**Implementing ESEA Title V-A Transfers Involving Equitable Services:**

**Consistent vs. Contradictory Interpretations**

Bryan Lieb, Esq. (ESEA Ombudsman, Mississippi) – September 17, 2018 (revised March 15, 2019)

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**Introduction**

The U.S. Department of Education’s (ED’s) interpretation of ESEA Title V-A transferability creates a weapon for LEAs to convert equitable services funding to LEA use at the LEA’s whim, denying private school participation in ESEA programs and poisoning the LEA– private school relationship.

ED’s interpretation, which ignores specific statutory instructions and brazenly redefines ESEA section 8501 consultation, lacks any legal support in ESEA and overtly contradicts and nullifies the statutory framework Congress enacted to ensure the provision of equitable services to private schools, including Congress’s explicit solution for the problem of Title V-A transfers involving equitable services.

Unsurprisingly, the United States Supreme Court favors plain language, acknowledges specific exceptions to general rules, and resoundingly rejects contradictory interpretations of statutes in favor of consistent interpretations:

“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear (citation omitted), or **because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law** (citations omitted). *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988)* **(emphasis added)**.

“‘[I]t is a commonplace of statutory construction that the specific governs the general.’ That is particularly true where … ‘Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.” *RadLAX Gateway Hotel v. Amalgamated Bank, 566 U.S. 639 (2012).*

“It is a basic principle of statutory construction that a specific statute … controls over a general provision … particularly when the two are interrelated and closely positioned …” *HCS-Laundry v. United States, 450 U.S. 1 (1981).*

“When a statute’s language is plain, the sole function of courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Sebelius v. Cloer, 569 U.S. 369 (2013).*

These bedrock interpretative principles should be kept in mind as ESEA’s consistent statutory framework is contrasted with ED’s contradictory interpretation in the review below. The ESSA amendments are universally acknowledged as having “strengthened the equitable services provisions” of ESEA. See, *ESSA: Moving Toward a Well-Rounded Title I*, p.115 (LRP Publications, 2016) (listing nine changes adding strength to the equitable services provisions). Given this strengthening, is Title V transferability in fact a “back door” by which private schools can be stripped of equitable services at the whim of LEAs maneuvering to convert those funds to LEA use?

ED has never denied that its transfer interpretation has exactly this effect, nor explained why it has adopted such a starkly anti– private school stance, remaining silent or regurgitating its basic, boilerplate guidance when its interpretation has been subjected to rigorous written challenges offered by multiple states. If a persuasive, well-supported legal analysis were available for its position, ED seemingly would have offered it by now.

ED’s contradictory interpretation must be abandoned in favor of ESEA’s statutory requirements. In introducing an adversarial, zero-sum process dictated by the LEA, ED appears to have forgotten that ESEA program funding is for the benefit of all students, not solely for public school students. A straightforward reading of ESEA’s interrelated statutes discussed herein reveals a completely consistent and balanced interaction satisfying the interests of both public and private stakeholders.

**1. ESEA Treats Equitable Services with Uniform Consistency, Including in the Transfer Scenario**

ESEA ensures and safeguards full and uncompromised private school participation in ESEA programs through an interrelated and consistent framework of statutes including the ESEA program application assurances, the core requirement of § 8501(a)(1), the specific instructions of § 5103(e)(2), the timing requirement of § 8501(c)(3), and the definitional requirements of § 8501 consultation.

**A. Binding Assurances**

An LEA must apply for its ESEA program allocations. In applying, the LEA provides required “assurances,” under ESEA § 2102(b)(2)(E) and 4106(e)(2)(B) for the Title II-A and IV-A programs. The LEA assures that if granted the allocation it “will comply with section 8501 (regarding participation by private school children and teachers).”

**B. Section 8501(a)(1)’s Core Requirement**

When the LEA receives its ESEA program allocations, § 8501(a)(1) requires an LEA receiving financial assistance under a program to, after timely and meaningful consultation, provide equitable services that address private school needs under the program.

This core requirement is, of course, consistent with the above-noted assurances.

**C. Sections 5103(e)(1) and 5103(e)(2): General Rule, Specific Exception**

Congress addresses the problem of equitable services entangled in a transfer. Section 5103(e) includes the “Applicable Rules” for a Title V-A transfer:

ESEA § 5103(e): APPLICABLE RULES. —

(1) IN GENERAL. — **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.

