

9/14/17

Hilary Malawer
Assistant General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW, Room 6E231
Washington, DC 20202

Docket ID: ED-2017-0S-0074

Dear Ms. Malawer:

Catapult Learning LLC. is writing in response to the request of the U.S. Department of Education (ED or the Department) for input on ED regulations that may be appropriate for repeal, replacement, or modification. We thank the Department for the opportunity to comment on this important issue.

Catapult Learning is the nation's leading provider of educational support and high quality professional development services for private and religious schools. The services we provide are paid for using Title I, Title II, IDEA or other state funding designated for private schools. Last year we had the privilege of serving more than 100,000 at-risk students in private and religious schools across the country.

We are writing this letter on behalf of the thousands of private school students we help each year. In responding to the Department's request we have reviewed the ED regulations from the perspective of the private schools that participate in Department programs through the "equitable services" provisions of the Elementary and Secondary Education Act (ESEA), the Individuals with Disabilities Education Act (IDEA), and other statutes. We have reviewed both formal regulations and the Department's non-regulatory guidance (NRG), in order to cover the full regulatory environment within which relevant programs operate. Our recommendations follow.

1. Preserve the November 2016 Guidance on Equitable Services under ESEA.

In its communications seeking input on regulatory reform, ED officials have asked not just for ideas on regulations that should be repealed or amended, but also for identification of regulations that should be retained. From the perspective of Catapult Learning and the private schools we serve, it is critical that the Department retain the November 21, 2016 guidance on private school equitable participation (<https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf>, Section V). This NRG provided the Department's first and only formal instructions on implementation of the significant changes to the ESEA equitable participation requirements made by the Every Student Succeeds Act (ESSA), such as on the calculation of the amount of Title I and II funds that must be made available for equitable services and on the time period for obligating equitable services funds.

This guidance has been extremely useful to private schools in working with public school officials in implementing the reauthorized law, and our first priority is that the important clarifications and interpretations made in that guidance be maintained. While not all States and school districts have yet fully implemented the new requirements the policies in the guidance are the right ones and they give our schools the language needed to help ensure the provision of appropriate services to their students.

We note that while the new guidance provides the Department's interpretation of provisions of the equitable services requirements that were amended by ESSA, the earlier regulations on the participation of private school children in Title I programs (34 CFR 200.55-60) and the Department's 2003, 2006, and 2009 guidance documents on equitable services remain in place. The new guidance recommends that administrators continue to rely on the previous guidance on issues that were not affected by the reauthorization. Cross-walking these documents is cumbersome, and the continuation of obsolete regulations and guidance could lead to confusion and misunderstandings about what current law requires. Therefore, the Department might update the regulations and consolidate all the guidance into one, up-to-date package. However, our first priority is that that the new interpretations provided in the November 2016 package be preserved.

2. Clarify the applicability of "supplement, not supplant" requirements to private schools.

Over some time, the private school community has sought clarification on the applicability of various "supplement, not supplant" (SNS) requirements to the equitable services provided under ED programs. We have so far been unable to receive that clarification.

SNS has traditionally provided that funding from ED programs may be used only to supplement, and not supplant funds that would otherwise be used for activities supported under those programs, with the Department applying three "rebuttable presumptions" in determining whether the use of Federal funds under a particular program would constitute supplanting. ESSA revised the SNS requirement under Title I by specifying that, if each of the Title I schools in a local educational agency (LEA) receives the State and local funds that it would otherwise receive in the absence of Title I, the LEA will have met the SNS requirement. Under other ESEA programs, the previous SNS statutory language remains in place. Neither the statutory language under Title I nor the SNS language for the other titles mentions private schools.

Private schools have received mixed signals on whether and how the SNS requirements apply to the services their students receive under equitable services requirements. Our general sense has been that SNS means that Federal funding may not replace State and local funds and, thus, that our schools would generally be exempt from the requirement because they generally do not receive State and local funding. However, Question G-18 of the 2006 ESEA Title II guidance

(found at <https://www2.ed.gov/programs/teachergual/guidance.pdf>) indicates the SNS could prohibit the use of Title II funds to provide teacher training that a private school had previously provided with its own funds. Some LEAs have apparently relied on this language to support district policies that, for example, prohibit the use of Title II funds for professional development of private school teachers that does not take place outside of an otherwise scheduled professional development day on the school's schedule. This interpretation makes it nearly impossible to coordinate professional development activities in a systematic and sustained manner as required under Title IIA, and does not take into account added value that Federal funds can provide to the professional development content.

We believe that these interpretations of the statute are misguided and are inconsistent with the statutory intent behind SNS. Moreover, they inappropriately interject public officials into the finances and programs of private schools, and severely complicate the implementation of the SNS and equitable services requirements. We recommend that ED, as part of the regulatory reform initiative, resolve this problem, ideally by clarifying that SNS does not apply to the equitable services provided to private school students and teachers or that SNS determinations apply only to State and local funds. Alternatively, the Department's regulations or guidance could state that private schools do not have to provide specific services or make specific payments in order to comply.

3. Clarify and emphasize that LEAs may extrapolate poverty-count data when calculating amounts to use for equitable participation of private school students.

