

ESEA Flexibility

In September 2011, the U.S. Department of Education invited States to request flexibility regarding specific requirements of the *Elementary and Secondary Education Act* (ESEA) in order to better focus on improving student learning and increasing the quality of instruction in public schools. The flexibility is conditional upon States transitioning students, teachers, and schools to a system aligned with college- and career-ready standards for all students, developing differentiated accountability systems, and undertaking reforms to support effective classroom instruction and school leadership.

Following are excerpts from the Department’s guidance on ESEA Flexibility as related to the equitable participation of private school students and teachers. For a complete copy of the guidance, visit the Department’s ESEA Flexibility website at: <http://www.ed.gov/esea/flexibility> (see *Support and Technical Assistance for States, Overview, Frequently Asked Questions (FAQs)*).

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Frequently Asked Questions

Revised August 3, 2012

A. GENERAL GUIDANCE ON ESEA FLEXIBILITY

A-17. May the Secretary waive the requirements for an LEA to provide for the equitable participation of private school students and teachers?

No. Under ESEA section 9401(c)(5), the Secretary may not waive any statutory or regulatory requirement related to the equitable participation of private school students, teachers, and families.

B. GUIDANCE REGARDING WAIVERS IN ESEA FLEXIBILITY

B-10. May an LEA spend the funds that it otherwise would be obligated to spend for choice-related transportation and SES or for professional development on any allowable activity that is designed to improve student achievement?

Generally, yes. This flexibility relieves an LEA from the requirement to spend an amount equal to 20 percent of its Title I, Part A allocation on choice-related transportation and SES, and from the requirement to spend an amount equal to 10 percent of its Title I, Part A allocation on professional development. An LEA has the flexibility to spend these funds on any activity allowable under Title I, Part A that is designed to improve student achievement or support teacher and leader effectiveness, including to support the implementation of interventions in priority and focus schools; to provide high-quality expanded learning time in those schools; to

implement other activities identified by the State’s differentiated recognition, accountability, and support system; or to carry out other strategies to help students succeed, such as public school choice or SES. Although an LEA is not required to spend these funds on particular activities, LEAs must ensure sufficient support for implementation of interventions in priority schools, focus schools, and other Title I schools identified under the SEA’s differentiated recognition, accountability, and support system by leveraging the funds it would otherwise be obligated to spend for choice-related transportation and SES.

B-10a. Are the Title I, Part A funds that an LEA would otherwise spend for choice-related transportation and SES or for professional development in LEAs identified for improvement subject to the requirements to provide equitable services to eligible private school children, their teachers, and their families?

Yes, to the same extent and under the same conditions as regular Title I, Part A funds. In general, an LEA allocates its Title I, Part A funds in two ways: it allocates the majority of those funds to its Title I schools consistent with ESEA section 1113(c); and it reserves some funds off the top of its allocation under 34 C.F.R. § 200.77 for both required and permissible activities. An LEA’s responsibility to provide equitable services to eligible elementary and secondary private school children, their teachers, and their families depends on the nature of the services provided. Equitable services apply to funds an LEA allocates to its Title I schools under ESEA section 1113(c). They also apply to off-the-top reservations that provide district-wide services to Title I schools. However, they do not apply to reservations from which an LEA provides services to a subgroup of students—e.g., homeless students, neglected and delinquent students—or if an LEA focuses the reserved funds on a specific subset of low-performing schools—e.g., schools in restructuring—because public Title I school students as a whole do not benefit from those services either.

Accordingly, with respect to Title I, Part A funds freed up from not needing to meet the 20 percent obligation or the set aside for professional development under ESEA flexibility, the responsibility to provide equitable services depends on how an LEA uses those funds. If, for example, the LEA allocates the funds under ESEA section 1113(c) to its Title I schools, it must also provide equitable services with the funds. Similarly, if the LEA uses the freed up funds for an off-the-top reservation to provide summer school or professional development to all its Title I schools, or all its Title I schools at a particular grade level, the requirement to provide equitable services would apply. On the other hand, if the LEA uses funds from an off-the-top reservation to implement interventions in its priority and/or focus schools, the equitable services requirement would not apply. (Added November 10, 2011)

B-10b. Must an LEA consult with private school officials prior to deciding how to use Title I, Part A funds that may be freed up if the LEA is no longer required to meet the requirements in ESEA section 1116?

