

M E M O R A N D U M

September 13, 2005

*PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION*

TO: AESA

FROM: Maree F. Sneed
Jennifer Stillerman

RE: **Supplemental Educational Services & Educational Service Agencies**

This memorandum responds to your inquiry regarding the delivery of supplemental educational services (“SES”) by educational service agencies (“ESAs”) under the No Child Left Behind Act of 2001 (“NCLB”).

I. What Are Supplemental Educational Services?

Supplemental educational services are “tutoring and other supplemental academic enrichment services” provided free of charge to eligible students “outside of the regular school day.” 34 C.F.R. § 200.45(a); U.S. Department of Education, Non-Regulatory Guidance: Supplemental Educational Services, A-1, at 1 (June 13, 2005) (“SES Guidance”). Such services must be “[s]pecifically designed to . . . [i]ncrease the academic achievement of eligible students as measured by the State’s assessment system” and to “[e]nable these children to attain proficiency in meeting State academic achievement standards.” 34 C.F.R. § 200.45(a)(2). SES programs must be “consistent with the content and instruction used by the local educational agency (LEA)” and “aligned with the State’s academic content standards.” SES Guidance, A-1, at 1. In addition, the services must be “[o]f high quality and research-based.” 34 C.F.R. § 200.45(a)(3).

II. Which Students May Receive SES?

A student is eligible to receive supplemental educational services if he or she comes from a low-income family and is enrolled in a Title I school that has

failed to make adequate yearly progress (“AYP”) for at least 3 years in a row. *Id.* § 200.45(b),(c)(1); see also SES Guidance, A-2, A-5, at 1-3. ^{1/} As the Department of Education’s (“DOE’s” or the “Department’s”) Guidance notes, a student’s eligibility for supplemental educational services is not determined by considering “whether the student is a member of a subgroup that caused the school to not make AYP or whether the student is in a grade that takes the statewide assessments” SES Guidance, A-5, at 3. Rather, LEAs are instructed simply to “determine family income on the same basis that the LEA uses to make allocations to schools under subpart A” of Title I. 34 C.F.R. § 200.45(b)(2). The majority of LEAs distribute Title I, Part A funding to schools based on the number of students at those schools who are “certified for free and reduced priced meals provided under the National School Lunch Program.” SES Guidance, F-5, at 25. If an LEA finds that it has inadequate funds “to serve all eligible children,” it is required to “give priority to the lowest-achieving eligible students.” *Id.* F-3, at 24. When making this determination, LEAs are instructed to employ “fair and equitable criteria,” and “use professional judgment in applying those criteria.” *Id.*

According to a study published by the Center on Education Policy (“CEP”) in March 2005, “[t]he average percentage of students eligible for [SES] has . . . remained fairly steady in recent years, totaling about 1% of students in 2004-2005.” Center on Education Policy, From the Capital to the Classroom: Year 3 of the No Child Left Behind Act, 125 (March 2005) (“CEP, From the Capital to the Classroom”). CEP reported that, “[i]n the districts [it] surveyed, the percentage of eligible students who actually received supplemental educational services has been

^{1/} Schools that do not achieve AYP for two consecutive years are identified for improvement. 34 C.F.R. § 200.32(a)(1). Thus, a school that fails to make AYP for three consecutive years is in its second year of school improvement. *Id.* § 200.32(c)(1). Title I schools are required to offer public school choice during their first year of improvement and SES (along with school choice) during their second. *Id.* §§ 200.44(a), 200.45(c)(1).

