be dismissed.

a. The private school's representative or designee will question the private school witness. The Ombudsman may question the witness at any time.

b. When the witness's testimony is complete, the LEA's designee may cross-examine the witness. The scope of cross-examination is not limited,⁴³ but the questions must be relevant to the issues in dispute.

1. After the cross-examination, the private school representative may “re-direct,” if desired, asking the witness additional questions, but only to clarify testimony elicited during the cross-examination.

2. Following any “re-direct,” the LEA may “re-cross,” if desired, to question the witness specifically about the clarifying testimony given during the re-direct.

3. Additional rounds of optional re-direct and optional re-cross may continue (narrowing in focus as described in 1. and 2., above), but the Ombudsman may immediately intervene to disallow repetitive testimony or the raising of new matters not clarifying of prior testimony.

⁴³ Mississippi Rules of Evidence, Rule 611(b).

c. When the parties conclude their examination of the witness, or when the Ombudsman terminates the examination due to repetitive testimony:

1. The Ombudsman shall remind the private school representative that if the witness might be needed for rebuttal testimony following the LEA's presentation of its case, the private school witness must return to the sequestration area(s) – and if not immediately available for rebuttal testimony if called upon, the Ombudsman may disqualify the witness from giving rebuttal testimony and proceed with the case.

2. The Ombudsman shall reiterate to the witness not to discuss his or her testimony with anyone until the completion of the hearing.

d. The above sequence, including oath/affirmation and parts a., b. (1-3), and c. (1-2), shall repeat for additional private school witnesses, if any, until all the private school's witnesses have testified.

e. The Ombudsman shall direct the LEA's representative or designee to present the LEA's case by giving a brief opening statement if desired, then by summoning its first witness to testify and questioning the witness (witness is first placed under oath by the Ombudsman, per § 2(I)(ix), above). The Ombudsman may question the witness at any time.

f. When the witness's testimony is complete, the private school's designee may cross-examine the witness.

1. As in b. (1-3), above, additional rounds of re-direct by the LEA and re-cross by the private school may occur if desired and if the Ombudsman allows the questions (same considerations as b. (1-3), above.)

2. When the parties conclude their examination of the LEA witness, or when the Ombudsman terminates the examination due to repetitive testimony, the Ombudsman shall remind the witness not to discuss his or her testimony with anyone until the conclusion of the hearing, and the witness shall be dismissed (the LEA having no option for later rebuttal testimony).

g. The above sequence shall repeat for additional LEA witnesses, if any (parts e., and f. (1-2)) until all the LEA's witnesses have testified.

h. The Ombudsman shall ask the private school representative whether any rebuttal testimony is requested, as provided for by § 2(H)(ii)(j).

1. If, after the inquiry discussed in § 2(H)(ii)(j)(1-2), the Ombudsman allows the rebuttal testimony, the rebuttal witness shall be summoned (and placed under oath) or recalled (and reminded of still being under oath) and

questioned. After any desired cross-examination, re-direct and re-cross (as described above), the witness shall be dismissed.

2. If the private school desires to call another rebuttal witness, the process described in 1., above, shall repeat.

i. The Ombudsman shall direct the LEA's representative or designee to, if desired, make a closing argument, explaining how the private school has failed to meet its burden of proof (per § 2(G)(ii)) to demonstrate by a preponderance of the evidence presented that the LEA is noncompliant with the equitable services provisions of *ESEA* regarding each dispute at issue. This argument shall be limited to discussion of the evidence presented at the hearing and shall not incorporate matters not in evidence.

j. The Ombudsman shall direct the private school's representative or designee to, if desired, make a closing argument, explaining how the private school has met its burden of proof (per § 2(G)(ii)), to demonstrate by a preponderance of the evidence presented that the LEA is noncompliant with the equitable services provisions of *ESEA* regarding each dispute at issue. This argument shall be limited to discussion of the evidence presented at the hearing and shall not incorporate matters not in evidence.

k. The Ombudsman shall close the hearing and indicate that he/she will convey a written Decision and any consequent Order (see § 2(G)) to the parties within the next ten (10) business days.

l. The hearing transcript shall be kept on file at OFP. If requested, a copy will be issued to the parties. If composed by an outside contractor (court reporter), the Ombudsman shall obtain a copy of the hearing transcript as soon as possible.

J. Ombudsman Decision and Order: Within ten (10) business days following the close of the hearing, the Ombudsman shall consider the evidence and compose a written decision (in accordance with § 2(G)) which shall be conveyed to the parties by email, with receipt confirmed by the Ombudsman. If the LEA is found noncompliant in one or more disputed matter, the Ombudsman's written Order to Remediate shall accompany the written decision, ordering the measures to be undertaken by the LEA to achieve compliance, monitored by the Ombudsman. If noncompliance was not demonstrated, this shall be noted in the conclusion of the written Decision, and no Order to Remediate will issue.

3. APPEAL

The Ombudsman's Decision and Order may be appealed by either party as follows:

A. Appeal to the Mississippi Superintendent of Education: Within the three (3) business days following the Ombudsman's issuance of the Decision, either party may file notice of appeal to the Mississippi State Superintendent of Education, or designee, who shall, within the ten (10) business days following the filing of said notice, review all materials considered in the case, including the transcript if applicable, and affirm, modify or reverse the Ombudsman's Decision and Order in a written decision issued to the parties.

B. Appeal to the United States Secretary of Education: Either party may appeal the decision of the Mississippi State Superintendent of Education to the Secretary of Education at the United States Department of Education no later than 30 calendar days after the parties' receipt of the State Superintendent's decision, or if no decision is issued within 45 calendar days after the filing of the initial private school Complaint for Enforcement.⁴⁴ The appeal shall be accompanied by a copy of the Ombudsman's Decision and Order, a copy of the Mississippi State Superintendent's Decision, and a complete statement of the reasons supporting the appeal.⁴⁵

⁴⁴ *ESEA* § 8503 [20 U.S.C. 7883] (b): [APPEALS TO SECRETARY]

⁴⁵ *Id.*