Under Title I, LEAs have several options for counting or estimating the number of private school students living in Title I school attendance areas who from families below the poverty level. One of those options (based on language in ESEA Section 1117(c)(1)(B)) is to extrapolate from a limited survey of students if complete data are unavailable. The Department's 2003 guidance on equitable participation explains this option in more detail:

After obtaining income data from a representative sample of families with children in private school, an LEA may extrapolate those data to the entire private school student population if complete actual data are unavailable. The LEA should take care to ensure that the data are truly representative of the private school students in the district (Question B-4, page 12 of the guidance).

Extrapolation from incomplete data is frequently the least cumbersome, least expensive, and best method of determining a poverty count for the purpose of determining the amount to be used for equitable services. Yet we have found, in recent years, that ED officials are downplaying the advantages of this option. We encourage the Department, through regulations or guidance, and through administrative action, to ensure that LEAs are fully aware of the extrapolation option and of its advantages, and in so doing, are working with private school officials to obtain the fairest count of low-income private school children, rather than using the method that provides the smallest number.

4. Clarify and emphasize the availability of the "proportionality" option for estimating the low-income student population in private schools in situations where a public school is using the school lunch community eligibility provision.

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Another statutory option for estimation of the low-income private school population of a school attendance area (found in ESEA Section 1117(c)(1)(C)) is to apply “the low-income percentage of each participating school attendance area...to the number of private school children who reside in that school attendance area.” This “proportionality” option is particularly appropriate in situations where the applicable public school is identifying students as eligible for free and reduced-price lunches through the “community eligibility provision” (CEP). The CEP allows high-poverty schools to make their counts of students from low-income families through an estimating procedure. When a district uses this method for providing lunches, it can also use this same estimation of poverty for the Title I program.

In situations where a public school is using the CEP, it makes little sense to go through the expense and effort of collecting survey or other data on private school students in order to calculate the amount to be provided for equitable services. Rather, the most efficient, fair and appropriate course of action is to use the proportionality option. We recommend that the Department emphasize this point in its guidance and through its administrative actions.

5. Ensure that LEAs abide by the requirement to obligate equitable services funds in the fiscal year in which those funds are received.

Under ESEA Section 1117(a)(4)(B):

“Funds allocated to a local educational agency for educational services and other benefits for eligible private school children shall be obligated in the fiscal year for which the funds are received by the agency.”

The November 2016 guidance reiterates this requirement, but also states that there may be extenuating circumstances in which an LEA is unable to obligate all funds within the statutory timeframe in a responsible manner and permits LEAs, in those circumstances, to carry over equitable services funds into the next school year.

We agree that there could be some very extreme situations such as a natural disaster in which LEAs would simply be unable to provide equitable services by the statutory deadline and should be allowed to carry over the funds. Our experience indicates, however, that very general language allowing noncompliance for “extenuating circumstances” as defined entirely by the LEA is being used as an excuse for delaying the provision of important services to private school students without a clear and compelling reason for doing so. We thus encourage the Department to emphasize, through guidance and administrative action, that the statutory deadline should be met except in very extraordinary cases and that the “extenuating circumstances” language should not be as used a loophole for evading that deadline. Furthermore, the Department should clarify in NRG that if the funds generated by private school students are not fully expended for the private school program during the course of the year in which they were allocated, those funds should be carried over to the next school year to benefit private school students, consistent with the requirement under IDEA.

6. Take action to ensure that State educational agencies fulfill their new responsibilities under ESSA.

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The actions that the Department takes to ensure full compliance with the statute can be as important as what is written in regulations and NRG. For that reason, we express concern over what appears to be the less than full compliance by State educational agencies (SEAs) with the new equitable services requirements added by ESSA. For example, according to information on the ED website, almost two years after the enactment of ESSA only 42 States and territories have appointed an ombudsman to monitor and enforce the equitable services requirements (as is required by ESEA Section 1117(a)(3)(B)). Moreover, some States have met the requirement by assigning this responsibility to an official who already held a full-time job in the SEA. Additionally, very few States are meeting the new requirement (in ESEA Section 1117(a)(4)(C)) that SEAs provide timely notice to appropriate private school officials of the funds for educational services and benefits under Title I that the State's LEAs have determined are available for private school children.

We call on the Department to enforce these requirements aggressively, such as by withholding approval of the consolidated State plans from States that are out of compliance, entering into corrective action plans with stringent deadlines, or other significant actions.

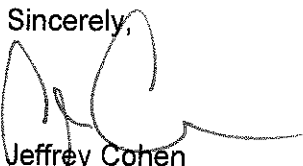
7. Require that the Department's monitoring protocol include monitoring of the implementation of the equitable services requirements under ESSA.

Prior to the education flexibility waivers under NCLB, ED monitoring of states included elements that monitored the implementation of the equitable services requirements. This element in the monitoring process had the largest number of findings for many years, and these findings allowed States to rectify specific issues and the Department to note trends in non-compliance that could be addressed. Once waivers were in place, the Department's monitoring shifted to compliance with the State's waiver application and the focus on equitable services was dropped.

Through administrative action, we urge the Department to require that States be regularly monitored, that representative districts within the State be chosen for focus during the monitoring visit, and that compliance with equitable services requirements be reinstated in the protocol for the monitoring process.

Thank you again for the opportunity to provide input on the Department's regulatory improvement initiative. If we can be of further assistance, please do not hesitate to contact us.

Sincerely,



Jeffrey Cohen
CEO
Catapult Learning, LLC