The Department recently announced that it is launching “Supplemental Educational Services Pilot Programs” for the 2005-06 school year. See U.S. Department of Education, Supplemental Educational Services Pilot Programs, <http://www.ed.gov/nclb/choice/help/sespilot.html> (“SES Pilot Programs”). This initiative includes a pilot program in Virginia that permits “four divisions (districts)” to “reverse the order in which public school choice and SES are offered in the school improvement timeline.” *Id.* “As a result, SES will be offered to low-income students in schools marked ‘in need of improvement’ one year earlier.” *Id.* Under its “flexibility agreement” with DOE, Virginia has “committed to increasing the number of eligible students participating in SES; extending enrollment periods; expanding options for parents; and providing achievement data on students in the SES pilot districts.” *Id.*

relatively small, just 18% in 2004-2005.” *Id.* (That figure is “higher than the 1% of eligible students [who used] the public school choice option” to change schools in 2004-2005. *Id.*)

III. How Are SES Funded?

Under NCLB, an LEA is required to “spend an amount equal to 20 percent of its Title I, Part A allocation, before any reservations, on: (1) Choice-related transportation; (2) Supplemental educational services; or (3) A combination of (1) and (2).” *SES Guidance*, K-2, at 41. For example, if an LEA’s Title I, Part A allocation is \$100,000, that LEA must spend \$20,000 on choice-related transportation and supplemental educational services, “[u]nless a lesser amount is needed to meet demand” *See id.* The level of funding “that an LEA will devote to supplemental educational services depends in part on how much it spends on choice-related transportation.” *Id.* “For instance, an LEA might have to spend 10 percent of its Title I allocation [or \$10,000 in the above example] to transport students who exercise[d] the option to transfer in the previous year and are still enrolled in their new schools; this would leave a total of 10 percent [or \$10,000] for supplemental educational services and the provision of transportation to any additional students who wish to change schools in the current year.” *Id.* K-4, at 42.

“[I]f the cost of satisfying all requests for supplemental educational services exceeds an amount equal to 5 percent of an LEA’s Title I, Part A allocation, the LEA may not spend less than that amount on those services.” *Id.* K-2, at 41. Consequently, if it would cost the LEA in the above example more than \$5,000 to meet SES demand, that LEA would be required to spend at least \$5,000 on supplemental educational services.

In terms of per-pupil spending, NCLB “sets the per-pupil cost for supplemental educational services at the lesser of an LEA’s per-pupil allocation under Part A of Title I . . . or the actual cost of the services.” *Id.* K-14, at 46. ^{2/} The Department’s Guidance observes that “[i]n some LEAs the per-pupil ‘tuition’ charged by some State-approved providers that are available to serve students in the LEA may exceed the per-pupil amount the LEA can spend.” *Id.* K-18, at 47. In such circumstances, the LEA is permitted to “supplement the amount available to a child in order to allow that child to receive supplemental educational services from

^{2/} An LEA’s “per-pupil allocation” is “[t]he amount of its allocation under [Title I, Part A], divided by the number of students from families below the poverty level” 34 C.F.R. § 200.48(c)(1). DOE defines the “actual cost” of supplemental educational services as “the amount that a provider charges for services.” U.S. Department of Education, *Non-Regulatory Guidance: Supplemental Educational Services*, K-15, at 46 (June 13, 2005).

the provider selected by his or her parents.” *Id.* However, the LEA will be prohibited from including “any amount provided to a child in excess of the per-pupil cap against the 20 percent of its Title I, Part A funding that it must spend for supplemental educational services and choice-related transportation.” *Id.* For example, “if the cost of enrolling a child with a provider is \$1,500 and the LEA’s per pupil cap . . . is only \$1,000, the LEA may make available to the child the full \$1,500 but it may count only the first \$1,000 toward meeting the 20-percent requirement.” *Id.* The Department’s Guidance notes a broad range in the per-pupil cap across LEAs, from approximately \$900 to \$2,400. *Id.* K-14, at 46.

The upper limit on an LEA’s per-pupil expenditures for purposes of the 20-percent set aside “applies to the cost of instructional services only,” in other words to “direct expenditures for . . . supplemental educational services.” *Id.* K-12, K-14, at 45-46. As DOE observes, “LEAs may incur additional per-pupil costs related to the administration of supplemental educational services, transportation of students to a provider, or appropriate accommodations for students with disabilities.” *Id.* K-14, at 46. “[A]dministrative costs incurred in providing . . . supplemental educational services” may be paid from Title I funds if they are “reasonable and necessary” but may not “count . . . toward [an LEA’s] 20-percent requirement.” *Id.* K-12, at 45-46. Examples of such administrative expenses include costs incurred to inform parents about supplemental educational services (for instance, through letters or events) ^{3/} and to negotiate LEA-provider contracts. Interview with Stacy Kreppel, U.S. Department of Education, Office of Innovation and Improvement (September 12, 2005) (“Kreppel Interview”).

