Date: May 25, 2018

To: US ED Office of Non-Public Education (Maureen Dowling)

From: Bryan Lieb, Esq., ESEA Ombudsman, Mississippi

Re: Clarifications sought regarding equitable services issues in Title V-A transfers

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In past months the United States Department of Education (ED) has begun elaborating on its non-regulatory guidance concerning the equitable services consequences of Title V-A transfers, spreading this information through conference presentations and limited publications such as ONPE’s *Ombudsman Update*.

ED’s pronouncements forbid the creation of a “stand-alone” equitable services program followed by the transfer of the remaining ESEA program funding. Consequently, private schools’ expected equitable services funding could be eliminated (converted to LEA use) by LEAs performing Title V-A transfers to maneuver initial ESEA program allocations into programs for which private schools are largely or wholly ineligible for equitable services (or into programs to which equitable services do not apply). This is not a hypothetical scenario, as real instances of LEA attempts at this maneuver, for the openly stated purpose of converting the funds to LEA use, have already occurred with FY18 allocations. FY19 allocations are now on the immediate horizon, increasing the urgency of this situation.

ESEA Ombudsmen are empowered with the authority to monitor and enforce ESEA’s equitable services provisions. In discussion of transfer issues, Ombudsmen have expressed concern that ED’s expanding non-regulatory guidance on Title V-A transfers will inevitably result in:

* increasing LEA manipulation of transfer to retain funding for LEA use that would otherwise be assigned to equitable services,
* the undoing of the painstaking groundwork done by many Ombudsmen to cultivate public-private trust and collaboration in the administration of equitable services, and
* the consequent undermining of the equitable services provisions of ESEA and of the credibility of Ombudsmen unable to respond to private school outrage at the loss of equitable services

Individual Ombudsmen are pursuing solutions to this looming challenge by various means. This letter seeks assistance with a set of unanswered questions about the interpretation of ESEA statutes relevant to the transfer issue, including statutes appearing to provide explicit instructions for a mutually satisfactory public-private handling of the transfer scenario. These statutes will be cited, and these questions posed, by private schools vehemently disputing the elimination of their expected equitable services. In order to arm Ombudsmen with authoritative responses, and as reassurance we are not being led to endorse violations of ESEA, rigorous answers to these questions are requested.

Q1: Is the requirement of ESEA § 5103(e)(2) upon LEAs to “conduct consultations in accordance with section 8501” defined as: proceeding through the consultation process described by § 8501(c)(1) through (c)(5) – including equitable services plan formation and private school written affirmation thereof – prior to a Title V-A transfer? If defined differently, what is the alternative definition of “conduct consultations in accordance with section 8501” and where is this identified in ESEA?

Q2(a): If an LEA receives financial assistance under an ESEA program (for example, the LEA’s initial Title II-A funding allocation), must the LEA provide equitable services that address private school needs under the program, as stated in ESEA § 8501(a)(1)? \*

\*ESEA § 8501(a)(1) states:

Except as otherwise provided in this Act, to the extent consistent with the number of eligible children in areas served by a … local educational agency … receiving financial assistance **under a program** specified in subsection (b) [the Title VIII-incorporated programs], who are enrolled in private elementary schools and secondary schools in areas served by such agency, … the agency, … shall, after timely and meaningful consultation with appropriate private school officials provide to those children and their teachers or other educational personnel, on an equitable basis, special educational services or other benefits that **address their needs** **under the program**. (emphasis added)

Q2(b): Is the above-noted requirement of § 8501(a)(1) compatible with (rather than in conflict with) a Title V-A transfer because of Title V-A’s § 5103(e)(2) requirement to “conduct consultations in accordance with section 8501” which occurs, per § 8501(c)(3), prior to the transfer – thus enabling the LEA receiving financial assistance under an ESEA program to provide equitable services under that program before transferring the remaining funds? \*

\*ESEA § 8501(c)(3) states:

The consultation required by paragraph (1) [§ 8501(c)(1)] shall occur **before the agency, consortium, or entity makes any decision that affects the opportunities of eligible private school children, teachers, and other educational personnel to participate in programs under this Act**, and shall continue throughout the implementation and assessment of activities under this section. (emphasis added)

Q2(c): If equitable services are not established prior to a transfer, are private school children and teachers who are eligible to participate in ESEA programs (for example Title II-A and IV-A enrollment-based programs) denied the opportunity to participate in these ESEA programs when funding is transferred to a program\* in which they are (wholly or substantially) not eligible to participate?

