



**Congressional
Research Service**

Informing the legislative debate since 1914

Equitable Services for Private School Students and Staff and the Elementary and Secondary Education Act

September 13, 2021

Congressional Research Service

<https://crsreports.congress.gov>

R46907



R46907

September 13, 2021

Rebecca R. Skinner
Specialist in Education
Policy

Equitable Services for Private School Students and Staff and the Elementary and Secondary Education Act

Since the enactment of the Elementary and Secondary Education Act (ESEA, P.L. 89-10, as amended) in 1965, the major programs of aid to elementary and secondary education authorized under it have sought to provide for the equitable participation of eligible students enrolled in both public and private schools. This is particularly true of the largest federal elementary and secondary aid program, Education for the Disadvantaged, authorized by ESEA Title I-A.

Determining how to provide services to eligible students enrolled in private schools was a key issue related to the enactment of the ESEA and has continued to be of interest to many in Congress for over 50 years. Prior to the ESEA's enactment, Congress considered numerous bills that would have provided aid to elementary and secondary schools. None of these bills was enacted due primarily to three major concerns: (1) federal control of education, (2) school segregation, and (3) the role for private elementary and secondary schools in the programs. When the ESEA was drafted, Members of Congress found ways to address, or at least neutralize, these three concerns. Three of the six original titles of the ESEA, including Title I, Financial Assistance to Local Educational Agencies for the Education of Children of Low-Income Families, provided for the equitable participation of private school students in federal elementary and secondary education programs.

Under current law, the ESEA includes two major sets of provisions related to providing services to eligible private school students. Title VIII-F-1 (§§ 8501-8506) contains general provisions regarding a variety of ESEA programs under which services may be provided to private school students, while Title I-A, Section 1117 contains provisions specifically regarding the Education for the Disadvantaged program. A small number of additional ESEA programs have separate provisions for serving eligible private school students. Under the Title I-A and Title VIII-F-1 provisions, local educational agencies (LEAs) are responsible for providing equitable services to eligible private school students and teachers. While the specifics of the equitable services provisions under Title I-A and Title VIII-F-1 differ, the statutes providing for the equitable participation of private school students in relevant ESEA programs have generally required that (1) the services be provided by a public entity or a third-party under contract with a public entity; (2) the control of funds, materials, and equipment must remain under public control; and (3) the services, benefits, materials, and equipment provided must be secular, neutral, and nonideological. These requirements are similar to those that have been included in the ESEA since its enactment. Providing equitable services in this manner, whereby private school students and teachers are served under federal education programs but private schools themselves do not receive funds, has meant that private schools are not considered direct recipients of federal aid and are not bound by the requirements of federal laws that apply to federal aid recipients (e.g., civil rights laws).

Equitable service provisions have been included in several non-ESEA programs, such as the Immediate Aid to Restart School Operations program enacted in response to the Gulf Coast hurricanes of 2005, and the federal education assistance provided in response to the COVID-19 national emergency declared on March 13, 2020. Some of these programs have mirrored the ESEA equitable services provisions with LEAs being responsible for providing equitable services, while others have shifted the responsibility to the state educational agency (SEA). Some have raised questions about whether the delivery of equitable services under ESEA programs could be handled by SEAs rather than LEAs. In addition, regardless of whether LEAs or SEAs are responsible for providing equitable services, there are issues related to whether equitable services need to be provided for specific private school students or whether the provision of equitable services could be altered to provide services that would benefit a larger group of students in a private school, similar to Title I-A schoolwide programs in public schools.

Contents

Introduction	1
History of ESEA Equitable Services Provisions	2
Role of Public and Private Elementary and Secondary Education in the Mid-1960s	2
Proposals for Federal Aid to Elementary and Secondary Education Prior to 1965	3
Initial Enactment of the ESEA in 1965.....	6
The Six Titles of the Original ESEA.....	7
Federal Involvement in Education Policy, School Desegregation, and Private Schools	8
Implementation of the ESEA's Equitable Services Provisions from 1965-1997.....	10
The First <i>Felton</i> Decision: <i>Aguilar v. Felton</i> (1985).....	12
The Second <i>Felton</i> Decision: <i>Agostini v. Felton</i> (1997).....	15
More Recent Information on the Provision of Equitable Services to Private School Students Under the ESEA.....	15
Current Provisions for Equitable Services to Eligible Private School Students Under the ESEA	20
Current Provisions for Equitable Participation Under Title VIII-F-1.....	21
Participation in Equitable Services by Private School Children and Teachers	22
Consultation	23
Expenditures.....	24
Complaint Resolution.....	25
Bypass Procedures.....	25
Additional Provisions.....	26
Current Provisions for Equitable Participation Under Title I-A, Section 1117	26
Eligible Private School Students	26
Reservation of Funds for Equitable Services	27
Provision of Title I-A Services.....	29
Equitable Participation and Direct Federal Aid to Private Schools.....	29
Other ESEA Provisions Focused on Private Schools.....	30
Equitable Services Outside of the ESEA	30
IDEA Parentally Placed Private School Children with Disabilities.....	31
Restart School Operations Program.....	32
COVID-19 Pandemic-Related Education Assistance.....	33
CARES Act.....	34
CRRSAA.....	36
ARPA.....	38
Direct Federal Aid to Private Schools	38
Selected Issues	38
SEAs Providing Equitable Services	39
Title I-A.....	39
Other ESEA Programs	40
Schoolwide Programs.....	41

Tables

Table 1. Number of Students Enrolled in Private Schools Who Were Served Under ESEA
Title I-A, Selected School Years 18

Contacts

Author Information 42

Introduction

Since the enactment of the Elementary and Secondary Education Act (ESEA, P.L. 89-10, as amended)¹ in 1965, the major programs of aid to elementary and secondary education authorized under it have sought to provide for the equitable participation of eligible students enrolled in both public and private elementary and secondary schools.² This is particularly true of the largest federal elementary and secondary aid program, Education for the Disadvantaged, authorized by ESEA Title I, Part A and commonly referred to as the Title I-A program.

Providing for the equitable participation of private school students in federal education programs was one of three major issues that had thwarted congressional efforts to pass legislation to provide federal aid to elementary and secondary schools prior to the enactment of the ESEA. The provision of equitable services to private school students and teachers has continued to be an issue of interest to many in Congress for more than 50 years.

While the specifics of how equitable services are provided to private school students and teachers have changed over time, providing for the equitable participation of private school students and teachers in elementary and secondary schools has generally required that (1) the services be provided by a public entity or by a third-party under contract to a public entity, (2) the control of funds, materials, and equipment must remain under public control, and (3) the services, benefits, materials, and equipment provided must be secular, neutral, and nonideological.

This report begins by examining the history of the ESEA equitable services provisions. It discusses the role of public and private elementary and secondary education in the mid-1960s and proposals for federal aid to elementary and secondary schools prior to 1965. It then discusses the initial enactment of the ESEA, with a focus on federal involvement in elementary and secondary education, school desegregation matters, and private schools. Next, the report considers the implementation of equitable services provisions from 1965 through 1997, which includes an overview of two Supreme Court decisions that affected the delivery of equitable services.

The next section of the report examines current equitable services provisions included in the ESEA. The ESEA includes two major sets of equitable services provisions—one in Title I-A and one in Title VIII-F-1. The report discusses both sets of provisions and highlights the similarities and differences between them. It then discusses whether the provision of equitable services constitutes aid to private schools and other ESEA provisions that apply specifically to private schools.

This is followed by a discussion of the inclusion of equitable services provisions in non-ESEA programs, specifically with respect to the Individuals with Disabilities Education Act (IDEA), in federal education programs enacted following the Gulf Coast hurricanes in 2005, and in response to the COVID-19 pandemic. The report concludes with consideration of selected issues related to the provision of equitable services.

¹ With the exception of the discussion in the “Selected Issues” section at the end, this report focuses only on equitable services for private school students and staff under programs authorized by the ESEA. It does not discuss the different treatment of private postsecondary educational institutions and their students under the Higher Education Act and related federal legislation.

² Throughout this report, the terms *private school* and *nonpublic school* are used interchangeably.

History of ESEA Equitable Services Provisions

This section of the report discusses the prevalence of private school education in the mid-1960s, efforts to provide federal aid for elementary and secondary education prior to the enactment of the ESEA, and the enactment of the ESEA. The discussion addresses issues that thwarted efforts prior to the ESEA to provide federal aid for elementary and secondary education. It also provides an overview of the titles included in the original ESEA.

A note regarding terminology: the federal program of Education for the Disadvantaged is currently authorized under Title I-A of the ESEA. Under provisions of the Education Consolidation and Improvement Act (ECIA), included in the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35), ESEA Title I was redesignated as Chapter 1 of the ECIA. This designation continued until adoption of the Improving America's Schools Act (IASA) in 1994 (P.L. 103-382). In this report, the Title I-A designation will be used throughout except when references are made to specific document titles or legislation that utilizes the Chapter 1 terminology.

Role of Public and Private Elementary and Secondary Education in the Mid-1960s

Throughout the 20th and 21st centuries, a significant portion of the nation's elementary and secondary school students have attended private schools. According to the most recent available data covering both public and private schools, 10.2% of all elementary and secondary students were enrolled in private schools for school year (SY) 2017-2018.³ Of the 5.7 million students enrolled in private elementary and secondary schools in that year, 2.1 million were enrolled in Catholic schools, 2.2 million were enrolled in schools affiliated with other religious organizations, and 1.4 million were enrolled in nonsectarian schools. Typically, a higher percentage of elementary than secondary students has been enrolled in private schools; in fall 2017, 10.8% of elementary students were enrolled in private schools, compared to 8.8% of secondary students.⁴

At the time of the initial adoption of the ESEA in 1965, the percentage of students enrolled in private schools was higher than it is currently. For SY1965-1966, 14.8% of elementary students, 10.1% of secondary students, and 13.5% of all elementary and secondary students were enrolled in private schools.⁵ In the past, even more than currently, a large majority of private school students were enrolled in religiously affiliated schools. In SY1961-1962, 97.7% of private elementary students were enrolled in such schools. In SY1960-1961, 88.0% of private secondary students were enrolled in such schools. Of those enrolled in religiously affiliated schools in these two years, 93.6% of elementary students and 90.9% of secondary students were enrolled in Catholic schools.⁶

³ U.S. Department of Education, National Center for Education Statistics, *Condition of Education, 2020*, "Private School Enrollment" Indicator, https://nces.ed.gov/programs/coe/indicator_cgc.asp.

⁴ U.S. Department of Education, National Center for Education Statistics, *Digest of Educational Statistics, 2019*, Table 205.10, https://nces.ed.gov/programs/digest/d19/tables/dt19_205.10.asp.

⁵ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1966*, Table 27, p. 23, https://books.google.com/books?id=9pW0C16kXsUC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

⁶ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1966*, Table 35, p. 30, <https://books.google.com/books?id=>

In 1965, and currently, the private share of elementary and secondary enrollments varied widely among different regions, states, and localities. For example, in fall 2017 13.6% of all elementary and secondary students were enrolled in private schools in the Northeast region, compared to 11.7% in the Midwest, 9.3% in the South, and 8.1% in the West.⁷ These regional and state differences were somewhat more pronounced in the period immediately preceding consideration of the ESEA in 1965 than currently. In SY1961-1962, the private school share of elementary school enrollments was 28.4% for the New England states, 36.3% for the Mid-Atlantic states, 27.0% for the Great Lakes states, and 21.0% for the Plains states, compared to 6.5% for the Southeastern states, 7.3% for the Southwestern states, 10.0% for the Rocky Mountain states, and 12.3% for the West Coast states.⁸ In SY1960-1961, the private school share of secondary school enrollments was 17.3% for the New England states, 11.9% for the Mid-Atlantic states, 11.0% for the Great Lakes states, and 9.4% for the Plains states, compared to 3.8% for the Southeastern states, 4.1% for the Southwestern states, 3.8% for the Rocky Mountain states, and 6.3% for the West Coast states.⁹ Among individual states, private elementary school shares were highest in SY1961-1962 for Rhode Island (49.4%), Wisconsin (42.0%), and Pennsylvania (41.2%). Private secondary school enrollment shares were highest in SY1960-1961 for Vermont (22.2%), Massachusetts (17.9%), and Maine (17.8%).¹⁰

Proposals for Federal Aid to Elementary and Secondary Education Prior to 1965

Between the end of World War II in 1945 and the original enactment of the ESEA in 1965, Congress considered numerous proposals for federal financial support of elementary and secondary education. A small number of these were enacted—primarily the National School Lunch Act of 1946 (P.L. 396, 79th Congress); formalization and expansion of authority to compensate local educational agencies (LEAs) for the costs of educating children whose presence resulted from establishment or expansion of military or certain other federal facilities (P.L. 815 and P.L. 874, 81st Congress, 1950);¹¹ targeted support of programs focused on science, mathematics, and foreign language education at the elementary and secondary levels (Titles III, V, and VI) and the postsecondary level under the National Defense Education Act of 1958 (NDEA, P.L. 85-864);¹² and the Vocational Education Act of 1963 (P.L. 88-210).¹³

9pW0C16kXsUC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

⁷ U.S. Department of Education, National Center for Education Statistics, *Digest of Educational Statistics, 2019*, Table 205.10, https://nces.ed.gov/programs/digest/d19/tables/dt19_205.10.asp.

⁸ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1965*, Table 9, pp. 16-17, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112073934413&view=1up&seq=36>.

⁹ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1965*, Table 9, pp. 16-17, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112073934413&view=1up&seq=36>.

¹⁰ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1965*, Table 9, pp. 16-17, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112073934413&view=1up&seq=36>.

¹¹ This authority was first provided under a 1941 amendment to the Defense Housing and Community Facilities and Services Act of 1940 (P.L. 849, 76th Congress), popularly known as the Lanham Act.

¹² Title III of the NDEA authorized Financial Assistance for Strengthening Science, Mathematics, and Modern Foreign Language Instruction in elementary and secondary schools. Section 305 specifically authorized loans to nonprofit private schools for this purpose.

¹³ Limited federal support for vocational education was first authorized by the Smith-Hughes Act of 1917 (P.L. 347,

Beyond these, several bills were passed by the House or, more often, the Senate that would have authorized financial aid to state and local elementary and secondary school systems on a broader scale.¹⁴ These bills were primarily focused on providing grants to help pay the costs of teacher salaries and school construction. They were intended to help meet the needs of elementary and secondary school systems attempting to address rapidly rising enrollment levels due to the post-World War II baby boom.¹⁵ Their focus was on support of teacher salaries, as the largest single cost factor for elementary and secondary education, and on school construction as required to serve rapidly rising numbers of enrolled students.

Because they were focused on the broad objects of salaries for all types of teachers and the costs of construction of all types of school facilities, these proposals were characterized as general aid bills, as opposed to categorical aid for more narrowly defined subjects and activities, as exemplified by the programs authorized by the NDEA in 1958. Another characteristic of these major pre-ESEA proposals is that they would have provided federal aid only to state and local systems of public elementary and secondary education; they did not include any support for private schools or their students or staff.