IV. Can Educational Service Agencies Be SES Providers?

ESAs may provide supplemental educational services so long as they receive approval from their State based on their State’s published criteria. As the DOE’s SES Guidance indicates, “any public or private (non-profit or for-profit) entity that meets the State’s criteria for approval” may be a provider of supplemental educational services. SES Guidance, C-8, at 12. Both DOE regulations and the Guidance make clear that ESAs “are among the types of entities that may apply” to state educational agencies (“SEAs”) for approval as SES

^{3/} In a study on “Early Implementation” of SES requirements during the 2002-2003 school year, DOE reported that “[o]ne district estimated that the cost of mailing letters to the families of students in just three identified schools was \$50,000 because the district had to find the parents’ addresses, translate the letter into multiple languages, and send and resend the letters to parents who did not receive them on the first or second mailing.” U.S. Department of Education, Office of the Under Secretary, Early Implementation of Supplemental Educational Services under the No Child Left Behind Act: Year One Report, xiii, 25 (2004).

providers. Id. (“Public schools (including charter schools), private schools, LEAs, educational service agencies, institutions of higher education, faith-based and community-based organizations, and private businesses are among the types of entities that may apply for approval by the SEA.”) (emphasis added); 34 C.F.R. § 200.47(b)(1) (“[P]rovider means a non-profit entity, a for-profit entity, an LEA, an educational service agency, a public school, . . . or a private school”) (emphasis added).

NCLB defines an educational service agency as “[a] regional public multi-service agency authorized by state statute to develop, manage, and provide services or programs to local educational agencies.” Elementary and Secondary Education Act of 1965 (“ESEA”), as amended, § 9101(17), codified at 20 U.S.C. § 7801(17). The statute also includes “educational service agencies and consortia of those agencies” under its general definition of a “local educational agency,” which is: “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.” Id. § 9101(26)(A),(D), codified at 20 U.S.C. § 7801(26)(A),(D). 4/

It should be noted that LEAs (and schools) that have been identified for improvement may not serve as SES providers. 34 C.F.R. § 200.47(b)(1)(iv)(A)-(B). 5/ Consequently, an ESA that is not adequately independent from a district

4/ This memorandum does not analyze the circumstances under which an ESA might be treated as an LEA under NCLB. Please advise us if you would like us to address this issue.

5/ As part of its new SES Pilot Programs, DOE intends to “enter into flexibility agreements with select urban districts that are committed to providing SES to more eligible children.” SES Pilot Programs. Chicago Public Schools, “the first urban district to enter into a flexibility agreement with the Department,” id., will be permitted “to provide supplemental services to families, even though the district has been identified as ‘needing improvement,’” N-C-L-B Spells Free Tutoring, Prepared Remarks for Secretary Spellings at the Supplemental Educational Services (SES) Pilot Announcement at Sherwood Elementary School in Chicago, Illinois (Sept. 1, 2005), <http://www.ed.gov/news/speeches/2005/09/09012005.html>.

In return, Chicago has “agreed to provide: [e]arly notification to parents of their children’s eligibility to participate in SES; [e]xtended enrollment periods . . . ; [t]he use of district facilities by non-district providers for a reasonable fee; and [a]cademic data to an independent third party to evaluate the effectiveness of SES

identified for improvement (or that itself receives Title I funds as an LEA under NCLB) may also be prohibited from serving as an SES provider. In Pennsylvania, DOE reportedly granted an appeal filed by private providers that challenged the State's approval of Philadelphia's intermediate unit as an SES provider. Katherine Shek, "ED orders Philadelphia to halt tutoring programs," Education Daily (Feb. 2, 2005). DOE apparently concluded that the intermediate unit was insufficiently independent from the Philadelphia School District, which had been identified for improvement and is the intermediate unit's single member. See id.; Catherine Gewertz, "Chicago, Ed. Dept. Settle Tutoring Dispute," Education Week (Feb. 9, 2005); Karla Scoon Reid, "Districts Spar With Ed. Dept. Over Tutoring," Education Week (Nov. 3, 2004).