\*For example:

* Title I-A (poverty-based counting method)
* Title I-C (only migrant students)
* Title I-D (*no equitable services*)
* Title III-A (only English-learner students)
* Title V-B (*no equitable services*)

Q3: In the context of Title V-A transfers, does ESEA give LEAs complete control (via the transfer) over whether a private school receives equitable services, despite every ESEA description of consultation\* being stated in terms of how equitable services will be provided, not whether the services will be provided?

\*ESEA § 1117(a)(1)(A): “[The LEA] shall … provide … [equitable services];” ESEA § 1117(b)(1): “… the goal of reaching agreement … on how to provide [equitable services];” ESEA § 8501(c)(1): “To ensure timely and meaningful consultation, a … local educational agency … shall consult with appropriate private school officials. Such agency and private school officials shall both have the goal of reaching agreement on how to provide equitable and effective programs for eligible private school children …”.

Q4: Does “the lack of any ESEA program solely for private schools” (for example, there is no “Title XXXVII – Program Solely for Private Schools”) excuse or forbid LEAs from complying with the specific instructions of ESEA § 5103(e)(2) to “conduct consultations in accordance with section 8501” prior to transferring funding from a program that provides equitable services? If such excuse or forbiddance is claimed, what is the specific legal authority in ESEA supporting this claim and contradicting the explicit instructions of § 5103(e)(2)?

Q5: Regarding transfers into Title I-A, ED instructs that an equitable proportion be calculated from the amount transferred into Title I-A after the transfer (i.e.: from the total amount in I-A after the transfer). How is this guidance not violative of ESEA for two related reasons?

(1) § 1117(a)(4)(A)(ii)’s Title I-A requirement (emphasis added): *“The proportional share of funds [for equitable services] shall be determined based on the total amount of funds received by the local educational agency under this part prior to any allowable expenditures or transfers by the local educational agency.”*

(2) § 5103(e)(1)’s requirement: ***“Except as otherwise provided in this part, funds transferred under this section are subject to each of the rules and requirements applicable to the funds under the provision to which the transferred funds are transferred.”*** The effect of § 5103(e)(1) is thus to apply the rule of § 1117(a)(4)(A)(ii) to any funds transferred into Title I-A, meaning that a proportional share for equitable services is not deducted from any funds transferred into Title I-A (the equitable amount for Title I-A having been determined prior to any transfers).

Q6: Why does ED cite ESEA § 5103(e)(1) (quoted in bold italics above) as support for ED’s statement in the January 2018 Ombudsman Update: “*LEAs must calculate equitable service shares based on the total amount of funds available under a program* ***after*** *a transfer,*” when § 5103(e)(1), in its opening phrase, “*Except as otherwise provided in this part*” (Title V, Part A), conspicuously points to § 5103(e)(2)’s providing (as an exception to (e)(1)’s more general rule) the specific instructions to resolve equitable services scenarios by using the § 8501 consultation process prior to the transfer, thus apparently contradicting rather than supporting ED’s statement?

Q7: ED, to date, continues to interpret Title V-A as forbidding a “stand-alone” equitable services program in a private school (for example a Title II-A program) if there is no corresponding (II-A) program operating in the LEA, but also mentions the importance of timely and meaningful consultation prior to the transfer. ED has not indicated how it expects Ombudsmen to enforce the equitable services provisions of ESEA when outraged private schools – left empty-handed after a transfer – file complaints under § 8501(c)(6) that timely and meaningful consultation did not occur and that they were not treated equitably as required by section 8501. With the mutually beneficial solution of a stand-alone equitable services program forbidden by ED’s current pronouncements, are Ombudsmen expected to resolve the complaint by:

(1) disallowing the transfer (due to consultation failure and equity failure) and requiring the LEA to operate an undesired ESEA program so that the equitable services due to the private school under that ESEA program can be provided, or

(2) allowing the transfer and explaining to private schools that transfers can be manipulated to eliminate equitable services?

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Thank you for your consideration of these questions. With FY19 allocations at hand, answers are needed.

Sincerely,

Bryan Lieb, Esq.

ESEA Ombudsman, Mississippi