(2) CONSULTATION. — Each State educational agency or **local educational agency** that transfers funds under this section **shall conduct consultations in accordance with section 8501, if such transfer transfers funds from a program that provides for the participationof students, teachers, or other educational personnel, from private schools**.

(emphasis added)

Note the first clause of the “general” provision actually points out the exception “otherwise provided in this part” (Title V – Part A), the exception being the specific procedure required by 5103(e)(2) when equitable services are involved in the transfer. Lacking this exception, 5103(e)(1) might be read to completely contradict and avoid the program assurances and the command of 8501(a)(1). But with 5103(e)(2), Congress maintains the consistency of its statutory framework by requiring the application of pre-transfer consultations with the private school in accordance with section 8501, resulting in equitable services being provided under the subject program.

**D. Section 8501(c)(3): Timing is Important**

Consultations in accordance with section 8501 must occur prior to the transfer, and for good reason.

ESEA § 8501(c)(3) states:

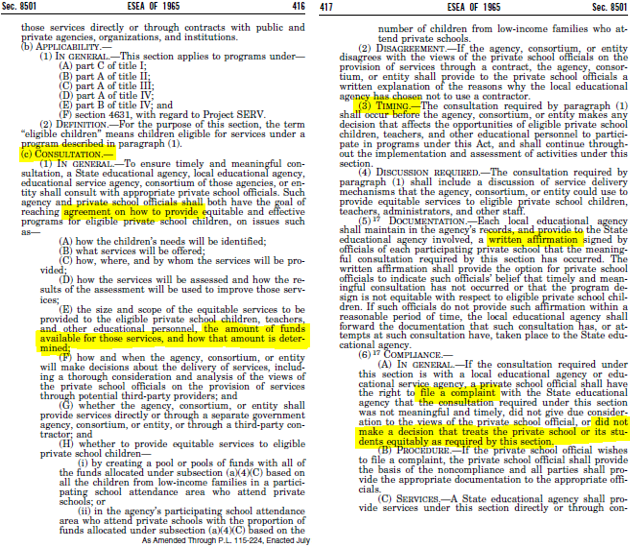
The consultation required by paragraph (1) [§ 8501(c)(1)] shall occur **before the agency, consortium, or entity makes any decision that affects the opportunities of eligible private school children, teachers, and other educational personnel to participate in programs under this Act**, and shall continue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

This pre-transfer timing is consistent with the LEA’s assurances and with § 8501(a)(1)’s requirement that an LEA receiving financial assistance under a program must provide equitable services under the program. Contradiction would arise if the required § 8501 consultations occurred post-transfer. If an LEA were permitted to first maneuver funding between ESEA programs, then at the LEA’s whim, private school students and teachers could be stunningly denied the opportunity to participate in programs under the Act (for example if all Title II-A and IV-A funds were transferred to I-A), nullifying the statutory assurances and § 8501(a)(1).

The pre-transfer timing requirement for consultations in accordance with section 8501 eliminates the possibility of these overtly adversarial results in direct contradiction of the related statutes.

**E. Section 8501 Consultations: Establishing the Equitable Services Plan**

Being obligated to “conduct consultations in accordance with section 8501” prior to the transfer, what specifically is required of the LEA? Here is ESEA’s sole definition, per 8501(c):



Consultation is “how” equitable services will be provided: ESEA § 8501(c) is the statutory litany of plan creation, including: identifying services fitting student needs, how the services will be provided and assessed, the calculation method and amount of funds available for those services, and concluding with the private school’s written affirmation and opportunity to complain if not treated equitably.

Consistent with the LEA’s assurances, § 8501(a)(1), and § 5103(e)(2)’s specific instructions, the goal is reaching “**agreement on how to provide**” equitable services. Though on occasion there may be lingering items of disagreement as to how to provide the services under a given ESEA program, the question is never whether to provide such services. If “whether” was debatable, equitable services would be completely at the whim of the LEA. Every ESEA description of consultation is stated in terms of “how,” not “whether,” 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 [an LEA] 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 …”

This sole definition of § 8501 consultation applies with or without the transfer scenario being in play. In either case, the process occurs – start to finish, through to the written affirmation – before any decision is taken by the LEA that would affect the private school’s opportunity to participate in programs under the Act. During the consultation process, the transfer has not yet occurred, the program’s allocation has not moved from the original program. Equitable share and resultant services are finalized, in lockstep consistency with every interrelated statute discussed above.