A spokesperson for DOE was quoted as stating that the intermediate unit must "become an independent body" with "an independent board to oversee its operation" in order to deliver supplemental educational services to students in the Philadelphia School District. Mensah M. Dean, "Schools told to change tutoring setup," Philadelphia Daily News (Feb. 2, 2005). In addition, DOE reportedly found it difficult to distinguish between the district's "extended-day program" ("not part of the NCLB tutoring program" and "run through" the intermediate unit) and the supplemental educational services delivered by the intermediate unit under NCLB. Shek, "ED orders Philadelphia to halt tutoring programs."

The mere fact that an ESA offers programs or services to the students of a district or school that has been identified for improvement would not, standing alone, appear to disqualify that ESA from serving as an SES provider. See SES Guidance, C-24, at 17 ("Programs that operate independently from the [identified] school and are not a part of the school's regular program may become supplemental educational service providers if they meet the SEA's criteria. The status of the school does not affect the eligibility of an independent entity housed in the school.").

Apart from becoming SES providers, ESAs may play a role in facilitating communication among districts about effective approaches to SES delivery and in supporting cooperative solutions to some of the challenges posed by SES implementation. Indeed, DOE has noted that "[n]eighboring districts or districts with similar demographics often face common challenges . . . and could benefit from hearing each other's strategies or, in some instances, from approaching common problems collaboratively." U.S. Department of Education, Office of Innovation and Improvement, Creating Strong Supplemental Educational Services Programs, 42 (May 2004) ("DOE, Creating Strong [SES] Programs"). Such cooperative initiatives – including those involving regional public entities – would be considered administrative in nature and could be paid for out of Title I funds.

services." SES Pilot Programs. The Department plans to announce additional "flexibility agreements" with "select urban school districts" "in the near future." Id.

Kreppel Interview. However, as indicated above, administrative costs associated with SES implementation may not be included in an LEA's 20-percent set aside for supplemental educational services and choice-related transportation.

We also note that ESAs may be eligible to provide certain technical assistance to LEAs on behalf of their SEAs. The Department's Guidance observes that an SEA "can provide technical assistance to its LEAs on removing barriers to parent participation in supplemental educational services." SES Guidance, B-2, at 5. Under NCLB, SEAs may "work with . . . educational service agencies or other local consortia . . . to provide technical assistance to local educational agencies and schools, including . . . technical assistance relating to parental involvement . . ." ESEA, as amended, § 1111(c)(4), codified at 20 U.S.C. § 6311(c)(4).

V. How Do ESAs Become SES Providers?

An ESA interested in becoming an SES provider must submit an application to its SEA and obtain SEA approval so that it may appear on the State's list of approved providers. See SES Guidance, C-1, C-2, at 8-9. The SEA must offer interested entities the opportunity to apply for approval at a minimum of once per year, and maintain "an updated list of approved providers . . . from which parents may select." 34 C.F.R. § 200.47(a)(1)(ii)(A),(a)(3); SES Guidance, C-1, C-2, at 8-9. Applications may be obtained from SEAs (or their websites). State-by-state links are available on the website of the Supplemental Educational Services Quality Center ("SES Quality Center") at <http://www.tutorsforkids.org/state.asp>.

The SES Quality Center's Toolkit for providers summarizes the categories of information sought by SEAs from potential providers in their SES applications. Requested information covers such areas as: (1) the applicant's "[c]urrent experience," including the grades/number of students served, "experience with specific student populations," and "geographic setting"; (2) the applicant's "[b]asic [SES] program information, including academic subjects, grade levels and needs of students served, location, transportation, cost, etc."; and (3) information concerning the applicant's "[p]rogram design," "operations," and "organizational capacity." Supplemental Educational Services Quality Center, The Providers' Toolkit for Supplemental Educational Services, 11-21 (December 2004).

