

## **Nonregulatory Guidance**

# **Q&As ON THE PARTICIPATION OF PRIVATE SCHOOLS IN PROVIDING SUPPLEMENTAL EDUCATIONAL SERVICES**



**MAY 2006**

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# Q&As ON THE PARTICIPATION OF PRIVATE SCHOOLS IN PROVIDING SUPPLEMENTAL EDUCATIONAL SERVICES

## INTRODUCTION

Title I of the Elementary and Secondary Education Act (ESEA), as amended by the No Child Left Behind Act (NCLB), provides for “supplemental educational services” for disadvantaged students. Supplemental educational services (SES) are tutoring and other academic enrichment provided outside of the regular school day to eligible public school students to help improve achievement in reading, language arts, and math. To be eligible, students must be from low-income families and attend Title I public schools that State educational agencies (SEAs) have determined to be in their second year of improvement, in corrective action, or in restructuring. Parents of eligible students may obtain these services for their children free of charge from an approved SES provider of their choice. Under NCLB, private schools are eligible to become approved providers and to receive payment for providing SES to eligible public school students.

The following Questions and Answers provide SEAs, local educational agencies (LEAs), and the private school community with guidance on private school participation in providing SES. By amplifying certain issues and by providing information on new topics, these Questions and Answers are intended to supplement the Department’s current SES non-regulatory guidance and the information on SES contained in the brochure, *Opportunities for Private Schools to Provide Extra Academic Help to Disadvantaged Students*. The current SES guidance is available at <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc>. The brochure is available at <http://www.ed.gov/admins/comm/suppsvcs/privschools/opportunities.html>.

Please note that while this guidance is written with private schools in mind, its applicability is not limited to the private school community. Faith-based and community organizations and other private and public entities interested in SES may also find this guidance helpful.

## QUESTIONS AND ANSWERS

### 1. What Federal, State, or local statutes or regulations apply to SES providers? Do these statutes or regulations apply to the SES program only or also to the private school sponsoring the program?

In providing its services, an SES provider must meet all applicable Federal, State, and local health, safety, and civil rights laws, as is required by the statute [Section 1116(e)(5)(C)]. For a discussion of applicable Federal civil rights laws, see Question 10 below. A private school that is a prospective SES provider should inquire with the State as to which State and/or local laws, if any, are applicable to the school by virtue of its participation in SES.

In addition, an SES provider must meet the requirements applicable to all providers in Section 1116(e) of Title I and 34 CFR 200.45-200.47.

### 2. To minimize the impact on the school, should a private school establish a separate 501(c)(3) corporation with an independent board of directors for the purpose of providing SES?

An SES provider, merely by being a provider, is not a recipient of Federal financial assistance, and, as a result, certain Federal requirements that apply to recipients of Federal financial assistance are not directly applicable to a provider unless the provider otherwise receives Federal financial assistance for other purposes. (See Question 10 below for more information on this topic.) Nonetheless, a private school may wish to establish a separate 501(c)(3) (nonprofit) corporation with an independent board of directors, or a for-profit corporation, for the purpose of providing SES, although it is not required to do so. While it will take some time and cost some money, taking this step may make it easier for a private school to track the funds it receives. This step may also help the school track and document which students were served by its SES program and when, and thereby allow the school to submit accurate and timely vouchers to an LEA for its services. In the event that an audit is conducted, it will also be easier for the auditors to examine the private school’s receipt of funds for providing SES without intruding on the school’s internal affairs.

Short of establishing a separate 501(c)(3) corporation, a private school may wish to set up a separate financial account for the purpose of providing SES, although, again, it is not required to do so.

A private school may also partner with another school or organization, nonprofit or for-profit, that is an SES provider.

For more information on this topic, see *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government*, p. 13, available at <http://www.whitehouse.gov/government/fbci/guidance-document-200510.pdf>.

### 3. May a private school provide tutoring services to its own students alongside the public school students that it serves in its SES program?