**F. Set-Aside of the Intact Equitable Share; Satisfaction of Stakeholder Interests**

The private school’s equitable share of the allocation – designated for specific equitable services program use during the foregoing consultations – remains intact and is ready for use. The LEA has completed its statutory obligation in accomplishing the § 8501 consultations required by § 5103(e)(2). The LEA is now free to transfer the allocation’s remaining funds to suit the LEA’s needs, if and when the LEA desires. Whether or when the LEA decides to transfer some or all of the remaining public-share amount of the allocation has absolutely no impact on the private school’s intact equitable share and resulting services under the given ESEA program.

This is the clear and internally consistent procedure described by the ESEA statutes. Any deviation would directly contradict the statutory framework discussed above: the statutory assurances, the core requirement of § 8501(a)(1), the specific instructions of § 5103(e)(2), the timing requirement of § 8501(c)(3), and the definitional requirements of § 8501 consultation.

This process for Title V-A transfers involving equitable services satisfies the interests of all stakeholders: the LEA interest in funding flexibility, and the private school interest in receiving its proportional share of program-specific funding and services. In this environment, a cooperative partnership can take root and flourish.

This should be the end of the story.

**2. ED’s Contradictory, Destructive Interpretation of Equitable Services in the Transfer Scenario**

ED’s interpretation of Title V-A transferability creates a weapon for LEAs to convert equitable services funding to LEA use at the LEA’s whim, denying private school participation in ESEA programs and subverting the LEA– private school partnership by motivating LEAs to approach equitable services as an exercise in self-interested, adversarial maneuvering using transfers to obtain maximum funding retention at private school expense, rather than as the good-faith provision of services to private schools according to the duties required by the LEA’s ESEA allocations. ED’s interpretation ignores specific statutory instructions and baselessly redefines ESEA section 8501 consultation, lacks any legal support in ESEA and overtly contradicts and nullifies the statutory framework Congress enacted to ensure the provision of equitable services to private schools, including Congress’s explicit solution for the problem of Title V-A transfers involving equitable services.

**A. Transferability as “Open Season” on Equitable Services**

Under ED’s interpretation, an LEA could transfer all of its Title II-A and IV-A allocations, denying a private school the opportunity to participate in those programs by moving that funding to a program to which equitable service does not apply (such as I-D or V-B), to a program in which the private school has few or no qualifying students (such as I-A (low-income) or III-A (ELs)), or to a program in which the private school does not desire to participate. The power to dictate the outcome is all on one side. A private school can be left empty-handed, or nearly so, with the transfer clawing back funding for LEA use.

**B. Total Reliance on a Partial Reading of the General Rule of § 5103(e)(1)**

ED’s interpretation relies on the general rule of § 5103(e)(1), but conspicuously never mentions the first clause, “Except as otherwise provided in this part,” and insists that because transferred funds take on the character of the program to which they are transferred, we must limit ourselves to normal treatment of the destination program (where the funds have been transferred) and of the source program (if any portion was not transferred), and an intact set-aside of the equitable share is prohibited (though nowhere in ESEA does this “prohibition” appear in text or implicitly).

**C. Ignoring the Specific Exception to the General Rule**

ED then ignores that § 5103(e)(2) is a specific exception for transfers involving equitable services (and continues ignoring that this exception is specifically pointed out by the first clause of § 5103(e)(1)). Of § 5103(e)(2), ED acknowledges only that consultation must occur prior to the transfer. ED remarkably ignores a fundamental principle of statutory interpretation: that exceptions take precedence over general rules (see, U.S. Supreme Court decisions noted herein).

**D. Redefining Consultation to Ignore the Actual Steps of § 8501(c)**

ED then conspicuously\* redefines “conduct consultations in accordance with section 8501” into a mere discussion about the transfer, noting that the LEA does not need the private school’s permission to conduct the transfer (but ignoring Congress’s explicit solution to the problem: that equitable services must first be established through “conduct[ing] consultations in accordance with section 8501.” Nowhere in ESEA is the redefining of § 8501 authorized, or even implied – but ED persists in this redefinition in an attempt to cover its baseless forbiddance of a stand-alone, set aside equitable services program.