VI. What Criteria Must ESAs Meet in Order to Obtain State Approval as Providers?

The SEA must establish, publish, and utilize "objective criteria for approving [SES] providers." SES Guidance, C-1, at 8. The State may only approve a provider if it: (1) "[h]as a demonstrated record of effectiveness in increasing

student academic achievement”; (2) “[w]ill use instructional strategies that are high quality, based upon research, and designed to increase student academic achievement”; (3) “[p]rovides services that are consistent with the instructional program of the LEA and with State academic content and achievement standards”; (4) “[i]s financially sound”; and (5) “[w]ill provide supplemental educational services consistent with applicable Federal, State, and local health, safety, and civil rights laws.” *Id.* The SEA is prohibited from mandating that a provider “hire only staff who meet” NCLB’s “highly qualified” requirements. 34 C.F.R. § 200.47(b)(3).

An SEA must “[r]emove from [its] list any provider that fails for two consecutive years to contribute to increased student proficiency relative to state academic content and achievement standards.” DOE, Creating Strong [SES] Programs, at 4; see also 34 C.F.R. § 200.47(a)(4)(ii).

VII. What Is the Relationship Between Providers and LEAs?

Each provider chosen off of the State’s list is required to sign an agreement with the relevant LEA. 34 C.F.R. § 200.46(b). That agreement must “[r]equire the LEA to develop, in consultation with the parents and the provider, a statement that includes – (A) Specific achievement goals for the student; (B) A description of how the student’s progress will be measured; and (C) A timetable for improving achievement.” *Id.* § 200.46(b)(2)(i). ^{6/} In addition, the provider-LEA contract must set forth “procedures for regularly informing the student’s parents and teachers of the student’s progress” ^{7/} and “[p]rovide for the termination of the agreement if the provider is unable to meet the goals and timetables specified in the agreement.” *Id.* § 200.46(b)(2)(ii)-(iii).

If the provider will be serving a “student with disabilities under IDEA or a student covered under Section 504,” the agreement “must be consistent with the student’s individualized education program under” IDEA or “the student’s individualized services under Section 504.” *Id.* § 200.46(b)(3). Finally, the contract

^{6/} Some districts “have created a learning plan template.” U.S. Department of Education, Office of Innovation and Improvement, Creating Strong Supplemental Educational Services Programs, 31 (May 2004) (“DOE, Creating Strong [SES] Programs”).

^{7/} For instance, “Los Angeles requires all providers to send progress reports to a student’s parents and teachers after every 15 hours of service.” *Id.* at 36. “Forsyth’s contract calls for providers to supply parents and teachers with the results of pre- and post-testing, as well as biweekly progress reports.” *Id.*

must state “how the LEA will pay the provider,” ^{8/} and “[p]rohibit the provider from disclosing to the public, without the written permission of the student’s parents, the identity of any student eligible for, or receiving, supplemental educational services.” Id. § 200.46(b)(2)(iv)-(v).

According to DOE’s Guidance, an LEA is not permitted to “impose requirements that relate to whether a provider has an effective educational program,” SES Guidance, G-3, at 30, but may “impose reasonable administrative and operational requirements through its agreements with providers,” id. G-4, at 30-31; see also DOE, Creating Strong [SES] Programs, at 18 (“[D]istricts are routinely including in their contract such specifics as staff clearance requirements (e.g., fingerprinting and background checks), insurance needed, and child abuse reporting requirements.”).

VIII. Delivering SES: Methods and Challenges

This section outlines various approaches and obstacles to SES delivery that ESAs might consider in evaluating whether to apply for SEA approval as a provider, how to design SES programs, and potential areas of greatest need.

