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CAPE's Suggestions Regarding ESSA Guidance

**Submitted to
ESSA.guidance@ed.gov
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**Suggestions from the Council for American Private Education
Regarding ESSA Guidance Concerning Services to
Students and Teachers in Private Schools
Submitted to ESSA.Guidance@ed.gov
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General Suggestion

Under NCLB, the Department had very valuable guidance regarding a host of topics relating to equitable services for students and teachers in private schools under various titles of ESEA. The guidance covered issues such as: the definition of “equitable services,” the allocation of funds required for equitable services; the obligations of SEAs and LEAs in providing equitable services geared toward the specific needs of teachers and students in private schools; the need for consultation during the design, development and implementation of various programs activities; the topics to be addressed during consultation; and so on.

That guidance offered valuable assistance to state officials, school district officials, and private school officials as they worked to determine how best to apply various provisions of the law as Congress intended. We would strongly urge that those NCLB guidance documents be used as a starting point and template for developing new guidance—updated, of course, to incorporate the important changes that have been made to the equitable services provisions in ESSA.

Also, with services under ESSA set to start with the 2017-18 school year, it is absolutely critical that guidance be provided ASAP, but no later than the end of 2016. The consultation process will begin in earnest in early 2017, so guidance has to be available before that time on several issues, including, though not limited to:

- implementation of the new formulas for determining allocations for services to private school students under Title I-A and Title II-A
- the new requirement for states to notify private school officials of the funds allocated for services
- the pooling language
- the ombudsman requirement
- the flexibility under Title V for transferring funds.

Without timely guidance, it is hard to imagine how these new provisions will be up and running right out of the gate.

In addition to this general suggestion, we have the following specific suggestions relating to new elements in ESSA affecting students and teachers in private schools. They draw from suggestions previously offered by various organizations representing private schools during ESSA “listening sessions” with USDE officials and through submissions to essa.questions@ed.gov.

Ombudsman—§1117(a)(3)(B) and §8501(a)(3)(B)

One area where the Department can help ensure equitable services is by providing robust guidance regarding the new ombudsman that states must designate to help ensure that equitable services are provided to private school children, teachers, and other educational personnel.

The ombudsman should be a neutral arbiter who understands both sides in consultation and mediates concerns so as to reach agreement. She/he can help foster better working relationships and provide assurances of fair and equitable treatment on both sides of consultation. Here are a few specific suggestions for non-regulatory guidance on the ombudsman role:

- The ombudsman must understand the operational differences between private and public school teachers and students and how programs impact them;
- If the ombudsman is not a stand-alone role, she/he should not be biased by other assigned duties;
- The ombudsman should be appointed and regulations surrounding their role should be in place well before consultations for the 2017-18 school year—ideally during the 2016-17 school year;
- Funding for the ombudsman must come out of the administrative budget of the SEA and not the proportionate share for private school students;
- Both the LEA and private school must have timely communication with the ombudsman;
- The ombudsman must have an open, timely, and transparent reporting process, especially with regard to disclosure of proportional share—if reports remain internal or are not released in a timely fashion, the position is weakened;
- Finally, states must be given latitude to shape the role as they see fit so it works in their unique education system.

In summary – the Department must provide robust support for the position and outline principles, but should leave other details to the states.

(from USCCB's remarks at USDE Listening Session 3/1/15)

Pooling—§1117(b)(1)(J) and §8501(c)(1)(H)

The private school community attempted to accomplish something very simple in the ESEA reauthorization, namely, to enshrine in statute the longstanding pooling option already recognized in guidance documents published by the Department for both Title I and Title IX of NCLB. Essentially pooling allows a school district, after consulting with private school officials, to deliver equitable services to private school students and teachers by combining some or all funds allocated for those services from across the school district rather than isolating funds and services school by school. Pooling can result in greater efficiency and effectiveness in delivering services. A crystal clear explanation of how pooling is supposed to work may be found in the Department's guidance documents for Title I and Title IX.

The pooling language in the consultation section of Title I of ESSA (Sec. 1117(b)(1)(J)) is not nearly as clear as the Department's guidance in that it does not plainly differentiate between the pooling option and the school-by-school option. Regulations or guidance from the Department should reestablish that clarity.

The pooling language in Title VIII suffers from the same problem plus an even more serious problem. In mirroring language appropriate to Title I, but not to Title VIII, it seems to limit consultation on pooling to the funds generated by children from low-income families. However, eligibility for services in programs covered by Title VIII is not based on income, but on factors other than poverty (e.g., a student's status as an English language learner, as in Title III-A, or as a migratory child under Title I-C). Thus, the pooling language does not match up with other foundational provisions in the statute.