\*In the *2019 Title I-A Equitable Services Draft Guidance* document, ED’s highlighted blurb under the heading CONSULTATION AND TRANSFERABILITY is a grotesque misquote of § 5103(e)(2), which in fact requires LEAs to “conduct consultations in accordance with section 8501 [when equitable services are involved].”

**E. Redefined, “Consultation” is now “Whether,” no longer “How” to Provide Equitable Services**

Provided the LEA has put on a good show of discussion and consideration, ED converts consultation into decision at the LEA’s whim on “whether” to provide equitable services, not “how” to provide them. This invented interpretation is absolutely contradictory to, and destructive of, the statutory framework established by Congress for equitable services, including Congress’s reasonable solution for the transfer scenario. This interpretation makes equitable services substantially optional for any LEA willing to maneuver against its private school – and the LEA can claim it is acting within ED’s rules.

**F. More Illogical Invention**

At the National Title I Conference in February of 2018 (and reportedly elsewhere), ED throws in a “from-thin-air” pronouncement that “*because there are not any ESEA programs that consist only of services to private schools’ students, the ESEA therefore prohibits an LEA from retaining funds in a program solely to provide equitable services*.” This invented prohibition is nowhere to be found in the text of ESEA, and such a prohibition directly contradicts (as thoroughly discussed above) ESEA’s specific instructions on how to handle a transfer involving equitable services, instructions consistent with every interrelated statute. ESEA cannot be read to forbid an outcome it gives explicit instructions for accomplishing.

**3. ED’s Interpretation Must Be Abandoned in Favor of the Statutory Law**

For many, ESEA speaks with a consistent and orderly voice on the process for handling equitable services in the transfer scenario. Per the United States Supreme Court, plain statutory language must be enforced according to its terms. It takes significant effort to interpret these statutes to allow for the large-scale destruction of equitable services, but this is ED’s position.

If any real or imagined ambiguity need be addressed, every principle of statutory interpretation eliminates ED’s interpretation from consideration. The Supreme Court decisions cited in this paper’s introduction profoundly establish:

* *“[I]it is a basic principle of statutory construction that a specific statute … controls over a general provision … particularly when the two are interrelated and closely positioned …” HCS-Laundry v. United States, 450 U.S. 1 (1981).* Applied to our question, the specific 5103(e)(2) controls over the general 5103(e)(1), and the exception for handling equitable services must be given application, not ignored.
* *“[I]t is a commonplace of statutory construction that the specific governs the general." That is particularly true where … ‘Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.’” RadLAX Gateway Hotel v. Amalgamated Bank, 566 U.S. 639 (2012)*. Applied to our question, the problem of what to do when equitable services are entangled in a transfer situation is solved by following the instructions of § 5103(e)(2) and setting aside the equitable share in § 8501 consultations with the private school, then transferring the remaining funding.

And most profoundly of all:

* *“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or* ***because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law****.” United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988) (emphasis added).* Applied to our question, ED’s interpretation, in dramatic conflict with multiple related statutes, must be abandoned in favor of the correct interpretation (set-aside) which is **fully compatible with the rest of the law**.

Not only does ED’s interpretation substantively conflict with the core equitable services requirements and protections of ESEA, but it also introduces a toxic, adversarial interaction where there should be a mindset of public-private cooperation. Cooperation cannot naively rely upon perpetual benevolence but must be underpinned by the absolute ESEA requirement that its educational assistance is for all students, allowing no possibility that an LEA can claw away equitable services funding for its own use.

**4. The Way Forward**

ED should immediately release new informal guidance acknowledging the legal correctness of the set-side of the equitable share in the transfer scenario. ED should follow this informal guidance with formal non-regulatory guidance explaining the statutory equitable services/transfer process and reversing all implications in former guidance contrary to the consistent application of the ESEA statutes concerned with equitable services and transfer.

The change should be effective immediately or as soon as transition is reasonably possible. We are discussing correct implementation of what the law currently is – at this moment and before – all guidance to the contrary having only ever been non-binding and advisory, and never having created or imposed new legal requirements.

Ombudsmen should lead the effort to communicate the newly recognized, rebalanced framework for addressing the transfer situation to LEAs and private schools.

If ED cannot agree to fix its guidance, it should make clear to states that they are free to follow their good faith interpretation of the law on this issue, without fear of being called to account by ED. ED should reiterate that its guidance is non-binding and creates no new legal requirements, and convene a conference of stakeholders and practitioners to seek input on and analyze all aspects of the law and procedures for transfers involving equitable services.