Supplemental educational services “typically take the form of before- or after-school individual tutoring or small group instruction.” CEP, From the Capital to the Classroom, at 126. While “[m]any providers are offering ‘hands-on’ tutoring by trained instructors,” a segment of providers offers “Internet-based or computer-based instruction and academic support that students can access in a school, at a community center, or at home.” Steve Fleischman, White Paper: The Role of Educational Technology in Meeting the Promise of Supplemental Educational Services, 3 (U.S. Department of Education). DOE’s SES Guidance recognizes that providers may employ such “alternate methods for delivery of services,” including “online, Internet-based approaches, [and] other distance-learning technologies.” SES Guidance, C-10, at 13. It also specifies that providers utilizing “technology to deliver tutoring services [may] provide students with computers for the students to use or keep as part of the provider’s instructional program.” Id. ^{9/} Whether operating “hands-on” or online programs, providers are

^{8/} “Billing arrangements generally require the provider to submit a listing of the services that have been provided, for whom, for how many hours, and at what cost.” Id. at 18.

^{9/} According to one school district’s experience, supplying students with computers may not guarantee their access to online supplemental educational services if those students do not have Internet access at home. In an account published by CEP, the Grant Joint Union High School District of California

permitted to offer their services not only before and after school but also in the summer to “augment school-year instruction” and “help reduce ‘summer learning loss.’” Id. J-2, at 39-40.

With respect to content, the Department’s report on SES implementation during 2002-2003 found that a majority of providers in the DOE study “offer[ed] services that focus on reading instruction,” with “instructional approach[es]” varying from “detailed diagnosis and scripted lessons to more general help with homework.” U.S. Department of Education, Office of the Under Secretary, Early Implementation of Supplemental Educational Services under the No Child Left Behind Act: Year One Report, xiv, 30 (June 2004) (“DOE, Early Implementation”). In addition, “[s]ome providers have developed or implemented their own assessment instruments that they use to measure student progress.” Dr. Steven M. Ross & Supplemental Educational Services Quality Center, Supplemental Educational Service Providers; Suggested Strategies for States, 5 (March 2005).

To encourage greater symmetry and continuity in content and experience, DOE recommends strong communication between providers and students’ regular classroom instructors. DOE, Creating Strong [SES] Programs, at 19. DOE observes that while “most districts supply providers with students’ most recent standardized test scores, many classroom teachers can provide a more comprehensive understanding of students’ skill levels and learning needs than is available from assessment scores alone.” Id. In Los Angeles, for example, providers are required to “give classroom teachers copies of student learning plans that providers must develop for each student to guide services, and progress reports that require providers to check a box indicating whether the student is making satisfactory or unsatisfactory progress.” Gail L. Sunderman & Jimmy Kim, Increasing Bureaucracy or Increasing Opportunities? School District Experience with Supplemental Educational Services, 29 (Cambridge, MA: The Civil Rights Project at Harvard University 2004).

In addition, a provider’s “capacity to serve all grade levels and all student needs” is significant. CEP, From the Capital to the Classroom, at 131. “[A]ccording to [CEP’s] survey,” “only 42% of districts required to offer supplemental educational services reported that most or all of their outside providers were able to serve the needs of students with disabilities in 2003-2004” and “only 32% of these districts reported that most or all of their outside providers were able to serve the

explained that “families [in its district] did not have internet service or the money to pay for it. Some parents did not even have a telephone” Center on Education Policy, From the Capital to the Classroom: Year 3 of the No Child Left Behind Act, 141, Box 5-D (March 2005).

needs of English language learners.” *Id.* CEP also found that “older students especially appeared underserved.” *Id.* DOE has observed that middle school students in particular may show “some resistance” to participating in SES programs because they feel “self-conscious about needing help” and are “embarrassed to admit to their peers that they are in a tutoring program.” DOE, Early Implementation, at 33. In addition, “competition from sports and other after-school activities is more pronounced in middle schools than in elementary schools, further reducing middle school participation levels in supplemental services.” *Id.*

The location of a provider’s program appears to be another issue of considerable importance. DOE’s report on “Early Implementation” of SES requirements concluded that “[p]arents looked for providers who offered services at the school because they did not have transportation to take their children off-site.” *Id.* at xvi, 37. Moreover, “even parents of older students may not feel comfortable having their child walk or take a city bus to an off-site tutoring session.” DOE, Creating Strong [SES] Programs, at 12. Indeed, DOE’s “Early Implementation” study found that “[p]arents often chose providers based more on logistics and convenience than on educational concerns.” DOE, Early Implementation, at xvi, 37.