The statute provides (Sec. 8501(a)(1)) what it has always provided, namely, that private school students and teachers must receive services on an equitable basis based on the number of *eligible* children enrolled in private schools. As has been the case for decades, the statute defines (Sec. 8501(b)(2)) the term "eligible children" to mean children eligible for services under the originating program, whether it be English learners or migratory children or whoever is eligible for the program at hand. The statute also requires (Sec. 8501(a)(4)(A)), as it has in the past, that expenditures for services for eligible private school students be equal to expenditures for eligible public school children, in proportion to the number of children served. Starting with the new law, state education agencies now even have to notify private school officials of the allocation of funds available for eligible private school children, applying whatever the eligibility factors are (Sec. 8501(a)(4)(C)). To be consistent with all of these provisions, the pooling alternatives referenced in Sec. 8501(c)(1)(H) must be understood as being based on those same eligibility factors, that is, based on the count of all private school children eligible for the program involved, not just children from families with certain income levels, as is mistakenly suggested.

(from CAPE's remarks at USDE Listening Session 3/1/15)

Transfers—§5103(e)(2)

Another area requiring special attention in guidance is the issue of funding transferability under Title V, Part A. Title V-A of ESSA, as in previous legislation, allows state and local education agencies (SEAs/LEAs) to transfer funds from some specified ESSA programs to other specified ESSA programs. Some of those programs provide for equitable services to private school teachers or students. Title V-A also requires that state agencies or school districts that choose to transfer funds, “shall conduct consultations in accordance with section 8501 if such transfer transfers funds from a program that provides for the participation of students, teachers, or other educational personnel, from private schools” (Title V-A, Sec. 5103(e)(2)). In such a case, the CAPE community urges that the SEA/LEA’s consultation secures in advance the clear agreement of private schools to such transfers.

The provisions in Title V relating to flexibility are not intended to undo any provisions in ESSA that ensure equitable services to students and teachers in private schools. Thus, school districts must not transfer the proportion of funds in a particular program reserved for services to private school students or teachers absent consultation with, and the agreement of, private school officials. One suggestion is that the regulations could state clearly: “The SEA or LEA may transfer only the funds allocated *as the LEA proportionate share*; private school officials must be consulted as to whether or not they choose to make a similar transfer of funds from their proportionate share.”

(from ACSI’s remarks at USDE Listening Session 3/1/15)

Title II-A

As has been the case throughout the history of ESEA, states and districts receiving funds under Title II-A of ESSA must provide equitable services to eligible teachers and administrators in private schools that address their needs in accordance with the provisions of Sec. 8501. The new law requires that resources for such services be determined based on the total Title II-A allocation, not just on the funds earmarked for professional development, as was the case under NCLB.

In their applications to receive funding under this program from the U.S. Department of Education, state education departments must include an assurance that they will comply with Sec. 8501 regarding equitable services to private school children and teachers (Sec. 2101(d)(2)(I)). Similarly, in *their* applications to receive funding from the state, school districts must also include an assurance that they will comply with the same equitability provisions (Sec. 2102(b)(2)(E)).

It is essential that timely guidance make clear the new allocation requirements under Title II, which are very different from the requirements under NCLB. Clear guidance could help all parties avoid potential confusion.

Timeline & Guidance During Transition Year

We would like to call for clear guidance and clarification to states and school districts regarding the delivery of equitable services to private school students and teachers during the forthcoming transition year (2016-17). The need for guidance is especially acute given the differences between waiver states and non-waiver states, and the options available to districts regarding ESEA flexibility, public school choice, and supplemental educational services. The 17-page FAQ document released February 26, 2016, covered a host of issues, but equitable services was not among them. It would be good to know the ground rules that apply when districts choose one path over another during the transition year.

Miscellaneous Items

ESSA now requires that consultation now include a discussion of how the proportion of funds for services to private school students is determined (Sec. 1117(b)(1)(E)) and also requires that a “Notice of Allocation” be provided by state education agencies to private school officials (Sec. 1117(a)(4)(C) and (Sec. 8501(a)(4)(C)). We suggest that the simplest and most accurate means of assuring that the provision is observed be utilized.

Lastly, we would request that ONPE be proactive on putting together resources highlighting the changes that will impact private schools. Having a definitive resource from the ONPE office would be helpful in equipping private school administrators for consultation at the local level in the new world of *Every Student Succeeds*.

(from USCCB’s remarks at USDE Listening Session 3/1/15)