**Appendix A: ESEA Statutes Discussed Herein**

**a. Assurances**

As part of an LEA’s application for Title II-A and Title IV-A funding allocations, the LEA must submit written assurances guaranteeing certain conduct upon receipt of the funding:

**ESEA § 2102(b)(2)(E)**:

An assurance that the local educational agency will comply with section 8501 (regarding participation by private school children and teachers).

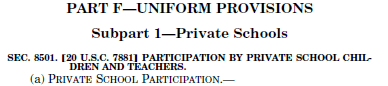
**ESEA § 4106(e)(2)(B)**:

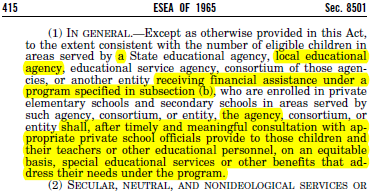
comply with section 8501 (regarding equitable participation by private school children and teachers);

**b. ESEA § 8501(a)(1)**:

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)

[snip view]:





All other statutes speaking on this issue support the conclusion that if financial assistance is received under a program, equitable services must be provided under the program. There is no evidence that any other provision in ESEA blatantly contradicts § 8501(a)(1) by creating a method to outmaneuver the clear core requirement of § 8501(a)(1). Section 5103(e)(1) is not an “otherwise provided” LEA back door for crippling equitable services and seizing the funding: rather, that very statute contains the first clause “Except as otherwise provided in this part,” pointing to § 5103(e)(2)’s instructions for dealing with equitable services in a transfer situation, and thus avoiding contradiction of every other connected statute.

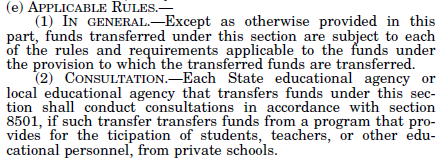
**c. ESEA § 5103(e) APPLICABLE RULES** —

(1) IN GENERAL. — **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.

(2) CONSULTATION. — Each State educational agency or local educational agency that transfers funds under this section **shall conduct consultations in accordance with section 8501, if such transfer transfers funds from a program that provides for the participationof students, teachers, or other educational personnel, from private schools**.

(emphasis added)

[snip view:]



**d. ESEA § 8501(c)(3)** **TIMING** —

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)

**e. ESEA § 8501(c) CONSULTATION** —

[The text is reprinted in full via screen snip in the body of the paper]

**Appendix B: Refuting US ED’s One-Liner Transferability “Arguments”**

The US ED arguments highlighted in **bold** below have occasionally appeared in text or at conference presentations. A supporter of US ED’s one-liner arguments believes that equitable services can be optional at the whim of the LEA, and that it is acceptable for the LEA to maneuver to convert equitable share to its own use. US ED’s interpretation directly contradicts all related law implementing equitable services in ESEA, and conflicts with the basic tenets of statutory interpretation. US ED has never offered a rigorous legal defense of its position or otherwise attempted to answer the legal questions challenging its interpretation. The “one-liner” statements US ED expresses publicly are collected below, with a capsule refutation following each:

**“If there is no money in a program (because of transfer), neither side gets anything – which is “equitable!”** This invented argument appears nowhere in ESEA and is directly contradicted by the statutory assurances, 8501(a)(1) (*“[An LEA] receiving financial assistance under a program … shall provide [equitable services addressing private school needs] under the program.”*), and the 8501(c)(3) timing of consultation occurring before any transfer decision is made – when the allocation is still in the original program, before it is emptied of funding. If you believe in “the equitability of nothing” (while the LEA gleefully uses the converted spoils elsewhere), you believe equitable services are optional at the whim of the LEA while ignoring your contradiction of every related statute.

**“You can’t have a program at the private school without a corresponding program in the LEA!”** Another invented argument appearing nowhere in ESEA and directly contradicted by the statutory assurances, 8501(a)(1), and 5103(e)(2)’s specific instructions to “conduct consultations in accordance with section 8501” which is the process of creating an equitable services program – prior to the transfer. Forbidding a set-aside and a resulting stand-alone program completely contradicts the law.