The Department has also commented that “the parent of an elementary school student who attends a school-based or center-based aftercare program may be less likely to enroll the child in any SES program that does not provide services at the child’s school, the after-school center, or in their home.” DOE, Creating Strong [SES] Programs, at 12. Accordingly, DOE suggests that “[w]here center-based rather than school-based aftercare is the norm,” it may make sense for providers to enter into agreements with “popular local aftercare programs, such as a YMCA or Boys and Girls Club.” *Id.* Through such arrangements, “providers could offer services at the center so that parents who need full-time aftercare for their child sign up for SES.” *Id.* In Rochester, New York, the district “built on its strong community partnerships to look for other available space that would be convenient for parents” and “actively sought out the Rochester Housing Authority in an effort to link it with providers who may be interested in offering SES in centrally located community centers throughout the city.” *Id.* at 17.

Finally, the delivery of SES programs in rural locations presents special challenges and may be an area in which participation by ESAs could be especially significant. While some urban districts have themselves struggled to attract providers, [10/](#) a recent report issued by the U.S. Government Accountability

[10/](#) DOE quoted a Rochester City School District staff member as stating: “[m]ost of the approved SES providers were not based in Rochester and could not adequately market the program from afar. They were stuck in a catch-22 situation – trying to plan for staffing a program in Rochester, but unable to staff the program until they signed up enough students to justify the staffing. Many providers opted

Office (“GAO”) suggests that school districts in rural areas face more substantial hurdles in “offering supplemental educational services to students” in part “because of the small school size” in such districts. U.S. Government Accountability Office, No Child Left Behind Act: Additional Assistance and Research on Effective Strategies Would Help Small Rural Districts, 17 (September 2004) (“GAO, No Child Left Behind Act”). The report noted that, “[a]ccording to some rural officials, providers were reluctant to provide services in rural districts because the small number of children who may need these services do not provide a profitable business opportunity.” *Id.*; see also DOE, Creating Strong [SES] Programs, at 21 (“Districts with isolated rural schools may face the greatest challenge in ensuring that parents of SES-eligible children have diverse providers from which to choose.”).

GAO identified “geographic isolation” as a second factor adversely affecting rural districts’ ability to extend supplemental educational services to their students. GAO, No Child Left Behind Act, at 18. It reported that districts were “often unable to use [SES] providers on approved state lists” because “traveling long distances to meet the providers was generally not a viable option for students.” *Id.* In one district, for instance, students were required to travel “3 hours to reach the provider’s site.” *Id.* Indeed, CEP’s report found that while “the average number of state-approved providers . . . more than doubled between 2002-2003 and 2003-2004, rising from 4 to 11 providers, . . . [r]ural districts reported a slight decrease, from 2 providers to just 1.” CEP, From the Capital to the Classroom, at 127.

CEP’s case study of Harrison, Michigan illustrates the role that ESAs can play as SES providers in rural settings. According to the report, “few supplemental education service providers have shown any interest in working in the rural district.” *Id.* at 139, Box 5-C. However, the “Regional Education Service District for the local area did offer onsite tutoring services at Harrison schools.” *Id.* (Private providers operated programs “about 35 miles from the schools” in one instance and “about 70 miles from the schools” in another; “various providers offered online services, but few of the district’s students have daily access to the internet.” *Id.*). Although “only 13 students used supplemental educational services consistently” in 2003-2004, “[t]he services offered by the Regional Education Service District . . . proved more popular in 2004-2005.” *Id.* Over 40 students were “receiving tutoring” in the fall of 2004, and more were “slated to begin in January when sports and other after-school activities [would be] end[ing].” *Id.*