A private school may provide tutoring services to its own students alongside the public school students that it serves in its SES program. Of course, the school must provide services to public school students consistent with

the SES program design approved by the SEA in terms of educational program, pupil/tutor ratio, intensity of services, etc., regardless of whether it provides tutoring services to its own students alongside the public school students it serves in its SES program. If the SES program design approved by the SEA provides, for example, for an intensity of services of two one-hour sessions per week and a pupil/tutor ratio of 5/1, the school must meet those terms regardless of whether it provides tutoring services to its own students alongside the public school students.

An SES provider must ensure that the instruction and content it provides are secular, neutral, and nonideological. If the tutoring services that a private school provides to its own students involve inherently religious activities such as religious instruction or proselytization, they must be offered separately in time or location from the SES program for public school students.

#### **4. How may a private school use the funds it receives for providing SES?**

The funds that an SES provider receives for providing SES are essentially income for the provider in exchange for its providing services to public school students. Any funds that a private school receives for providing SES may be used at the discretion of the school for any purpose, including for supporting non-SES students.

#### **5. How detailed are the local and State academic standards that SES providers must meet? May private school teachers in an SES program teach the curriculum they use during the regular school day or must they teach with a new set of standards?**

In approving a provider, each SEA must ensure that the services offered by the provider are aligned with the State's academic content and achievement standards, as well as consistent with the instructional program of the LEA, as is required by the statute [Section 1116(e)(5)(B)]. While a provider must meet these criteria, its program need not be identical to the instructional program of the LEA. In fact, one of the virtues of SES is that public and private providers offer a diversity of programs, from which parents may choose, that are consistent with, but not necessarily identical to, the LEA's instructional program and are aligned with the State's standards. A private school thus may use the instructional program it uses during the normal school day or another curriculum of its choice in its SES program, provided that the curriculum is consistent with the curriculum used by the LEA and is aligned with the State's academic content and achievement standards.

State academic standards may vary, as may the extent to which an SEA's provider application form is tied to these standards. In its application to the SEA, a private school should describe the connections between its SES

program and the State's academic standards and, where possible, should cite the specific standards the program addresses.

For more information on this topic, see *Supplemental Educational Services Non-Regulatory Guidance*, C-17, 18; and *Toolkit for Faith-Based and Community Organizations to Provide Extra Academic Help (Supplemental Educational Services)*, p. 7-8, available at <http://www.ed.gov/admins/comm/suppsvcs/toolkit.pdf>.

#### **6. What are the assessment requirements for SES students? What assessment responsibilities does a provider have?**

An SES provider is responsible for meeting the assessment requirements outlined in its contract with an LEA, including:

- a. Enabling a student to attain his or her specific achievement goals (as established by the LEA, in consultation with the student's parents and the provider) [Section 1116(e)(3)(A)]; and
- b. Measuring the student's progress, and regularly informing the student's parents and teachers of that progress [Section 1116(e)(3)(A) and (B)].

To meet the statutory requirement to measure progress, an SES provider may use the assessment(s) of its choice, unless otherwise required by the SEA as part of its provider approval process or by the LEA in consultation with the provider. In the event the SEA or LEA has no specific assessment requirements, the best practice would be to specify, in the contract between the LEA and the provider, the assessment(s) that will be used.

For more information on this topic, see *Supplemental Educational Services Non-Regulatory Guidance*, D-3.

#### **7. Is an SES provider reimbursed for the cost of services in accordance with the number of children registered or the number of children in attendance at the SES program?**

An LEA has discretion as to which method of reimbursement it uses. In its contract with an SES provider, an LEA may include administrative provisions addressing such issues as whether payments will be based on student enrollment or student attendance.

For more information on this topic, see *Supplemental Educational Services Non-Regulatory Guidance*, I-4.

#### **8. May private school space be rented to a third-party provider of SES?**

Yes. Renting space to an approved SES provider is another option for a private school interested in becoming involved in SES. This option may be beneficial insofar as

it may provide an opportunity for teachers in the private school to be employed by the outside provider that is renting space in their school. This option may also be beneficial insofar as it may provide an opportunity for students in the private school also to receive tutoring services from the provider, although the provider could not charge these tutoring services as SES expenses.