It has been widely observed and reported that the general aid proposals of the 1945-1965 period failed to be enacted due to three main sources of objection to them.¹⁶ The first of these was concern about federal control over major elementary and secondary school policies, such as curricula, instructional methods, or teacher qualifications. During this period, the federal role in elementary and secondary education, whether financial or otherwise, was limited. For example, the federal share of total revenues for public elementary and secondary education was 1.4% for SY1945-1946 and increased to 4.2% for SY1964-1965.¹⁷ There was concern that, whether intended or not, a much more substantial federal role in education funding might inevitably lead, over time, to direct or indirect federal influence over numerous aspects of state and local elementary and secondary education policies, such as curricula or teacher qualifications.

Second, there were concerns over public elementary and secondary school policies regarding the race of students. In 1954, the Supreme Court handed down its decision in the case of *Brown v. Board of Education*—that racial segregation of public elementary and secondary schools on the basis of state law violated the U.S. Constitution. In addition to such de jure segregation, which

64th Congress).

¹⁴ Jack Jennings, *Presidents, Congress, and the Public Schools*, Harvard Education Press, 2015, pp. 15-29; James W. Guthrie, “A Political Case History: Passage of the ESEA,” *Phi Delta Kappan*, February 1, 1968, <https://kappanonline.org/political-case-history-passage-esea-guthrie/>; Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*, Syracuse University Press, 1968 (hereinafter referred to as “Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*”); Julie Roy Jeffrey, *Education for Children of the Poor*, Ohio State University Press, 1978; Eugene Eidenberg and Roy D. Morey, *An Act of Congress, The Legislative Process and the Making of Education Policy*, W.W. Norton and Company, 1969 (hereinafter referred to as “Eugene Eidenberg and Roy D. Morey, *An Act of Congress, The Legislative Process and the Making of Education Policy*”); and Carl F. Kaestle, “Federal Aid to Education After World War II: Purposes and Politics,” in *The Future of the Federal Role in Elementary and Secondary Education*, Center on Education Policy, 2001, <https://files.eric.ed.gov/fulltext/ED477181.pdf>.

¹⁵ Total enrollment in public elementary and secondary schools rose from 25,111,000 students in SY1949-1950 to 30,045,000 in SY1954-1955 and 42,280,000 in SY1964-1965; U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1965*, Table 28, p. 24, <https://babel.hathitrust.org/cgi/pt?id=uiug.30112073934413&view=1up&seq=36>.

¹⁶ See sources referenced in footnote 14.

¹⁷ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1966*, Table 65, p. 53, https://books.google.com/books?id=9pW0C16kXsUC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

had taken place in a number of Southern states, several public elementary and secondary schools in other regions of the nation were heavily segregated by race as a result of the demographic characteristics of the residential areas they served—de facto segregation.

While de facto segregation of public elementary and secondary schools was a significant factor in many parts of the nation throughout the 1945-1965 period, the legislative focus in the period following the 1954 *Brown* decision was on the remaining effects of de jure segregation in the Southern states in which such policies had been in effect. Many Members of Congress from these states expressed concern that large-scale federal financial aid would be used as a lever to force Southern states to desegregate public schools more quickly or comprehensively than what had occurred thus far. In contrast, some other Members of Congress hoped that increased federal aid would indeed stimulate increased desegregation of schools, and supported such aid at least partially for this reason, and they resisted supporting federal aid if any of the funds would go to states and LEAs operating public schools under de jure policies of racial segregation.

On a number of occasions,¹⁸ bills authorizing large scale federal aid for teacher salaries and school construction did not pass the House after amendments were adopted that would prohibit the provision of any funds to state or local school systems operating under de jure segregation policies. These were often referred to as Powell Amendments because they were frequently offered by Representative Adam Clayton Powell, who during much of this period was Chairman of the House Committee on Education and Labor. Typically, the Powell Amendments would be adopted with support of Members opposed to school segregation, as well as Members who opposed broader federal school aid due to concerns over federal control or the limiting of the proposed aid to public schools only (see below); then bills including Powell Amendments would not pass due to opposition by Members representing Southern states plus Members concerned that excessive federal control would accompany the aid.

The third main source of objection to proposals for large-scale federal aid to elementary and secondary education throughout the 1945-1965 period revolved around the role for private elementary and secondary schools. As noted above, the pre-ESEA bills that were passed by the House and/or Senate, but not enacted, during this period would have provided support only to public schools. As also noted above, the proportion of elementary and secondary school students who were enrolled in private schools was relatively high (compared to the present time) throughout the period, especially in selected states and regions of the nation, and a large majority of private school students were enrolled in religiously affiliated schools, particularly Catholic schools.

Some national organizations concerned with educational or religious policies opposed the adoption of any increased federal elementary and secondary education funding that would include private schools as beneficiaries. These included the National Education Association, Council of Chief State School Officers, National School Boards Association, American Civil Liberties Union, National Council of Churches, American Jewish Congress, and Protestants and Other Americans United for Separation of Church and State.¹⁹ Representatives of these organizations often argued that inclusion of private schools, a large majority of them religiously affiliated, in a new federal program of aid to elementary and secondary education would reduce funding and

¹⁸ See sources referenced in footnote 14.

¹⁹ Eugene Eidenberg and Roy D. Morey, *An Act of Congress, The Legislative Process and the Making of Education Policy*, pp. 13-14; and Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*, pp. 15-16. Note that the “Protestants and Other” portion of the name of the Protestants and Other Americans United for Separation of Church and State was dropped in 1972.

support available to public schools, and would inevitably involve the support of specific religious organizations, in violation of principles of separation of church and state. At the same time, organizations such as the United States Conference of Catholic Bishops, National Catholic Welfare Conference, and National Catholic Education Association opposed any new aid programs that did not include support of private schools.²⁰ Among other points, these latter organizations argued that with a large percentage of elementary and secondary students enrolled in private schools, many of them disadvantaged, it was a matter of fairness for a national program aimed at improving education for the disadvantaged (as was the case with the ESEA—see below) to include services to eligible private school students.

It was frequently observed and reported that many Members of Congress representing constituencies where a substantial percentage of students were enrolled in private schools would not support proposals for large-scale federal aid that excluded such schools. At the same time, the pre-ESEA proposals included only public schools largely because many other Members would not support providing significant amounts of direct federal aid to private elementary and secondary schools, especially those with a religious affiliation.²¹ During the mid-1960s, private schools were experiencing financial pressures associated with baby boom growth in enrollments, along with—in the case of religiously affiliated schools—a decreased ability to rely on relatively low-cost religious staff as teachers. Several states and localities had begun to provide limited, secular services such as transportation and student health services, or classes in secular subjects on a *shared-time* basis. In a shared-time model, private school students would go to a public school for a few hours each week for instruction in selected secular subjects.

Initial Enactment of the ESEA in 1965

Unlike the several proposals of the 1945-1964 period, managers and supporters of the ESEA in 1965 found ways to satisfy, at least minimally, and/or neutralize the three major sources of opposition described above that had prevented the earlier proposals from being enacted. The legislative process under which the original ESEA was considered was distinctive in several respects. The version that was ultimately enacted was highly similar to the legislative proposal that was submitted to Congress. A small number of amendments were adopted during congressional consideration, all but one of them occurring early in the process during debate on the bill by the General Subcommittee on Education of the House Committee on Education and Labor.²² Many other amendments were offered but no additional significant amendments were

²⁰ Eugene Eidenberg and Roy D. Morey, *An Act of Congress, The Legislative Process and the Making of Education Policy*, pp. 61-70; Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*, pp. 15-16.

²¹ Certain forms of indirect aid were already available to private elementary and secondary schools, whether or not they were religiously affiliated. These included exemption from most local, state, and federal taxes, as well as the availability (albeit limited) of loans under the NDEA (see footnote 12).

²² One of the General Subcommittee on Education amendments changed a provision of the introduced bill to emphasize public agency control over educational materials and services for eligible private school students and teachers under Titles II and III. A second amendment adopted by the subcommittee was to supplement the counts of children in low-income families as used in the Title I allocation formulas—children aged 5-17 in families with income below \$2,000—with counts of children aged 5-17 in families receiving Aid to Families with Dependent Children (AFDC) payments above \$2,000. Other subcommittee amendments required state and local evaluation of Title I programs and increased the appropriations authorization for Title V. The single amendment adopted during House floor debate involved the process for appointing members of advisory councils. Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*, pp. 60-67.

adopted during consideration of the bill by the House Committee on Education and Labor, the full House, the Senate Committee on Labor and Public Welfare, or the full Senate.

Because the same version of the bill was passed by the House and the Senate, there was no need for conference committee consideration. The entire legislative process took place relatively quickly—the bill was introduced on January 12, 1965, and was signed into law on April 11, 1965. It has been widely reported that this expedited consideration, resistance to amendments, and particularly the avoidance of a conference committee were intended to minimize opportunities for opponents of the bill to organize resistance to it, especially over religious and private school issues, and to avoid stages of the legislative process (such as conference committees) at which previous federal elementary and secondary education aid bills had stalled.²³

The Six Titles of the Original ESEA

The original ESEA as enacted (P.L. 89-10) contained six titles. Each is discussed below.

Title I—Financial Assistance to Local Educational Agencies for the Education of Children of Low-Income Families

Both in 1965 and currently, this was and is the largest federal elementary and secondary education program, providing aid for the education of disadvantaged children residing in areas with concentrations of children from low-income families.²⁴ Funds were, and are, allocated by formula to LEAs via state educational agencies (SEAs). Funds were initially allocated based on the number of children aged 5-17 in families with income below \$2,000 according to the 1960 Census, plus the number of children aged 5-17 in families receiving payments under the Aid to Families with Dependent Children (AFDC) program above \$2,000, multiplied by a cost factor based on state average expenditures per pupil for elementary and secondary education. Concerns about the ESEA's treatment of students enrolled in private schools were focused primarily on this program.

With respect to students enrolled in private schools, Title I required, as conditions for state and LEA eligibility to participate in the program,

- (2) that, to the extent consistent with the number of educationally deprived children in the school district of the educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate; [and]
- (3) that the local educational agency has provided satisfactory assurance that the control of funds provided under this title, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this title, and that a public agency will administer such funds and property.²⁵

Title II—School Library Resources, Textbooks, and Other Instructional Materials

Grants were to be allocated to states by formula based on their number of students enrolled in public and private elementary and secondary schools. Within states, books and other instructional materials were to be allocated based on need (as determined by the state).

²³ Stephen K. Bailey and Edith K. Mosher, *ESEA: The Office of Education Administers a Law*, pp. 60-67.

²⁴ As originally enacted, and for several years thereafter, Title I (only) of the ESEA was structured as a new Title II of P.L. 874 (81st Congress), a program to provide funding to public school systems in areas affected by federal activity, such as military facilities.

²⁵ §205(a)(2) and (3). Because Title I of the ESEA was originally structured as Title II of P.L. 874 (81st Congress), section numbers began with 201.

With respect to students enrolled in private schools, Title II provided “that to the extent consistent with law such library resources, textbooks, and other instructional materials will be provided on an equitable basis for the use of children and teachers in private elementary and secondary schools in the State” (§203(a)(3)(B)). Title II further provided that title to all materials purchased with funds under this program must be held by a public agency, and that books and instructional materials must be limited to those that have been approved for use in the state's public schools (§205).

Title III—Supplementary Educational Centers and Services

Title III authorized grants to LEAs at the discretion of the U.S. Commissioner of Education²⁶ for the “development and establishment of exemplary elementary and secondary school educational programs to serve as models for regular school programs” (§301(a)). The total share of Title III funds to be granted to LEAs within each state was to be determined by a formula with 50% based on population aged 5-17 and 50% based on total population.

With respect to students enrolled in private schools, Title III provided “that, to the extent consistent with the number of children enrolled in nonprofit private schools in the area to be served whose educational needs are of the type which the supplementary educational activities and services provided under the program are to meet, provision has been made for participation of such children” (§304(b)(3)(B)).

Title IV—Educational Research and Training

Title IV amended the Cooperative Research Act of 1954 with respect to the education research activities of the U.S. Office of Education.

Title V—Grants to Strengthen State Departments of Education

SEAs were given a substantial role in the administration of ESEA programs. Funding under Title V was intended to help increase the capabilities of SEAs to meet those responsibilities. Funds were granted to states through a combination of flat grants (\$100,000 per state) plus allocations proportional to the number of students enrolled in public elementary and secondary schools in each state.

Title VI—General Provisions

These included limitations on federal control over state and local educational policies, and a prohibition against the use of funds provided under the act for religious instruction.

Federal Involvement in Education Policy, School Desegregation, and Private Schools

In the ESEA as enacted, the three primary concerns about federal involvement that had hindered previous legislative attempts, as discussed above, were addressed. First, specific provisions were included in the act prohibiting federal involvement in or control over many of the core aspects of state and local elementary and secondary education policy. The primary such provision was Section 604:

Nothing contained in this Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution or school system, or over the selection of library resources,

²⁶ At that time, this person was the chief officer of the U.S. Office of Education.

textbooks, or other printed or published instructional materials by any educational institution or school system.

Similar provisions, extended in scope over time, have been included in each version of the ESEA since 1965, as well as the Department of Education Organization Act of 1979.²⁷

Further, while the primary ESEA program—Title I aid for the education of disadvantaged children—was targeted in its focus on improving education for low-achieving students attending schools in areas with concentrations of school-age children from low-income families, it was broad and flexible in many other important respects. From the beginning, Title I has been nondirective or noncontrolling with respect to such basic instructional elements as the curricula and educational strategies to be implemented by state and local grantees.

Second, concerns about school segregation with respect to the ESEA were largely defused by the preceding enactment of the Civil Rights Act (CRA) of 1964. In particular, Title VI of the CRA authorized the U.S. Office of Education (USOE)²⁸ to discontinue federal aid payments to segregated school systems. While adoption of the ESEA raised the stakes for segregated school systems by substantially increasing the amount of federal aid they might lose, the CRA effectively made moot the Powell Amendments that had hindered the adoption of earlier federal elementary and secondary education aid proposals.

And third, concerns about federal support, or lack of support, for private elementary and secondary schools and/or their students were resolved in the ESEA through application of a new strategy involving *child benefit* and *shared-time* concepts. While the original (and current) ESEA provided no direct financial aid to private schools, its Titles I, II, and III required participating states and LEAs to include eligible private school students, staff, and in some cases parents in the services funded by the act. For example, under ESEA Title I, LEAs receiving grants were required to consult with local private school officials to identify eligible students enrolled in their schools. Eligible private school students were low-achieving students residing in the areas with concentrations of students from low-income families in which public schools are selected to operate Title I programs. The identified private school students were to receive supplementary educational services that were equitable to the Title I services provided to eligible public school students. Control of federal funds, provision of services, and ownership of textbooks and other instructional materials were to be maintained by public school authorities. In effect, LEAs and SEAs were to act as public trustees for providing equitable services to eligible students enrolled in private schools. In addition, Section 605 of the original ESEA prohibited the use of funds provided under the act for religious instruction.

The essence of the child benefit concept embodied in the ESEA is that eligible private school children would receive and benefit from federally funded educational services and materials, but no aid would accrue to the private schools themselves. The educational services and instructional materials provided with federal funds would be secular only, and public agencies would retain control of all funds. In typical practice during the initial years of ESEA implementation, eligible private school students would come to public schools, or public school teachers would go to private schools, for a limited period of time each week for instructional purposes. This was modeled to some extent on shared-time programs implemented previously in some states, under

²⁷ See especially Sections 1604, 8526 and 8526A of the ESEA, and Section 103 of the Department of Education Organization Act of 1979 (P.L. 96-88).