In addition, it has been observed that “[e]ducational technology offers [a] potential solution to serving students in hard-to-reach areas.” *Id.* at 140. Nonetheless, as noted in GAO’s 2004 report, “the use of online service providers as an option [can be] difficult in some small rural districts, especially those where

to drop out for a year . . .” DOE, Creating Strong [SES] Programs, at 15 (quoting a district staff member) (internal quotation marks omitted).

severe weather conditions and physical features such as mountains [make] it difficult to establish and maintain Internet lines.” GAO, No Child Left Behind Act, at 18. Such districts may also find a scarcity of “technical maintenance personnel” willing to serve “isolated rural areas.” Id. Further, “[d]istance learning providers frequently require the use of computers and internet access in students homes,” which, as reflected in the Harrison example, “[s]tudents receiving SES do not always have” CEP, From the Capital to the Classroom, at 140 (quoting a state official) (internal quotation marks omitted). Here again, ESAs may play a role in supporting districts that do not have “adequate technology infrastructure and the ability to assign personnel to supply on-site support for students during their SES sessions.” DOE, Creating Strong [SES] Programs, at 21. In this regard, DOE suggests the possibility of a partnership between such a district and the “closest” ESA, which “may already have the required technology and staff to support online learning.” Id. Moreover, DOE notes that “ESAs may also be well-positioned to become SES providers themselves, especially if they could serve students from multiple schools or from more than one district.” Id.

IX. ESAs as LEAs

Finally, if an ESA receives Title I, Part A funds as an LEA, the following summary of LEA responsibilities may be relevant. See April 9, 2002 Brustein & Manasevit Memorandum to AESA Regarding “Eligibility of Educational Service Agencies for No Child Left Behind Programs.” 11/ First, LEAs are required to alert parents to the “availability of [SES] services” at a minimum of once per year. SES Guidance, E-1, at 21. This notice must be “in an understandable and uniform format and, to the extent practicable, in a language that the parents can understand.” ESEA, as amended, § 1116(e)(2)(A), codified at 20 U.S.C. § 6316(e)(2)(A). Strategies for parental outreach may include hosting “provider fairs,” explaining SES at “back-to-school nights,” and enlisting the help of “parent outreach centers.” SES Guidance, B-2, I-1, I-2, at 4, 37. “Other marketing strategies” include “articles and ads in local newspapers,” “press releases and news conferences,” “refrigerator magnets,” and “postcard reminders.” DOE, Creating Strong [SES] Programs, at 29. In addition, cooperation with “respected community leaders and community- and faith-based organizations is another approach that several districts have used to encourage parents” to enroll their students in SES programs. Id. at 30. DOE notes that in Forsyth, Georgia, the district communicated with “non-English speaking parents of SES-eligible students” through a “Transition Center” that was “[c]oordinated by bilingual staff with credibility in the community.” Id. at 13.

11/ As noted previously, we have not conducted our own analysis of whether and under what circumstances an ESA might qualify to receive Title I, Part A funds as an LEA under NCLB.

In supplying parents with information about SES services, LEAs must provide “a brief description of the services, qualifications, and demonstrated effectiveness of each [approved] provider” that is “within the [LEA] or whose services are reasonably available in neighboring [LEAs].” ESEA, as amended, § 1116(e)(2)(A)(ii)-(iii), codified at 20 U.S.C. § 6316(e)(2)(A)(ii)-(iii). To obtain such information, LEAs may consider developing a “written questionnaire” for providers, conducting interviews of provider staff, and/or organizing meetings with any approved providers “interested in delivering services” to their respective regions. DOE, Creating Strong [SES] Program, at 16. LEAs should aid parents in selecting a provider from the state’s list, but only upon a parent’s request for such assistance. SES Guidance, E-1, at 21.

As noted above, LEAs are also charged with the task of deciding “which students should receive services if not all students can be served,” and must execute a contract with each provider that is chosen by the “parents of an eligible student.” Id. In addition to forming agreements with selected providers, the Department’s Guidance indicates that LEAs should aid their SEAs in “identifying potential providers within the LEA.” Id. Finally, LEAs are bound to “[p]rotect the privacy of students who receive supplemental educational services.” Id.