

Are You a Recipient of Federal Financial Assistance?: A Look at Select Federal Programs

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INTRODUCTION

Independent schools are eligible to participate in a wide variety of federal grant and other programs. As a separate National Association of Independent Schools (“NAIS”) publication explains, an independent school that becomes a “recipient” of “federal financial assistance” through such program participation must comply with certain federal legal requirements, such as nondiscrimination laws. ^{1/} However, federal program participation does not always involve receipt of federal financial assistance. This article explores whether an independent school becomes a “recipient” of “federal financial assistance” through participation in seven federal programs, such that certain federal legal requirements are triggered.

In 2017, NAIS surveyed its member schools about their participation in federal programs. The survey updated a similar study that NAIS conducted in 2009. Based on a comparison of the 2009 and the 2017 survey results, NAIS aimed to obtain a more accurate sense of developments in independent school participation in federal programs.

A total of 1431 schools received the 2017 survey and approximately 29% submitted responses. According to the survey’s results, only 15% of respondents indicated that they participated in a federal program in 2016-2017, down from 19% in 2009. Of the schools that participated in federal programs, the six most popular federal programs are:

- (1) ERate (56.7%)
- (2) Improving Teacher Quality State Grants (Title II, Part A) (40%)
- (3) National School Lunch (6.7%)
- (4) Grants to Local Education Agencies for Low Income Students (Title I, Part A) (6.7%)
- (5) Individuals with Disabilities Act (IDEA) (6.7%)
- (6) School Breakfast (5%)

Because NAIS also found that independent schools sometimes participate in the Special Milk Program for Children, a review of that program is also included in this article. In addition, in December 2015, Congress passed the Every Student Succeeds Act (ESSA) which reauthorized the Elementary and Secondary Education Act (ESEA),

^{1/} *Independent Schools and Federal Laws* (2013)

previously known as No Child Left Behind (NCLB). 2/ ESSA created a new program called Student Support and Academic Enrichment (SSAE) Grants (Title IV, Part A) 3/ which includes elements of the old Enhancing Education Through Technology program and the old Safe and Drug Free Schools program. Private school students are entitled to equitable participation in SSAE. This article therefore includes a discussion regarding SSAE grants.

Part I of this article summarizes law relevant to determining when an entity is a recipient of federal financial assistance. Part II applies the law to the following seven federal programs:

- (1) Grants to Local Education Agencies for Low Income Students (Title I, Part A)
- (2) Improving Teacher Quality State Grants (Title II, Part A)
- (3) Student Support and Academic Enrichment (SSAE) Grants (Title IV, Part A)
- (4) Individuals with Disabilities Act (IDEA)
- (5) National School Lunch Program
- (6) Special Milk Program for Children
- (7) School Breakfast Program

In particular, Part II addresses the following questions with respect to the seven federal programs:

- (1) What is the program?
- (2) How is the program structured?
- (3) How does an independent school participate in the program?
- (4) Is an independent school that participates in the program a recipient of federal financial assistance as a result of such participation?

2/ P.L. 114-95 (Dec. 10, 2015).

3/ 20 U.S.C. § 7101 et seq.

This article does not address the ERate programs. Matters regarding ERate are addressed in a separate NAIS article.⁴

As explained in Part II, ESEA statutory and regulatory provisions and U.S. Department of Education (“ED”) guidance suggest that an independent school does not become a recipient of federal financial assistance through participation in Title I or Title IV. ESEA statutory and regulatory provisions and ED guidance suggest that an independent school also does not become a recipient of federal financial assistance through participation in Title II unless the independent school receives a direct grant under those programs. Statutory provisions and ED guidance also suggest that an independent school does not become a recipient of federal financial assistance through participation in IDEA if the student is parentally placed into the school. However, the independent school may be a recipient if a public agency places the student into the school.

With respect to the School Lunch Program, School Breakfast Program and the Special Milk Program for Children, statutory and regulatory provisions suggest that under certain circumstances an independent school may be a recipient of federal financial assistance through participation in those programs.

This article is intended for general informational purposes only and does not constitute legal advice. An attorney should be consulted regarding the specific facts and circumstances associated with any federal program. Schools are encouraged to consult an attorney for additional information regarding whether participation in a federal program will result in receipt of federal financial assistance, federal legal obligations for organizations receiving federal financial assistance, application of those obligations to particular situations, interpretations of and developments in the laws discussed in this article, and relevant state and other legal obligations.

⁴ E-Rate and Federal Strings (2014)

PART I

GENERAL BACKGROUND

“Federal financial assistance” generally means assistance from the federal government that non-federal entities receive or administer in the form of (1) grants and loans of Federal funds, (2) grants or donations of Federal property and interests in property, (3) services of detailed federal employees, (4) the sale and lease of, and the permission to use Federal property or any interest in such property without consideration, and (5) contracts intended to provide assistance. ^{5/} “Federal financial assistance” generally does not include amounts that an organization receives as payment for goods or services provided to the federal government pursuant to a procurement contract. ^{6/} Certain federal laws and implementing regulations that are triggered by receipt of federal financial assistance define what constitutes federal financial assistance for purposes of that particular law. In addition, different agencies’ regulations implementing the same law may vary in their definitions of federal financial assistance, although those variations generally are non-substantive. ^{7/} As described in Part II, the federal programs in which independent schools appear to participate most often generally involve the federal government providing funds, services, and equipment to third parties where the third parties are not in return providing goods or services to the federal government. Those programs therefore appear to involve

^{5/} See, e.g., 34 C.F.R. § 100.13(f) (ED regulations implementing Title VI of the Civil Rights Act of 1964 (“Title VI”) define “Federal financial assistance” to include “(1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.”).

^{6/} The Federal Grant and Cooperative Agreement Act, as amended, explains the circumstances under which the government uses federal financial assistance agreements, such as grant agreements and cooperative agreements, and procurement contracts. See 31 U.S.C. §§ 6301-6308. Federal agencies are to use a “grant agreement” when the principal purpose is to transfer a thing of value to the recipient in order to carry out a public purpose authorized by federal law, and the federal agency does not expect to have substantial involvement in carrying out the activity. *Id.* § 6304. Federal agencies are to use a “cooperative agreement” when the principal purpose is to transfer a thing of value to the recipient in order to carry out a public purpose authorized by federal law, and the federal agency is expected to have substantial involvement in carrying out the activity. *Id.* § 6305. “Grant agreements” and “cooperative agreements” do not include agreements providing direct cash assistance to an individual, subsidies, loans, loan guarantees, or insurance. *Id.* § 6302. By contrast, the Federal Grant and Cooperative Agreement Act instructs federal agencies to use a “procurement contract” when the principal purpose of the legal instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the federal government. *Id.* § 6303.

^{7/} To help identify whether the federal government considers a particular program to constitute federal financial assistance, an independent school may wish to refer to the annual Catalog of Federal Domestic Assistance (“CFDA”), at www.cfda.gov. The CFDA is a government-wide compendium of federal programs, projects, services, and activities that provide federal financial assistance.