²⁸ This office, within the Department of Health, Education, and Welfare (DHEW), administered most federal education programs before the establishment of the U.S. Department of Education (ED) in 1979.

which private school students would go to a public school for a few hours each week for instruction in selected secular subjects.

Some public school advocates were displeased that support for private school students was included in the ESEA in any form, while advocates of Catholic and other private schools opposed the control of aid by state and local public school authorities and the lack of full parity in treatment of private and public schools. Nevertheless, the child benefit approach proved to be at least minimally acceptable to both proponents and opponents of federal aid to private schools.²⁹

Implementation of the ESEA's Equitable Services Provisions from 1965-1997

Little is known about how and the extent to which Title I-A³⁰ and other program services were provided to eligible private school students during the first several years of implementation of the ESEA. Information on or evaluation of the ESEA's equitable services provisions have always been limited, but were especially so in the early years of the program.

The Education Amendments of 1974 (P.L. 93-380) mandated that a study of Title I-A programs be conducted by the National Institute of Education (NIE). At that time, the NIE was a branch of the USOE in the Department of Health, Education, and Welfare (DHEW) that was responsible for conducting and supporting educational research and related activities. According to the 1976 interim report of the resulting NIE Compensatory Education Study,³¹ in SY1975-1976 an estimated 5% of all private school students enrolled in grades K-8 (116,218 students) received services under Title I-A, compared to an estimated 19.5% of public school students in those grades.³²

The interim report of the NIE Compensatory Education Study found that large LEAs were more likely to provide Title I-A services to private school students than smaller LEAs in 1975-1976: 76.1% of large LEAs (enrollment more than 17,268 students), 46.0% of medium LEAs (4,359-17,268 students), and 11.4% of small LEAs (fewer than 4,359 students) served any private school students under Title I-A.³³ Overall, 17.1% of all LEAs provided instructional services to any private school students under Title I-A, while 7.7% of all LEAs provided support services to any private school students under Title I-A.³⁴

²⁹ See sources referenced in footnote 14.

³⁰ In the years following the initial enactment of the ESEA in 1965, several parts were added to Title I. The primary Title I program of aid to LEAs for the education of disadvantaged children is currently Part A of Title I, and is referred to as Title I-A in this report in most circumstances.

³¹ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*, Washington, DC, December 30, 1976, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015008170543&view=1up&seq=7> (hereinafter referred to as “National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*”).

³² National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*, p. III-14. This study focused specifically on grades K-8 because it was found that less than 1% of students served by Title I-A in SY1975-1976 were enrolled in grades 9-12. Note that for public school students, participants in state compensatory education programs were included in the Title I-A participation figures.

³³ National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*, p. III-19.

³⁴ National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*, p. III-19. For purposes of the study, support services were defined as “the expenditure of funds for

A final report on the NIE Compensatory Education Study, published in 1978,³⁵ further stated that only 43% of all LEAs that received Title I-A funds and contained private elementary and secondary schools within their boundaries provided any Title I-A services to private school students. On average, the Title I-A-supported services to private school students consisted of one hour of instruction per week, compared to an average of approximately five hours per week (depending on grade level) for public school students. Following the NIE's Compensatory Education Study, the National Advisory Council on the Education of Disadvantaged Children (NACEDC)³⁶ issued a report in 1979 that criticized the almost complete lack of information on the types of services provided to private school students under Title I-A and on the effectiveness of those services.

The Department of Education Organization Act of 1979 (P.L. 96-88) replaced the USOE in DHEW with the U.S. Department of Education (ED). A study prepared for ED and published in 1983—the District Practices Study (DPS)³⁷—provides the most substantial available data on Title I-A services to private school students during the period of the mid-1970s through early 1980s. According to the DPS, in SY1981-1982 56% of LEAs that received Title I-A grants and had private school students residing in their Title I-A (public) school attendance areas provided Title I-A services to any of those private school students. The proportion of LEAs providing Title I-A services to at least one private school student rose with LEA enrollment size.³⁸ Also in SY1981-1982, the DPS reported that 83% of private school students served under Title I-A received those services at their private school, 16% at a public school, 2% in a mobile van, and 4% at a neutral site.³⁹

The authors of the DPS found that Title I-A students attending private schools received an average of 2.6 hours per week of Title I-A-funded instruction, compared to an average of 4.0 hours per week for public school students.⁴⁰ With respect to the share of private versus public school students who participated in Title I-A, the authors of the DPS reported that in SY1979-1980 3.8% of all private school students in grades K-12 participated in Title I-A, compared to 12.5% of all public school students.⁴¹

any services which do not involve direct instruction of the participants.”

³⁵ U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Institute of Education, *Compensatory Education Study. Final Report to Congress From the National Institute of Education*, Washington, DC, September 1978.

³⁶ National Advisory Council on the Education of Disadvantaged Children (NACEDC), *1979 Special Report on the NIE Compensatory Education Study*, <http://files.eric.ed.gov/fulltext/ED173498.pdf>. At that time, the establishment of the NACEDC was authorized under Section 148 of the Title I-A statute. The council advised the Secretary of DHEW and Congress on major aspects of the Title I-A program, particularly on evaluation and assessment practices.

³⁷ Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book* (also referred to as the District Practices Study), prepared for the U.S. Department of Education, June 1983, <https://files.eric.ed.gov/fulltext/ED243244.pdf> (hereinafter referred to as “Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book*”).

³⁸ Title I-A services were provided to private school students by 17% of small, 44% of medium, and 68% of large enrollment LEAs; Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book*, p. 9-10.

³⁹ Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book*, p. 9-30. The percentages total to more than 100% due to some students being served in multiple locations (i.e., the types of sites at which services were provided were not mutually exclusive).

⁴⁰ Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book*, p. 9-23.

⁴¹ Advanced Technology, Inc., *Local Operation of Title I, ESEA, 1976-1982, A Resource Book*, pp. 9-10 and 9-11.

During the period of 1965 through the mid-1980s, virtually all⁴² students served by Title I-A, whether they attended public or private schools, participated in targeted assistance programs. This means that in public schools selected to receive Title I-A funds, individual students who were among the most educationally disadvantaged in the school were selected to be served. The instructional and support services for these students might have been provided within their regular classroom and during regular class hours (e.g., receiving special, individualized assistance by a teacher's aide), or more often in a pullout context outside of the regular classroom (e.g., individual or small group instruction in a separate setting by a specialized reading teacher).⁴³ Similarly, then, as now, students enrolled in private schools selected to be served by Title I-A were to be the most disadvantaged individual students at the school. Thus, virtually all students counted as Title I-A participants during this time period, whether in public or private schools, directly received targeted instructional or support services funded at least in part by Title I-A. As will be discussed further below, this continues to be the model for serving private school students under Title I-A, but a large majority of public school students counted as participating in Title I-A are currently served via schoolwide programs, under which funds may be used in ways that are intended to improve the performance of all enrolled students, and all students enrolled in the school are counted as being served under Title I-A.

The First *Felton* Decision: *Aguilar v Felton* (1985)

A 1985 Supreme Court decision in the case of *Aguilar v. Felton*⁴⁴ declared unconstitutional the practice of providing Title I-A services to pupils of religiously affiliated private schools by sending public school teachers or other staff into such schools. The Court ruled that provision of Title I-A services to students on the premises of religiously affiliated private schools was unconstitutional because it involved “excessive administrative entanglement” between public and religious school officials. This had previously been the dominant method of providing such services,⁴⁵ and the majority of private school pupils served by Title I-A attended religiously affiliated schools.

⁴² While the schoolwide program was initially authorized in Section 133 of the Education Amendments of 1978 (P.L. 95-561), it was originally restricted to schools where 75% of more of the students were from low-income families, and was accompanied by a requirement that Title I grants to these schools must be matched by an equivalent amount of non-federal supplementary funds. Beginning with the Improving America's Schools Act (IASA; P.L. 103-382) in 1994, the eligibility threshold was reduced to 60% for SY1995-1996 and 50% for SY1996-1997 and thereafter, and the non-federal matching requirement was dropped. The eligibility threshold was further reduced to 40% under the No Child Left Behind Act of 2001 (P.L. 107-110). The level of participation in schoolwide programs remained low until adoption of the IASA, after which it grew rapidly.

⁴³ Launor F. Carter, *A Study of Compensatory and Elementary Education: The Sustaining Effects Study*, final report, prepared for the U.S. Department of Education, Office of Program Evaluation, January 1983, p. I-1, <https://files.eric.ed.gov/fulltext/ED246991.pdf>.

⁴⁴ 105 S. Ct. 3232. See House Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, *After Aguilar v. Felton: Chapter 1 Services to Nonpublic Schoolchildren*, March 1986, Serial No. 99-N, especially David M. Ackerman, Congressional Research Service, “Constitutional Guidelines for the Provision of Services Under Chapter 1 of the ECIA to Eligible Children Who Attend Private Sectarian Schools,” p. 3-17, and Wayne C. Riddle, Congressional Research Service, “Generally Permissible Uses of Federal Assistance Under the Basic Grant Program of Chapter 1, ECIA,” p. 34-47. (Hereinafter referred to as “House Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, *After Aguilar v. Felton: Chapter 1 Services to Nonpublic Schoolchildren*”).

⁴⁵ As noted previously, the most comprehensive study of Title I-A services to private school students reported that in SY1981-1982, 83% of private school students served under Title I-A received those services at their private school, compared to 16% at a public school, 2% in mobile vans, and 4% at neutral sites. The percentages total to more than 100% due to some students being served in multiple locations; Advanced Technology, Inc., *Local Operation of Title I*,

The *Aguilar v. Felton* case was based on the provision of Title I-A services to private school students residing in the New York City school district. In that LEA, instruction was generally provided at private school sites by public school teachers. The instructional materials and equipment were provided by the public school system, classrooms were required to be free of religious symbols, contact between teachers and religious school staff was to be minimized, and supervision of the program included unannounced visits by public school staff to the classrooms where Title I-A services were being provided in private schools.⁴⁶

As discussed above, at the time of the *Aguilar v. Felton* ruling, the instruction for a large majority of the private school students served by Title I-A took place at private schools, and a large majority of private elementary and secondary schools were religiously affiliated.⁴⁷ The most common means by which Title I-A services were provided to private school students at the time of the ruling was instruction by public school teachers in a private school classroom or other space where religious symbols had been removed and other measures had been taken to insulate the Title I-A instruction and class from the regular activities of the private school.⁴⁸

The 1992 National Assessment of Chapter 1 Act (P.L. 101-305) required ED to study and report on the current status of Title I-A equitable services to private school students.⁴⁹ The resulting report—*Chapter 1 Services to Religious-School Students: A Supplementary Volume to the National Assessment of the Chapter 1 Program*⁵⁰—comprehensively reviewed the extent and characteristics of Title I-A services to private school students during the late 1980s through early 1990s, a period when the *Aguilar v. Felton* decision was fully in effect. The report focused on religiously affiliated schools because they continued to enroll a large majority of all students enrolled in private schools, including those participating in Title I-A.

According to the report, a rapid initial decline in private school student participation resulted largely from a lack of immediately available neutral sites at which private school students could be served, as well as concerns about the health and safety of private school students being transported to neutral sites or public schools and the resulting disruption of school schedules.⁵¹ By SY1990-1991, it was reported that Title I-A services were most often provided to private school students in mobile vans (29% of private school students served), in portable classrooms and “other religiously neutral facilities” (24% of students), via computer-assisted instruction in

ESEA, 1976-1982, *A Resource Book*, p. 9-30.

⁴⁶ House Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, *After Aguilar v. Felton: Chapter 1 Services to Nonpublic Schoolchildren*.

⁴⁷ In SY1985-1986, 38.7% of all private elementary and secondary schools were affiliated with the Catholic Church, 42.0% were affiliated with other religious organizations, and 19.3% were nonsectarian. U.S. Department of Education, National Center for Education Statistics, *Digest of Educational Statistics, 1987*, Table 44, p. 55, <https://files.eric.ed.gov/fulltext/ED330086.pdf>.

⁴⁸ House Committee on Education and Labor, Subcommittee on Elementary, Secondary, and Vocational Education, *After Aguilar v. Felton: Chapter 1 Services to Nonpublic Schoolchildren*.

⁴⁹ Interim and final reports of the National Assessment of Chapter 1, published in 1986 and 1987, did not assess the effects of the *Aguilar v. Felton* decision on Title I services to private school students, due mainly to the timing of those reports' preparation. P.L. 101-305 was adopted largely in response to this.

⁵⁰ M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*, prepared for the U.S. Department of Education, August 1993, <https://files.eric.ed.gov/fulltext/ED362615.pdf> (hereinafter referred to as “M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*”).

⁵¹ M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*, p. i.

“specially designated facilities on religious school premises” (32% of students), in public school facilities (12% of students), and in other facilities (2% of students).⁵²

While the *Aguilar v. Felton* decision was in force, LEAs had to comply by delivering Title I-A services through alternative means, such as bringing private school pupils into public schools for Title I-A instruction, renting space in neutral sites (such as mobile classroom vans parked on public streets), or using telecommunications technologies to deliver instruction. In general, these alternatives generated increased costs that, according to program regulations, had to be paid “off the top” of an LEA’s Title I-A grant (i.e., before the calculation of equal grants per child from a low-income family in eligible public school attendance areas or private schools). In addition, because these alternative techniques for delivering services were often substantively different from those used to serve public school students, there was concern that they might violate requirements that Title I-A services to private school pupils be equivalent to those provided to public school pupils. Finally, some advocates of private schools considered the post- *Aguilar v. Felton* methods of serving private school students under Title I-A to be unsatisfactory because of the time loss and inconvenience for some private school students, who were often required to interrupt their school day to be transported to a neutral or public school site.⁵³

As a result of these difficulties, as well as a period of uncertainty over how and when LEAs were to comply with the *Aguilar v. Felton* ruling, private school student participation in Title I-A declined substantially in SY1985-1986, the first year after the Supreme Court’s decision, compared to SY1984-1985. According to a tabulation for the period of SY1979-1980 through SY2004-2005 that was prepared for a National Assessment of Title I report published in 2007,⁵⁴ private school student participation in Title I-A fell from approximately 184,500 students served in SY1984-1985 to 127,900 students in SY1985-1986, a reduction of 31%. The estimated number of private school participants in Title I-A recovered somewhat in succeeding years, but remained below the SY1984-1985 level each year until SY1997-1998, when it rose to 188,194 students.

During its consideration of ESEA reauthorization legislation in 1987-1988 (the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 [Hawkins-Stafford Act; P.L. 100-297]), Congress attempted to find ways to resolve the difficulties associated with compliance with the *Aguilar v. Felton* decision. Some expressed concern that the coalition of public and private school interest groups and associations that had historically supported Title I-A and other federal aid to elementary and secondary education might be broken apart over the new barriers to serving private school students in these programs. Concern was expressed over the SY1985-1986 reduction in private school students served under Title I-A, as well as the increased costs of serving these students—which reduced the funds available to serve all students, public and private.⁵⁵

⁵² M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*, pp. iii and 21.