**“5103(e)(1) says transferred funds are subject to the rules of the program to which transferred. Funds left behind remain subject to the rules of the program they are left in. You can’t set aside a portion exclusively for equitable services, because any portion left behind would have to be equitably divided between the LEA and private school.”** US ED’s only attempted citation to ESEA ignores the exception for transfers involving equitable services pointed out in the first clause of 5103(e)(1), and specified in 5103(e)(2): First, conduct consultations in accordance with 8501 (program creation). After, transfer as desired. This is Congress’s solution to the problem of transfers and equitable services, a solution which satisfies the interests of both parties (in funding flexibility and in equitable services). Per the foundational tenets of statutory interpretation announced by the U.S. Supreme Court, exceptions prevail over general rules. US ED’s interpretation contradicts, and destroys the intent of, every other related statute.

**“The GOAL of consultation is agreement. But agreement is not always the result. The transfer is the LEA’s final decision.”** This is a gross misrepresentation of the statute (8501(c)(1)) which states: “[The parties] shall both have the goal of reaching agreement on how to provide equitable [services to the private school].” US ED’s misstatement of the statutory text (by omitting “… on how to provide …”) converts consultation into a discussion on whether (instead of how) to provide equitable services (with the LEA as self-interested decider). It is well known that disagreements can persist on the details of how the equitable services will be provided, but US ED – by omitting key language – conflates this possibility of disagreement into a question of whether equitable services will be provided at all (see examples: [ESSA Flexibilities 2018, pg. 19, #7](https://www2.ed.gov/policy/elsec/leg/essa/essa-flexibilities-document-for-publication.pdf) ; [Omb. Update, Jan. 2018, Answers from ED, pg. 4](https://innovation.ed.gov/files/2017/06/Ombudsman-Update-January-30-2018.pdf)). Scrupulous care is normally taken to avoid altering the meaning of statutory text when giving an abbreviated quotation. In attempting to support its interpretation, ED fails to exercise that care.

**“Nothing can change until the law changes.”** But nothing else in the law is consistent with US ED’s interpretation forbidding a set-aside. The only interpretation of the law that preserves both funding flexibility and equitable services is the interpretation spelled out in 5103(e)(2): conduct consultations in accordance with section 8501 (i.e., consult pre-transfer to form an equitable services program, complete with private school affirmation.) There is nothing wrong with the law. The erroneous guidance must change.

**Appendix C: *Ombudsman Update* newsletter, January 2018** *(with footnotes discussing errors)*

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| **Answers From ED**  **Question:** How is the amount of funds for equitable services determined when an LEA chooses to transfer funds between programs? After consultation, does the final decision continue to remain with the LEA if it decides to transfer funds among programs, and must the private school be in agreement with an LEA decision to transfer funds?  **Answer:** LEAs must calculate equitable service shares based on the total amount of funds available under a program **after** a transfer (*ESEA* section 5103(e)(1)).**[[1]](#endnote-1)** Just as an LEA may not transfer funds to a particular program solely to provide equitable services, it may not retain funds solely for this purpose. **[[2]](#endnote-2)** Thus, if an LEA chooses to transfer 100 percent of its *Title II* Part A or *Title IV* Part A funds to *Title I* Part A, it may not provide equitable services under *Title II* Part A or *Title IV* Part A. **[[3]](#endnote-3)** Under this scenario, an LEA would determine the proportionate share available for equitable services under *Title I* Part A based on the total allocation, including the amounts transferred into *Title I* Part A.  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)) **[[4]](#endnote-4)** The final decision regarding the transfer of funds, however, remains with the LEA. **[[5]](#endnote-5)**  Although an LEA is not required to obtain agreement from private school officials prior to a transfer of funds, **[[6]](#endnote-6)** the goal of consultation is agreement (see *ESEA* section 8501(c)(1)). **[[7]](#endnote-7)** Thus, we encourage LEAs to carefully consider the views of private school officials prior to making decisions regarding transfers. By engaging in timely and meaningful consultation and developing positive relationships with private school officials, an LEA can facilitate creation of a cooperative environment and minimize problems and complaints. **[[8]](#endnote-8)**  If private school officials believe that timely and meaningful consultation has not occurred, they should first discuss this matter with the LEA official responsible for coordinating the consultation between the two entities. Private school officials may also contact the LEA superintendent or program director of the federally funded program to ask for assistance. If the response at the local level is not satisfactory, the private school official may contact the SEA official (i.e., the ombudsman) responsible for ensuring that *ESEA* programs are implemented at the local level. Often, these steps will resolve the matter. In the event the problem is not resolved, private school officials have the right to file a formal written complaint with the SEA. **[[9]](#endnote-9)**  For more information, please see the Department’s *Non-Regulatory Guidance: Fiscal Changes and Equitable Services Requirements under the Elementary and Secondary Act of 1965 (ESEA), as amended by the Every Student Succeeds Act* [*(ESSA)*,](http://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf) sections U-4 and U-5:  **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 titles *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).) **[[10]](#endnote-10)** 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** [emphasis added].  **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? **[[11]](#endnote-11)**  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** [emphasis added] a transfer. (See *ESEA* section 5103(e).) **[[12]](#endnote-12)** |