“federal financial assistance.” The question then becomes whether the independent school is a recipient of the federal financial assistance.

Relevant federal statutes generally do not define “recipient” of federal financial assistance. 8/ In a trilogy of decisions, the U.S. Supreme Court addressed who is a “recipient of federal financial assistance” for purposes of nondiscrimination laws that apply to such recipients. Lower courts have struggled to apply the Court’s decisions and on occasion have reached different conclusions with respect to similar facts. Nevertheless, the Court’s decisions provide key principles.

First, in *Grove City College v. Bell*, 9/ the Court held that a private college was a recipient of federal financial assistance because it indirectly received federal financial assistance through federal grants to some of its students. The Court acknowledged that the students, not the college, were the direct recipients of the federal financial assistance. The Court found, however, that the federal program’s structure and its legislative history manifested Congress’s intent that the college would be the ultimate recipient of the aid.

Second, in *U.S. Department of Transportation v. Paralyzed Veterans of America*, 10/ the Court considered whether commercial airlines received federal financial assistance under a federal program that awarded grants to airport operators. The Court concluded that the airlines were not direct recipients of federal financial assistance because the program at issue specifically directed that funds be awarded to airport operators. The Court also concluded that although the airlines benefited from the federal funding, they were not indirect recipients of the federal funds because Congress did not intend the airlines to be the ultimate recipients of the funds. The Court explained that unlike the students in *Grove City*, Congress did not intend the airport operators to serve as a conduit through which the government provided federal financial assistance to airlines. The Court also emphasized the contractual nature of federal assistance and noted that an entity that accepts Congress’s offer of funds does so knowing that receipt of those funds will subject it to coverage under the nondiscrimination statutes. In *Paralyzed Veterans*, the airport operators, rather than the commercial airlines, were in a position to accept or reject the nondiscrimination obligations imposed. *Paralyzed Veterans* therefore established a distinction between

8/ Various federal regulations, particularly those implementing nondiscrimination laws that apply to recipients of federal financial assistance, define “recipient” for purposes of those laws. See, e.g., 34 C.F.R. § 106.2(i) (for purposes of Title VI, ED defines “recipient” of federal financial assistance to include “any public or private . . . institution, or organization, or other entity . . . to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof”); 7 C.F.R. § 15.2(e) (for purposes of Title VI, the USDA defines “recipient” as “any public or private agency, institution, or organization . . . to whom Federal financial assistance is extended, directly or through another recipient, for any program.”).

9/ 465 U.S. 555 (1984).

10/ 477 U.S. 597 (1986).

recipients and beneficiaries of federal financial assistance and clarified that to qualify as an indirect recipient, Congress must have intended for the entity to be the ultimate recipient, and that recipients must be in a position to accept or reject federal aid.

Third, in *National Collegiate Athletic Association v. Smith*, 11/ the Court held that the NCAA was not a recipient of federal financial assistance based on its receipt of dues from members that received federal financial assistance. The Court distinguished *Grove City* on the ground that NCAA members did not receive federal funds earmarked to pay NCAA dues while the *Grove City* students received federal funds earmarked to pay educational expenses. The Court then articulated the general standard developed in the Court's decisions: "Entities that receive federal assistance, whether directly or through an intermediary, are recipients [of federal financial assistance]; entities that only benefit economically from federal assistance are not." 12/

Grove City, *Paralyzed Veterans*, and *Smith* provide an analytical framework to determine whether an independent school is a recipient of federal financial assistance. Based on those cases, a court may consider the following questions in connection with an independent school's participation in a federal program: (1) Is the independent school a direct recipient of federal financial assistance? (2) Is the independent school an indirect recipient of federal financial assistance? In considering question (2), a court would likely consider whether the federal statute and regulations that authorized the federal financial assistance indicate an intent that an independent school be treated as a recipient of the funds. (3) If the independent school is not a "direct" or "indirect" recipient under those principles or the matter is unclear, a court may apply other theories to determine whether an independent school is a "recipient" or is merely a "beneficiary" of the federal financial assistance, such as whether the recipient was in a position to accept or reject aid.

As *Grove City*, *Paralyzed Veterans*, and *Smith* demonstrate, the federal program's purpose, structure, and design must be considered to determine whether a particular entity is a recipient of federal financial assistance in connection with the program. Accordingly, Part II of this article discusses each of the seven federal programs in which independent schools seem to participate most frequently.

This article does not address whether an independent school may be deemed a recipient of federal financial assistance based on its relationship with a non-governmental third party that is a direct recipient of federal financial assistance under the seven federal programs discussed in this article. Courts employ different theories to address such relationships, and the cases are highly fact-specific. As indicated in the Introduction, an independent school should consult legal counsel regarding the specific

11/ 525 U.S. 459 (1999).

12/ *Id.* at 468.

facts and circumstances associated with an independent school's involvement with any federal program.

PART II

TITLE I, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT – GRANTS TO LOCAL EDUCATIONAL AGENCIES

What is the program?

The purpose of Title I is to improve outcomes for disadvantaged students and “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close achievement gaps.” 13/ ED administers the program.

How is the program structured?

Title I grants pass through State Educational Agencies (SEAs) to eligible local educational agencies (LEAs) according to a formula that considers the number of students, ages 5 to 17 in the school district of the LEA, who come from low-income families. 14/ LEAs are public entities and do not include independent schools. 15/ The statute creates four different funding arrangements, including Basic Grants, Concentration Grants, Targeted Grants, and Education Finance Incentive Grants. 16/ LEAs allocate their Part A funds to eligible attendance areas or schools “in rank order” based on the number of low-income children who live in each area or are enrolled at each school. 17/

How does an independent school participate in the program?

Title I, Part A requires LEAs to provide private school children, “on an equitable basis, . . . special educational services, instructional services (including evaluations to determine the progress being made in meeting such students’ academic needs), counseling, mentoring, one-on-one tutoring or other benefits . . . such as dual or concurrent enrollment, educational radio and television, computer equipment and materials, other technology, and mobile educational services and equipment) that address their needs.” 18/ LEAs must also ensure that those students’ teachers and

13/ 20 U.S.C. § 6301.

14/ 20 U.S.C. §§ 6332-6337.

15/ *Id.* § 7801(30). A local educational agency is defined as “a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.”

16/ *Id.* §§ 6333-6337.

17/ *Id.* § 6313(c)(1).