⁵³ M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*.

⁵⁴ Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I Final Report, Volume I: Implementation*, prepared by the Policy and Program Studies Service, Office of Planning, Evaluation and Policy Development for the U.S. Department of Education, Institute of Education Sciences, October 2007, Exhibit B-1, p. 155, https://ies.ed.gov/ncee/pdf/20084012_rev.pdf (hereafter referred to as “Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I Final Report Volume I: Implementation*”).

⁵⁴ M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*, especially pp. 3-5.

⁵⁵ M. Bruce Haslam and Daniel C. Humphrey, *Chapter 1 Services to Religious-School Students. A Supplemental Volume to the National Assessment of the Chapter 1 Program*, especially pp. 3-5.

The most significant new provision for serving private school students that was adopted in the Hawkins-Stafford Act was the authorization of specific appropriations to pay the additional capital expenses of serving private school students under Title I-A as a result of the *Aguilar v. Felton* decision. *Capital expenses* were defined as including costs for purchasing, leasing, or renovating facilities, transportation, insurance, maintenance, or similar goods and services. These funds were to be allocated to the states in proportion to their relative number of private school students served under Title I-A in SY1984-1985. SEAs were then to distribute these funds to their LEAs with greatest need for assistance. The special capital expenses appropriation was initially funded for FY1989 at \$19,760,000, rising gradually to \$41,434,000 in FY1995 and then to \$41,119,000 in each of FY1997 and FY1998.

The Second *Felton* Decision: *Agostini v. Felton* (1997)

On June 23, 1997, in deciding the case of *Agostini v. Felton*, the Supreme Court reversed the 1985 *Aguilar v. Felton* ruling.⁵⁶ The Court abandoned the presumption that placing public employees within religious institutions inevitably results in either indoctrination, excessive entanglement, or a symbolic union between government and religion. The Court also abandoned the rule, established earlier in *Aguilar v. Felton*, that “any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination.”⁵⁷

Following the *Agostini v. Felton* decision, it became somewhat less costly and difficult to provide Title I-A services to eligible children attending private schools. LEAs could return to the practice of sending public school teachers into religiously affiliated private schools to instruct pupils eligible for Title I-A services. Funding for Title I-A capital expenses to help pay the extra costs of serving private school students under the limitations of the *Aguilar v. Felton* decision gradually declined after the *Agostini v. Felton* decision, falling to \$24,000,000 for FY1999, \$12,000,000 for FY2000, and \$6,000,000 for FY2001 (the last year for which this provision was authorized and funded).⁵⁸

More Recent Information on the Provision of Equitable Services to Private School Students Under the ESEA

The most recent comprehensive information on the provision of equitable services to eligible private school students under Title I-A, as well as other ESEA programs, is provided in a pair of reports published by ED as part of the National Assessment of Title I in 2007, as mandated under Section 1501 of the ESEA as amended by the No Child Left Behind Act of 2001 (P.L. 107-110). These reports are the *National Assessment of Title I Final Report, Volume I: Implementation*,⁵⁹

⁵⁶ See CRS Report 97-848 A, *The Implications of “Agostini v. Felton” for the Provision of Title I Assistance to Nonpublic School Children*, by David M. Ackerman and Wayne Riddle (hereinafter referred to as “CRS Report 97-848 A, *The Implications of “Agostini v. Felton” for the Provision of Title I Assistance to Nonpublic School Children*”) (available to congressional clients upon request).

⁵⁷ See CRS Report 97-848 A, *The Implications of “Agostini v. Felton” for the Provision of Title I Assistance to Nonpublic School Children*, p. 13.

⁵⁸ U.S. Department of Education, Budget Service, appropriations data, various years. When the ESEA was comprehensively reauthorized by the No Child Left Behind Act (NCLB; P.L. 107-110) in 2002, the authorization for Title I-A funding for capital expenses was not included.

⁵⁹ Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I Final Report, Volume I:*

and *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*.⁶⁰ Both reports based their findings on a nationally representative sample of 1,501 private schools and 607 LEAs in which these schools were located for SY2004-2005 and SY2005-2006. The first report provides summary information, and the second report more detailed information, on private school student participation in ESEA programs.

According to these reports, of all students participating in Title I-A in SY2004-2005, 87% participated in schoolwide programs in public schools, 12% participated in targeted assistance programs in public schools, and 1% were enrolled in private schools.⁶¹ The private school participants in Title I-A constituted an estimated 3% of all students enrolled in private schools.⁶² The share of students served by Title I-A who were enrolled in private schools was low in part because of the growth that had occurred in Title I-A public schoolwide programs in the period between adoption of the 1994 Amendments to the ESEA (Improving America's Schools Act [IASA; P.L. 103-382]) and SY2004-2005.⁶³ The number of private school students served by Title I-A in SY2005-2006 was reported as 191,100. In that year, 16% of all private schools in the sample participated in Title I-A, including 37% of Catholic schools, 7% of other religious schools, and 6% of nonsectarian schools.⁶⁴

LEAs serving private school students under Title I-A most often provided instructional services (87% of LEAs that provided Title I-A services to any private school students), instructional equipment or materials (65%), professional development for private school teachers (63%), and parental involvement activities (60%). The services were most often provided primarily by public school teachers at the private school (49% of LEAs that provided Title I-A services to any private school students), by third party contract providers at the private school (28%), in computer-

Implementation.

⁶⁰ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*. U.S. Department of Education, Office of Planning, Evaluation and Policy Development, Policy and Program Studies Service, 2007, <https://www2.ed.gov/rschstat/eval/choice/private/report.pdf> (hereinafter referred to as “Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*”).

⁶¹ Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I Final Report Volume I: Implementation*, p. 12.

⁶² Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 14.

⁶³ While the schoolwide program was initially authorized in Section 133 of the Education Amendments of 1978 (P.L. 95-561), it was originally restricted to schools where 75% of more of the students were from low-income families and was accompanied by a requirement that Title I grants to these schools must be matched by an equivalent amount of non-federal supplementary funds. Beginning with the Improving America's Schools Act (IASA; P.L. 103-382) in 1994, the eligibility threshold requirement was reduced to 60% for SY1995-1996 and 50% for SY1996-1997 and thereafter, and the non-federal matching requirement was dropped. The eligibility threshold was further reduced to 40% or more of students from low-income families under the No Child Left Behind Act of 2001 (P.L. 107-110). The level of participation in schoolwide programs was low until adoption of the IASA, after which it grew rapidly. The number of students served by public schoolwide programs under Title I-A grew from 7,088,756 in SY1996-1997 to 17,363,021 in SY2004-2005.

⁶⁴ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 12.

assisted laboratories at the private school (16%), by public school teachers in a public school (14%), or in mobile vans (10%).⁶⁵

With respect to all ESEA programs with equitable services provisions, not just Title I-A, the authors of the *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives* study reported that 44% of all private schools participated in one or more ESEA programs in SY2004-2005. The rate of participation was much greater for Catholic schools (80%) than for other religious (28%) or nonsectarian private (25%) schools.⁶⁶ The rate of participation by all private schools in ESEA programs was greatest for State Grants for Innovative Programs (ESEA Title V-A, at that time) and Improving Teacher Quality State Grants (ESEA Title II-A) (20% for each), Safe and Drug-Free Schools State Grants (ESEA Title IV-A) (19%), and Education Technology State Grants (ESEA Title II-D) and Title I-A (16% each).⁶⁷ For ESEA programs overall, the services most often provided to students and staff of private schools were professional development for teachers (51%-89% of LEAs serving private school students, depending on the ESEA program involved) and provision of instructional equipment and materials (39%-69%, depending on the ESEA program involved).⁶⁸ The percentage of ESEA program total funds used to serve private school students was reported as 2% for Title I-A, 3% for Improving Teacher Quality State Grants, 4% for Education Technology State Grants, 5% for Safe and Drug-Free Schools State Grants, and 6% for State Grants for Innovative Programs.⁶⁹

Among private schools that did not participate in any ESEA programs, 58% reported doing so as a conscious decision not to get involved with federal assistance, while 40% of such schools reported that they had no knowledge of eligibility for assistance under the ESEA. For Title I-A specifically, 50% of schools that did not participate reported that they enrolled no students from low-income families who resided in public school attendance areas selected to provide Title I-A services.⁷⁰

The most recent data on the number of private school students served under Title I-A comes from two types of sources. First, states are asked to provide this information in the annual ESEA Consolidated State Performance Reports (CSPR).⁷¹ According to the most recent CSPR reports,

⁶⁵ Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I Final Report Volume I: Implementation*, p. 15; and Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 71.

⁶⁶ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 12.

⁶⁷ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 12.

⁶⁸ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, pp. 20-25.

⁶⁹ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 44.

⁷⁰ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 18.

⁷¹ These reports are available at <https://oese.ed.gov/offices/office-of-administration/about-us/consolidated-state-performance-reports/#sy15-16>.

in SY2015-2016 200,651 private school students were served under Title I-A. However, these data exclude two states. Virginia reported no private school students served, presumably because private school students are served in that state through a third-party bypass arrangement (although a similar arrangement applies in Missouri, which did report the number of private school students served in the state through that arrangement). New York also did not report the number of private school students served under Title I-A in its CSPRs for SY2015-2016 or any recent previous year.

The second source of recent data consists of three different surveys conducted by ED's National Center for Education Statistics (NCES) that, on occasion, have gathered information on the number of private schools and their students who have received Title I-A services. Most recently, the NCES National Teacher and Principal Survey reported that in SY2017-2018, 24.3% of all private schools enrolled students who were served by Title I-A, and that 4.0% of all private school students received Title I-A services.⁷² Separately, for SY2015-2016 the NCES Private School Universe Survey reported that 19.4% of all private schools enrolled students who were served by Title I-A, and that 9.0% of all private school students received Title I-A services.⁷³ Finally, the NCES Schools and Staffing Survey reported that in SY2011-2012 20.8% of all private schools enrolled students who were served by Title I-A and that 3.7% of all private school students received Title I-A services.⁷⁴ Each of these are sample surveys that, on one or more occasions (but not regularly), collected data on the extent of private school and student participation in Title I-A. Other ESEA programs were not included, and there is no clear explanation for the differences in survey results, other than the fact that the data were collected for different school years.

Table 1 provides data on the number of students enrolled in private schools who were served under Title I-A for selected school years between 1975-1976 and 2015-2016 (data for years before SY1975-1976 are not available).

Table 1. Number of Students Enrolled in Private Schools Who Were Served Under ESEA Title I-A, Selected School Years

School Year	Number of Private School Students Served
1975-1976	116,218
1979-1980	189,114
1980-1981	213,499
1981-1982	184,084
1982-1983	177,210
1983-1984	190,660
1984-1985	184,532
1985-1986	127,922
1986-1987	137,900
1987-1988	136,618

⁷² U.S. Department of Education, National Center for Education Statistics, National Teacher and Principal Survey (NTPS), "Preliminary Private School Restricted-Use Data File," 2017-2018, https://nces.ed.gov/surveys/ntps/tables/ntps1718_table_01_s2a.asp.

⁷³ U.S. Department of Education, National Center for Education Statistics, Private School Universe Survey (PSS), 2015-2016, <https://nces.ed.gov/surveys/pss/tables/TABLE27.asp>.

⁷⁴ U.S. Department of Education, National Center for Education Statistics, Schools and Staffing Survey (SASS), "Private School Data File," 2011-2012, https://nces.ed.gov/surveys/sass/tables/sass1112_2013312_s2a_001.asp.

School Year	Number of Private School Students Served
1988-1989	137,656
1989-1990	151,948
1990-1991	157,360
1991-1992	163,329
1992-1993	171,239
1993-1994	177,243
1994-1995	172,982
1996-1997	167,590
1997-1998	188,194
1998-1999	197,356
1999-2000	183,894
2000-2001	201,572
2001-2002	195,556
2002-2003	183,066
2003-2004	188,617
2004-2005	187,951
2005-2006	191,100
2015-2016 ^a	200,651

Sources:

For SY1975-1976: U.S. Department of Health, Education, and Welfare, U.S. Office of Education, National Institute of Education, *Evaluating Compensatory Education: An Interim Report on the NIE Compensatory Education Study*, Washington, DC, December 30, 1976, p.14, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015008170543&view=1up&seq=7>. This study provided data only for grades K-8 because it found that less than 1% of students served by Title I-A in 1975-1976 were enrolled in grades 9-12.

For SY1979-1980 through SY2004-2005: Stephanie Stullich, Elizabeth Eisner, and Joseph McCrary, *National Assessment of Title I, Final Report Volume I: Implementation*, prepared by the Policy and Program Studies Service, Office of Planning, Evaluation and Policy Development for the U.S. Department of Education, Institute of Education Sciences, October 2007, Exhibit B-1, p. 155, https://ies.ed.gov/ncee/pdf/20084012_rev.pdf. Data were not collected for SY1995-1996.

For SY2005-2006: Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*. U.S. Department of Education, Office of Planning, Evaluation and Policy Development, Policy and Program Studies Service, 2007, p. 14, <https://www2.ed.gov/rschstat/eval/choice/private/report.pdf>.

For SY2015-2016: Consolidated State Performance Reports for 2015-2016 (<https://oese.ed.gov/offices/office-of-administration/about-us/consolidated-state-performance-reports/#sy15-16>). The Consolidated State Performance Reports for New York and Virginia for SY2015-2016 do not include data on the number of private school students served under ESEA Title I-A.

a. Data are not included for New York or Virginia.

Current Provisions for Equitable Services to Eligible Private School Students Under the ESEA

The ESEA includes two major sets of provisions related to providing services to eligible students enrolled in private schools. Title VIII-F-1 (§§8501-8506) contains general provisions regarding a variety of ESEA programs under which services may be provided to private school students, while Title I-A, Section 1117 contains provisions specifically regarding the largest ESEA program, Education for the Disadvantaged. A small number of additional ESEA programs have separate provisions for serving eligible students enrolled in private schools.

Under all ESEA programs with private school student participation provisions, services are provided to private school students according to the *child benefit* model, as discussed above in the context of debates over the original ESEA legislation in 1965. Accordingly, children enrolled in private schools may benefit from publicly funded services, yet funding for and the provision of these services remain under public control (i.e., the funds are not provided directly to private schools).

ESEA programs that provide for services to eligible students enrolled in private schools⁷⁵ fall into three categories:

Category 1. Programs to which the general provisions of Title VIII-F-1 fully apply:

- Title I-C (Migrant Education),
- Title II-A (Supporting Effective Instruction),
- Title III-A (English Language Acquisition, Language Enhancement and Academic Achievement),
- Title IV-A (Student Support and Academic Enrichment Grants),⁷⁶
- Title IV-B (21st Century Community Learning Centers), and
- Project School Emergency Response to Violence (Project SERV), which is authorized under Title IV-F-3.⁷⁷

Category 2. The largest ESEA program, under which private school student participation is primarily governed by Section 1117, but to which selected provisions of Title VIII-F-1 also apply:

- Title I-A (Education for the Disadvantaged)

Category 3. Additional ESEA programs with separate provisions for participation by eligible private school students:

- Title II-B-3, (American History and Civics Education),⁷⁸ and

⁷⁵ If home schools are considered private schools under state law, home schooled students are eligible to receive benefits and services provided to private school students.