Appendix C (footnotes)

1. ED ignores that § 5103(e)(1) points to the specific exception in § 5103(e)(2) for handling equitable services involved in the transfer scenario. [↑](#endnote-ref-1)
2. The entire statement, and particularly, “[An LEA] may not retain funds solely for this [equitable services] purpose,” appears nowhere in ESEA. In fact, this supposed prohibition is precisely contradicted by the specific instructions of § 5103(e)(2). [↑](#endnote-ref-2)
3. This statement ignores that the result of “consultations in accordance with section 8501” is a fully formed equitable services program. ED’s treatment is contradictory of every interrelated statute concerned with equitable services. [↑](#endnote-ref-3)
4. ED’s only acknowledgment of 5103(e)(2) is not as an exception to the general rule of 5103(e)(1), but only that consultation is required pre-transfer. ED then proceeds to brazenly redefine section 8501 consultation. [↑](#endnote-ref-4)
5. Though the decision to transfer funds is the LEA’s, the consistent statutory scheme enacted by Congress balances the LEA’s authority by assuring that an intact equitable services program will exist under the given ESEA program. [↑](#endnote-ref-5)
6. The LEA is not required to get private school permission for the transfer, however, an intact equitable services program is required to be formed first, through the 8501 consultation process before the transfer. [↑](#endnote-ref-6)
7. ED is egregiously misquoting § 8501(c)(1) to conflate consultation on how to provide equitable services (correct) with ED’s invented idea that consultation is an effort to reach agreement about whether to conduct the transfer (incorrect). This redefinition of consultation into a question of “whether,” rather than an establishment of “how,” equitable services will be provided, leaves the transfer to the whim of the LEA and eliminates the protective underpinnings of the law. [↑](#endnote-ref-7)
8. It is poor policy and extremely naïve to rely on the good will and perpetual forbearance of a self-interested party (the LEA) when the safety net of minimal requirements of law have been removed. Under ED’s interpretation, the LEA can claim to be within the rules while maneuvering for maximum gain at the expense of its private school. [↑](#endnote-ref-8)
9. Under ED’s interpretation of the law (no set-aside and/or stand-alone equitable services), the dispute resolver is faced with either blocking the transfer so that equitable services can be provided, or allowing the transfer which converts the private school’s equitable share to LEA use. Both choices are contrary to law: the first decision defeats the public interest in funding flexibility, the second decision defeats the private interest in receiving equitable services. Compare to the lawful and consistent interpretation (set-aside), which satisfies the interest of all stakeholders. [↑](#endnote-ref-9)
10. At the time this guidance was issued, some ambiguity remained for allowing a set-aside of the equitable share. However, ED’s “redefinition” of section 8501 consultation into “a discussion about the intended transfer” is latent in this answer. [↑](#endnote-ref-10)
11. This confounding question and answer appears as far back as the 2004 (NCLB) transferability guidance. The question seems to maliciously enquire whether the LEA can transfer away just the equitable services portion (leaving the private school empty-handed). This is not the question ED answers, however, replying that the LEA cannot transfer funds into a program solely to provide equitable services (a bizarre and unlikely scenario). Thus, a poor question and worse answer in 2004 laid the implication that has been finally “clarified” into today’s anti– private school interpretation with ED’s, “Just as an LEA may not transfer funds to a particular program solely to provide equitable services, it may not retain funds solely for this purpose.” (at note 2, above) [↑](#endnote-ref-11)
12. Inventing language that 5103(e)(1) and (2) conspicuously do not state or imply, and ignoring the specific exception in 5103(e)(1) and (2) for using the consultation process to handle entangled equitable services funding. [↑](#endnote-ref-12)