18/ *Id.* § 6320(a)(1); 34 C.F.R. § 200.62(a)(1).

families “participate, on an equitable basis” in parental involvement and professional development activities implemented under the statute. 19/ The amount of money spent on services for eligible children in private schools must “be equal to the proportion of funds allocated to participating school attendance areas based on the number of children from low-income families who attend private schools.” 20/ The LEA may determine such allocation each year or every two years. 21/ LEAs must consult private school officials regarding the development and implementation of Title I, Part A activities. 22/

Any benefits or services provided under Title I, Part A to private schools, “including materials and equipment,” must be “secular, neutral, and nonideological.” 23/ Under certain circumstances, the Secretary of Education (“Secretary”) must waive an LEA’s private-school-related obligations. For example, the Secretary must waive obligations if the delivery of equitable services would violate a law. 24/ If a waiver is granted, the Secretary must ensure that the affected private school students receive the services through alternate means. 25/

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

ESEA and ED Title I, Part A regulations and guidance suggest that independent schools are not direct recipients of federal financial assistance under Title I. ED guidance provides in relevant part that (1) schoolwide programs under Title I “may not be operated in private schools” because “private schools are not eligible for Title I services;” (2) “[t]he LEA is responsible for planning, designing, and implementing the Title I program and may not delegate that responsibility to the private schools or their officials;” (3) LEAs are prohibited from simply delivering “instructional materials and supplies paid with Title I funds” to private schools; and (4) private schools may not be reimbursed for the cost of instructional materials and supplies because private school officials “have no authority to obligate or receive Title I funds.” 26/ The LEA is charged with asserting “control of funds provided under this part” and holds title to any

19/ 20 U.S.C. § 6320(a)(1); 34 C.F.R. § 200.62(a)(2).

20/ 20 U.S.C. § 6320(a)(4)(A); 34 C.F.R. § 200.64(a).

21/ 20 U.S.C. § 6320(a)(4)(D); 34 C.F.R. § 200.78(a)(2)(iii)

22/ 20 U.S.C. § 6320(b); 34 C.F.R. § 200.63(a).

23/ 20 U.S.C. § 6320(a)(2); 34 C.F.R. § 200.62(c).

24/ 20 U.S.C. § 6320(e).

25/ See *id.*

26/ See ED, *Title I Services to Eligible Private School Children: Non-Regulatory Guidance*, 20-22 (Oct. 17, 2003). A 2016 ED guidance document states that unless otherwise provided, the Oct. 17, 2003 guidance document remains applicable. ED, *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)*, at 23 (Nov. 21, 2016) (“*Fiscal Changes and Equitable Services Guidance 2016*”). In relevant parts, the 2016 ED guidance document does not override the 2003 ED guidance document.

“materials, equipment, and property purchased with such funds.” ^{27/} The apparent inability of independent schools to receive directly any funds, property, or services under Title I suggests that the school does not become a direct recipient of federal financial assistance through participation in the program.

ESEA and ED guidance and regulations suggest that an independent school also does not become an indirect recipient of federal financial assistance as a result of participation in Title I. ED has stated that “[p]rivate schools with students who participate in programs conducted by LEAs that are funded under federal programs such as Title I of the Elementary and Secondary Education Act . . . are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds.” ^{28/} ED regulations suggest that independent schools are not indirect recipients of Title I funds because they are not the intended ultimate recipients of such funds: A LEA is prohibited from allocating Title I, Part A funds for “[t]he needs of the private school” or “[t]he general needs of children in the private school.” ^{29/} In addition, services provided to private school students pursuant to Title I, Part A must be delivered by individuals who are “independent” of the private school and of “any religious organization.” ^{30/} Accordingly, under *Grove City* and *Paralyzed Veterans* principles, it appears that under Title I an independent school may not be an indirect recipient of federal financial assistance.

At least one court has reached a different conclusion. In an unpublished decision that pre-dates the NCLB, a federal district court concluded that a parochial school that participated in Title I was a recipient of federal financial assistance for purposes of Section 504 of the Rehabilitation Act of 1973. ^{31/} The court found that the school was an indirect recipient of such assistance because Title I funds were earmarked for its students and teachers. We located no published court decision on point.

^{27/} 20 U.S.C. § 6320(d)(1); 34 C.F.R. § 200.67(a).

^{28/} 71 Fed. Reg. 62530, 62530 n.7 (Oct. 25, 2006).

^{29/} 34 C.F.R. § 200.66(b)(2).

^{30/} 20 U.S.C. § 6320(d)(2)(B); 34 C.F.R. § 200.64(b)(3)(ii).

^{31/} *Dupre v. Roman Catholic Church of Diocese of Houma-Thibodaux*, Civ.A. 97-3716, 1999 WL 694081 (E.D. La. Sept. 2, 1999).

TITLE II, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT – PREPARING, TRAINING, AND RECRUITING HIGH-QUALITY TEACHERS, PRINCIPALS, OR OTHER SCHOOL LEADERS, SUPPORTING EFFECTIVE INSTRUCTION

What is the program?

The purpose of Title II funding is to “1) increase student achievement consistent with the challenging State academic standards; 2) improve the quality and effectiveness of teachers, principals, and other school leaders; 3) increase the number of teachers, principals, and other school leaders who are effective in improving student academic achievement in schools; and 4) provide low-income and minority students greater access to effective teachers, principals, and other school leaders.” 32/ ED administers the program.

How is the program structured?

SEAs apply for Title II, Part A grants from the federal government. 33/ ED allocates funds to each SEA according to a formula that considers the state’s overall population of students, ages 5 to 17, and the relative number of that same group who come from low-income families, in comparison to those groups’ respective populations nationwide. 34/ The formula began to phase out hold-harmless provisions in FY 2017, and shifted the formula to place increased weight on the poverty factor. 35/ States may use Title II, Part A funds for: (1) State activities (SEAs can reserve up to 5% of funding) 36/; and (2) subgrants to LEAs (each SEA must provide at least 95% of the base funding it receives to LEAs in the state via subgrants, although the SEA may reserve up to 3% for state activities to support principals and school leaders). 37/ LEAs are public entities and do not include independent schools. 38/ LEAs must apply to the appropriate SEA in order to receive Title II, Part A grants. 39/

The bulk of funding received by SEAs is passed on through subgrants to LEAs. SEAs shall distribute the funds according a formula that weighs an LEA’s overall population of students ages 5 to 17 (20%), and the percentage of that same group who

32/ 20 U.S.C. § 6601.

33/ 20 U.S.C. § 6611(d).

34/ *Id.* § 6611(b)(1),(2); see also *Fiscal Changes and Equitable Services Guidance 2016* at 13-16.

35/ *Id.* The formula currently provides 35% of funding based on population ages 5 to 17 and 65% of funding based on population ages 5 to 17 in poverty. This will move to 20% based on population ages 5 to 17 and 80% based on population ages 5 to 17 in poverty by 2020.

36/ 20 U.S.C. § 6611(c).

37/ *Id.*; see also *Fiscal Changes and Equitable Services Guidance 2016* at 16-17.

38/ 20 U.S.C. § 7801(30).

39/ *Id.* § 6612(b).

come from low-income families (80%), in comparison to those groups' respective populations in all LEAs statewide. 40/

LEAs that receive a subgrant must use the funds to “develop, implement, and evaluate comprehensive programs and activities” aligned with the purpose of the title. 41/ ESSA expanded the list of permissible uses of Title II, Part A funds to include a wide array of professional development and recruitment efforts such as 1) “providing training, technical assistance, and capacity building . . . to assist teachers, principals, and other school leaders with selecting and implementing formative assessments, designing classroom-based assessments, and using data from such assessments to improve instruction,” (2) “carrying out in-service training for school personnel in the techniques and supports needed to help educators understand when and how to refer students affected by trauma, and children, with, or at risk of mental illness,” (3) “providing training for all school personnel . . . regarding how to prevent and recognize child sexual abuse,” and (4) “developing and providing professional development . . . to promote high-quality instruction and instructional leadership in science, technology, engineering, and mathematics subjects, including computer science.” Other permissible activities include, but are not limited to, implementing educator and school leader mentoring programs, developing evaluation and feedback systems, recruiting individuals from other fields into education and other hiring initiatives, and reducing class sizes. 42/

How does an independent school participate in the program?