⁷⁶ The program authorized under ESEA Title IV-A is not currently funded.

⁷⁷ Other activities authorized under Title IV-F-3, National Activities for School Safety, are not subject to equitable participation requirements.

⁷⁸ This program does not require the provision of equitable services, but private school students and teachers are eligible to participate.

- Title IV-F-4, §4644 (Jacob K. Javits Gifted and Talented Students Education Program).⁷⁹

In addition to statutory language addressing the equitable participation of private school students in ESEA programs, ED has issued regulations⁸⁰ and nonregulatory guidance regarding the Title VIII-F-1 provisions, as well as regulations⁸¹ and nonregulatory guidance⁸² regarding the equitable participation requirements that pertain specifically to Title I-A. Nonregulatory guidance was also produced on the provision of equitable services under Titles II-A, III, and IV-A.⁸³

The following discussion of equitable participation requirements under Title VIII-F-1 and under Title I-A is based on statutory requirements and the aforementioned regulations and nonregulatory guidance promulgated by ED. The first section of this discussion focuses on the equitable participation requirements under Title VIII-F-1. This is followed by discussion of the equitable participation provisions that specifically apply to Title I-A.

Current Provisions for Equitable Participation Under Title VIII-F-1

As previously discussed, Title VIII-F-I includes equitable participation requirements that apply to several ESEA programs. This section provides an overview of these requirements that includes discussion of eligibility to receive services, the provision of services, consultation, expenditures, complaint resolution, bypass procedures, and additional provisions.

⁷⁹ Under this program, the Secretary of Education is required to ensure, where appropriate, that equitable services are provided to students and teachers in private nonprofit elementary and secondary schools (§4644(g)).

⁸⁰ 34 C.F.R. §§299.6-299.9.

⁸¹ 34 C.F.R. §200.62.

⁸² U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, Title I, Part A, of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families, Updated Non-Regulatory Guidance, Washington, DC, October 7, 2019, <https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf>; and U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, Non-Regulatory Guidance: Fiscal Changes and Equitable Services Requirements Under the Elementary and Secondary Education Act of 1965 (ESEA), as Amended by the Every Student Succeeds Act (ESSA), Washington, DC, November 21, 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essaguidance160477.pdf>. In addition, to the extent it is not inconsistent with the latter document, the pre-ESSA non-regulatory guidance contained in Title IX, Part E Uniform Provisions, Subpart 1—Private Schools (available at <http://www2.ed.gov/policy/elsec/guid/equitableseguidance.doc>) and revised in March 2009 remains applicable.

⁸³ U.S. Department of Education, Office of Innovation and Improvement, *Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Learning*, Washington, DC, September 27, 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiipartaguidance.pdf>; U.S. Department of Education, Office of Innovation and Improvement, *Non-Regulatory Guidance: English Learners and Title III of the Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA)*, Washington, DC, September 23, 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiiienglishlearners92016.pdf>; and U.S. Department of Education, Office of Innovation and Improvement, *Non-Regulatory Guidance Student Support and Academic Enrichment Grants*, Washington, DC, October 2016, <https://www2.ed.gov/policy/elsec/leg/essa/essassaegrantguid10212016.pdf>.

Participation in Equitable Services by Private School Children and Teachers

Section 8501 of the ESEA requires that LEAs (or other grantees under relevant programs) 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.”⁸⁴ The ombudsman designated by an SEA under Section 1117 (see subsequent discussion) also is required to monitor and enforce the requirements of Section 8501 to help ensure that equitable services are provided to private school children and staff. In addition, the ombudsman serves as an SEA’s primary point of contact for private school officials with questions or concerns about the provision of equitable services under the ESEA.⁸⁵

The control of funds used to serve eligible private school students—as well as title to materials, equipment, and property purchased with those funds—must be with a public agency. The services may be provided by employees of a public agency, or “through contract by the public agency with an individual, association, agency, organization, or other entity”⁸⁶ that is “independent of the private school and of any religious organization.”⁸⁷ All services, benefits, materials, and equipment provided must be secular, neutral, and nonideological.

The services, benefits, materials, and equipment provided to private school students and staff must be equitable in comparison to those provided to public school students and staff. These services must be provided in a timely manner. The expenditures for private school students must be equal to those for public school students, taking into account the number and educational needs of the children to be served.

Private school students enrolled in nonprofit elementary and secondary schools, including religiously affiliated schools, located in the LEA are eligible to receive services.⁸⁸ However, if an ESEA program restricts eligibility to a specific group of students (e.g., limited English proficient

⁸⁴ §8501(a)(1).

⁸⁵ U.S. Department of Education, *Frequently Asked Questions – General Issues Related to Nonpublic Schools*, August 2019, Item 7, <https://www2.ed.gov/about/inits/ed/non-public-education/files/onpe-faqs-aug2019.pdf> (hereinafter referred to as “ED, *FAQs Related to Non-Public Schools*”).

⁸⁶ §8501(d)(2)(A)(ii).

⁸⁷ §8501(d)(2)(B). If services are delivered by a third party, the service provider must be under the control and supervision of the LEA and must be independent of the private school. For example, a private school teacher may be hired to provide services in his or her own school, as long as the teacher is independent of the private school and under the supervision of the LEA during the time the services are provided. Under the Title I-A statute (§1117(d)(2)(B)), the service provider must also be independent of any religious organization. However, current nonregulatory guidance (U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, Title I, Part A, of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families, Updated Non-Regulatory Guidance, Washington, DC, October 7, 2019, <https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf>, p. 36) states that “the Department will no longer enforce, apply, or administer the specific requirement in ESEA section 1117(d)(2)(B) that an equitable services provider be independent ... of any religious organization.” ED reached this decision based on the Supreme Court’s ruling in *Trinity Lutheran Church of Columbia Inc. v. Comer*. For more information about the case, see U.S. Department of Education, “Selected U.S. Supreme Court Rulings Related to Private and Home Schools,” <https://oese.ed.gov/supreme-court-rulings-related-to-private-and-home-schools/>. ED informed Congress of this decision in a letter dated March 11, 2019 (Letter from Betsy DeVos, U.S. Secretary of Education, to Honorable Nancy Pelosi, Speaker of the House, March 11, 2019, <https://www2.ed.gov/policy/elsec/guid/secletter/190311.html>).

⁸⁸ Home-school students are eligible to receive services if home schools are considered private schools under state law.

students), the same restrictions apply to the private school students to be served. Under ESEA programs other than Title I-A, the LEA responsible for providing equitable services is determined based on the location of the school in which the student is enrolled, rather than being based on where the student lives. In other words, an LEA is obligated to provide equitable services to eligible students enrolled in private schools that are located within the LEA's geographic boundaries. In contrast, and as discussed further below, the LEA responsible for providing equitable services to private school students under Title I-A is the LEA in which the private school student resides, not the one in which his or her private school is located.⁸⁹

Consultation⁹⁰

For purposes of determining which services will be provided to private school students, consultation involves communication between LEAs and private school officials on relevant issues related to equitable participation. An LEA is obligated to start the consultation process with school officials representing all private schools located within its boundaries. Consultation must occur before the LEA makes any decision that affects opportunities for equitable participation. The consultation requirement cannot be met by an LEA solely on the basis of offering to provide services. An LEA is required to discuss the provision of the services and the needs of private school students and teachers, and must have input from private school officials regarding these issues.

Consultation must be both meaningful and timely. *Meaningful* means that all required topics are discussed, including the following:

- how the children's needs will be identified;
- what services will be offered;
- how, where, and by whom services will be provided;
- how services will be assessed;
- the size and scope of the services to be provided;
- how and when the LEA will make decisions about service delivery, including consideration of the views of private school officials on the provision of services via third-party providers;
- whether services will be provided directly or through a third-party contractor; and
- whether services will be provided by creating a pool of funds for serving children in private schools, or funds available to provide services will be determined on an individual school basis.

The goal in discussing these topics is that LEA and private school officials will reach agreement on how to provide "equitable and effective programs for eligible private school children."

Timely consultation requires that advance notice be given to private school officials regarding the start of the consultation process and that the process must begin with sufficient time for services to be provided at the start of the school year. Documentation that appropriate, meaningful

⁸⁹ Students with disabilities who are enrolled in a private school by their LEA of residence for the purpose of receiving a free appropriate public education are eligible to receive equitable services under the programs covered by Section 8501 of the ESEA. The LEA in which the private school is located is responsible for providing these equitable services.

⁹⁰ Consultation requirements are included in Section 8501(c).

consultation has occurred must include a written affirmation to this effect that is signed by officials of each participating private school.⁹¹

Expenditures⁹²

Expenditures for equitable services to private school students and staff must be equal to the expenditures for the public school program, taking into account the number and educational needs of the children to be served. Funds to serve eligible private school students must be obligated in the same fiscal year as the funds are received by an LEA or other public grantee. These determinations are often made based on the relative enrollments of public and private school students. Calculations based on relative enrollments, however, assume that these numbers accurately reflect the needs of students and teachers in public and private schools. LEAs may also use another factor such as measures of student family poverty or low-income levels in making expenditure decisions, but a decision cannot be based solely on poverty because both educational need and the number of students must be taken into account. LEAs should consult with private school officials regarding the methodology used to determine expenditures.

An LEA has the option to create a pool of funds under all programs covered by Title VIII-F-1 for serving all of the eligible students enrolled in private schools within the LEA, rather than calculating funding and providing services on a school-by-school basis. Only the LEA may obligate and expend federal education funds on behalf of private school students and staff. The control of program funds and ownership of any materials purchased with those funds rests with the LEA.

Participation in a program by public school and private school students and staff is generally considered to be equitable if the following conditions are met:⁹³

- the LEA spends an equal amount of funds to serve similar public and private school students and staff, taking into account the number and educational needs of those students and staff;
- the LEA provides services and benefits to private school students and staff that are equitable in comparison to the services and benefits provided to public school students and staff;
- the LEA assesses and addresses student and staff needs on a comparable basis;
- the LEA provides, in the aggregate, approximately the same amount of services to public school students and staff as it does to private school students and staff;
- the LEA provides public school and private school students and staff with equal opportunities to participate in program activities;

⁹¹ The written affirmation must include an option for private school officials to indicate that they do not believe timely and meaningful consultation occurred or that they do not believe the program design is equitable for eligible private school children. If private school officials do not provide such affirmation within a “reasonable period of time,” the LEA is required to forward the documents to the SEA, indicating that the consultation has, or attempts at consultation have, occurred.

⁹² Requirements for expenditures are included in Section 8401(a)(4).

⁹³ U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Title IX, Part E Uniform Provisions, Subpart 1—Private Schools*, Washington, DC, revised March 2009, <http://www2.ed.gov/policy/elsec/guid/equitableguidance.doc>, pp. 14-15.

- the LEA provides private school students and staff with an opportunity to participate in services that provide reasonable promise for participating students to meet academic standards; and
- the LEA provides different benefits to private school students and teachers if their needs are different than those of public school students and staff. While services may differ, they must be allowable services under the particular ESEA program for which services are being provided.

Complaint Resolution⁹⁴

Private school officials may file complaints if they believe the consultation requirements discussed above have not been met by LEA officials. If the private school officials demonstrate that the consultation requirements have not been met, they may request that services be provided by the SEA, either directly or through contracts with public or private agencies, organizations, and institutions.⁹⁵

Separately, procedures are established in Section 8503 under which parents, teachers, and other interested individuals may submit complaints concerning potential violations of the ESEA provisions for serving private school students to SEAs. An SEA must issue a written resolution within 45 days following the receipt of a complaint. SEA actions on these complaints may be appealed to the U.S. Secretary of Education (hereinafter referred to as the Secretary).⁹⁶

Bypass Procedures⁹⁷

Under Sections 8502 and 8504, there is also a formal bypass system by which the Secretary arranges for the provision of equitable services directly to private school students and staff through a third-party provider in instances where equitable services are not provided to eligible private school students and staff. A bypass could be implemented due to state constitutional prohibitions on serving children in private schools or to the failure or unwillingness of SEAs, LEAs, or other public agencies to comply with the ESEA's private school participation requirements.

Under a bypass, the requirement for the SEA or LEA to serve eligible private school students is waived, and the Secretary arranges for the provision of services to eligible private school students, teachers, or other educational staff. Once implemented, a bypass remains in effect until the Secretary determines that there will no longer be any failure or inability of the SEA or LEA to meet the ESEA's private school participation requirements. Bypass arrangements for certain ESEA programs have been used for several years in Missouri and Virginia.⁹⁸

⁹⁴ Requirements for complaint resolution are included in Sections 8501(c)(6) and 8503.

⁹⁵ §8501(c)(6).

⁹⁶ Appeals must be submitted to the Secretary not later than 30 days after the SEA resolves the complaint or fails to resolve the complaint within the 45-day time limit.

⁹⁷ Requirements for bypass procedures are included in Sections 8502 and 8504.

⁹⁸ For more information, see 64 *Federal Register* 30186-30188, June 4, 1999.

Additional Provisions

Related to the issue of equitable participation, Section 8505 states that “nothing in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction.”

Section 8506 states that nothing in the ESEA shall be construed to “permit, allow, encourage, or authorize any Federal control over any aspect of any private, religious, or home school.” Further, statutory language states that nothing in the ESEA “shall be construed to affect any private school that does not receive funds or services under this Act,” and that students who attend private schools that do not receive funds or services under the ESEA cannot be required to participate in any assessments “referenced in this Act.” In addition, statutory language specifically states that nothing in the ESEA should be constructed to require any SEA or LEA receiving ESEA funds to “mandate, direct, or control the curriculum” of a private or home school.

Current Provisions for Equitable Participation Under Title I-A, Section 1117

Provisions for equitable services to eligible private school students and staff under the program for Education of the Disadvantaged authorized by ESEA Title I-A are found in Section 1117. In many ways, the equitable participation requirements under Title I-A are similar to those under Title VIII-F-1, and there are a number of cross-references between provisions in Section 1117 of Title I-A and Title VIII-F-1. For example, as discussed previously, each SEA must designate an ombudsman to monitor and enforce the requirements of Section 1117 as well as Title VIII-F-1.

After timely and meaningful consultation with private school officials, LEAs are required to provide eligible children, on an equitable basis, services and other benefits under Title I-A that address their needs, and must ensure that teachers and families of the children participate on an equitable basis in services and activities related to parent involvement.⁹⁹ Similar to the requirements of Title VIII-F-1, the services, benefits, materials, and equipment provided must be secular, neutral, and nonideological. Equitable services must be provided in a timely manner and may be provided through a third-party contractor. The control of public funds and materials purchased with those funds must remain with a public agency. There are also complaint process and bypass provisions similar to those of Title VIII-F-1. The consultation process under Section 1117 differs somewhat in that consultation must also include a discussion of parental involvement and professional development.

Eligible Private School Students

An area where the Title I-A provisions differ substantially from those for other ESEA programs is with respect to which private school students are eligible for services. Private school students must reside (as opposed to attend a private school located) in a participating public school attendance area¹⁰⁰ to be eligible for services provided under Title I-A. That is, the LEA in which

⁹⁹ Parent involvement requirements are included in Section 1116. If an LEA reserves funds from its allocation for Section 1116, it must provide for the equitable participation of parent involvement activities in private schools. This can be determined based on the proportion of private school students from low-income families residing in the public school attendance area relative to all students from low-income families residing in the public school attendance area.