Yes. Under ESEA section 1120(b), an LEA must consult with private school officials during the design and development of the LEA’s Title I, Part A programs. That consultation must include

meetings of LEA and private school officials and must occur before the LEA makes any decision that affects the opportunity of eligible private school children to participate in Title I, Part A programs, including decisions regarding the use of funds freed up under ESEA section 1116. (Added November 10, 2011)

B-19. How does this flexibility affect the ability of SEAs and LEAs to transfer funds from one eligible program to another?

ESEA section 6123(a) authorizes an SEA to transfer up to 50 percent of the non-administrative funds available for State-level activities in a given fiscal year under the following (currently operating) programs:

- Improving Teacher Quality State Grants (ESEA section 2113(a)(3))
- Educational Technology State Grants (ESEA 2412(a)(1))
- 21st Century Community Learning Centers (21st CCLC) (ESEA section 5112(b))

An SEA may transfer these funds into its allocations under one or more of the listed programs or into its allocation under Title I, Part A of the ESEA.

Similarly, ESEA section 6123(b) authorizes an LEA that is not identified for improvement or corrective action to transfer up to 50 percent of the funds it receives in a given fiscal year under the following (currently operating) programs:

- Improving Teacher Quality State Grants (ESEA section 2121)
- Educational Technology State Grants (ESEA 2412(a)(2)(A))

An LEA may transfer funds into its allocations under one or more of these programs or into its allocation under Title I, Part A of the ESEA. An LEA that is identified for improvement may transfer only up to 30 percent of its funds under an eligible program and must use those funds for improvement activities consistent with ESEA section 1116(c) or transfer the funds into ESEA section 1003 for improvement activities. An LEA that is identified for corrective action may not transfer any funds.

Under this flexibility, an SEA may transfer up to 100 percent of its non-administrative funds from one or more of the three programs identified above to the other identified programs and to Title I, Part A in order to implement more effectively the principles of this flexibility and improve student achievement. Similarly, an LEA may transfer program funds from one of the two programs identified above to the other identified program and to Title I, Part A. This authority would apply to all LEAs notwithstanding the limitations on such transfers and the restrictions on the use of the transferred funds in ESEA section 6123(b)(1). To the extent that an SEA or LEA transfers funds into a single program, such as Title I, Part A, it gains considerable flexibility with respect to the use of its funds as well as flexibility for reporting and accounting for the time and effort of staff whose salaries would then be supported from only one Federal source.

Under ESEA section 6123(a), an SEA may not transfer State administrative funds under the listed programs. To obtain flexibility with respect to the use of its administrative funds, however, an SEA still has the authority to consolidate funds for State administration if the SEA can demonstrate that the majority of its resources are derived from non-Federal sources as authorized by ESEA section 9201. This, too, reduces an SEA's burden to track its uses of funds to the specific program contributing those funds and to account for the time and effort of staff whose salaries would be then supported from the consolidated administrative funds pool.

B-20. Does this flexibility permit an SEA or LEA to transfer funds out of Title I, Part A or out of programs not covered under ESEA section 6123?

No. Under this flexibility, the Secretary will not waive ESEA section 6123(c), which prohibits an SEA or LEA from transferring funds out of Title I, Part A of the ESEA. Additionally, this flexibility does not permit an SEA or LEA to transfer funds out of programs not covered under ESEA section 6123, such as funds for specific populations of underserved students.

B-21. In transferring funds, must an SEA or LEA comply with the notice requirements in ESEA section 6123(d)?

No. Under ESEA section 6123(d), an SEA must notify the Department and an LEA must notify its SEA, not later than 30 days before the effective date of each transfer, of the program(s) from which funds are to be transferred; the amount and Federal fiscal year of the funds to be transferred; the program(s) to which the funds will be transferred; and the effective date for the transfer. These notice requirements do not apply under this flexibility for an SEA or an LEA. However, an SEA and an LEA must keep records to document each transfer.

B-22. What are the responsibilities of an SEA or LEA for the provision of equitable services to private school children and teachers with respect to funds being transferred?

Each program covered by the transferability authority is subject to equitable participation requirements, which may not be waived (see ESEA section 9401(c)(5)). Before an SEA or LEA may transfer funds, it must engage in timely and meaningful consultation with appropriate private school officials (ESEA sections 6123(e)(2) and 9501). With respect to the transferred funds, the SEA or LEA must provide private school students and teachers equitable services under the program(s) to which, and from which, the funds are transferred, based on the total amount of funds available to each program after the transfer.