Title II, Part A requires LEAs to ensure that private school teachers or other private school educational personnel participate on an equitable basis. 43/ The amount of money spent on services for eligible teachers and educators in private schools must be proportional, based on the district's total Title II, Part A allocation, minus administrative costs, comparing total number of private school students to the total number of students (public and private) in the district. 44/ Under NCLB, an LEA was only required to provide private school educators and personnel with an equitable share of funds based off the amount spent on professional development (rather than other allowable uses). Under ESSA, the equitable share must be calculated based on LEA's total Title II, Part A allocation, which should increase the funds available to eligible

40/ *Id.* § 6612(a)(2); *Fiscal Changes and Equitable Services Guidance 2016* at 17-18.

41/ *Id.* § 6613(a).

42/ *Id.* § 6613(b); *see also* ED, *Building Systems of Support for Excellent Teaching and Learning* (Sept. 27, 2016) (“*Teacher Quality Guidance 2016*”). ED has not issued any additional guidance on this topic.

43/ 20 U.S.C. § 6612(b)(2)(E); § 7881(a)(1); *see also* *Teacher Quality Guidance 2016* at 28.

44/ *Id.* § 7881(a)(1); For example, if an LEA enrollment is 900 and participating private school enrollment is 100 (for a total enrollment of 1,000) and the total LEA allocation minus administrative costs is \$950,000, the per pupil rate is \$950 and \$95,000 must be reserved for equitable services for private school teachers and personnel. *See* *Fiscal Changes and Equitable Services Guidance 2016* at 35. Eligible private school teachers and personnel are also entitled to an equitable share of funds reserved for state level activities. 20 U.S.C. 7881(a)(1); *Fiscal Changes and Equitable Guidance 2016* at 36-37.

private school educators and personnel.^{45/} These equitable services funds may be used to provide professional development and other services to eligible private school educators and personnel so they may meet the needs of private school students; however, funds may not be used for class-size reduction in private schools. ^{46/} LEAs must consult private school officials regarding the development and implementation of Title II, Part A activities. ^{47/}

Any benefits or services provided under Title II, Part A to private schools, “including materials and equipment,” must be “secular, neutral, and nonideological.” ^{48/} Under certain circumstances, the Secretary must waive an LEA’s private-school-related obligations. For example, the Secretary must waive obligations if the delivery of equitable services would violate a law. ^{49/} If a waiver is granted, the Secretary must ensure that the affected private school teachers and educators receive the services through alternate means. ^{50/}

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

With respect to equitable participation in LEA subgrants, ESEA language and ED Title II guidance suggest that independent schools are not direct recipients of federal financial assistance under Title II. Relevant statutory language for Title II provides that, to the extent that an LEA uses Title II funds to provide professional development to teachers and others: (1) the LEA must control the funds used to provide services, and title to materials, equipment, and property purchased with those funds, and must administer the funds and property; (2) the employees of the LEA must provide the professional development services, or must contract with an individual, association, agency, organization, or other entity for the services; (3) in the provision of those services, the employee, person, association, agency, organization, or other entity must be independent of private schools and of any religious organization, and the employment or contract shall be under the control and supervision of the LEA; (4) funds used to provide professional development services under Title II, Part A cannot be commingled with non-Federal funds. ^{51/} The apparent inability of independent schools to receive directly any funds, property, or services under Title II suggests that the school does not become a direct recipient of federal financial assistance through participation in the program.

^{45/} *Fiscal Changes and Equitable Guidance 2016* at 35.

^{46/} *Id.* at 36.

^{47/} 20 U.S.C. § 7881(c); *see also Teacher Quality Guidance 2016* at 27.

^{48/} *Id.* § 7881 (a)(2).”

^{49/} *Id.* § 7882.

^{50/} *See id.*

^{51/} 20 U.S.C. § 7881(d).

ED guidance also suggests that an independent school does not become an indirect recipient of federal financial assistance as a result of participation in Title II, Part A. ED has stated that “[p]rivate schools with students who participate in programs conducted by LEAs that are funded under federal programs such as Title I of the Elementary and Secondary Education Act . . . are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds.” ^{52/} Title II, Part A is likely a program similar to Title I, Part A. For example, the two programs are similar in their funding structure: grants for both programs pass through SEAs to eligible LEAs based on a similar formula that considers the number of students in the district from low-income families. ^{53/} In addition, both programs require LEAs to provide services or ensure participation on an equitable basis. ^{54/} Therefore, private schools that participate in a Title II program conducted by an LEA are likely not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds.

Additionally, under the relevant statutory language, an LEA must control the funds used to provide services and the title to materials, equipment, and property purchased with those funds, and the LEA must administer the funds and property. In addition, the “employee, person, association, agency, organization, or other entity” providing the professional development services must be independent of private schools and of any religious organization. ^{55/} Accordingly, under *Grove City* and *Paralyzed Veterans* principles, it appears that under Title II, Part A an independent school may not be an indirect recipient of federal financial assistance.

At least two courts have reached a different conclusion. In an unpublished decision that pre-dates the NCLB, a federal district court concluded that a parochial school that participated in Title II was a recipient of federal financial assistance for purposes of Section 504 of the Rehabilitation Act of 1973. ^{56/} The court found that the school was an indirect recipient of such assistance because Title II funds were earmarked for its students and teachers. A more recent decision found that a private Christian school was an indirect recipient of federal funds because the private school made the decision to make the funds available to its faculty, the faculty had to seek permission before applying for the funds, and the school designated a staff member to facilitate the applications. Additionally, while the dollars never entered the school’s bank account, the school included a line item in its budget indicating the availability of the monies.^{57/} We located no published court decisions on point.

^{52/} 71 Fed. Reg. 62530 n.7 (Oct. 25, 2006).

^{53/} See 20 U.S.C. §§ 6332-6337, 6611(b)(1),(2), 6612(a)(2).

^{54/} See *id.* §§ 6320(a)(1), 6612(b)(2)(E), 7881(a)(1).

^{55/} 20 U.S.C. § 7881(d).

^{56/} *Dupre v. Roman Catholic Church of Diocese of Houma-Thibodaux*, Civ.A. 97-3716, 1999 WL 694081 (E.D. La. Sept. 2, 1999).

^{57/} *Kingston v. Toledo Christian Schools Board of Trustees*, Case No. 3:17 CV 1 (N.D. Ohio. Sept. 29, 2017).

TITLE IV, PART A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT—STUDENT SUPPORT AND ACADEMIC ENRICHMENT GRANTS

What is the program?