**9. How is the budget for an SES program developed? What amount may be allocated for administration, what salary must an SES teacher be paid, what percentage of funds may be used for transportation, etc.?**

While an SEA is not prohibited from including specific budgetary or accounting requirements in its SES provider application form, a provider normally has discretion in developing an SES program budget. Private schools interested in becoming SES providers should give advance consideration to their financial capacities for providing SES.

Guidance on developing and implementing an SES budget may be found in *The Providers' Toolkit for Supplemental Educational Services*, developed by the Supplemental Educational Services Quality Center (SESQC) and available for download at <http://www.tutorsforkids.org/ToolkitDownload.asp>. SESQC was established through a grant to the American Institutes for Research from the Office of Innovation and Improvement of the U.S. Department of Education.

**10. Question C-3 of the Department's non-regulatory guidance on SES contains the following statement: "[a] supplemental educational service provider, merely by being a provider, is not a recipient of Federal financial assistance." If a private school receives Federal funds for providing SES, why is that school not considered to be a recipient of Federal financial assistance? If a private school that receives Federal funds for providing SES is not a recipient, is that school nonetheless subject, directly or indirectly, to the requirements of the regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act of 1975?**

As noted above, an SES provider must meet all applicable Federal, State, and local civil rights laws (as well as health and safety laws). With respect to Federal civil rights laws, most apply generally to "recipients of Federal financial assistance." These laws include Title VI of the Civil Rights Act of 1964 (discrimination on the basis of race and national origin), Title IX of the Education Amendments of 1972 (discrimination on the basis of sex), Section 504 of the Rehabilitation Act of 1973 (Section 504) (discrimination on the basis of disability), and the Age Discrimination Act of 1975 (discrimination on the basis of age).

Also as noted above, an SES provider, merely by being a provider, is not a recipient of Federal financial assistance. The regulations that define "Federal financial assistance" do not contemplate that a school or other organization that receives a contract from an LEA procuring its services as a provider of SES is thereby a recipient of Federal financial assistance. For example, the regulations implementing Section 504 and the Age Discrimination Act define "Federal financial assistance" to exclude recipients of procurement contracts from the definition. 34 CFR 104.3(h); 34 CFR 110.3. See also 34 CFR 100.13(f); 34 CFR 106.2(g). This is because a procurement contract is not intended to provide assistance to the contractor, but, rather, to obtain a service for the issuer of the contract, which, in this case, is the LEA. The LEA, on the other hand, is responsible for any discrimination that occurs in obtaining services through a procurement contract. The civil rights regulations bar a recipient of Federal financial assistance (such as an LEA) from discriminating directly or through contractual or other arrangements. See, e.g., 34 CFR 104.4(b)(1). Therefore, discrimination in the provision of SES by a provider could lead to termination of the contract for services by the LEA. However, the provider would have no direct nondiscrimination responsibilities under the civil rights statutes mentioned above, unless it otherwise receives Federal financial assistance for other purposes.

The provisions of two Federal civil rights laws, however, may apply to an SES provider despite the fact that it is not a "recipient of Federal financial assistance." Title II of the Americans with Disabilities Act of 1990 (ADA) would apply to public entities, but not private entities, that provide SES. Under Title III of the ADA, private providers, including private schools, that operate places of public accommodation, except for religious entities including religious private schools, must make reasonable modifications to their policies, practices, and procedures to ensure nondiscrimination on the basis of disability, unless to do so would fundamentally alter the nature of the program.

In addition, any entity that employs 15 or more employees, whether or not it is an SES provider, is subject to both Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin, and Title I of the ADA, which prohibits discrimination in employment on the basis of disability, except that Title VII does not apply to the employment of individuals of a particular religion by a religious organization and Title I of the ADA also contains such a provision allowing a religious organization to limit employment to persons of a particular religion.