¹⁰⁰ An eligible public school attendance area (generally a school) is identified by an LEA based on data on students from low-income families used to determine which school attendance areas will receive Title I-A funds. For more

the student resides is responsible for providing services to the child even if the student attends a private school in another LEA.¹⁰¹

Reservation of Funds for Equitable Services

The process for determining the amount of Title I-A funds that an LEA must reserve for equitable services is related to the process by which Title I-A funds are allocated to public schools. Title I-A funds are allocated to SEAs based on a variety of factors, the most important of which is the estimated number of school-age (5-17 years old) children from poor families based on the Census Bureau's standard definition of poverty.¹⁰² After authorized reservations, state total grants are then allocated to LEAs on the same basis. Within LEAs, funds are allocated for use in individual public schools—and to serve eligible students who reside in the attendance areas of those public schools but attend private schools—based on the number of students in low-income families enrolled in those schools. Census poverty estimates are rarely available at the level of public school attendance areas, and LEAs must use the best available proxy measure of low family income to select schools at which to provide services and allocate funds among them.

Historically, the proxy measure most often used for this purpose has been students eligible for free and reduced price lunch (FRPL) under the National School Lunch Program (NSLP). While using this measure of the number of children from low-income families has always had limitations, it has become increasingly complicated in recent years due to the implementation of the Community Eligibility Provision (CEP) under the NSLP. Schools participating in CEP no longer identify children as being from low-income families in the same way as in past years. As a result, a number of adjustments or alternative proxy measures of low family income are currently being considered and implemented for Title I-A purposes by states and LEAs across the nation, consistent with the Title I-A statute, regulations, and nonregulatory guidance.¹⁰³ Whatever measure of low income is selected by an LEA, public school attendance areas with the highest percentages of students from low-income families are selected to provide Title I-A services.¹⁰⁴

An LEA, in consultation with private schools, must obtain the best available data on private school students from low-income families residing in public school attendance areas within the LEA. In calculating the number of school-age children from low-income families who reside in Title I-A (public) school attendance areas and are enrolled in private schools, LEAs may use the same measure of low income as used for public school children or one of the following alternatives:

information on how LEAs make this determination, see CRS Report R44461, *Allocation of Funds Under Title I-A of the Elementary and Secondary Education Act*, p. 16; and CRS Report R46600, *ESEA: Title I-A Poverty Measures and Grants to Local Education Agencies and Schools*, p. 14-18.

¹⁰¹ If this is the case, the LEA responsible for the child can choose to reimburse the LEA in which the private school is located for the provision of services rather than providing the services itself. See U.S. Department of Education, Office of Innovation and Improvement, Office of Non-Public Education, *Title I, Part A, of the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act: Providing Equitable Services to Eligible Private School Children, Teachers, and Families, Updated Non-Regulatory Guidance*, Washington, DC, October 7, 2019, p. 32, <https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf>.

¹⁰² See CRS Report R46600, *ESEA: Title I-A Poverty Measures and Grants to Local Education Agencies and Schools*.

¹⁰³ For analysis of this and related issues, see CRS Report R46600, *ESEA: Title I-A Poverty Measures and Grants to Local Education Agencies and Schools*.

¹⁰⁴ LEAs may choose to focus services only on certain grade levels (e.g., only elementary schools) as long as all school attendance areas in which 75% or more of school-age children are from low-income families are served.

- the results of a survey (that, to the extent possible, protects the identity of families of private school students);
- applying the percentage of public school students who are from low-income families in the public school attendance areas to the number of private school students residing in those areas (e.g., if the low-income rate is 60% for public school students and a private school has 200 students, 60% of the 200 students would be considered low income); or
- comparable data for private school students from another source that can be equated or correlated to the data used for public school students residing in Title I-A school attendance areas (i.e., establishing a proportional relationship between two sources of data on public school children and applying the same ratio to a known source of data for private school students).¹⁰⁵

According to a report prepared as part of the National Assessment of Title I in 2007, 73% of LEAs that served private school students under Title I-A reported that they used the same method to determine the number of students from low-income families and residing in Title I-A (public) school attendance areas who are enrolled in private schools as they used to determine the number of such students enrolled in public schools.¹⁰⁶ However, it should be noted that this survey was conducted before the establishment of the CEP and the subsequent activity by many states and LEAs to develop alternatives to FRPL data as measures of students from low-income families enrolled in public schools. Such alternatives may not be available for private school students.¹⁰⁷

For purposes of allocating funds for equitable services to students enrolled in private schools, LEAs are required to discuss with private school officials the method or data sources that will be used to determine the number of private school children from low-income families that reside in each school attendance area of the LEA. LEAs may determine the share of Title I-A funds used to serve eligible private school students annually or once every two years.

Based on the total number of children from low-income families residing in each school attendance area who attend either public or private schools, the LEA calculates the total amount of funds available for each area. The amount reserved for equitable participation is determined by multiplying the per-pupil allocation for the LEA under Title I-A by the number of private school students from low-income families who reside in the attendance area. This calculation is to apply to the LEA's total Title I-A grant per pupil, before deduction of any funds off the top of the

¹⁰⁵ §1117(c)(1). According to the ED policy guidance document, *Local Educational Agency Identification and Selection of School Attendance Areas and Schools and Allocation of Title I Funds to Those Areas and Schools* (p. 16), "To obtain a count of private school children, an LEA may use: (1) The same poverty data it uses to count public school children. (2) Comparable poverty data from a survey of families of private school students that, to the extent possible, protects the families' identity. The LEA may extrapolate data from the survey based on a representative sample if complete actual data are not available. (3) Comparable data from a different source, such as scholarship applications, so long as the income level for both sources is generally the same. (4) Proportional data based on the poverty percentage of each public school attendance area applied to the total number of private school children who reside in that area. (5) An equated measure of low income correlated with a measure of low income used to count public school children."

¹⁰⁶ Gayle S. Christensen, Sarah Cohodes, Devin Fernandes, Daniel Klasik, Daniel Loss, and Michael Segeritz, *Private School Participants in Programs Under the No Child Left Behind Act and the Individuals with Disabilities Education Act: Private School and Public School District Perspectives*, p. 99.

¹⁰⁷ See CRS Report R46600, *ESEA: Title I-A Poverty Measures and Grants to Local Education Agencies and Schools*.

LEA's grant for purposes such as administration, parental involvement, services to neglected and delinquent or homeless children and youth, or LEA-wide initiatives.¹⁰⁸

The LEA may, optionally, create a pool of funds for serving all of the eligible students residing in Title I-A school attendance areas who are enrolled in a number of private schools, rather than calculating funding and providing services on a school-by-school basis. Such pooling of funds to serve eligible private school students may be applied to multiple private schools in which students residing in a single LEA are enrolled, or to funds from multiple LEAs of residence for students enrolled in individual private schools.

Provision of Title I-A Services

As noted earlier, Title I-A services may be provided for public schools in one of two ways. If 40% or more of the students at a public school selected to participate in Title I-A are from low-income families, the Title I-A funds are to be used to conduct a *schoolwide* program aimed at improving instruction for all of the school's students. Other selected public schools conduct *targeted assistance school* programs, under which individual students deemed to be the most at risk of failing to meet state educational standards, regardless of family income, are selected to receive services funded under Title I-A. For private schools whose students are selected to receive Title I-A services, only the targeted assistance school model is authorized.

Services are provided to the lowest achieving students who reside in the attendance area of a public school participating in Title I-A and are enrolled in the participating private schools, regardless of family income. Thus, for private school students to receive services, a student must reside in a participating public school attendance area for purposes of Title I-A, and the student must be identified by the private school as failing, or most at risk of failing, to meet academic achievement standards based on "multiple, educationally related, objective criteria." In determining these criteria, the LEA must consult with private school officials. Private school students served under Title I-A must be held to high academic standards. LEA and private school officials must consult on what constitutes annual progress for students served under the Title I-A program. For example, they must consult about the use of a state assessment or an alternative assessment to gauge student progress. It may not be appropriate, however, to expect private school students to meet state standards, especially if the private school's curriculum is not aligned with the standards. The LEA must modify the program for private school students if expected annual progress, based on the agreed upon measure, is not made.

Equitable Participation and Direct Federal Aid to Private Schools

Under the ESEA equitable participation requirements included in Title I-A, Section 1117 and Title VIII-F-1, a nonpublic school whose students and teachers receive equitable services is not considered a recipient of federal financial assistance.¹⁰⁹ Under the ESEA, equitable participation programs are operated for the benefit of students in private schools rather than for the benefit of the private schools themselves. The LEA or SEA providing equitable services is responsible for ensuring there is no discrimination with respect to administering the federal program.

¹⁰⁸ After a total amount for services to eligible private school students is calculated, based on the total Title I-A grant per child from a low-income family in the LEA, any necessary funds to administer equitable services for eligible private school students may be deducted from the total amount available for such services.

¹⁰⁹ ED, *FAQs Related to Non-Public Schools*.

If, however, a private school receives a grant or subgrant of federal funds to administer a federal education program, the private school would be considered a recipient of federal financial assistance. Such a school is subject to the “federal civil rights laws enforced by the Department’s Office for Civil Rights prohibiting discrimination based on race, color, national origin, sex, disability, and age and is subject to the Department’s jurisdiction for purposes of enforcing those laws.”¹¹⁰ ED notes in its guidance that such private schools may also be subject to federal laws administered by other federal agencies.¹¹¹

Other ESEA Provisions Focused on Private Schools

In addition to equitable services provisions, ESEA, Section 8506 includes provisions that are focused specifically on private, religious, and home schools.¹¹² The provisions related to home schools apply regardless of whether a home school is considered a home school or a private school under state law.

Under Section 8506(a), statutory language states that nothing in the ESEA shall be considered to affect any private school that does not receive funds or services under the ESEA. In addition, Section 8506(a) states that students attending a private school that is not receiving funds or services under the ESEA shall not be required to participate in any assessment referenced in the ESEA (e.g., reading and mathematics assessments required for specific grades under Title I-A).

Section 8506(b) states that nothing in the ESEA shall be considered to affect a home school. It also states that home schooled students are not required to participate in any assessment referenced in the ESEA.

Section 8506(c) states that nothing in the ESEA shall be considered to “permit, allow, encourage, or authorize” any federal control over any aspect of any private, religious, or home school. At the same time, private, religious, and home schools are not prohibited from participating in ESEA programs or services.

Section 8506(d) states that nothing in the ESEA shall be considered to require any SEA or LEA that receives ESEA funds to “mandate, direct, or control the curriculum” of a private school or a home school. ESEA funds are prohibited from being used for such purposes.

Equitable Services Outside of the ESEA

Equitable service provisions have been included in several non-ESEA federal elementary and secondary education programs. For example, the Individuals with Disabilities Education Act (IDEA) includes equitable services provisions for elementary and secondary students with disabilities who are parentally placed in private schools. Equitable participation requirements were included in the Immediate Aid to Restart School Operations program (hereinafter referred to as the “Restart School Operations program”) enacted in response to the Gulf Coast hurricanes of 2005. More recently, equitable services provisions were included in the federal education assistance provided in response to the national emergency related to COVID-19 declared by President Trump on March 13, 2020.¹¹³ This section provides an overview of these provisions.

¹¹⁰ ED, *FAQs Related to Non-Public Schools*, Item 11.

¹¹¹ ED, *FAQs Related to Non-Public Schools*, Item 11.

¹¹² Section 8505 specifically prohibits the use of any payment under the ESEA for religious worship or instruction.

¹¹³ The White House, “Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease

IDEA Parentally Placed Private School Children with Disabilities¹¹⁴

The IDEA requires LEAs to provide for the participation of parentally placed private school children with disabilities in programs carried out under the IDEA, Part B Grants to States program.¹¹⁵ These are children whose parents opt to place them in a private school (in contrast, some children with disabilities are placed in private schools by an LEA when it is determined a public school cannot meet the child's needs). To the extent consistent with the number and location of parentally placed private school children with disabilities, under the IDEA, "provision is made for the participation of those children"¹¹⁶ in Part B by providing special education and related services to such children in accordance with the requirements of IDEA Section 612(a)(10).

LEAs are required to use a proportionate amount of their IDEA Part B funds to provide special education and related services to such students (referred to as the *proportionate share*). The formula for determining the proportionate share is based on the number of eligible parentally placed children with disabilities attending private schools in the LEA relative to the total number of eligible public and private school children with disabilities in the LEA's jurisdiction.¹¹⁷ In determining the number of parentally placed private school children with disabilities, the IDEA requires that LEAs conduct *child find* activities to identify, locate, and evaluate parentally placed private school students with disabilities.¹¹⁸ The funds used to conduct child find activities, including student evaluations, may not be deducted from the proportionate share of IDEA Part B funds available to provide equitable services to parentally placed private school children with disabilities.¹¹⁹

The IDEA requires that timely and meaningful consultation occur with respect to the provision of special education and related services for parentally placed private school children with disabilities.¹²⁰ An LEA must consult with private school representatives and parents of parentally placed private school children with disabilities during the design and development of special education and related services for such children. As part of the consultation process, the parties must discuss the following:

how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such

(COVID-19) Outbreak," March 13, 2020, <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; also at U.S. President (Trump), "Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak," 85 *Federal Register* 53, March 18, 2020.

¹¹⁴ IDEA, §612(a)(10)(A). For more information about IDEA Part B, see CRS Report R41833, *The Individuals with Disabilities Education Act (IDEA), Part B: Key Statutory and Regulatory Provisions*.

¹¹⁵ An LEA may also refer a child with disabilities to a private school. When this occurs, the LEA is responsible for the costs associated with the private school education, and the student is entitled to receive all the services necessary to provide a free appropriate public education (IDEA Part B, §612(a)(10)(B)).

¹¹⁶ IDEA §612(a)(10)(A)(i).

¹¹⁷ IDEA, §612(a)(10)(i).

¹¹⁸ IDEA, §612(a)(3) and (10). The LEA is also required to identify children with disabilities who are homeless or wards of the state through child find.

¹¹⁹ IDEA, §612(a)(10)(A)(ii)(IV).

¹²⁰ IDEA, §612(a)(10)(A)(iii).

services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made.¹²¹

Similar to the provision of equitable services under the ESEA, the special education and related services provided to children with disabilities may be provided by the LEA or through a contract with a third-party entity.¹²² The LEA must always control the IDEA funds used to provide services to such students and must hold the titles to all materials, equipment, and property acquired with the IDEA funds.¹²³ The services provided must be secular, neutral, and nonideological.¹²⁴

Children with disabilities enrolled in public schools or placed in a private school by an LEA are entitled to receive all services necessary to ensure that they receive a FAPE.¹²⁵ An LEA's obligations to provide services to parentally placed private school children with disabilities, however, are not the same as those for children with disabilities attending public schools or children with disabilities who have been placed in a private school by the LEA.¹²⁶ No parentally placed private school child with a disability has a right to receive some or all of the special education or related services that the child would be entitled to receive if the child attended a public school or were placed in a private school by an LEA provided that the LEA makes available a FAPE for children with disabilities.¹²⁷ According to ED:

With this in mind, it is possible that some eligible parentally-placed students with disabilities will not receive any services while others will receive them. For those who do receive services, the amount of services may also be different from what they would receive if enrolled in a public school. It is important to note that nothing in IDEA requires a private school to administer any portion of the law.¹²⁸

Restart School Operations Program

Division B, Title IV of the FY2006 defense appropriations act (P.L. 109-148) provided \$1.6 billion to meet the educational needs of individuals and institutions affected by the hurricanes in the Gulf of Mexico in 2005. Of these funds, \$750 million was appropriated for the Restart School Operations program. This program, authorized in Section 102 of Title IV-A, provided funds to school administrators and personnel to restart school operations, reopen schools, and re-enroll students in elementary and secondary schools in LEAs and nonpublic schools in Louisiana,

¹²¹ IDEA, §612(a)(10)(A)(iii)(IV).