The purpose of Title IV, Part A funding is to improve academic achievement by “increasing the capacity of States, local educational agencies, schools and local communities to 1) provide all students with access to a well-rounded education; 2) improve school conditions for student learning; and 3) improve the use of technology in order to improve the academic achievement and digital literacy of all students.” 58/ ED administers the program.

How is the program structured?

SEAs must submit a plan to receive Title IV, Part A grants from the federal government. 59/ ED allocates funds to each SEA based on the state’s share of funds under Title I, Part A (which allocates funds based on a formula that considers number of students, ages 5 to 17 in the school district of the LEA, who come from low-income families). 60/ States may use Title IV, Part A funds for 1) state activities (the state may reserve up to 1% for administrative costs and up to 4% for other approved activities) 61/ and 2) subgrants to LEAs (each SEA must provide at least 95% of the base funding to LEAs via subgrants). 62/ LEAs are public entities and do not include independent schools. 63/ LEAs must apply to the appropriate SEA in order to receive Title IV, Part A grants. 64/

The bulk of funding received by SEAs is passed on through subgrants to LEAs. SEAs must award subgrants to LEAs via a formula that takes into account the LEA’s Title I, Part A allocation in the prior year. 65/ LEAs may use Title IV, Part A subgrants for 3 types of activities: 1) activities to support well-rounded educational opportunities (at least 20% of funds) 2) activities to support safe and healthy students (at least 20% of funds) and 3) activities to support the effective use of technology. 66/

58/ 20 U.S.C. § 7111.

59/ *Id.* § 7113(c)(1)

60/ *Id.* § 7113(b)(1)(A); ED, *Student Support and Academic Enrichment Grants: Non-Regulatory Guidance*, 8 (Oct. 2016) (“SSAE Guidance 2016”).

61/ 20 U.S.C. § 7114(a)-(b); *see also* SSAE Guidance 2016 at 8-9.

62/ 20 U.S.C. § 7114(a)-(b).

63/ *Id.* § 7801(30).

64/ *Id.* § 7116.

65/ *Id.* § 7115(a)(1); *see also* SSAE guidance 2016 at 9.

66/ *Id.* § 7116(e)(2)(C)-(E). The requirement to use at least 20% of funds for well-rounded educational opportunities activities and at least 20% for safe and healthy students activities only applies to LEAs who receive at least \$30,000. *Id.* § 7116(f).

Activities which support well-rounded educational opportunities may include programs such as 1) college and career counseling 2) programs to “improve instruction and student engagement in science, technology engineering and mathematics, including computer science” 3) “efforts to raise academic achievement through accelerated learning programs . . . such as reimbursing low-income students to cover part or all of the costs of accelerated learning examination fees” and 4) foreign language, environmental, and civics education. 67/

Activities which support safe and healthy students may include programs such as 1) drug and violence prevention education and professional development; 2) “school-based mental health services, including early identification of mental health symptoms, drug use, and violence, and appropriate referral;” 3) bullying and harassment prevention; and 4) training for school personnel related to suicide prevention and “effective and trauma-informed practices in classroom management.” 68/

Activities that support effective use of technology may include programs that 1) provide educators, school leaders, and administrators with professional development to utilize technology and personalize learning; 2) purchase devices, equipment, and software; 3) develop new courses and curriculum including blended learning opportunities. 69/

How does an independent school participate in the program?

Title IV, Part A requires LEAs to ensure that private school students, teachers, and other personnel participate on an equitable basis. 70/ The amount of money spent on services for eligible students and educators must be proportional, comparing the total number of private school students to the total number of students (public and private) in the district. LEAs must consult private school officials regarding the needs of private school students and educators in relation to eligible Title IV, Part A services. 71/

Any benefits or services provided under Title IV, Part A to private schools, “including materials and equipment,” must be “secular, neutral, and nonideological.” 72/ Under certain circumstances, the Secretary must waive an LEA’s private-school-related obligations. For example, the Secretary must waive obligations if the delivery of equitable services would violate a law. 73/ If a waiver is granted, the

67/ *Id.* § 7117; see also *SSAE Guidance 2016* at 19-24.

68/ *Id.* § 7118; see also *SSAE Guidance 2016* at 24-31.

69/ *Id.* § 7119; see also *SSAE Guidance 2016* at 31-36.

70/ *Id.* § 7116(e)(2)(B); see also *Fiscal Changes and Equitable Services Guidance 2016* at 33.

71/ *Id.* § 7881(c).

72/ *Id.* § 7881 (a)(2).

73/ *Id.* § 7882.

Secretary must ensure that the affected private school teachers and educators receive the services through alternate means. 74/

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

With respect to equitable participation in LEA subgrants, ESEA language and ED Title IV, Part A guidance suggest that independent schools are not direct recipients of federal financial assistance under Title IV, Part A. Relevant statutory language for Title IV, Part A provides that to the extent an LEA uses Title IV funds to provide students with a well-rounded education, improved school conditions for student learning, and improved technology, (1) the LEA must control the funds used to provide services, must hold title to materials, equipment, and property purchased with those funds, and must administer the funds and property (2) the employees of the LEA must provide the services, or must contract with an individual, association, agency, organization, or other entity for the services (3) in the provision of those services, the employee, person, association, agency, organization, or other entity must be independent of private schools and of any religious organization, and the employment or contract shall be under the control and supervision of the LEA, and (4) funds used to provide services under Title IV, Part A cannot be commingled with non-Federal funds. 75/ The apparent inability of independent schools to receive directly any funds, property, or services under Title IV suggests that the school does not become a direct recipient of federal financial assistance through participation in the program.

ED guidance also suggests that an independent school does not become an indirect recipient of federal financial assistance as a result of participation in the Title IV, Part A program. ED has stated that “[p]rivate schools with students who participate in programs conducted by LEAs that are funded under federal programs such as Title I of the Elementary and Secondary Education Act . . . are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds.” 76/ Title IV, Part A is a program similar to Title I, Part A. For example, the two programs are similar in their funding structure. Grants for both programs pass through SEAs to eligible LEAs. 77/ Moreover, for Title IV, Part A, ED allocates funds to each SEA based on the state’s share of funds under Title I, Part A. 78/ In addition, both programs require LEAs to provide services on an equitable basis. 79/ Therefore, private schools that participate in Title IV of the ESEA are also likely not considered recipients of Federal funds unless

74/ See *id.*

75/ See 20 U.S.C. § 7116(e)(2)(B) (noting that each application shall include insurances that the LEA comply with 20 U.S.C. § 7881 regarding equitable participation by private school children and teachers); 20 U.S.C. § 7881(d).

76/ 71 Fed. Reg. 62530, 62530 n.7 (Oct. 25, 2006).

77/ See 20 U.S.C. §§ 6332-6337, 7114(a)-(b).

78/ 20 U.S.C. § 7113(b)(1)(A).