B-22a. Are there any limitations on an LEA's ability to transfer 100 percent of its Title II, Part A Improving Teacher Quality State Grant funds into another authorized program?

Yes. ESEA section 9501(b)(3)(B) requires an LEA to provide, at a minimum, equitable services to private school teachers based on an amount of the LEA's overall allocation under Title II, Part

A that is not less than the aggregate amount of FY 2001 funds that the LEA used for professional development under the former Eisenhower Professional Development program and Class-Size Reduction program. Because the Department may not waive requirements related to the equitable participation of private school students and teachers (see ESEA section 9401(c)(5)), even if an LEA wishes to transfer most or all of its Title II, Part A funds into another authorized program, the law requires the LEA to reserve an amount of Title II, Part A funds for equitable services provided under that program for private school teachers and other educational personnel that is calculated on the assumption that the LEA is reserving for professional development under Title II, Part A at least as much as it did for FY 2001 under the two predecessor programs.

Assume, for example, that an LEA reserved a total of \$30,000 in FY 2001 funds under the Eisenhower Professional Development program and the Class-Size Reduction program for professional development. In order to provide equitable services in a subsequent school year consistent with ESEA section 9501(b)(3)(B), the LEA would need to assume that it would spend at least \$30,000 under Title II, Part A for professional development, including the amount of this \$30,000 that it would use to provide equitable services to private school teachers and other educational personnel. The amount available for equitable services would be proportionate to the participating private school children compared to the total number of public and participating private school children in the LEA based on the most current enrollment data. For example, if there are 100 children enrolled in participating private schools and 900 children enrolled in public schools in an LEA in the 2012–2013 school year, the LEA would need to spend at least \$3,000 ($\$30,000 \div 1000 \times 100 = \$3,000$) to provide equitable services in the form of professional development to private school teachers and other educational personnel. This requirement applies even if the LEA is in a State that receives ESEA flexibility and wishes to transfer 100 percent of its Title II, Part A funds to another authorized program. In this case, the LEA could transfer all but \$3,000 of Title II, Part A funds to the other program, but would need to make the \$3,000 of Title II, Part A funds available for equitable services in the form of professional development to private school teachers and other educational personnel. (Added May 7, 2012)

D. GUIDANCE FOR SEAS REQUESTING ESEA FLEXIBILITY

D-2. Must an SEA solicit input on its request from appropriate stakeholders?

Yes. In its request for this flexibility, an SEA must provide a description of how the SEA meaningfully engaged and solicited input on its request from teachers and their representatives, as well as diverse communities and appropriate stakeholders, such as students, parents, community-based organizations, civil rights organizations, organizations representing students with disabilities and English Learners, business organizations, and Indian tribes. By engaging relevant stakeholders at the outset of the planning and implementation process, an SEA can ensure they have input in shaping the SEA's comprehensive plan, which will help ensure successful implementation of the SEA's plan. Ideally, an SEA will solicit input from stakeholders representing diverse perspectives, experiences, and interests, including those who will be impacted by and those who will be implementing the policies included in the SEA's plan,

and will strengthen its request by revising it based on this input.

D-3. Must an SEA consult with its Committee of Practitioners?

Yes. Under ESEA section 1903(b), an SEA must have in place a State Committee of Practitioners to advise the State in carrying out its responsibilities under Title I, Part A of the ESEA. Because most of this flexibility relates to requirements of Title I, Part A, each SEA seeking this flexibility must provide an assurance that it has consulted with the State's Committee of Practitioners regarding the information set forth in its request. The Committee of Practitioners must include representatives from LEAs, administrators, teachers, parents, members of local school boards, representatives of private school children, and pupil services personnel.

D-4. What if an SEA must secure a change in State law or policy in order to implement one of the principles of this flexibility?

There may be instances in which an SEA needs to secure a change in State law or policy in order to implement one of the principles of this flexibility. For example, an SEA may need a change in State law with respect to components of its accountability system in order to implement a differentiated recognition, accountability, and support system consistent with principle 2. The SEA does not necessarily need to have secured this change by the time it submits its request for this flexibility; if its request is otherwise acceptable and meets the principles of this flexibility, the Department may conditionally approve the SEA's request. The SEA must, however, secure any necessary change in State law or policy in time for it and its LEAs to fully meet their responsibilities consistent with the timelines for implementation contained in the document titled *ESEA Flexibility*, and may not implement any waivers until it has done so.