¹²² IDEA, §612(a)(10)(A)(vi)(I).

¹²³ IDEA, §612(a)(10)(A)(vii).

¹²⁴ IDEA, §612(a)(10)(A)(vi)(II).

¹²⁵ IDEA, §612(a)(10)(B). As defined in IDEA Section 602(9), FAPE means “special education and related services that—

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 614(d).”

¹²⁶ IDEA, §612(a)(10)(C).

¹²⁷ With respect to Section 612(a), FAPE must be “available to all children with disabilities residing in the state between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school” with some exceptions (IDEA, §612(a)(1)).

¹²⁸ U.S. Department of Education, *Frequently Asked Questions—General Issues Related to Non-Public Schools*, August 2019, Item 8, <https://www2.ed.gov/about/inits/ed/non-public-education/files/onpe-faqs-aug2019.pdf>.

Mississippi, Alabama, and Texas that served an area in which a major disaster was declared in accordance with Section 401 of the Stafford Act¹²⁹ in response to Hurricane Katrina or Hurricane Rita.

The Secretary was authorized to make payments to SEAs based on criteria the Secretary deemed appropriate, taking into account the number of public and private school students who were enrolled during SY2004-2005 in elementary and secondary schools that were closed as a result of Hurricane Katrina or Hurricane Rita. SEAs were required to make payments to LEAs and reserve funds to provide services and assistance to nonpublic schools based on the number of school-aged children served by the LEA or nonpublic school during SY2004-2005, the severity of the impact of the hurricanes on the LEA or nonpublic school, and the extent of the needs of the LEA or nonpublic school. In addition, the amount of funding reserved to provide services and assistance to nonpublic schools within each state was required to be proportional to the number of nonpublic schools in relation to the total number of schools in the state. If funds made available to provide services and assistance to nonpublic schools remained unobligated 120 days after the enactment of P.L. 109-148, such funds could then be used to provide services or assistance to LEAs or nonpublic schools.

Eligible nonpublic schools had to be accredited or licensed or otherwise operating in accordance with state law and had to be in existence prior to August 22, 2005. The educational services and assistance provided to eligible nonpublic schools was required to be equitable in comparison to the educational services and other benefits provided for public school students and had to be provided in a timely manner. The services or assistance provided, including equipment and materials, had to be secular, neutral, and nonideological. Control of funds for the services and assistance provided to a nonpublic school and title to materials, equipment, and property purchased with such funds was required to be in a public agency. A public agency was required to administer such funds, materials, equipment, and property and to provide for such services directly or contract with a public or private entity for the provision of the services.

An LEA or nonpublic school receiving services or assistance from the SEA could use such services or assistance for several allowable uses, such as recovery of student and personnel data, replacement of school district information systems, reasonable transportation costs, rental of mobile educational units, initial replacement of instructional materials and equipment, and initiating and maintaining education and support services. The Secretary was permitted to approve other activities that were related to the purpose of the program. For example, the Secretary approved the use of funds to reimburse nonpublic schools under the “limited emergency circumstances related to the recent hurricanes” for costs previously incurred in contracting for or providing services that were needed to restart school operations. However, such services had to be secular, neutral, and nonideological (e.g., reimbursement for the cleanup of buildings not used primarily for “inherently religious purposes”).¹³⁰

COVID-19 Pandemic-Related Education Assistance

From March 2020 through March 2021, three laws providing increasing levels of federal funding for elementary, secondary, and postsecondary education were enacted in response to the COVID-19 national emergency. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security

¹²⁹ 42 U.S.C. §§5121-5207. For more information, see CRS Report R46379, *Emergency Authorities Under the National Emergencies Act, Stafford Act, and Public Health Service Act*.

¹³⁰ U.S. Department of Education, *Allowable Uses of Restart Funds for Private Schools*, April 24, 2006, Item 9, <http://www2.ed.gov/katrina/proginfo/allowable-uses.doc>.

Act (CARES Act; P.L. 116-136) was signed into law. The act included the Education Stabilization Fund (ESF), which was created “to prevent, prepare for, and respond to coronavirus, domestically or internationally.” The ESF is composed of three emergency relief funds: (1) a Governor’s Emergency Education Relief (GEER) Fund, (2) an Elementary and Secondary School Emergency Relief (ESSER) Fund, and (3) a Higher Education Emergency Relief Fund (HEERF).¹³¹ On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA; P.L. 116-260) was enacted. Division M of the act is the Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (CRRSAA). It provided appropriations for the GEER Fund, ESSER Fund, and HEERF. The Secretary was required to reserve funds under the GEER Fund for the Emergency Assistance to Non-Public Schools (EANS) program. On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (ARPA; P.L. 117-2), an FY2021 budget reconciliation measure developed in response to the COVID-19 pandemic.¹³² It provided mandatory appropriations for the ESSER Fund, EANS, and HEERF.¹³³

Equitable participation requirements were included in the CARES Act, CRRSAA, and ARPA for ESF programs that provided funds for elementary and secondary education. However, the specific equitable participation requirements differed across the three acts.

CARES Act

An LEA that receives funds under the GEER Fund or the ESSER Fund is subject to equitable services requirements. More specifically, LEAs receiving such funds are required to provide equitable services to students and teachers in nonpublic schools, as determined in consultation with representatives of nonpublic schools, in the same manner as Section 1117 of the ESEA. After reserving the required amount of funding to provide services for nonpublic school students and teachers, the LEA is then required to provide services that are equitable in comparison to services provided to public school students and teachers. Services provided to nonpublic school students and teachers must be provided in a timely manner. Such services, including materials and equipment, must be secular, neutral, and nonideological.

ED’s initial interpretation of this provision indicated that only a portion of the Section 1117 provisions applied. Nonbinding guidance from ED¹³⁴ indicated that the determination of the share of funds available to serve nonpublic school students from GEER Fund and ESSER Fund grants received by LEAs should be based on *total enrollment* in nonpublic schools located in the LEA. The guidance explained that all public school students in the LEA are eligible to be served under the GEER Fund and ESSER Fund. That is, the programs are not limited to serving low-income public school students, so the required equitable services should not be limited to low-income nonpublic school students. In practice, this means that LEAs would determine the amount of funding to reserve to provide services to nonpublic school students and teachers based on the total number of nonpublic school students enrolled in the LEA relative to total public and nonpublic school enrollment. For some LEAs, this may result in them reserving a substantially larger percentage of the funds they received under the GEER Fund or ESSER Fund than they would have reserved if the calculation had been based only on the number of eligible low-income

¹³¹ These are the acronyms utilized by the Department of Education in ESF-related materials.

¹³² See the House Budget Committee report (H.Rept. 117-7) for a discussion of the context surrounding ARPA.

¹³³ ESF appropriations provided under the CARES Act and CRRSAA were discretionary appropriations.

¹³⁴ ED has removed the guidance from its website, as the guidance does not match the Interim Final Rule that ED published in July. The guidance is available to congressional clients from the authors of this report upon request.

nonpublic school students relative to the total number of eligible low-income nonpublic and public school students.¹³⁵

Some Members of Congress indicated that they did not agree that the guidance issued by ED reflects congressional intent. For example, former Senator Lamar Alexander, then-Chair of the Senate Committee on Health, Education, Labor, and Pensions, stated that he thought, and he believed that most Members also thought, that LEAs would reserve funds to serve nonpublic school students and teachers in the same way that they are reserved under Title I-A. However, he did not say that Secretary DeVos had exceeded any boundaries in issuing the guidance nor did he commit to overturning the guidance, which does not have the force of law.¹³⁶ In addition, several Democratic Members sent a letter to Secretary DeVos indicating that they did not believe that the ED guidance reflects congressional intent.¹³⁷ The letter argued that the CARES Act's reference to the equitable services provision in Section 1117 of the ESEA requires the determination of how much funding should be reserved to serve students and teachers in nonpublic schools to be made based on the number of nonpublic school students who would be included in the count of students used to determine funding for equitable services under Title I-A of the ESEA (i.e., low-income nonpublic school students) rather than based on the count of all students attending nonpublic schools in the LEA.

The letter further stated that if Congress had wanted to have funding determined based on the number of students attending all nonpublic schools and have LEAs serve teachers and students attending all nonpublic schools located in the LEA, it could have cited the equitable services provisions included in ESEA Section 8501 rather than Section 1117. As previously discussed, under the Section 8501 provision all nonpublic school students who are eligible to be served by the relevant program are included in the count used to determine the amount of funding that should be reserved to serve nonpublic school students and teachers. In addition, under Section 8501, the determination of eligible nonpublic school students is based on the number of eligible nonpublic school students attending nonpublic schools in the LEA.

On July 1, 2020, ED published an interim final rule (IFR) providing LEAs with three options for implementing the equitable services provision.¹³⁸ (ED also removed the prior guidance from its website.) Under one option, an LEA could determine the proportional share based on enrollment in participating nonpublic elementary and secondary schools in the LEA compared to the total enrollment in public and participating nonpublic elementary and secondary schools in the LEA (total enrollment option).

¹³⁵ See, for example, Letter from Carissa Moffat Miller, Executive Director, Council of Chief State School Officers, to Secretary Betsy DeVos, Secretary of Education, May 5, 2020, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj73ZLI1cfpAhWRgnIEHZugAZoQFjAAegQIBBAB&url=https%3A%2F%2Fccsso.org%2Fsites%2Fdefault%2Ffiles%2F2020-05%2FDeVosESLetter050520.pdf&usq=AOvVaw2GJDEIYRfzHpW08Udl7QSC>.

¹³⁶ Andrew Ujifusa, "Sen. Alexander Splits From Betsy DeVos on COVID-19 Aid to Help Private Schools," *Education Week*, May 21, 2021, <http://blogs.edweek.org/edweek/campaign-k-12/2020/05/alexander-devos-COVID-aid-private-schools-CDC-reopening.html>.

¹³⁷ Letter from Robert C. "Bobby" Scott, Chair, Committee on Education and Labor, U.S. House of Representatives, Rosa L. DeLauro, Chair, Committee on Appropriations, Subcommittee on Health and Human Services, Labor, and Education and Other Related Services, U.S. House of Representatives, and Patty Murray, Ranking Member, Committee on Health, Education, Labor, and Pensions, U.S. Senate, to The Honorable Betsy DeVos, Secretary of Education, May 20, 2020, <https://edlabor.house.gov/imo/media/doc/2020-5-20%20Ltr%20to%20DeVos%20re%20Equitable%20Services.pdf>.

¹³⁸ U.S. Department of Education, "CARES Act Programs; Equitable Services to Students and Teachers in Non-Public Schools," 85 *Federal Register* 39479-39488, July 1, 2020.

The remaining options included in the IFR were available to LEAs only if they agreed to use the funds available for public education exclusively to serve students and teachers in public Title I-A schools. If this condition was met, an LEA could determine the share of funds to be reserved to serve students and teachers in nonpublic schools by either (1) using the proportional share of Title I-A funds calculated by the LEA under Section 1117(a)(4)(A) of the ESEA for SY2019-2020, or (2) determining the number of children ages 5-17 who are from low-income families and attend each nonpublic school in the LEA that will be participating in a CARES Act program compared to the total number of children ages 5-17 who are from low-income families in Title I-A schools and participating nonpublic elementary and secondary schools in the LEA. In addition, if an LEA chose to implement one of these two options, it was required comply with the supplement not supplant requirement included in Section 1118(b) of the ESEA.¹³⁹ Among other things, this requirement prohibited the LEA from allocating CARES Act funds to Title I-A schools and then redirecting state or local funds to non-Title I-A schools.

The IFR was subsequently challenged in four U.S. district courts.¹⁴⁰ On September 4, 2020, in *National Association for the Advancement of Colored People v. Elisabeth D. DeVos*, the U.S. District Court for the District of Columbia issued an opinion¹⁴¹ and an order¹⁴² vacating the IFR. ED did not appeal the rulings. In revised guidance following the court rulings, ED indicated that LEAs must calculate the proportional share for equitable services using the formula included in ESEA Section 1117.¹⁴³ In determining the proportional share, LEAs may use the proportional share calculated for Title I-A purposes from either SY2019-2020 or SY2020-2021. However, unlike the requirements of Section 1117, ED determined that the LEA in which a nonpublic school is located should provide the equitable services, which is similar to the provision of services under ESEA Title VIII-F-1.¹⁴⁴

CRRSAA

Congress took a different approach to the provision of equitable services under the CRRSAA. Rather than have LEAs reserve a portion of their GEER Fund and ESSER Fund appropriations to provide services to private school students and teachers, \$2.75 billion of the total appropriation for the GEER Fund (\$4.05 billion) was reserved for the EANS program. These funds were

¹³⁹ The CARES Act did not apply a supplement not supplant requirement to either the GEER Fund or the ESSER Fund. For more information about the Title I-A supplement not supplant requirement, see CRS In Focus IF10405, *Fiscal Accountability Requirements That Apply to Title I-A of the Elementary and Secondary Education Act (ESEA)*.

¹⁴⁰ “The IFR was challenged in four U.S. district courts: *Washington v. DeVos*, No. 2:20-cv-1119-BJR, 2020 WL 5079038 (W.D. Wash. Aug. 21, 2020) (granting preliminary injunction against the Department); *Michigan v. DeVos*, No. 3:20-cv-4478-JD, 2020 WL 5074397 (N.D. Cal. Aug. 26, 2020) (granting preliminary injunction against the Department); *NAACP v. DeVos*, No. 20-cv-1996 (DLF), 2020 WL 5291406 (D. D.C. Sept. 4, 2020) (vacating the IFR); and *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, No. 1:20-cv-2310-GLR (D. Md.)”; U.S. Department of Education, *Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs*, October 9, 2020, p. ii, <https://oese.ed.gov/files/2020/10/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-10-9-2020.pdf> (hereinafter referred to as “U.S. Department of Education, *Providing Equitable Services Under the CARES Act Programs*.”)

¹⁴¹ Memorandum Opinion, *National Association for the Advancement of Colored People v. Elisabeth D. DeVos*, No. 20-cv-1996 (DLF) (United States District Court for the District of Columbia 2020), September 4, 2020, https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC_Opinion-Granting-Partial-Summary-Judgment.pdf.