79/ See *id.* §§ 6320(a)(1), 7116(e)(2)(B).

they otherwise receive a grant or subgrant of Federal funds. Under the relevant statutory language, LEAs must control the funds used to provide services and the title to materials, equipment, and property purchased with those funds, and the LEA must administer the funds and property. In addition, the “employee, person, association, agency, organization, or other entity” providing the services must be independent of private schools and of any religious organization. ^{80/} Accordingly, under *Grove City* and *Paralyzed Veterans* principles, it appears that under Title IV, Part A an independent school may not be an indirect recipient of federal financial assistance.

At least one court has reached a different conclusion. In an unpublished decision that pre-dates the NCLB, a federal district court concluded that a parochial school that participated in Title IV, Part A of the ESEA was a recipient of federal financial assistance for purposes of Section 504 of the Rehabilitation Act of 1973. ^{81/} The court found that the school was an indirect recipient of such assistance because the Title IV funds were earmarked for its students and teachers. We located no published court decision on point.

^{80/} 20 U.S.C. § 7881(d).

^{81/} *Dupre v. Roman Catholic Church of Diocese of Houma-Thibodaux*, Civ.A. 97-3716, 1999 WL 694081 (E.D. La. Sept. 2, 1999).

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

What is the program?

IDEA ensures that “children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” 82/ ED administers the program. 83/

How is the program structured?

ED makes grants to states. 84/ Under IDEA, the maximum grant that a state can receive is calculated by multiplying (a) the number of children in the state with disabilities in the 2004-2005 school year who received special education and related services by (b) 40% of the average per-pupil expenditure in public schools in the U.S., adjusted by an annual rate of change. 85/ The state must reserve a certain percentage for state-level activities. 86/ Any funds not reserved for state-level activities must be distributed to LEA via subgrants. 87/ The bulk of funding received by SEAs is passed on through subgrants to LEAs. 88/ LEAs are public entities and do not include independent schools. 89/ LEAs must apply to the appropriate SEA in order to receive subgrants. 90/

LEAs that receive a subgrant may use the funds for (1) special education and related services (2) early intervention educational services, and (3) high cost education and related services. 91/ LEAs must use the funds only to “pay the excess costs of providing special education and related services to children with disabilities.” 92/

82/ 20 U.S.C. § 1400(d); 34 C.F.R. § 300.1.

83/ 20 U.S.C. § 1402(a); 34 C.F.R. § 300.1.

84/ 20 U.S.C. § 1411(a).

85/ *Id.* § 1411(a)(2)(B).

86/ *Id.* § 1411(e)(2)(A).

87/ *Id.* § 1411(f)(1).

88/ *Id.* § 1441(f)(2)(A).

89/ 34 C.F.R. § 300.28.

90/ 20 U.S.C. § 1413(a).

91/ *Id.* § 1413(a)(4).

92/ *Id.* § 1413(a)(2).

How does an independent school participate in the program?

IDEA requires SEAs and LEAs to ensure the equitable participation of parentally-placed children with disabilities in IDEA programs and services. 93/ “Parentally-placed private school children with disabilities” means children with disabilities enrolled by their parents in private schools, as opposed to children placed within the private school by a public agency. 94/ Analysis as to whether an independent school that participates in IDEA is a recipient of federal financial assistance appears to differ depending on whether the child is parentally-placed versus placed into a private school by a public agency. 95/

LEAs’ obligations to parentally-placed private school children with disabilities are also different from their responsibilities to those enrolled in public schools. 96/ Parentally-placed children with disabilities do not have an individual entitlement to services they would receive if they were enrolled in a public school. 97/ Instead, the LEA is required to spend a proportionate amount of IDEA federal funds to provide equitable services to this group of children. 98/ Therefore, it is possible that some parentally-placed children with disabilities will not receive any services while others will. 99/

LEAs must consult private school officials regarding (1) the child find process, (2) the determination of the proportionate share of federal IDEA funds, including the determination of how that share was calculated, and (3) how, where, and by whom special education and related services will be provided. 100/

Any benefits or services provided under IDEA to private schools, “including materials and equipment,” must be “secular, neutral, and nonideological.” 101/ If the delivery of equitable services would violate a law or if the Secretary determines that an SEA, LEA, or other entity has substantially failed or is unwilling to provide for such equitable participation, the Secretary must arrange for alternative provisions of service to children with disabilities in private schools. 102/

93/ 20 U.S.C. § 1412 (a)(10)(A)(i); 34 C.F.R. § 300.138; *Provisions Related to Children With Disabilities Enrolled by Their Parents*, ED, 1 (February 2008),

<https://www2.ed.gov/admins/lead/speced/privateschools/idea.pdf>.

94/ See 34 C.F.R. § 300.130.

95/ See next section.

96/ 34 C.F.R. § 300.137; *Provisions Related to Children With Disabilities Enrolled by Their Parents*, at 1.

97/ 34 C.F.R. § 300.137(a); *Provisions Related to Children With Disabilities Enrolled by Their Parents*, at 1.

98/ U.S.C. § 1412 (a)(10)(A); 34 C.F.R. § 300.133; *Provisions Related to Children With Disabilities Enrolled by Their Parents*, at 1

99/ 34 C.F.R. § 300.138(a)(2).

100/ U.S.C. § 1412 (a)(10)(A)(iii); 34 C.F.R. § 300.134.

101/ 20 U.S.C. § 1412 (a)(10)(vi)(II).

102/ 20 U.S.C. § 1412(f)(1).

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

With respect to equitable participation in LEA subgrants, IDEA guidance suggests that independent schools whose students receive equitable services are not direct recipients of federal financial assistance under IDEA. Relevant statutory language for IDEA provides that, to the extent that an LEA uses funds to provide special education and related services, (1) the LEA must control the funds to provide the services, as well as title to materials, equipment, and property purchased with those funds 103/ and cannot use funds to benefit a private school 104/ (2) the employees of the LEA must provide the services or must contract with an individual, association, agency, organization, or other entity for the services 105/ and (3) funds used to provide professional development services under IDEA cannot be commingled with state funds and can only be used to supplement Federal, State, and local funds expended for special education and related services. 106/ The apparent inability of independent schools to receive directly any funds, property, or services under IDEA suggests that the school does not become a direct recipient of federal financial assistance through participation in the program.

ED guidance also suggests that an independent school does not become an indirect recipient of federal financial assistance as a result of enrolling students who receive equitable services under in IDEA. ED has stated that “[p]rivate schools with students who participate in programs conducted by LEAs that are funded under federal programs such as...the Individuals with Disabilities Education Act . . . are not considered recipients of Federal funds unless they otherwise receive a grant or subgrant of Federal funds.” 107/ ED regulations suggest that independent schools are not indirect recipients of IDEA funds because they are not the intended ultimate recipients of such funds: An LEA is prohibited from allocating IDEA funds for “[t]he needs of a private school” or “[t]he general needs of the students enrolled in the private school.” 108/ In addition, IDEA services provided to parentally-placed private school children with disabilities, “must be secular, neutral, and nonideological.” 109/ Accordingly, under *Grove City* and *Paralyzed Veterans* principles, it appears that under IDEA an independent school is not an indirect recipient of federal financial assistance.

The analysis may change if the child is placed into or referred to a private school by a public agency. IDEA “provides for placement in private schools at public expense”

103/ 20 U.S.C. § 1412 (a)(10)(A)(vii); 34 C.F.R. § 300.144(a).

104/ 34 C.F.R. § 300.141.

105/ 20 U.S.C. § 1412 (a)(10)(A)(vi)(I); 34 C.F.R. § 300.142(a)

106/ 20 U.S.C. § 1412 (a)(17); 34 CFR § 300.133(d); *see also* 20 U.S.C. § 1413(a)(2)(A).

107/ 71 Fed. Reg. 62530, 62530 n.7 (Oct. 25, 2006).

108/ 34 C.F.R. § 300.141.

109/ *Id.* § 300.138(c)(2).

to ensure that students with disabilities receive the free and appropriate public education to which they are entitled. 110/ Even though the LEA may select, pay for, and coordinate the private school placement, the private school may still be considered the intended recipient. A district court in California recently came to this conclusion, reasoning that like the students in *Grove City*, the school district (i.e. the public agency) was simply acting as the conduit of the aid to its intended recipients (the private schools) which are benefitting generally from the funds. 111/ As in *Paralyzed Veterans*, the private school was in the position to accept or reject the federal funds because it could elect to take the student placements under the IDEA. 112/ Another district court in New Jersey agreed, explaining that state department of education regulations extended the obligation to comply with the requirements of IDEA to the private school and that the private school was a recipient of federal funds.113

110/ See 20 U.S.C. § 1412(a)(10)(B); 34 C.F.R. § 300.146.

111/ See, e.g., *Smith v. Tobinwood*, No. 16-CV-01676-RS, 2016 WL 3519244, at *6 (N.D. Cal. June 29, 2016) (finding that “when a disabled child...gets placed in private school on the public dime, that private school...is the intended recipient of the federal financial assistance disbursed via the IDEA”).

112/ See *Paralyzed Veterans*, 477 U.S. at 606; *Tobinwood*, 2016 WL 3519244, at *6. *But see J.M. v. Nobel Learning Communities, Inc.* No. CIV.A. 12-3882, 2013 WL 4833846, at *4 (rejecting the Plaintiffs’ claim that the Defendant can simply refuse IDEA services on the grounds that such a blanket refusal would likely expose the Defendant to other federal liability).

113 *P.N. v. Greco*, 282 F. Supp. 2d 221,237, 241 (D.N.J. 2003) (finding private school that accepted placement of handicapped student under IDEA was recipient of federal funds). The Greco court also indicated that New Jersey state regulations implementing IDEA explicitly extended IDEA’s requirements to “private entities providing publicly funded educational programs.” *Id.* at 237.

NATIONAL SCHOOL LUNCH PROGRAM

What is the program?

Under the National School Lunch Act, as amended, the federal government created the National School Lunch Program (“School Lunch Program”) that helps states to deliver lunches to school children through grants and food donations. 114/ The U.S. Department of Agriculture (“USDA”) administers the program.

How is the program structured?

Payments and food donations are made by the USDA to SEAs. 115/ Each SEA, in turn, distributes most of the federal assistance that it receives to “school food authorities” that administer the program in participating schools. 116/ A “school food authority” is defined as “the governing body which is responsible for the administration of one or more schools; and has the legal authority to operate the [School Lunch] Program therein *or* be otherwise approved by [the Food and Nutrition Service] to operate the [School Lunch] Program.” 117/ An LEA is typically a school food authority.

To participate in the School Lunch Program, a school food authority must submit an application and Free and Reduced Price Policy Statement to its SEA. 118/ Upon approval, the school food authority must enter into an agreement with the SEA agreeing to certain terms and conditions of participation in the program. 119/ The “school food authority” implements the program in its school(s) through the operation of a “nonprofit school food service,” which essentially involves “food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services”. 120/ The school food authority receives funding for the program by applying for reimbursements of lunches (and, in some qualifying cases, meal supplements) that it has served to children in its school(s). 121/

114/ 42 U.S.C. § 1751; 7 C.F.R. § 210.1.

115/ See 42 U.S.C. §§ 1753, 1755.

116/ *Id.* § 1755, 1757; 7 C.F.R. §§ 210.3(d), 210.6-210.7.

117/ 7 C.F.R. § 210.2.

118/ *Id.* § 210.9(a).

119/ *Id.* § 210.9(b).

120/ *Id.* §§ 210.2, 210.9(b)(1).

121/ *Id.* § 210.7.

How does an independent school participate in the program?

“School food authorities” of interested nonprofit private schools generally apply to the relevant SEA to participate in the program and receive school lunch reimbursements. 122/ “In some States, however, the [SEA] is prohibited by statute from disbursing Federal funds to nonprofit private schools. In such instances, the application should be submitted to the alternate State agency or the appropriate Food and Nutrition regional office.” 123/

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

The structure of the School Lunch Program as well as USDA regulations suggest that an independent school is a recipient of federal financial assistance if its governing board participates in the School Lunch Program as a “school food authority.” Under the School Lunch Program, school food authorities receive federal funds in the form of reimbursements or food donations either indirectly through a state agency or directly from the federal government. Significantly, USDA regulations require school food authorities to comply with federal nondiscrimination laws that apply only to recipients of federal financial assistance, which suggests that the federal government considers school food authorities to be recipients of federal financial assistance. 124/ Thus, an independent school may be considered a recipient of federal financial assistance if its governing body participates in the School Lunch Program as a “school food authority.”

122/ CFDA’s Program No. 10.555; *see also* 7 C.F.R. § 210.9(a).

123/ CFDA’s Program No. 10.555; *see also* 42 U.S.C. § 1759(b) (“If a State educational agency is not permitted by law to disburse the funds paid to it under this Act to any of the nonpublic schools in the State, the Secretary shall disburse the funds directly to such schools within the State for the same purposes and subject to the same conditions as are authorized or required with respect to the disbursements to public schools within the State by the State educational agency.”); 7 C.F.R. § 210.3(b) (“If the State educational agency is unable to administer the Program in public or private nonprofit residential child care institutions or nonprofit private schools, then Program administration for such schools may be assumed by [the Regional Office of the Food and Nutrition Service of the Department] . . . or such other agency of the State as has been designated by the Governor or other appropriate executive or legislative authority of the State and approved by the Department to administer such schools.”).

124/ 7 C.F.R. § 210.23(b) (“In the operation of the program, no child shall be denied benefits or be otherwise discriminated against because of race, color, national origin, age, sex or disability.”); *see also id.* § 210.9(b)(11) (the school food authority agreement with state must provide that the school food authority will comply with the “requirements of [the USDA’s] regulations regarding nondiscrimination”).

SPECIAL MILK PROGRAM FOR CHILDREN

What is the program?