¹⁴² Order, *National Association for the Advancement of Colored People v. Elisabeth D. DeVos*, No. 20-cv-1996 (DLF) (United States District Court for the District of Columbia 2020), September 4, 2020, https://oese.ed.gov/files/2020/09/NAACP-v-DeVos-DDC_Order-granting-Partial-SJ-09-04-2020.pdf.

¹⁴³ U.S. Department of Education, *Providing Equitable Services Under the CARES Act Programs*, Item 10.

¹⁴⁴ U.S. Department of Education, *Providing Equitable Services Under the CARES Act Programs*, Item 4.

allocated to states based on their proportional share of private school children ages 5-17 from families with incomes at or below 185% of poverty.¹⁴⁵ The governor, who is the recipient of GEER Fund monies, is required to designate the SEA as the EANS program administrator.

SEAs are required to make the application for services or assistance available to nonpublic schools not later than 30 days after the receipt of EANS funds. That is, EANS funds may be used to provide services or assistance directly to private schools as opposed to providing services or benefits to private school students or staff. Similar to equitable service provisions included in the ESEA, however, the control of EANS funds for the services or assistance provided to nonpublic schools and the title to materials, equipment, and property purchased with such funds must be in a public agency. A public agency is to administer such funds, services, assistance, materials, equipment, and property. The provision of services and assistance must be provided by employees of a public agency or through a contract between the public agency and an individual, association, agency, or organization. Such employee, individual, agency, or organization must be independent of the nonpublic school receiving services or assistance, and the employment and contracts must be under the control and supervision of the public agency. All services or assistance provided, including equipment, material, and other items, must be secular, neutral, and nonideological.

The SEA must approve or deny an application for services or assistance from a nonpublic school not later than 30 days after the receipt of the application. It must prioritize services or assistance to nonpublic schools that enroll “low-income students” and are the “most impacted” by the COVID-19 emergency. The statutory language, however, does not define which students qualify as low-income or how to determine which schools are most impacted. Each SEA that complies with various assurances provided by the governor to ED but has unobligated EANS funds remaining six months after receiving them is required to return the unobligated funds to the governor for use under the GEER Fund.

A nonpublic school receiving services or assistance under the EANS program is required to use such services or assistance to address educational disruptions from the COVID-19 emergency. The services or assistance may include, for example, providing supplies to clean school facilities, providing personal protective equipment, improving ventilation systems, expanding capacity to administer COVID-19 testing, and providing educational technology. In some circumstances, a nonpublic school may also be reimbursed for expenses of various services or assistance that it incurred on or after the date of the onset of the qualifying emergency (i.e., March 13, 2020).

EANS funds cannot be used to provide direct or indirect assistance to scholarship granting organizations or related entities for elementary or secondary education. In addition, EANS funds cannot be used to provide or support vouchers, tuition tax credit programs, education savings accounts, scholarships, scholarship programs, or tuition-assistance programs for elementary or secondary education.

A nonpublic school must state in its application for services or assistance whether it received a Paycheck Protection Program (PPP) loan¹⁴⁶ prior to the date of the enactment of the CRRSAA and the amount of the loan. In addition, to receive services or assistance under the EANS program a nonpublic school must provide an assurance that it did not and will not apply for a PPP loan that

¹⁴⁵ In making EANS grants, ED used school enrollment and poverty data from the American Community Survey (ACS) 5-Year Public Use Microdata Sample (PUMS) to determine the relative shares of such children in each state. For more information, see U.S. Department of Education (ED), https://oese.ed.gov/files/2021/06/FINAL_GEERII_EANS-Methodology_Table_Revised_6.25.21.pdf (GEER II grants, which included a reservation of funds for EANS I), and https://oese.ed.gov/files/2021/04/Final_ARP-EANS-Methodology-and-Table-3.16.21.pdf (EANS II).

¹⁴⁶ For more information about the PPP, see CRS Report R46284, *COVID-19 Relief Assistance to Small Businesses: Issues and Policy Options*.

is made on or after the date of enactment of the CRRSAA. Receipt of a PPP loan prior to the date of enactment of the CRRSAA does not make a nonpublic school ineligible to receive services and assistance under the EANS program.

ARPA

Congress continued to provide appropriations for the EANS program under the ARPA. Instead of reserving funds for the program under the GEER Fund, another \$2.75 billion was provided specifically for the EANS program. This version of the EANS program is similar to the version authorized under the CRRSAA, with a few exceptions. For example, receiving reimbursement for expenses or services is not an allowable use of funds. In addition, SEAs may only provide services or assistance to nonpublic schools that serve a “significant percentage of low-income students” and are “most impacted” by the COVID-19 emergency. Similar to the CRRSAA, these terms are not defined in the ARPA.¹⁴⁷

Direct Federal Aid to Private Schools

Equitable service requirements that apply to the GEER Fund and ESSER Fund under the CARES Act are similar to those included in the ESEA. Private school students and teachers benefit from equitable services, but no assistance is provided directly to the private schools.¹⁴⁸ Under the EANS program authorized by the CRRSAA and the ARPA, private schools and their students and teachers can benefit from the services and assistance provided. However, the governor, not the private school, is the recipient of federal financial assistance and is responsible for ensuring the SEA “administers the EANS program in accordance with applicable laws, including civil rights laws.”¹⁴⁹ In its nonregulatory guidance, ED states, “A nonpublic school whose students and teachers receive services or assistance under the EANS program, even if such services or assistance are delivered through reimbursement, is not a ‘recipient of Federal financial assistance’.”¹⁵⁰ Thus, according to ED’s interpretation of these laws and consistent with ED’s interpretation of equitable service provisions in the ESEA,¹⁵¹ none of the equitable services provided through the CARES Act, CRRSAA, or ARPA result in a nonpublic school being considered a recipient of federal financial assistance.

Selected Issues

While equitable services have generally been provided by LEAs, the EANS program introduced a new approach to providing such services, raising questions about whether a similar approach

¹⁴⁷ ED solicited feedback on how the ARPA terms should be implemented. (For more information, see U.S. Department of Education, Notice Inviting Applications and Announcing Allocations for the Emergency Assistance to Non-Public Schools Program under the American Rescue Plan Act of 2021; Invitation for Comment, April 12, 2021, <https://oese.ed.gov/files/2021/04/FINAL-ARP-EANS-notice-4.12.21.pdf>.)

¹⁴⁸ U.S. Department of Education, *Providing Equitable Services to Students and Teachers in Non-Public Schools Under the CARES Act Programs*, October 9, 2020, Item 13, <https://oese.ed.gov/files/2020/10/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-10-9-2020.pdf>.

¹⁴⁹ U.S. Department of Education, *Frequently Asked Questions: Emergency Assistance to Non-Public Schools (EANS) Program as Authorized by the Coronavirus Response and Relief Supplemental Appropriations Act (CRRSAA)*, March 19, 2021, Item D-12, <https://oese.ed.gov/files/2021/03/Final-EANS-FAQ-2.0-3.19.21.pdf> (hereinafter referred to as “U.S. Department of Education, FAQs: EANS Program”).

¹⁵⁰ U.S. Department of Education, *FAQs: EANS Program*, Item D-12.

¹⁵¹ See, for example, U.S. Department of Education, *Frequently Asked Questions—General Issues Related to Non-Public Schools*, August 2019, Item 11, <https://www2.ed.gov/about/inits/ed/non-public-education/files/onpe-faqs-aug2019.pdf>.

could be applied to ESEA programs. This section discusses some of the issues that could arise should SEAs, rather than LEAs, be responsible for providing equitable services under the ESEA (beyond the small number of states where ESEA equitable services are already provided via a statewide bypass of LEAs). It also considers the possibility of providing equitable services to private school students and teachers based on a schoolwide program model.

SEAs Providing Equitable Services

This subsection discusses some of the issues that could be associated with shifting responsibility for the provision of equitable services from LEAs to SEAs. It begins with a discussion of this potential change with respect to the delivery of equitable services under Title I-A. It then considers the delivery of equitable services under this new model for other ESEA formula grant programs to which equitable services apply.

Title I-A

If all SEAs were required to provide equitable services under the ESEA, one issue that would have to be addressed is how to determine the amount of funding that should be reserved at the state level to provide these services. Under current law, each LEA determines the amount it must reserve to provide equitable services based on the number of low-income children living in a Title I-A school attendance area but attending a private school. The amount of funds reserved is based on the amount of Title I-A funds being provided per public school student in each of the LEA's Title I-A school attendance areas. If SEAs were reserving funds at the state level to provide these services, LEAs could provide this information to their SEA, and LEA grants could be reduced accordingly. The SEA could then reach out to the relevant private schools to determine what services would be provided to specific students.

Alternatively, LEAs could be removed completely from the process of determining the amount of funding to be reserved for equitable services. Instead, under one alternative option, the amount reserved for equitable services could be based on the share of low-income children attending private schools as a proportion of all children from low-income families attending public and private schools in the nation. This determination could be made using national data, such as the five-year American Community Survey (ACS) estimates. Another option would be to establish an aggregate funding level for providing equitable services in annual appropriations bills. These funds could then be awarded to states based on each state's relative share of children from low-income families attending private schools. This would be similar to the approach used in the EANS program. While either option could simplify the determination of the number of private school students upon which the reservation is based, it is not possible to know whether this would result in an increase or a decrease in the overall amount of funding that would be reserved to provide equitable services. As there are no comprehensive data available on the amount of funds being reserved for equitable services under current law, it is not possible to model the potential effects of this type of change, either in the aggregate or for specific states or LEAs. With respect to the amount of funds reserved per private school student, the SEA could divide the amount of funds reserved by the number of low-income children attending private schools. This would differ from current law, under which the amount of funds reserved for a low-income private school student may vary by LEA and Title I-A school attendance area. Similar to the EANS program, private schools serving low-income students could apply to the SEA to receive equitable services for their students and teachers. The SEA would be responsible for negotiating the services to be provided and for arranging such services.

Shifting responsibility for equitable services from LEAs to SEAs would centralize the delivery of such services and remove the responsibility and administrative burden from LEAs. It also would eliminate the complication of an LEA having to arrange for equitable services for students attending private schools outside of the LEA. This might result in more consistent treatment of private schools and their students and teachers within each state, in terms of both the types of services provided and the amount expended for such services per student or teacher served. It could potentially require additional staffing at the SEA level to handle the new responsibilities.

Depending on how the reservation of funds for equitable services would be calculated, more private schools may have students and teachers eligible to receive such services. It is also possible that if a set amount of funds was reserved or allocated to provide equitable services and a substantial percentage of private schools in a given state chose not to apply to the LEA for assistance for philosophical or other reasons, the amount of available funds distributed among the relatively small number of private schools that did apply could result in benefits being more generous per student served than those provided to public school students.¹⁵²

If funds for equitable services were reserved based on data that are not provided directly by LEAs (e.g., ACS estimates of school-age children in families with income at or below 185% of poverty, which is the income threshold for free or reduced-price school meals) and the SEA reserved the funds for equitable services prior to determining LEA grants, it may also affect LEA grant amounts. For example, an LEA that previously did not reserve much (or any) funding to provide equitable services may have its grant amount reduced by more than it would have had to reserve for equitable services under current law.

Other ESEA Programs

Similar issues would apply to other ESEA formula programs to which equitable services apply.¹⁵³ For some programs, SEAs would need to work with LEAs to obtain needed counts of eligible private school students. For example, LEAs could provide their SEA with the number of public school and private school children who are eligible for services under the English Language Acquisition program (Title III-A).¹⁵⁴ Alternatively, private schools could provide the relevant data in their applications to receive equitable services based on objective criteria established by the SEA for identifying eligible students. The SEA would then use this information to determine how much Title III-A funding should be reserved to provide equitable services to private school students and teachers. The SEA would then work with private schools to provide equitable services.

¹⁵² This difference between Title I-A funding for private school students and public school students in this scenario may be exacerbated as private school students are served through targeted assistance programs and most public school students are served through schoolwide programs. Under a schoolwide program, all students enrolled in the Title I-A school are considered to be served under Title I-A regardless of whether they directly benefit from the Title I-A program.

¹⁵³ This would include ESEA programs to which equitable participation requirements apply, with the exceptions of Project SERV and the Jacob K. Javits Gifted and Talented Student Education program. Neither of these programs is a formula grant program.

¹⁵⁴ Under Title III-A, LEAs, in consultation with private school officials, are required to establish objective criteria (e.g., a primary home language other than English survey) to determine which private school children are eligible for Title III-A services. For more information, see U.S. Department of Education, *Title III-A English Language Acquisition, Language Enhancement, and Academic Achievement: Equitable Services to Private School Students, Teachers, and Other Educational Personnel, Non-Regulatory Guidance*, July 2015, Item E-2, <https://www2.ed.gov/about/offices/list/oii/nonpublic/titlthree.pdf>.

For some ESEA formula grant programs, all public and private school students are eligible for services. For these programs, SEAs could determine the proportional share of funds that must be reserved to provide equitable services to students and teachers in private schools without assistance from the LEAs.

Schoolwide Programs

As discussed previously, public schools receiving Title I-A funds operate either a schoolwide program or a targeted assistance program. Under a schoolwide program, all students in the school may benefit from Title I-A funds if at least 40% of the students served by the school are from low-income families,¹⁵⁵ while targeted assistance programs focus on providing services to specific low-achieving students.

Equitable services are currently provided only to individual private school students. Depending on (1) the amount of funds reserved to provide services to students in a specific private school under current law or a model under which the SEA provides equitable services and (2) the percentage of private school students from low-income families served by the school, it might be possible to provide services on a schoolwide program basis while continuing to comply with other equitable services requirements, including public control of funds, materials, and equipment. For example, a private school could conduct a needs assessment and determine that students were struggling with reading. The private school could ask that the funds reserved for equitable services be used to purchase materials for a new literacy program for the school and/or provide relevant professional development. Consideration may be given to the method by which the success of the services provided would be demonstrated.

Another feature of Title I-A schoolwide programs is the option for schools to consolidate ESEA formula grant funds, provided the school continues to meet the purposes of the programs from which funds are consolidated. Rather than providing equitable services separately under each program for which students in a given private school are eligible, the funds could be combined to provide such services as long as the purposes of all the programs for which funds have been combined are met. This could make it easier to support schoolwide programs rather than services focused on individual private school students. If SEAs, rather than LEAs, were responsible for providing equitable services, an SEA could determine the total amount of ESEA funds available to provide equitable services to students and staff in each private school and then a decision could be made about how to provide services to private school students and staff. It could be harder for LEAs to determine the total amount of ESEA funds available to provide equitable services to students and teachers in a given private school, as the LEA responsible for providing equitable services for students at a given private school under Title I-A might not be the same LEA responsible for providing equitable services under other ESEA programs. This is because, as noted earlier, the LEA responsible for providing Title I-A services to eligible private school students is the LEA in which the student resides, even if the student attends a private school outside that LEA, while under all other relevant ESEA programs, eligibility of students to be served is based on the location of the private school, regardless of whether eligible students in that school reside within the same LEA.

¹⁵⁵ An SEA may waive the requirement that at least 40% of the students served by a Title I-A school must be from a low-income family (§1114(a)(1)(B)).

Author Information

Rebecca R. Skinner
Specialist in Education Policy

Acknowledgments

Wayne Riddle, former CRS Specialist in Education Policy and current contractor to CRS, co-authored this report.

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.