The Special Milk Program for Children (“Milk Program”), implemented under the Child Nutrition Act of 1966, as amended, seeks to “encourage consumption of fluid milk by children in the United States in (A) nonprofit schools of high school grade and under . . . and (B) nonprofit nursery schools, child care centers, settlement houses, summer camps and similar nonprofit institutions” which “do not participate in a meal service program authorized under [the Child Nutrition Act] or the National School Lunch Act.” 125/ Schools that participate in other meal programs may also apply for reimbursement through the Milk Program for milk provided to students in “split-session kindergarten programs” who do not have access to the meal programs at their schools. 126/ The USDA administers the program.

How is the program structured and how does an independent school participate in the program?

The USDA distributes funds to SEAs. 127/ SEAs reimburse participating “school food authorities” and nonprofit child care institutions for the costs associated with their delivery of milk to students under the terms of the statute. 128/ A “school food authority” is defined as “the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a milk program therein.” 129/ That definition includes “a nonprofit agency to which such governing body has delegated authority for the operation of a milk program in a school.” 130/ The “school food authority” or nonprofit child care institution implements the program in its school(s) or facility through a “nonprofit milk service”, which is a “milk service maintained by or on behalf of the school or child-care institution for the benefit of the children, all of the income from which is used solely for the operation or improvement of such milk service.” 131/

Each participating school authority or nonprofit child care institution must enter into an agreement with its SEA agreeing to certain terms and conditions of participation in the program. 132/ The authority or institution may also opt to serve free milk to

125/ 42 U.S.C. § 1772(a)(1).

126/ *Id.* § 1772(a)(2).

127/ *See* 7 C.F.R. §§ 215.4-215.5.

128/ *Id.* §§ 215.5(a), 215.6(a). The state may reserve up to 1% of its federal funding for “special developmental projects.” *Id.* § 215.6(a).

129/ *Id.* § 215.2.

130/ *Id.*

131/ *Id.* §§ 215.2; 215.7(d)(1).

132/ *Id.* § 215.7(d).

eligible students, contingent upon submission of a “free milk policy statement” and agreement that it will serve all qualifying children. 133/

If the SEA is prohibited from distributing funds to an interested school or child care institution, USDA’s Food and Nutrition Services Regional Offices (“FNSROs”) “shall administer the program” at that school or institution. 134/

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

The structure of the Milk Program as well as USDA regulations suggest that an independent school is a recipient of federal financial assistance if its governing board participates in the Milk Program as a “school food authority.” Under the Milk Program, school food authorities receive federal funds in the form of reimbursements or food donations either indirectly through a state agency or directly from the federal government. Significantly, USDA regulations require that “[t]he Department’s agreements with State agencies, the State agencies’ agreements with School Food Authorities and child-care institutions and the FNSRO agreements with School Food Authorities administering nonprofit private schools and with child-care institutions” must include “assurances” mandated under USDA’s “regulations on nondiscrimination in federally assisted programs.” 135/ Thus, an independent school may be considered a recipient of federal financial assistance if its governing body participates in the Milk Program as a “school food authority.”

133/ *Id.* § 215.7(b),(d)(2).

134/ *Id.* § 215.3(c).

135/ *Id.* § 215.14; *see also id.* § 215.7(d)(3) (requiring compliance with “the Department’s regulations respecting nondiscrimination”).

SCHOOL BREAKFAST PROGRAM

What is the program?

Under the School Breakfast Program, as amended, the federal government helps states initiate, maintain, or expand nonprofit breakfast programs in schools. 136/ The USDA administers the program.

How is the program structured and how does an independent school participate in the program?

The USDA makes breakfast assistant payments to SEAs. 137/ Each SEA, in turn, uses the federal funds it receives to reimburse or make advance payments to “school food authorities” that administer the program in participating schools. 138/ A “school food authority” is defined as “the governing body which is responsible for the administration of one or more schools and which has the legal authority to operate a breakfast program therein.” 139/ An LEA is typically a school food authority.

To participate in the School Breakfast Program, the school food authority must submit an application and free and reduced price policy statement to its SEA. 140/ School food authorities that simultaneously apply for the School Lunch Program and the School Breakfast Program must submit one free and reduced price policy statement for both. 141/ Upon approval, the school food authority must enter into an agreement with the SEA. 142/ The school food authority implements the program in its school(s) through the operation of a “nonprofit school food service,” which means “all food service operations conducted by the school food authority principally for the benefit of schoolchildren, all of the revenue from which is used solely for the operation or improvement of such food services.” 143/ The school food authority receives funding for the program by applying for reimbursements of breakfasts. 144/

136/ 42 U.S.C. § 1773(a); *see also* 7 C.F.R. § 220.1.
137/ 42 U.S.C. § 1773(b)(1)(A)(i); 7 C.F.R. § 220.4(a).
138/ 7 C.F.R. § 220.6(a).
139/ *Id.* § 220.2.
140/ *Id.* § 220.7(a).
141/ *Id.*
142/ *Id.* § 220.7(e).
143/ *Id.* §§ 220.7(e); 220.2.
144/ *Id.* § 220.5(a).

How is the program structured?

Nonprofit private schools and child care institutions apply to the relevant SEA. 145/ In some states, however, the SEA is prohibited by statute from disbursing federal funds to nonprofit private schools. In such instances, the application will be referred to the alternate state agency or the appropriate Food and Nutrition Service (FNS) regional office. 146/

Is an independent school that participates in this program a recipient of federal financial assistance as a result of such participation?

The structure of the School Breakfast Program as well as USDA regulations suggest that an independent school is a recipient of federal financial assistance if its governing board participates in the School Lunch Program as a “school food authority.” Under the School Breakfast Program, “school food authorities” receive federal funds in the form of reimbursements or advance payments through SEAs or FNSRO. 147/ Significantly, USDA regulations require school food authorities to comply with the Department’s regulations respecting nondiscrimination that applies to recipients of federal financial assistance, which suggests that the federal government considers “school food authorities” to be recipients of federal financial assistance. 148/ Thus, an independent school may be considered a recipient of federal financial assistance if its governing body participates in the School Lunch Program as a “school food authority.”

145/ CFDA’s Program No. 10.553; *see also* 7 C.F.R. §§ 220.13, 220.7

146/ CFDA’s Program No. 10.553; *see also* 7 C.F.R. § 220.3 (“Within the States, responsibility for the administration of the Program in schools as described in paragraphs (1) and (2) of the definition of School in § 220.2 shall be in the State educational agency, except that FNSRO shall administer the Program with respect to nonprofit private schools and adding in their place the words “as described in paragraph (1) of the definition of School in § 220.2 in any State wherein the State educational agency is not permitted by law to disburse Federal funds paid to it under the Program; *Provided, however,* that FNSRO Office of the Food and Nutrition Service] of the Department shall also administer the Program in all other nonprofit private schools which have been under continuous FNS administration since October 1, 1980, unless the administration of such private schools is assumed by a State agency”).

147/ 7 C.F.R. § 220.6.

148/ *Id.* § 220.7(e)(15); *see also* 7 C.F.R. § 15.1 (“The purpose of the regulations in this part is to effectuate the provisions of title VI of the Civil Rights Act of 1964...to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture or any Agency thereof”).